

UNITED STATE

DATE:

Mid-Atlantic Regional Office, Annapolis Ju

REPLY TO Bill Burlington, Regional Counsel
ATTN OF: Mid-Atlantic Region

SUBJECT: January 1997 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Received 140
Answered 178

TORT CLAIMS JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Pending 213
Received 37
Answered 64
Pending 180
Over Six Month 4*

FOI/PRIVACY JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Pending 66
Received 36
Answered 62
Pending 43
Over 30 Days 23

LITIGATION JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Cases Pending 265
New Cases Received 25
Habeas Corpus 16
Bivens 5
FTCA 2
Other 2
Cases Closed 11
Cases Pending 251
Lit Reports Completed 19
Cases/Hearings or Trials 1
Settlements/Awards 3
\$ Settlements/Awards \$95
(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for two of these claims. The remaini claims are awaiting signed settlement agreements after proceeding to court.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, will be in the Regional Office February 3-5, 1997. He will be on annual leave February 6-26.

We are delighted to announce the selection of Kathleen White, FCI Otisville, as the new Paralegal Trainee in the Mid-Atlantic Regional Office. Kathleen is currently the Secretary for the Associate Warden. We expect Kathleen to report for work in MARO in April.

We also want to congratulate Rick Schott, Attorney Advisor, on his well-deserved promotion to GS-14, Senior Attorney at Terre Haute. Rick has done a tremendous job overseeing a very capable, efficient legal office in a difficult institution.

We congratulate Mike Bredenberg on his temporary appointment as a Special Assistant U.S. Attorney for mental health commitments at FCI Butner. These hearings are conducted via videoconference linkage between a conference room at FCI Butner and the court room in Raleigh. Three hearings were held during the month of January.

Michelle Fuseyamore, Attorney, FCI Butner, will be the acting Executive Assistant at the FCI from January 27 through February 5, 1997.

Mike Bredenberg, Attorney, LSCI Butner, will be the Institution Duty Officer February 11-18, 1997.

Rick Schott, Attorney, USP Terre Haute, will be on annual leave February 24-18, 1997.

Debbie Munson, Attorney, FCI Beckley, will be in annual training February 4-7, 1997.

Mike Robar, Paralegal, FCI Manchester, will serve as a member of the Operational Review Team for HRM, Employee Development and Affirmative Action the week of February 3, 1997.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

Ensign Amendment: We have now responded to our TRO request out of Cumberland seeking to block the Bureau's implementation of the Ensign Amendment. Per instructions from the Legislative and Correctional Issues Branch, we took the position that this is what Congress said and this is what we are doing to implement the will of Congress. We did not go into an extensive defense of the bill. The AUSA assigned to this case was very troubled by our approach and wanted to vigorously defend Congress. Given these discussions and his threat to go to the Department, I suggested to Joyce Zoldak that we make sure the Department is in agreement with the approach we are

taking. I note that a New York District Court has struck down on First Amendment grounds a similar law which affected the military.

Butner Hospital Update: We learned in January that the activation date for the new Butner Complex Hospital has been pushed back to 1999. Construction delays were cited as the reason.

Litigation by Freeman/Militia Inmates: We have our first lawsuit by "Freeman" inmate Darvin Lawson (FPC Seymour Johnson). The complaint is a request for a writ of mandamus and is filed in the Supreme Court of Ohio. In essence, it is a petition asserting that the sentencing court had no jurisdiction over Mr. Lawson. It has been filed against the sentencing judge, prosecuting Assistant U.S. Attorneys, and former Seymour Warden, John LaManna. The court *sua sponte* dismissed the case by order dated January 13, 1997. Coincidentally, Kevin Walasinski informed me that "Freemen" inmates at Milan have started filing liens in Washtenaw County.

FCI Milan - Kevin Walasinski has been invited by the U.S. District Court, E.D.Mich., to make a presentation on the PLRA. This presentation is scheduled for April 11, 1997, and attendees will include District Court Judges, their staff attorneys, and representatives from the U.S. Attorney's Office.

FCI Morgantown - McNeal v. Barrett, et al. - we are in the process of discussing with the AUSA assigned to this FTCA case the feasibility of raising the discretionary function exemption. The inmate alleges he contracted TB while at Morgantown, that BOP's testing procedures are erratic and Morgantown failed to isolate inmates with TB. Although the inmate had a positive PPD, on x-ray he was found not to actually have TB. There have not been any cases of TB at Morgantown. Based on the facts of the case and the strong defense the government has available, in that the inmate does not have TB, we may not need to raise the discretionary function exemption. We are aware that Department approval is required for making this argument.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.): None

SETTLEMENTS:

Leacock v. Reno (EEO suit - FPC Alderson): We were successful in settling this EEO suit (African American physician discharged from Alderson claims race was the motive) for \$65,000. This case was tried by a jury in November, with the jury awarding the physician \$30,000. The judge indicated he felt the jury verdict was against the weight of the evidence, but then hesitated to grant our motion for a new trial. He

urged settlement at a figure one half the amount we would have been forced to pay, considering attorney's fees and costs. We were able to include a provision that there was no admission of discrimination in this settlement.

Fitzpatrick & Oliver v. USA (FPC Millington): We were successful in reaching an agreement to settle these inmate driver auto accident cases for \$16,987 and \$12,773 respectively. We are presently waiting for the signed settlement agreements. This case involved an inmate driver who while speeding, rear-ended another vehicle. The inmate was cited by the police for following too closely. The court (Judge McCalla) made it extremely clear that he felt the government was at fault and should settle these cases. We were able to reach what we think were very reasonable settlement figures with both plaintiffs.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Memphis - Rowland v. US, 96-2009 - On December 31, 1996, the District Court entered an Order requiring the Bureau of Prisons to recalculate petitioner's sentence in a manner consistent with the Order (the Court's intent was to release petitioner immediately). Our concern is that the Court arrived at this conclusion by focusing on the inmate's proposed release date, rather than his offense date, to determine whether old law or new law applied and whether petitioner should be subject to supervision by the Parole Commission.

FCI Milan - Lindow v. US, 95-CV-76175-DT - the Judge denied the government's motion to dismiss for lack of jurisdiction based on failure to file within six months of the final determination letter. The Court interpreted the Houston v. Lack "mail box" rule as applying to FTCA. This is an FTCA case involving an alleged failure to protect an inmate who was assaulted by other inmates.

FCI Ashland - Alpert v. BOP, et al. - We received an adverse decision in this 2241 petition. The petition sought jail time credit for 75 days. The facts are extensive regarding his sentence computation, but the heart of the decision involved the administrative remedy program. In 1992 while confined at FCI Texarkana, Alpert filed an appeal regarding the 75 days at issue in this case. The remedy was denied at both the institution and regional level, but was granted at the BP-11 level awarding Alpert the 75 days. The institution disagreed and according to a memorandum in the file the Central Office agreed to amend their decision denying the grant of the 75 days. However, an amended decision was never issued, and Alpert was released in 1993. In 1995 Alpert violated and was confined at FCI Ashland. He then learned that the 75 days previously credited to his sentence had been removed. Judge Wilhoit ruled that the crucial fact in this case was the fact that no amended decision was issued and that BOP staff failed

to pursue one. Consequently, the Court held that the Central Office decision in 1993 bound us. The Court stated to hold otherwise would render the administrative appeal process meaningless.

FCI Petersburg - Fuller v. Moore, Jude Mergihe, in an order filed January 7, 1997, granted inmate Fuller's petition under 3621(e) in part. Section 9 of BOP's Program Statement which categorically excludes from consideration for sentence reduction those inmates who received a base offense-level enhancement under U.S.S.G. 2D.1(b) was declared void and the inmate was declared eligible for early release. The court adopted the reasoning in the 9th Cir. Downey decision. The Court remanded the case back to the BOP to make any further discretionary decision consistent with the reasoning of its decision. The AUSA has recommended appeal. We will be forwarding a recommendation against appeal based on information that the new Program Statement will cure the conduct versus conviction issue raised by Down. Fuller's offense is drug conspiracy under section 846. He is currently at Butner with a projected release date of November 25, 1998.

FCI Ashland - Michelle Murray v. BOP, et al. - On January 28, 1997, the Sixth Circuit affirmed the decision in this case. Inmate Murray is a transsexual who alleged staff sexually abused and assaulted him. One defendant was tried on the sexual assault charge before a jury, which found him not guilty. Inmate Murray is no longer incarcerated and we do not anticipate a petition for certiorari being filed.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Memphis - Temple v. USA, 95-2707-G/V - A hearing was held on Friday, January 31, 1997, because the Judge had some questions regarding the facts of the case. This case involves a habeas petition regarding sentence computation. In addition to answering the Judge's questions, the government was also permitted to argue the merits of the case (failure to exhaust and no credit against federal sentence for credit already granted against a state sentence). However, there is a catch in this case. In response to a state court order which instructed that Temple be delivered to the custody of the federal government, Temple was delivered to CCA Mason, Tennessee (a private prison). This transfer did not involve the U.S. Marshals Service.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS:

FPC Millington - Inmate Okie Littrell, Reg. No. 13227-075, is represented by counsel and has filed an administrative claim seeking \$300,000. Our response is due March 4, 1996. Mr. Littrell states he began to complain of throat pain to staff

at FCI Oakdale in March of 1991, and his condition continued to deteriorate. He states he was transferred to USP Marion and his throat pain still went untreated. He claims that he was finally diagnosed with throat cancer while housed at FPC Millington in September of 1994. The claim was reviewed by the Clinical Director at FMC Ft. Worth. The conclusion at this point is that the throat condition was misdiagnosed as an infection, and treated with antibiotics and antifungals, without further inspection, over a long period of time. At present, the medical record has been submitted for Central Office medical review. We await their evaluation of our liability in this matter.

MEDICAL MALPRACTICE CASES UPDATE: None

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:

FMC Lexington - Inmate Murphy, Reg. No. 04794-027, filed a BP-9 challenging the Warden and RFRA committee's decision to deny him permission to have tarot cards in his personal property. We have offered to purchase the cards and have religious services hold the cards and make them available when Murphy practices his Wicca religious rituals. BOP policy clearly gives the Warden discretion to decide which religious items are allowed in an inmate's personal property. There is a likelihood this tarot card issue will go to litigation.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FMC Lexington - We received a favorable R&R by Magistrate Judge Peggy Patterson in Davis v. Beeler, 96-42. Davis has a current offense of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). Davis claims the BOP's interpretation of 922(g) is an unlawful interpretation of 3621(e) and the BOP did not promulgate its policy in accordance with the APA. Magistrate Patterson recommends dismissal of this petition based upon her analysis of whether the BOP's interpretation of the term "nonviolent offense" contravenes well-settled case law. Patterson noted the Sixth Circuit does not yet have binding precedent on this issue. Further, Patterson distinguished interpretations of crimes of violence in the sentencing context with the BOP's situation in its Congressionally-mandated decision-making for determining early release eligibility. Our other 3621(e) cases have been transferred from other Magistrates to Peggy Patterson.

FCI Ashland - Childs v. FBOP, et al. - On January 31, 1997, Judge Wilhoit signed an order dismissing this habeas petition because the petitioner had not exhausted his administrative remedies. However, in this eight page order Judge Wilhoit did decline to agree that the PLRA applied to habeas petitions;

and he did indicate that he might be inclined to follow Downey.

FPC Alderson - Thompson v. Edwards - We received the Magistrate's Findings and Recommendations in this 3621(e) habeas petition. The F&R recommends that an order similar to the order entered in the Wiggins case be entered for this case. The F&R went further and stated that it had been three months since Wiggins and the Bureau had not yet promulgated a new program statement and, therefore, the Court should set a deadline for the Bureau. Objections will be filed.

FPC Alderson - Armour v. Edwards, this habeas petition was filed relating to early release under 3621(e). A motion for summary judgment has been filed.

FCI Milan - Alston v. Pontesso - challenges BOP designation of "possession of firearm by a prohibited person" as a crime of violence for purposes of eligibility for drug program. Government response filed January 16, 1997.

FCI Milan - Rasnake v. Pontesso - Inmate challenges BOP determination that his two point enhancement for possession of a weapon makes his instant offense a crime of violence and ineligible for the year off provisions of the DAP.

FCI Morgantown - On January 24, 1997, the United States District Court for the Northern District of West Virginia (Kidd, J.), issued a Memorandum Opinion and Order in Pelissero v. Thompson (1:96-CV-57), a habeas corpus case in which the petitioner sought a sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(B), but was denied due to the fact that he was convicted for, inter alia, violation of 21 U.S.C. § 841(a)(1) -- a "crime of violence" within the meaning of Program Statement 5162.02, Definition of Term, "Crimes of Violence," § 9. Finding "the BOP's interpretation [of § 3621(e)(2)(B)] to be a 'permissible construction of the statute,'" the Court rejected the inmate's argument that the BOP could only look at the statutory elements of the crime for which he was convicted, and not delve into other factors underlying the crime.

Significantly, the Court also rejected inmate Pelissero's argument based upon Wiggins v. Wise, and rejected the inmate's argument that the notification requirement of 18 U.S.C. § 4042(b) was improper. Finally, the Court rejected the inmate's argument that a denial of a sentence reduction pursuant to § 3621(e)(2)(B) constituted a denial of a liberty interest.

On January 29, 1997, the United States District Court for the Northern District of West Virginia (Kidd, J.), issued a Memorandum Opinion and Order in the case of Fonner v. Thompson (1:96-CV-57). Fonner was a habeas corpus case in which the petitioner sought a sentence reduction pursuant to 18 U.S.C. §

3621(e)(2)(B), but was denied due to the fact that he was convicted for violation of 18 U.S.C. § 922(g)(1) -- a "crime of violence" in all cases within the meaning of Program Statement 5162.02, Definition of Term, "Crimes of Violence," § 7. Judge Kidd's Fonner opinion mirrored the language, reasoning, and holding of Pelissero.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

FCI Memphis - The following two referrals were made regarding escapes from FCI Memphis' satellite camp: David Thompson, Reg. No. 07302-041, date of escape: 12-26-96; and Ledarius Patrick, Reg. No. 04279-028, date of escape: 01-31-97.

FMC Lexington - On January 26, 1997, on the in-patient mental health unit, inmate Baltarrica, Reg. No. 33328-019, a Mariel Cuban detainee, was found in his room with injuries after an apparent fight with inmate Cummmings, Reg. No. 09304-021, an eighteen year old competency to stand trial study case. There is no evidence weapons were involved in this altercation. Baltarrica's pulse and blood pressure were weak when he was found by staff, and he had no pulse as he was taken to the clinic. CPR was administered, however, he was pronounced dead on arrival at the University of Kentucky Medical Center. An autopsy was ordered by the Warden and the matter has been referred to the FBI. Baltarrica has no known next of kin, so there is little chance any civil actions will arise out of his death.

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Milan - The trial scheduled for January 14, 1997, for inmate Christopher Snow has been delayed until March 1997 at defense counsel's request. This is a criminal trial for possession of contraband in prison and assault of a federal employee.

FCI Milan - The trial for inmate Morrison has been delayed until March of 1997 at defense counsel's request. This criminal trial had been scheduled for January 18, for two counts of attempted murder, two counts of aggravated assault, and one count of witness tampering.

FCI Petersburg - Inmate Poteet, Reg. No. 23675-083, one of the inmates previously reported as indicted for Introduction and Conspiracy to Possess and Possession of a Controlled Substance with Intent to Distribute; and Bribery of Public Official, has pled guilty to one count of Introduction of Drugs. Trial for the other defendants (including a correctional officer) is still scheduled for March 3, 1997.

FCI Petersburg - Inmate Raney's sentencing hearing is scheduled for February 18, 1997, regarding his escape from the Petersburg camp.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:

FCI Beckley - US v. Hudgins - The trial of Inmate Hudgins for possessing contraband (marijuana) was held January 7, 1997. The trial lasted approximately four hours. The jury deliberated for a few hours and asked to be released for the night. The next day the jury deliberated for a few more hours and then announced it could not reach an unanimous verdict. The judge sent the jury back to discuss it more. Finally, the jury came back with a verdict of guilty. However, during the polling of the jury, one member said that the verdict of guilty was not her verdict. The judge sent the jury away again and was trying to figure out what to do when the jury member knocked on the jury room door and apologized, claiming she did not understand the question and that she in fact agreed with the guilty verdict. This was Beckley's first prosecution.

REHABILITATION ACT: None

	ALD	ASH	BEC	BUT*	CUM	LEX	
BIV	0	0	0	2	0	2	
FTCA	0	0	0	1	0	0	
HC	3	0	3	1	0	1	
OTH	0	0	0	0	2	0	
TOT	3	0	3	4	2	3	

*Represents both the FCI and LSCI

Cases/Hearings or Trials	1	0
Settlements/Awards	3	0
\$ Settlements/Awards	\$95	0

(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for these claims or a check from Treasury.

⌘Incorrect figure for last month.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, will be attending the General Counsel's Meeting March 10-13.

Kevin Walasinski, Attorney, FCI Milan, will be attending DHO training March 3-7 and institutional familiarization training March 10-14.

Randy Smith, Paralegal, FCI Ashland, will be at DHO training from March 3-12, and on annual leave from March 13-14, 1997.

Bob Blackburn, Legal Tech, USP Terre Haute, will be in annual training March 3-7; and Teresa Marvel, Paralegal, will be in annual training March 17-21.

Michelle Fuseyamore, Attorney, FCI Butner, will be the Acting Executive Assistant from March 3-31, 1997.

Mike Bredenberg, Attorney, LSCI Butner, will be attending the Sentencing for Attorney's Seminar in Denver from March 23-27, 1997.

Mike Robar, Paralegal, FCI Manchester, is institution duty officer from February 25-March 4, 1997.

Matthew Mellady will be in annual refresher training March 3-7, 1997.

Darrel Waugh, Honors Attorney, Mid-Atlantic Regional Office, will be in Denver for DHO training March 3-7; and will attend Glynco's Introduction to Correctional Techniques March 17-April 3, 1997.

Milt Williams, Paralegal, FCI Petersburg, attended a town hall meeting on current developments in labor management relations in Virginia Beach, on February 4, 1997. The town hall meeting was sponsored by the Federal Labor Relations Authority, Washington Regional Office.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

Prison Litigation Reform Act:

FCI Butner - Rish v. Johnson - We have just learned that we are authorized to appeal a denial of our motion for summary judgment in this case. This is a Bivens case where former inmate orderlies at Butner claim they were exposed to HIV and Hepatitis B, as a result of not being provided with gloves and other protective gear when they were cleaning up human waste in the seclusion unit.

Aside from a rather routine qualified immunity question, this case involves the ability to retroactively apply Section 803 of the PLRA, which states there can be no cause of action for emotional harm without a prior showing of physical harm. The Department initially opposed us making the argument that section 803 could be applied to cases that were pending before the passage of the PLRA. A recent case, Kehner v. Trigg, 1997 WL 16504, S.D.Ind., January 15, 1997, allowed such retroactive application of section 803. Unfortunately, the case has virtually no rationale for allowing such application of section 803 to pending cases. I understand from the AUSA that the Department will be writing the

appeal brief in this case. Ed Cohen from DOJ has refused to allow us to raise the PLRA argument on appeal. Apparently, he believes the PLRA does not apply to federal prisoners.

FCI Butner - Staff conducted four mental health commitment hearings via video conference during February.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.): None

SETTLEMENTS:

FMC Lexington - Venus Michels v. US - We are receiving intense pressure from the U.S. Attorney's Office in Lexington, Kentucky, to settle this case, which is the last of three cases where a former correctional officer (Eddie Smith) forced several female inmates to have sex with him. The prior two cases we settled for \$150,000 a piece, as each was a horrible fact situation where Eddie Smith forcibly raped an inmate who was in the mental health unit. We believe this case is substantially different, as we believe Venus Michels was never raped, plus we feel we have evidence she was at least initially a willing participant in these sexual liaisons.

Venus Michels has finished her sentence and has been deported to England. INS will not allow her to return to the U.S. even for her trial. I want to take the position with the U.S. Attorney's Office that we should at least have Wanda Hunt and the AUSA depose Venus Michels, even if it means going to England, and bring out the consensual nature of her activities. We then have witnesses who can give live testimony at trial that Venus was perhaps involved in voluntary sex with Eddie Smith. Since Venus Michels cannot be at trial, there will be no live testimony to rebut our witnesses.

The U.S. Attorney's Office wants us to authorize a settlement offer of \$150,000, since this is what we paid in the other cases. We have talked with Margaret Hambrick (coincidentally, she was Warden at Lexington at the time) and she has suggested that we personally meet with the U.S. Attorney's Office in Lexington, and that if we still feel the settlement figure the U.S. Attorney's office wants is unreasonable, that she will support Wanda Hunt being allowed to travel to England to participate in the deposition. In one of the earlier cases, Wanda's work at the deposition brought the settlement figure down from \$175,000 to \$150,000 after only one days work.

I want to at least alert you to the fact that we have a unique case where we may be asking for your support with the Director that Wanda be allowed to engage in travel outside the United States.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

USP Terre Haute - Bagola v. Kindt - This Bivens action was against various UNICOR defendants based on an incident where Bagola's hand was amputated while working in UNICOR. We argued that the Bivens claims was precluded by 18 USC §4216 and that Bagola failed to state an Eighth Amendment cause of action. The District Court would not enter summary judgment based on the claim preclusion argument due to a previous appellate decision in the Bagola case. This 7th Circuit decision included the view that 4126 does not preclude Bivens in the dicta of its decision to remand the case back to the District Court after in forma pauperis had not been granted. The issue before the 7th Circuit was not the 4126 issue, and therefore, we didn't have the opportunity to brief the issue. On remand the District Court did grant summary judgment based on the fact the

defendants were not deliberately indifferent to Bagola's safety. Obviously this was a very good decision for us, but we had hoped that the District Court would deal with the claim preclusion issue because we thought a very good argument was presented. The court did indicate that good questions were raised, but were not willing to go against the Court of Appeals. We recently learned that inmate Bagola has filed a Notice of Appeal.

FCI Petersburg - Platshorn v. Hahn - Judge Meghie filed a memorandum order on February 3, 1997, referring this sentence computation case to the magistrate judge for a hearing. Platshorn was serving an aggregated parolable and non-parolable sentence of 64+ years. He was paroled on the parolable portion to the non-parolable sentence. The Court, in conducting its own computation, concluded the BOP's computation is incorrect and declined to follow BOP P.S. 5880.30 on which the calculation is based. The court's calculation differs by about four months and the court cites to §4161's requirement to aggregate consecutive sentences and states the BOP failed to follow the statute. The court would apply to Platshorn's current non-parolable sentence the 10 days per month SGT and then 1/3 of the time he spent serving the parolable sentence.

A motion to reconsider the court's referral was submitted on February 18, 1997, asking the court to find the BOP's computation correct, or alternatively referred to the magistrate only with the instruction for a clarification of the BOP's computation and whether this method comports with applicable law.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Memphis - United States v. Walters - this is one of the riot prosecution cases. On February 26, 1997, a hearing was held in this case because Walters' attorney, Robert Brooks, directly contacted one of the co-defendants, who was also represented by counsel. The end result was the Judge removed Mr. Brooks from the case. Currently a report date has been set for March 28, 1997, at which time the parties will inform the Judge whether they are ready to proceed to trial. If they are, the trial will begin April 7, 1997.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS:

MEDICAL MALPRACTICE CASES UPDATE:

This month Bill Burlington will participate with Dr. Duggirala and several other physicians in the new review process for medical cases in litigation where we believe we may have care that is below the appropriate standard.

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:

USP Terre Haute - McNair-Bey v. J.J. Clark - We just received a favorable RFRA decision where the court upheld Terre Haute's Institution Supplement which allows inmates to only wear religious pens on the inside of their clothing. The decision mentions that we did not argue that the policy did not substantially burden the inmate's right to practice his religion. Nonetheless, the court found our policy furthered a compelling interest in prison security by not having inmates become offended by other inmate's physical displays of their faith.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FCI Milan - Alston v. Pontesso - challenges BOP designation of possession of firearm by a prohibited person as a crime of violence for purposes of eligibility for drug program. Government response filed January 6, 1997.

FCI Milan - Rasnake v. Pontesso - challenges BOP determination that his two point enhancement for possession of a weapon makes his instant offense a crime of violence and thus ineligible for the year off provisions of the DAP.

FPC Alderson - Susan Hall v. Phillip Wise - On February 18, 1997, the District Court entered an order stating Section 7 of P.S. 5162.02 is invalid as it relates to those inmates denied eligibility for convictions under 922(g), felon in possession of a handgun. The Court did not strike down Section 7 as a whole, as the Magistrate recommended.

FCI Beckley - Ballenger v. Olson, et al. - The Magistrate Judge has filed Findings and Recommendation in this habeas relating to § 3621 early release. The R&R finds that ineligibility based on a conviction under 924(c)(1), using or carrying a firearm during a drug trafficking crime, is properly considered a crime of violence. The Federal Public Defender has asked for an extension for filing objections to the R&R. Hopefully, the District Court will adopt the Magistrates R&R.

FPC Alderson - Mildred Thompson v. Dan Edwards and Pamela Armour v. Dan Edwards - The Magistrate's Findings and Recommendation recommended that an order similar to the order entered in the Wiggins case be entered for this case, but the R&R went further and stated that it had been three months since Wiggins had been entered and the Bureau had not yet promulgated a new program statement and, therefore, the Court should set a deadline for the Bureau. Objections were filed. While the Judge has not yet entered orders in these two cases, Judge Faber did decline, in Ballenger v. Olson, et al. To set a time frame for promulgating a new program

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

FCI Milan - Inmate Nowyorkas, Reg. No. 19712-039, was found to be in possession of a wooden box filled with miscellaneous hardware and schematics. This was referred to the FBI as a possible manufacture of an explosive device. The FBI has now referred the case to the ATF. A decision on the referral has not been made.

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Milan - Inmate Snow's, Reg. No. 19272-039, trial for possession of contraband and assault of a federal employee is now scheduled for March 18, 1997. Inmate J. Morrison's, Reg. No. 08887-026, trial has now been postponed until May 27, 1997.

FCI Milan - Inmate W. Ray, Reg. No. 21891-039, was to stand trial on assault of a federal employee which had occurred at the FDC while the inmate was there for a competency hearing. The charge was dropped when the inmate was found incompetent to stand trial on his original charge.

FCI Petersburg - The trial set for March 3, 1997, for Correctional Officer Smith on charges of Introduction of Drugs and Bribery, has been rescheduled for March 24, 1997 at 10:00am in Richmond. The continuance was requested by the defendant. The two inmates, Miles and Poteet, have reached a plea agreement on the charges against them.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:

FMC Lexington - Donald Streck, Reg. No. 01575-061, who collected escape equipment and had a plan to escape with several other inmates in 1996, pled guilty to attempted escape and received a fourteen month sentence.

USP Terre Haute - On February 27, 1997, a plea bargain was agreed upon for Jesse Buchanan's attempted receipt of heroin. The agreement was an 18 month consecutive sentence with three years of supervised release and no fine.

FCI Petersburg - Inmate Raney was convicted in December 1996 for escape from the Petersburg Camp. The court sentenced Raney to the maximum term permitted by law on the escape charge and committed him to the BOP for a §3552(B) study.

FCI Beckley - Timothy Peck, an inmate from the Camp at Beckley, plead guilty to an escape charge. He has not yet been sentenced.

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES:

LSCI Butner - Patch, et al. v. Janet Reno, et al - Seven inmates at LSCI Butner filed this suit challenging on 1st Amendment grounds, our new policy. This case is styled

as a Bivens action and seeks a TRO, class certification, appointment of counsel and reimbursement for court costs. We will argue that the defendants are entitled to qualified immunity since the law was not clearly established at the time regarding the issues in this case. Copies of the complaint were provided to both the Central Office and DOJ.

New Litigation Cases by Institution and Type
Received During the Month of February 1997

	ALD	ASH	BEC	BUT	CUM	LEX	MAN	MRG	MIL	MEM
BIV	0	0	0	3	0	0	0	0	0	0
FTCA	0	0	0	0	0	0	0	1	1	1
HC	0	0	0	0	1	0	0	2	2	0
OTH	0	0	0	1	1	0	0	0	0	0
TOT	0	0	0	4	2	0	0	3	3	1

New Litigation Cases by Institution and Type
Received Calendar Year to Date

	ALD	ASH	BEC	BUT	CUM	LEX	MAN	MRG	MIL	MEM
BIV	0	0	0	5	0	2	0	0	0	0
FTCA	0	0	0	1	0	0	0	1	1	1
HC	3	0	3	1	1	1	0	8	2	1
OTH	0	0	0	1	3	0	0	0	0	0
TOT	3	0	3	8	4	3	0	9	3	2

BUT represents both the FCI and the LSCI

memorandum

DATE: <Date>Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel
 ATTN OF: Mid-Atlantic Region

SUBJECT: March 1997 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

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

Received 140 146 201
 Answered 178 130 135

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

Pending 213 180 179
 # Received 37 51 66
 # Answered 64 39 65
 # Pending 180 179 183
 # Over Six Month 4* 2* 3*

FOI/PRIVACY JAN FEB MAR APR MAY JUN JUL AUG SEP OCT
NOV DEC

Pending 66 43 42
 # Received 36 33 51
 # Answered 62 39 45
 # Pending 43 42 50
 # Over 30 Days 23 21 18

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

Cases Pending 265 353^π 352
 New Cases Received 25 17 19
 Habeas Corpus 16 6 12
 Bivens 5 6 6
 FTCA 2 3 1
 Other 2 2 0
 Cases Closed 11 18 4
 Cases Pending 251 352 353
 Lit Reports Completed 19 21 17
 Cases/Hearings or Trials 1 0 0

Settlements/Awards	3	0	2
\$ Settlements/Awards	\$95	0	\$3.007

(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for two of these claims or a check from Treasury.

■Incorrect figure for last month.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, will be on annual leave March 31-April 4, 1997; April 10-11, 1997 will attend a Regional Office Strategic Planning Meeting; April 15-17, 1997, will be in San Diego doing a presentation at a Health Services Meeting; and April 21-22, 1997, will be in Lexington meeting with the AUSA regarding settlement negotiations in the Venus Michels v. USA case and participating in Mental Health Training at FMC Lexington.

We are celebrating Wanda Hunt's selection as the new Equal Opportunity Officer for the Bureau. We have enjoyed having Wanda with us for the past two and a half years, and only regret that her time with us was so short. We know she will do an outstanding job in her new role. We wish her the best of luck in this challenging assignment.

We look forward to the arrival of Kathleen White, Paralegal Trainee, on April 14, 1997. Kathleen comes to us from FCI Otisville where she was Secretary to two Associate Wardens. Kathleen will be a welcome addition to the MARO staff.

During the week of April 28-May 2, 1997, the attorneys and paralegals throughout the Region will be attending the Joint MXR/NCR Legal Training in Durham, North Carolina.

Randy Smith, Paralegal, FCI Ashland, will travel to FCI Butner the week of April 14-18, 1997, to conduct an EEO investigation.

Michelle Fusseyamore, Attorney, FCI Butner, will be Acting Executive Assistant from April 1-4, and April 21-25, 1997.

Randi Everett, Legal Tech, USP Terre Haute, will be on annual leave April 7-11.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FCI and LSCI Butner - Both institutions have been issued notice of violations (NOV) under the Clean Air Act, by the State of North Carolina. The primary reason for the violations was the failure to obtain proper air quality permits on several boilers. The State was asked by Butner facilities staff to do a survey and they ended up issuing the NOV's. The State has also indicated that they will try to fine the government. We intend to oppose any attempt to levy fines under the Clean Air Act.

Prison Litigation Reform Act:

FCI Butner - Rish v. Johnson - Last month we reported that the Department had authorized us to argue in the Fourth Circuit that the provision of the PLRA which requires a showing of physical harm before a cause of action can lie for emotional harm (Section 803) can be applied retroactively to lawsuits filed before the passage of the Act. We have now been informed that we will not be allowed to make this argument, and will only be appealing the denial of qualified immunity. As you may recall, this is a Bivens case where former inmate orderlies at Butner claim they were exposed to HIV and Hepatitis B, as a result of not being provided with gloves and other protective gear when they were cleaning up human waste in the seclusion unit. The qualified immunity question will involve what was the clearly established 8th Amendment law regarding exposure to infectious diseases in 1992-1993.

FCI Milan - Kevin Walasinski, Attorney, is scheduled to speak to the judges and employees of the U.S. District Court, Eastern District of Michigan, on April 10, 1997,

regarding the PLRA.

FCI Cumberland - The institution continues to receive orders from the district court for collection of filing fees from inmates who have applied to proceed *in forma pauperis*. To manage these procedures more efficiently, the paralegal has incorporated a new section on Court Filing Fees into the Institution Supplement on Inmate Legal Activities. This section outlines the responsibilities of the inmate and staff and, more importantly, includes a Filing Fee Agreement form whereby the inmate agrees to the established procedures and consents to the withdrawal of fees from his trust fund account.

FCI Elkton - In December 1996 FCI Elkton was notified by the City of Salem that employees would be subject to a 1% municipal income tax. Pursuant to this ordinance each employer who employs one or more employees within the city limits is required to withhold 1% of all employees' gross wages. The ordinance was reviewed by this office. We determined that the FCI Elkton warehouse, which is physically within the city limits, was rented as temporary warehouse space. Our review of the ordinance indicates that warehouses are specifically exempt from this tax. A letter was prepared for the city of Salem Income Tax Department outlining our position of the imposition of this tax. Specifically, we stated that we believed employees working out of the warehouse were exempt, we further asserted that FCI Elkton is not a business as it does not operate for profit and that the official duty station of all FCI Elkton employees is Elkton, Ohio as opposed to Salem, Ohio. To date we have not had a response from the Income Tax Department.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.): None

SETTLEMENTS:

USP Terre Haute - Mitchell v. USA - This case has a lengthy history and was originally filed as a Bivens action against numerous defendants in May of 1994. The plaintiff alleged that staff had conspired to steal his property and embezzle his funds. Eventually, all the individual defendants were dismissed and only a FTCA action remained. A check issued from plaintiff's commissary account for \$7.00 was cashed after a stop payment order was issued. Plaintiff was offered \$7.00 settlement at the administrative claim stage but refused the offer. Case was settled for \$7.00.

FPC Alderson - Barrios v. U.S., Elder v. U.S., Wilson v. U.S. - These three FTCA cases alleged negligence based on an outbreak of salmonella poisoning at FPC Alderson. Each plaintiff requested relief in the amount of \$3,000. A settlement was reached with each plaintiff in the amount of \$1,000.

FMC Lexington - Venus Michels v. USA - We reported last month that we are receiving intense pressure from the U.S. Attorney's Office in Lexington, Kentucky, to settle this case. (This is the last of three cases where a former correctional officer, Eddie Smith, forced several female inmates to have sex with him. The prior two cases we settled for \$150,000 apiece, as each was a horrible fact situation where Eddie Smith forcibly raped an inmate who was in the mental health unit.) Because we feel this case involves a willing inmate participant, we believe the damages should be less than the \$350,000 that is being demanded by counsel for Ms. Michels.

On April 21st, Wanda Hunt, Warden Beeler, Joe Tang and I will meet with the AUSA and Chief of Civil,

[REDACTED]

b5

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Manchester - Sisk V. BOP - The Magistrates R&R dated February 14, 1997, denied both the defendant's and plaintiff's motions for summary judgment. At the point, only the Privacy Act claims for money damages remain. As the R&R states the facts in dispute are: whether a violation of the duty to maintain accurate records even occurred; how the documents were secured and used; the extent to which any violative actions were willful or in blatant disregard, and the extent to which any inaccuracy had any adverse effect on plaintiff. The plaintiff alleges that he was misclassified based on his central file not being maintained accurately (he alleges a letter which would influence his classification in a positive manner was not in his central file at the time of classification) and that he lives in fear because he is uncertain if staff have or will let that letter regarding his cooperation be known to the inmate population. A discovery schedule has not yet been received.

FCI Ashland - Armando Montavo v. Tom Cordle, is a common law tort action alleging a correctional counselor caused an inmate at Ashland emotional distress when he committed the torts of libel and slander. The case was originally filed in state court. A Motion to Remove the case to Federal court was filed and the state court's file was removed to the Federal court. However, the Magistrate Judge in the Federal court ruled that the E.D. Ky. did not have subject matter jurisdiction over the case because the torts of libel and slander were not cognizable under 28 U.S.C. §2680(h). Consequently, the Magistrate Judge remanded the case back to the State for lack of subject matter jurisdiction. A Motion for Reconsideration and a Motion to Substitute the United States as the sole defendant were filed with the Federal Court. These motions are presently

pending.

FCI Memphis - Coley v. Burkhart - In this case inmate Coley filed suit alleging that former Warden Burkhart (FPC Millington) racially discriminated against him by denying the inmate's furlough request. The government's dispositive motion asserted qualified immunity (no clearly established right to a furlough). The district court ruled that a genuine issue of material fact existed as to Burkhart's motive which precluded summary judgment. On March 6, 1997, we received word from the U.S. Attorney that the Office of the Solicitor General had decided not to appeal the District Court's denial of qualified immunity, even though the U.S. Attorney's Office and the BOP recommended appeal, the Civil Division recommended to the Solicitor General that no appeal be taken. This recommendation was based on the District Court's conclusion that there was a genuine issue of fact concerning the Warden's motive in denying the plaintiff's furlough request and the Supreme Court's opinion in Johnson v. Jones, 115 S.Ct. 2151 (1995) which held that where a district court denies summary judgment to a defendant raising the qualified immunity defense on the ground that the pretrial record presents a genuine issue of fact, interlocutory review of the evidence sufficiency issue is not available.

The Civil Division recognized the Sixth Circuit's heightened pleading standard requiring specific, non-conclusory allegations of facts that, if proven, would overcome the qualified immunity defense. The Civil Division further noted that Coley, who is white, alleged that similarly situated black inmates were given preferential treatment. Although Coley did not plead specific facts demonstrating that the black inmates were similarly situated, the Civil Division believed it would be difficult to argue that the heightened pleading standard places the burden on the plaintiff in advance of discovery.

Finally, the Civil Division noted that the District Court's order does not preclude filing a renewed motion for summary judgment if discovery yields no evidence that similarly situated white and black inmates were treated differently. Therefore, the Civil Division prefers that strategy to an appeal of the District Court's order denying the government's motion for summary judgment.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Beckley - Keats v. Olson - The Magistrate Judge has set oral arguments on the merits for April 10, 1997. Additionally, the Magistrate Judge ordered the government to respond to petitioner's Motion for Release pending the determination in this case. Objections to this release were filed. This case is a Habeas regarding jail time credit. The State of New York had primary jurisdiction over the inmate but both the State and the BOP overlooked this fact and he remained in federal custody for years before it was noticed that NY had primary jurisdiction. He was returned to NY to complete the time remaining on his state sentence. Inmate Keats complains he should receive credit toward both his federal and state sentences, rather than just his state sentence, since his state sentence ran concurrent to the federal sentence and he spent years in federal custody. (The sentences are in fact consecutive sentences.)

FCI Petersburg - Platshorn v. Hahn - A hearing has been scheduled for April 17, 1997, for this habeas sentence computation case that we reported last month. This involves a dispute over the calculation of 64+ year parolable/non-parolable sentences. The BOP initially aggregated the sentences, but upon parole from the 31 year parolable sentence to the consecutive non-parolable sentence, the sentences were de-aggregated according to policy. The hearing is to clarify the BOP's computation and/or determine the proper computation of petitioner's sentences under applicable law. The AUSA will meet with John White, RISA, the day before the hearing to prepare for his testimony at the hearing

regarding how the BOP calculated the sentences. An attorney has been appointed to represent Platshorn.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS: None

MEDICAL MALPRACTICE CASES UPDATE: None

SIGNIFICANT ADMINISTRATIVE REMEDIES:

FMC Lexington - The guardian of inmate Darrell Kurtz, Reg. No. 15197-018, has appealed the institution level denial of compassionate release for Kurtz. Central Office has directed us to accept this as a remedy appeal. Kurtz attempted suicide at FCI Sheridan, leaving himself with significant brain damage. Although he has limited mental capacity, he has largely recovered physically, and he has serious criminal past history, including attempted murder.

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:

FCI Milan - Idema v Pontesso - In this habeas petition the inmate alleges he was placed in detention for refusing to follow an order which violates his religious beliefs. The inmate is a Theravada Buddhist and claims that as a warrior he cannot be a servant (inmate was assigned to food service). Inmate seeks various injunctive relief orders from the court. A copy of the petition has been forwarded to the Central Office.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FCI Beckley - Inscore v. Federal BOP - A Notice of Appeal has been filed in the Fourth Circuit, challenging the District Court's refusal to order the BOP to develop a new Crimes of Violence policy within the Southern District of W. Va. (Alderson and Beckley). The District Court has declared Sections 7 & 9 void, but has refused to follow the Downey v. Crabtree approach of declaring the inmates eligible for release. I am very hopeful that we can moot this case on appeal by developing a new Crimes of Violence program statement before the Fourth Circuit decides this case.

FCI Beckley - Ballenger v. Olson - The District Court Judge adopted the Magistrate Judge's Findings and Recommendation in this Habeas relating to §3621 early release. The Court held that ineligibility based on a conviction under 924(c)(1), using or carrying a firearm during a drug trafficking crime, is properly considered a crime of violence.

FCI Manchester - Boone v. Chandler - New habeas petition received at Manchester challenging Crime of Violence classification of section 924(c) crime.

FCI Milan - McCall v. Pontesso - Inmate challenges denial of one year off eligibility for offense of unlawful transfer of a firearm. Government response was filed March 25, 1997.

USP Terre Haute - Caputo v. Clark - We recently received a favorable decision in this case challenging a denial of early release under 3621(e) after completion of a 500 hour drug treatment program based on past violence (aggravated assault) classified as a misdemeanor. The court found that the BOP had not acted illegally under 3621(e) even though Caputo had completed the drug program. The court found the pivotal point to the

be the language of the statute itself which states may be reduced.

USP Terre Haute - Johnson v. Clark - This habeas petition challenges the denial of early release under 3621(e). Petitioner successfully completed the DAP program and then was released via GCT. Shortly after that he violated his supervised release and is now back at Terre Haute. Petitioner raises two arguments. One, since his projected release date is 7-15-97 he argues that he should not have to exhaust his administrative remedies; and secondly, he challenges the BOP's denial of eligibility for early release based on his failure to demonstrate positive behavior after completion of the DAP program (supervised release violated).

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

FCI Milan - Declined Referral - Inmate Nowyorkas, Reg. No. 19712-039, was found to be in possession of a wooden box filled with miscellaneous hardware and schematics. This was referred to the FBI as possible manufacture of an explosive device. The FBI referred the case to the ATF who declined prosecution as there was no accelerant. Administrative disciplinary action was taken and a close supervision transfer has been approved.

FCI Ashland - Inmate Stevey Gibson, Reg. No. 05360-032, escaped from the camp at Ashland on March 23, 1997, and was apprehended on March 26, 1997. This case has been referred for prosecution.

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Memphis - United States v. Walters, et al. - these riot prosecutions are set for trial to begin on April 29, 1997.

FCI Beckley - Timothy Peck, an inmate from the Federal Prison Camp at Beckley, plead guilty to an escape charge during February. Peck was sentenced this month to a consecutive 18 month term.

FCI Beckley - The guilty verdict against inmate Adrian Hudgins for possessing contraband (marijuana) was previously reported in January. Hudgins was sentenced in March to a 21 month consecutive term and a \$500 fine.

FCI Milan - Inmate's Snow's prosecution for possession of contraband and assault of a federal employee has been indefinitely postponed. Inmate Snow physically assaulted his federal public defender who has now withdrawn from the case.

FCI Petersburg - The two day jury trial was held on March 25-26, 1997, and resulted in the acquittal of Correctional Officer [REDACTED] of charges of conspiracy to possess and distribute marijuana, possession and distribution of marijuana, aiding and abetting, and bribery. The Court, after the prosecution rested its case, granted defendant's Rule 29 motion on the bribery charge. The jury, after approximately an hour and ten minutes deliberation, acquitted Officer [REDACTED] on the drug charges. The case involved the prosecution of Officer [REDACTED] for allegedly providing inmates Poteet and Clarke with marijuana in 1995 and 1996 at FCI Petersburg. Poteet and Clarke entered into a plea agreement with the government and testified for the prosecution at [REDACTED] trial. Sentencing for Poteet and Clarke is still pending. The inmates testified how they had approached [REDACTED] and where the various drug transactions took place and how they paid [REDACTED] with rolls of quarters. [REDACTED] testified that [REDACTED] came to a pool hall in Newport News three times to get money from him. The government also introduced evidence of

b7c

telephone conversations of inmates allegedly setting up drug transactions. Evidence was also introduced of numerous telephone calls by ██████ to ██████ at the pool hall and other locations; and of a \$500 money gram sent to ██████ friend but was returned because of an incorrect address. ██████ testified that he had been in the pool hall with friends but didn't talk to anyone else (the friends testified supporting his story). ██████ testified he had a pocket planner that had his friend's address in it and he lost it in one of the housing units. ██████ testified he travels to the Tidewater area weekly on his days off to visit and care for his sick mother. The government felt they had a solid case. However, it seemed to boil down to the issue of the credibility between the inmates and the officer. Administrative action is still pending against Officer ██████

b7c

FCI Petersburg - United States v. Carlos Mason - This previously reported case for Introduction of Marijuana was set for trial on April 9, 1997. Word was received that the trial has been delayed as Mason has indicated he may enter a plea on the charge. This case stems from an officer searching Mason after a visit on August 18, 1996. Six balloons were found and confiscated. When the Lt. was walking out of the visiting room with the balloons, Mason grabbed the balloons and ran onto the compound and attempted to dispose of the balloons in a storm drain. Mason was restrained and the balloons were retrieved and tested positive for marijuana.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:

FCI Beckley - On March 3, inmate Alter Pena plead guilty to possessing contraband (marijuana). On March 31, 1997, he received the maximum sentence under his guideline range. He was sentenced to six months consecutive, with two years supervised release to run concurrent to his seven years of supervised release for his instant offense. All fines were waived due to his inability to pay, but he does have to pay the \$100 assessment fee.

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES:

FCI Cumberland - Maydak, et al. V. Bidwell, et al. - This Bivens action and request for injunctive relief challenged Warden Bidwell's implementation of the Ensign Amendment. Plaintiffs' requests for injunctive relief were denied and our Motion for Summary Judgment was granted. Maydak filed a Motion for Reconsideration asking the Court to make a determination that the requirement for administrative exhaustion be waived in his case. Judge Messitte denied Maydak's Motion for Reconsideration stating he and all prisoner plaintiffs seeking to file this type of lawsuit must complete administrative exhaustion through the Federal Bureau of Prisons review process before this Court can undertake substantive review of such claims.

New Litigation Cases by Institution and Type
Received During the Month of March 1997

	ALD	ASH	BEC	BUT	CUM	LEX	MAN	MRG	MIL	MEM
BIV	0	0	2	1	0	0	1	0	0	0
FTCA	0	0	0	0	0	0	0	0	0	1
HC	4	0	0	2	0	0	1	1	1	0
OTH	0	0	0	0	0	0	0	0	0	0
TOT	4	0	2	3	0	0	2	1	1	1

New Litigation Cases by Institution and Type
Received Calendar Year to Date

	ALD	ASH	BEC	BUT	CUM	LEX	MAN	MRG	MIL	MEM
BIV	0	0	2	6	0	2	1	0	0	0
FTCA	0	0	0	1	0	0	0	1	1	2
HC	7	0	3	3	1	1	1	9	3	1
OTH	0	0	0	1	3	0	0	0	0	0
TOT	7	0	5	11	4	3	2	10	4	3

BUT represents both the FCI and the LSCI

UNITED STATE

DATE:

Mid-Atlantic Regional Office, Annapolis Ju

REPLY TO Bill Burlington, Regional Counsel
ATTN OF: Mid-Atlantic Region

SUBJECT: April 1997 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Received	140	146	201	133						
Answered	178	130	135	193						

TORT CLAIMS JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

# Pending	213	180	179	183						
# Received	37	51	66	41						
# Answered	64	39	65	43						
# Pending	180	179	183	181						
# Over Six Month	4*	2*	3*	4*						

FOI/PRIVACY JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

# Pending	66	43	42	50						
# Received	36	33	51	43						
# Answered	62	39	45	24						
# Pending	43	42	50	65						
# Over 30 Days	23	21	18	29						

LITIGATION JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Cases Pending	265	353*	352	353						
New Cases Received	25	17	19	13						
Habeas Corpus	16	6	12	6						
Bivens	5	6	6	6						
FTCA	2	3	1	1						
Other	2	2	0	0						
Cases Closed	11	18	4	31						
Cases Pending	251	352	353	339						
Lit Reports Completed	19	21	17	18						
Cases/Hearings or Trials	1	0	0	1						
Settlements/Awards	3	0	4*	2						
\$ Settlements/Awards	\$95	0	\$3.007	\$180						
(\$ in Thousands)										

*We are in the process of obtaining settlement approval from the Central Office for two of these claims or a check fr Treasury.

*Incorrect figure corrected.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, will be on annual leave August 14 and 15th; August 25-27 he will be in the Regional Office for LMR training.

This month we welcome David Recker, Honors Attorney to the Regional Office. David comes to us from the state of Minnesota, where he attended William Mitchell Law School. We also want to thank Michelle Fuseyamore for her assistance in our office the week of August 4th.

Bob Blackburn, Legal Tech, USP Terre Haute, will be on annual leave August 4-8; and Rick Schott, Attorney, USP Terre Haute, will be on annual leave August 11-15.

Kathy Harris, Paralegal, MXR, will be on annual leave August 11-12 and August 21.

Joe Tang, Attorney, FMC Lexington, will be on annual leave September 2-5.

Kathy Smallwood, Paralegal, FCI Memphis, will be on annual leave August 7-8. Matthew Mellady, Attorney, FCI Memphis, will be TDY to the Central Office the week of August 11.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FCI Elkton - City Tax of Bureau Employees - Last month we reported that we are currently appealing an attempt by the City of Salem, to impose a 1% city work tax on employees from FCI Elkton, who were temporarily stationed at a warehouse within the City of Salem. We recently received word that the City has denied our appeal, and we now have the option of asking for a hearing before the city council. No date has been set for this hearing.

FCI Milan - U.S. v. Patriarca - The sentencing court ordered FCI Milan to respond to their recommendation the inmate be transferred to Rochester and the reason he was not transferred. The reply was forwarded to the court and AUSA on July 21, 1997.

FCI Milan - U.S. v. Dusenberry - This case involved a criminal forfeiture appeal proceeding. Telephone depositions of Milan staff were held on July 23, 1997, regarding procedures for handling inmate certified mail.

b5

FCI Milan - Warden Scibana and Kevin Walasinski, Attorney, met with the U.S. Attorney, Eastern District of Michigan, and criminal and civil chiefs on July 24, 1997. This was an introductory meeting for the Warden. That same day they also met with the U.S. District Court Judges in the Eastern District of Michigan for a brown bag luncheon welcoming Warden Scibana to Milan.

FCI Butner - Three mental health teleconference hearings were held this month.

Prisoner Litigation Reform Act

FCI Cumberland - Exhaustion of Administrative Remedies - Willet v. Bidwell (Fourth Circuit) - We currently have this Bivens case in the Fourth Circuit wherein the District Court dismissed the action for failure to exhaust administrative remedies, citing the PLRA. The inmate appealed the case to the Fourth Circuit. The inmate has raised in the Fourth Circuit that at the time his cause of action arose (he claims inadequate medical care) he was not required to exhaust, per McCarthy v. Madigan. Then, when Congress passed the PLRA in April of 1996, he could not exhaust because he was beyond the BOP's 20 day time limit to file an administrative appeal. He claims he is caught in a "Catch 22." [REDACTED]

FCI Cumberland - Carolyn Lanphear, Paralegal, met with Cumberland Unit Teams and staff from the Business Office on August 1 to reinforce the provisions of the PLRA with regard to in forma pauperis filings. She reiterated the importance of complying with the process in a timely manner to avoid contempt charges.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

FCI Lexington - Velda Reed and Sharon McGuire v. Reno - We have prepared and will soon be filing our Sixth Circuit brief in these consolidated age discrimination cases which challenge the Bureau's determination that all institution positions are subject to the 36 year old maximum age requirement. The plaintiffs' brief argues in essence, that the Bureau went through a "sham" review of positions in 1988 when the FERS statute changed the definition of "law enforcement officer," as we had already determined that our recommendation would be to include all institution positions within the definition. I would expect the Sixth Circuit to grant oral argument on these cases.

SETTLEMENTS: None

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FMC Lexington - Nidia Collazos-Cruz v. U.S. - The Sixth Circuit reversed Judge Wilhoit's Order granting summary judgment for the U.S. in this slip and fall case. The U.S. successfully argued at the district court level that plaintiff was at work at the time of her fall and plaintiff's declaration to the contrary executed in Columbia was not a proper declaration pursuant to 28 U.S.C. § 1746. The Sixth Circuit held plaintiff's declaration in Spanish complies with the statutory provision because part of it mirrors the statutory language. Since this declaration is valid, it raises a genuine issue of fact regarding whether plaintiff was at work at the time of her fall. This ruling raises interesting and unique legal issues for the district court, because plaintiff has long ago been deported to Columbia and the U.S. and Columbia have no treaties providing for out-of-person discovery in civil matters, i.e., telephonic depositions.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Ashland - Rudd v. Dove - In this Bivens case the Court ordered the plaintiff to pay the filing fee under the PLRA; however, the inmate refused to sign the form 24. The inmate then filed a motion arguing that staff were acting unconstitutionally and that the required filing fee was unconstitutional. Randy Smith, Paralegal, then contacted Jane Graham, Chief, Civil Division, and she agreed that her office needed to get involved and would either write a letter to the Court or make a limited appearance, without waiving a defendant's rights, to inform the Court of the inmate's action. Presently, summons have not issued to any defendant in this case.

FCI Manchester - Young v. Chandler - This Bivens case involves allegations of improper use of force in closing the food slot on an inmate in SHU. Because the Civil Rights Division was investigating this case, our staff were approved for private counsel in the individual capacity claims. The AUSA defended the official capacity claims. The plaintiff has not communicated with the court or defense counsels since he filed a change of address prior to his release in July 1996. Plaintiff failed to file a response to defendnats' motion to dismiss the official capacity claims. After two deadlines and warnings were issued by the magistrate judge, on July 22, 1997, the magistrate judge recommended, without discussion, granting the government's motion and recommended *sua sponte* dismissal of all claims against the defendants in both their official and individual capacities for failure to comply with the court's orders and lack of prosecution.

FCI Petersburg - Platshorn v. Hahn - As reported last month,

1997, ordered the BOP to provide the court with a copy of the former P.S. 5880.20 regarding de-aggregation of sentences. A copy was provided, along with an excellent declaration by Don Anderson, Central Office ISM, explaining de-aggregation of parolable/nonparolable sentences. Petitioner's attorney filed a motion to strike the declaration as an attempt by the government to get in "expert" testimony without an opportunity for petitioner to question. The AUSA filed a response asserting the declaration is simply an explanation of the portions of the Program Statement applicable to the court's inquiry and authentication of the document. We are hopeful the declaration will not be struck.

FCI Petersburg - Campbell v. Kesler - As reported last month a hearing is set at FCI Petersburg on September 15 regarding this Bivens case alleging that Officer Kesler took plaintiff into the bathroom and assaulted him. The pro se inmate has filed multiple motions with the court which the court has ruled on without input from the government. The Judge has agreed that plaintiff can consult with inmates at Petersburg during the hearing for legal advice although they may not participate directly in the hearing. The court denied plaintiff's motion to compel former Wardens Hahn and Moore as witnesses, but granted a motion to call various other BOP staff from Petersburg. The court denied plaintiff's motion to compel the dismissed defendants to answer interrogatories, but granted an order directing production of documents to Kathy Hawk and Margaret Hambrick. Various other motions were denied.

FCI Memphis - Baker v. U.S. - This FTCA case is set for trial August 28, 1997. The inmate alleges that we failed to protect him from the unprovoked attack of another inmate. This newest district court judge has not been convinced by our cited authority. However, she has also denied the inmate's request for witnesses, counsel (or courtroom assistance from another inmate), and documents. Still, the judge wants a trial, despite all the documents we've already submitted and her unwillingness to have other inmates brought to Memphis on writ.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS:

FCI Beckley - We have received claims from an auto accident occurring nearly two years ago in Kentucky. A vehicle from FCI Beckley was involved in an auto accident with a civilian vehicle. All seven occupants of the civilian vehicle, including a child, were injured. We have received claims from each, along with subrogation claims from their insurance companies. The claims total in the millions, and injuries are apparently severe. The police report, however, indicates the driver of the civilian vehicle was at fault; our driver was

not cited. We expect to deny these claims, although litigation is expected.

FCI Memphis - We have received communication from the attorney representing Barbara Danner, a former contract employee. Ms. Danner claims her contract was terminated in retaliation for her attempt to file a sexual harassment claim against a correctional employee. Ms. Danner's husband, still employed as an officer at Memphis, also claims harassment on the job as a result of his wife's situation. The attorney has attempted to file a tort claim, which has been rejected for as legally insufficient, and has filed a FOIA request.

FCI Memphis - A medical malpractice claim filed by an attorney for former inmate Okie Littrell, has been denied. While it is likely that some medical malpractice liability is extant, the attorney failed to respond to two separate requests for authority to represent, and for additional medical data. The formal denial of the claim for technical reasons, rather than getting to the merits, will foreshorten the opportunity for litigation.

FCI Ashland - A medical malpractice claim by former inmate Dickie Pulliam, is currently under negotiation. Pulliam's attorney has been informed that while a claim in the amount of the expected surgery may be considered, no claim for lost wages will be considered without the provision of considerable justification in the way of tax returns for the 10 year period prior to incarceration, and additional confirmation of employment records, nature of prior employment, etc. The claim has been transferred to OGC for settlement. This claim involves unexplained delay in terms of treatment for a knee injury sustained in a sports accident at the institution. Subash Duggirala has confirmed that the care inmate Pulliam received was substandard.

FCI Butner - An administrative claim has been filed by a paraplegic inmate who was severely burned on his legs. The hot and cold water taps were reversed in the shower. Due to his medical condition, the inmate could not feel the hot water scalding his legs. We have confirmed that the water temperature was higher than it should have been and that the hot and cold water taps were improperly reversed.

MEDICAL MALPRACTICE CASES UPDATE:

FCI Morgantown - Gutierrez v. U.S. - This FTCA case arose out of a fall from a top bunk which resulted in major damage to the elbow of an inmate who was out on writ housed in a local jail in Michigan. The primary negligence appears to rest with the U.S. Marshal's, although they are not actively involved with the defense of the case. This leaves the BOP making all settlement decisions. Your office has approved settlement authority up to \$60,000 since this case does involve major

damage to the former inmate's arm. We are working closely with the AUSA and trial is set for October.

SIGNIFICANT ADMINISTRATIVE REMEDIES:

FCI Ashland - An inmate recently filed a remedy complaining he was ordered to clean up a blood spill without proper training. The investigation revealed that the inmate did clean up the blood spill and was provided the necessary equipment and supplies for his safety. The Correctional Office disputed the inmate's version stating the inmate volunteered for the job. The institution does have inmates trained to clean up blood spills, but there are no procedures in place on how to utilize these inmates. The inmate's request for relief was granted in that the institution is looking at developing local procedures that the institution is looking at developing local procedures to utilize trained inmates to clean up all blood spills.

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:

Our preliminary review indicates we do not have any pending cases where we will need to inform the court of the Department's position that RFRA is still the applicable standard in cases involving BOP inmates. Jeff Shorba has been helping to locate a brief which may have been filed making this argument, which I plan to share with any AUSA who faces the issue.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FPC Alderson - Mildred Thompson v. Hemingway - On July 22, 1997, Magistrate Mary Fienberg held a hearing to determine why the Bureau of Prisons had not yet published a new policy to replace the "Crimes of Violence" Program Statement which was declared void in Wiggins v. Wise. At the conclusion of the hearing, the Magistrate called both sides into her chambers

[REDACTED]

[REDACTED]

b5

RDAP and requests his immediate release. The inmate alleges the actions were arbitrary and in violation of his due process rights. He also alleges that staff falsified memos and documents, and that expulsion was a breach of contract.

FCI Manchester - Moore v. Chandler - This habeas petition, due for response on August 20, 1997, is an 841(A) two point enhancement case.

FCI Butner - Garvin v. Lappin - This habeas is a two-point enhancement case. Our motion to dismiss was filed July 22, 1997.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Petersburg - US v. Ruffo (Jenks request for telephone tapes) - With the help of Libby Edson and Doug Curless, we appear to have reached a compromise in this case, wherein Judge Williams had ordered the government to review for Jenks, Giglio and Brady material, some 1300 phone tapes of a cooperating witness who is a pretrial inmate at Petersburg. This week, defense counsel and an FBI agent will be allowed to review tapes in the Warden's conference room. The FBI also requested last week to be able to obtain for their own use, other tapes of the cooperating witness, but stated they did not want to give us an administrative subpoena. Given Judge Williams' court order which clearly prohibits either the BOP or FBI from sharing any of the tapes with the AUSA, I informed Petersburg staff to insist that the FBI provide us at a minimum, with an administrative subpoena.

FCI Ashland - Inmate Steve Gibson, who was charged with escape and pled guilty, is scheduled for sentencing August 19. The AUSA notified us that at least one staff member may have to attend the sentencing hearing and testify that at the time Gibson was apprehended he was not heading back to the camp, but walking away from the camp. Judge Wilhoit is the presiding Judge.

FCI Beckley - Inmate Claude Shafer was recently indicted for escape from an institution for walking away from the camp at Beckley.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT: None

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES: None

DISMISSALS UNDER PLRA: None

UNITED STATE

DATE:

Mid-Atlantic Regional Office, Annapolis Ju

REPLY TO Bill Burlington, Regional Counsel
ATTN OF: ~~Mid-Atlantic Region~~

SUBJECT: ~~May 1997 Monthly Report~~

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Received 140 146 201 133 142
Answered 178 130 135 193 202

TORT CLAIMS JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Pending 213 180 179 183 181
Received 37 51 66 41 70
Answered 64 39 65 43 52
Pending 180 179 183 181 196
Over Six Month 4* 2* 3* 4* 4*

FOI/PRIVACY JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Pending 66 43 42 50 65
Received 36 33 51 43 40
Answered 62 39 45 24 46
Pending 43 42 50 65 51
Over 30 Days 23 21 18 29 28

LITIGATION JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Cases Pending 265 353* 352 353 339
New Cases Received 25 17 19 13 16
Habeas Corpus 16 6 12 6 7
Bivens 5 6 6 6 6
FTCA 2 3 1 1 1
Other 2 2 0 0 2
Cases Closed 11 18 4 31 12
Cases Pending 251 352 353 339 343
Lit Reports Completed 19 21 17 18 17
Cases/Hearings or Trials 1 0 0 1 1
Settlements/Awards 3 0 4* 2 0
\$ Settlements/Awards \$95 0 \$3.007 \$180 0
(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for two of these claims or a check fr Treasury.

*Incorrect figure corrected.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

This month we say farewell to Darrel Waugh, Attorney Advisor, who will be heading to USP Beaumont, beginning June 23rd. Darrel has done a tremendous job for us, and will truly be missed. Our loss, is Paul Layer and Mike Hood's gain, as we know they will soon learn to appreciate Darrel's many talents. We all wish Darrel the very best of luck in Texas.

Marian Callahan, Assistant Regional Counsel, will be on annual leave June 26-July 11, 1997.

Kathy Harris, Paralegal Specialist, will be on annual leave June 30-July 4, 1997.

Randy Smith, Paralegal, FCI Ashland, will attend Introduction to Correctional Supervision June 8-10; will be on annual leave June 23-27; and will hold DHO hearings for Chuck Kilgore on June 30-July 1.

Matthew Mellady, Attorney, FCI Memphis, will be in Denver for Sentencing Issues training June 2-4 and on annual leave June 5-6, and June 23-27.

Bob Blackburn, Legal Tech, USP Terre Haute, will be on annual leave June 23-27; and Rick Schott USP Terre Haute Attorney, will be on annual leave June 30, 1997.

Donald K. Hawkins, Paralegal Trainee, will be at FCI Petersburg from June 2-13, as part of his institutional paralegal training.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FPC Seymour Johnson - We have just learned from the Air Force that the land on which our prison camp is located, may contain some hazardous waste. In 1989 when we took over our current property, we were assured that there were no environmental issues concerning the land. We will await further information from the Air Force. On a related note, we are still trying to negotiate an interagency support agreement, as we have been without a written agreement for almost two years now.

USP Terre Haute - Terre Haute has recently instituted a consistent policy of not allowing contact attorney visits for inmates in the special housing units. This action was prompted in part by an influx of Black Gangster Disciple gang members out of Chicago. So far we have not received any challenge from the attorneys.

FCI Milan - U.S. District Court Judge Carr, Southern District of Ohio, requested his office staff tour FCI Milan. The tour was conducted by Kevin Walasinski and Lynn Bouchillon.

FCI Milan - On June 3, 1997, Kevin Walasinski participated in a deposition of ISM Stowell regarding an inmate's malpractice case against his original attorney. This is a state proceeding and the attorney has complied with all CFR regulations and permission has been granted by the U.S. Attorney for Mrs. Stowell to participate.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

FCI Manchester - Dunlap v. Fields, et al. - We were informed that this Bivens suit alleging use of excessive force by staff is scheduled for a pretrial conference June 10, 1997, with a jury trial probably later this summer. However, in view of the Supreme Court's recent decision in Lewis v. Balisok, we are filing a motion to dismiss arguing that unless and until inmate Dunlap successfully challenges a DHO finding that he assaulted staff, he cannot proceed with either a Bivens or FTCA suit claiming staff assaulted him.

FPC Alderson - Poindexter v. US - Civilian volunteer at FPC Alderson and an inmate driver were involved in a vehicle accident in the vicinity of the institution. The inmate driver, driving a van on a town trip transporting inmates, attempted to pull into a fast food restaurant. The van hit the front end of the plaintiff's car. The inmate was cited for an improper lane change. Attempts at settlement during the administrative claim stage were not successful. An attorney is involved and we are still attempting to settle this case. Liability is clear. A BOP physician who maintains a practice in the community has seen the plaintiff and states, contrary to much evidence, that her injuries were caused by our inmate driver. A separate subrogation claim by the insurance company has been settled.

SETTLEMENTS: None

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

USP Terre Haute - Bagola v. Kindt - We just learned that the Department of Justice (Stephen W. Preston, Deputy Assistant Attorney General) has recommended to the Solicitor General, that the government argue on appeal in the 7th Circuit, that the Inmate Accident Compensation Act precludes a remedy under Bivens. I am particularly hopeful that we can prevail on this issue in light of the recent Supreme Court opinion in Edwards v. Balisok, 1997 WL 155341 (1997), and recent good 7th Circuit case law. If the Solicitor General agrees, the Department of Justice will handle the appeal.

FMC Lexington - Velda Reed and Sharon McGuire v. Reno - An appeal has been taken on these age discrimination cases to the 6th Circuit. As we reported previously, on April 10th, Judge Karl Forrester rendered a favorable ruling, granting the government's motion for summary judgment in these consolidated

age discrimination cases. These were significant cases for the Bureau, as the plaintiff's challenged the Bureau's blanket policy that all institution positions meet the new FERS definition of "law enforcement officer."

FCI Ashland - Regis Linn v. USA - This FTCA action arose when a screw on an overhead fan broke and a small piece of the fan allegedly struck the visitor's arm causing him to lurch in his chair and strain his spine and shoulder. We argued, and the court agreed, that under Kentucky law, the visitor is a licensee and as such the government would have had no duty to warn the visitor of the fan's condition, unless we were already aware of the problem prior to the incident. The court went on to say that even if the visitor were an invitee, it would not change the end result. We are asking the United States Attorney's Office to get this opinion published.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Milan - Idema v. Pontesso - Judge Cohn has ordered a hearing on June 6 in this habeas case. This is one of two habeas cases filed by inmate Idema. The case involves Idema's denial of CCC placement by the CCM's Office based on Idema's outstanding warrant in the contempt of court order issued by a county judge in Fishkill, NY. Idema, subsequent to the filing of the suit, hired an attorney and had the contempt case dismissed. Unfortunately for Idema he received a series of incident reports based on his behavior which, at times is very outrageous. Idema is receiving some media coverage in the Detroit area based on his assertions that he was a military/CIA operative, special forces trained and well versed in counter-terrorism. His J&C fails to confirm any of these assertions.

USP Terre Haute - Locascio v. Clark - A hearing was held on May 12, 1997, before Judge McKinney. Locascio filed a TRO, preliminary injunction, and permanent injunction based on the fact that he was placed in administrative detention after a Prime Time Live interview with Sammy "The Bull" Gravano indicated that Locascio had conspired to kill John Gotti. In his complaint, Locascio alleged that he was being denied access to the court and his counsel since he was in AD and wanted to be released to the general population. Locascio was released to general population on Monday morning. This action was dismissed.

FPC Seymour Johnson - Milton v. Flowers, et al. - This is a Bivens case filed in 1993 with a long procedural history. The Judge has granted our motion for summary judgment against all the defendants except Randy Meeks, and the only remaining issue is whether Randy was deliberately indifferent to Milton's medical condition when making his job assignment. The Judge has ordered that Randy Meeks and Warden Flowers be present at a contempt hearing in Raleigh on June 20, 1997.

The Judge has made it clear that the hearing is limited to the narrow issue of what did Randy Meeks and Arnett Flowers actually know regarding Milton's medical condition when they signed their first declarations in this case. When the government filed their second summary judgment motion Randy Meeks filed a second declaration that modified his first declaration. Bill Burlington, Kathy Harris, and Melvin Lee (former litigation coordinator from Seymour) will be attending the hearing.

FCI Petersburg - As previously reported, Frank Karam, Captain, was subpoenaed and approved to testify in the case of Commonwealth of VA v. Gerald Timothy Daniel, on May 14, 1997, in Hanover, Virginia. Correctional Officer Daniel was found guilty of the traffic offense of "possession of a blue light" and "possession of a radar detector" and was fined \$150. He was also found guilty of the Class 1 misdemeanor of "impersonating a police officer by use of a blue light." On this conviction he was sentenced to one month imprisonment, suspended. The charges stemmed from the officer's use of a personal blue light, en route home, while off duty. Captain Karam was accompanied to court by Milt Williams, Paralegal. Administrative action is pending.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS:

FCI Butner - On May 6, 1997, we denied an administrative FTCA claim contending that Bureau of Prisons staff were negligent in improperly diagnosing and treating former inmate Fernando Zapata, thereby causing the medical condition which led to his death on November 4, 1994. The claim sought \$1.5 million in damages for the wrongful death of inmate Zapata. The investigation revealed that the inmate was incarcerated at FCI Allenwood when he began to show signs of what appeared to staff to be a psychiatric disorder. The inmate was then transferred to FCI Butner where he died upon his arrival at that facility. The autopsy revealed that Zapata died of a rapidly spreading brain cancer. We anticipate a lawsuit with regard to this incident.

MEDICAL MALPRACTICE CASES UPDATE: None

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES: None

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FCI Manchester - Wooley v. Chandler - New habeas petition received challenging "crime of violence" classification of section 924 crime.

FCI Morgantown - Pelissero v. Thompson - This case is currently on appeal to the Fourth Circuit. At the District Court level Judge Kidd upheld P.S. 5162.02, § 9's definition of "crime of violence," and thereby denied the inmate's request for a sentence reduction under §3621(e)(2)(B).

In April (after the filing of the appeal and our brief response) the Washington & Lee University Legal Assistance Program filed an amicus brief on behalf of inmates at FPC Alderson. Since Judge Kidd's opinion in this case expressly rejected the reasoning of Wiggins and thereby created a split between the Northern and Southern Districts of West Virginia, the Fourth Circuit allowed the amicus brief to be filed. Our response to that brief is due on June 13. The U.S. Attorney does not expect the case to be heard until later this summer. We are hoping that the Bureau's imminent publication of the amendments to 28 C.F.R. Parts 524 and 550 will moot the case.

FCI Milan - Taylor v. Pontesso - In this habeas petition the inmate alleges he is improperly being denied the benefits of the RDAP based on his 18 USC 922(g) conviction.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Memphis - U.S. v. Walters, Torres, Negron and Green - On Wednesday, May 14, 1997, a jury returned verdicts of guilty against all four defendants charged with rioting (18 USC § 1792) and destruction of government property (18 USC § 1361) during the October 20, 1995, disturbance at FCI Memphis. Sentencing is set for August 25, 1997.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:

FCI Milan - US v. Morrison - This criminal trial is scheduled for June 9, 1997. The case involves an allegation of rape, sexual assault, and attempted murder by inmate Morrison. Morrison engaged in this forceful activity with two inmates. One of the inmates is now HIV positive. The case has been scheduled and delayed several times in the past year. The AUSA is seeking two counts on each of the above charges. There is a Michigan State law making it a felony with a five year prison term for an HIV positive person to engage in sexual activity without disclosing the HIV status to the partner. There are two counts in the case on this charge.

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES:

FCI Milan - Norman v. Pontesso - This is a Bivens and declaratory suit challenging the provisions of the 1997 Omnibus Budget Act for fiscal year 1997. It specially

challenges the BOP's implementation of the Ensign Amendment. Copies of the complaint have been forwarded to the Central Office and DOJ.

LSCI Butner - Patch, et al. v. Reno, et al. - This Bivens case, also with claims for injunctive and declaratory relief, involved allegations from inmates at LSCI Butner claiming First Amendment violations due to statutory restrictions placed on the inmates' receipt of sexually explicit publications (Ensign Amendment). All of the plaintiffs, except Patch, were dismissed for failure to exhaust under the PLRA. Claims for monetary damages against the defendants in their official capacity were dismissed under the doctrine of sovereign immunity. The claims against the defendants in their individual capacity were dismissed based on qualified immunity. The claims for injunctive and declaratory relief were dismissed for failure to prove "injury in fact."

Dismissals Under PLRA: None

	ALD	ASH	BEC	BUT	CUM	LEX	MA
BIV	0	0	0	0	1	2	0
FTCA	0	0	0	0	0	0	0
HC	0	1	1	0	0	0	2
OTH	0	1	0	0	0	0	0
TOT	0	2	1	0	1	2	2

	ALD	ASH	BEC	BUT	CUM	LEX	MA
BIV	0	1	3	7	3	4	1
FTCA	0	0	0	2	0	0	0
HC	7	1	3	5	1	1	5
OTH	0	1	0	1	3	0	0
TOT	7	3	6	15	7	5	6

BUT represents both the FCI and the LSCI

UNITED STATE

DATE:

Mid-Atlantic Regional Office, Annapolis Ju

REPLY TO Bill Burlington, Regional Counsel
ATTN OF: Mid-Atlantic Region

SUBJECT: June 1997 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Received 140 146 201 133 142 172
Answered 178 130 135 193 202 164

TORT CLAIMS JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Pending 213 180 179 183 181 196
Received 37 51 66 41 70 69
Answered 64 39 65 43 52 60
Pending 180 179 183 181 196 203
Over Six Month 4* 2* 3* 4* 4* 4*

FOI/PRIVACY JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Pending 66 43 42 50 65 51
Received 36 33 51 43 40 46
Answered 62 39 45 24 46 53
Pending 43 42 50 65 51 52
Over 30 Days 23 21 18 29 28 21

LITIGATION JAN FEB MAR APR MAY JUN JUL AUG SEP OCT

Cases Pending 265 353* 352 353 339 343
New Cases Received 25 17 19 13 16 16
Habeas Corpus 16 6 12 6 7 9
Bivens 5 6 6 6 6 4
FTCA 2 3 1 1 1 2
Other 2 2 0 0 2 1
Cases Closed 11 18 4 31 12 20
Cases Pending 251 352 353 339 343 339
Lit Reports Completed 19 21 17 18 17 12
Cases/Hearings or Trials 1 0 0 1 1 3
Settlements/Awards 3 0 4* 2 0 0
\$ Settlements/Awards \$95 0 \$3.007 \$180 0 0
(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for three of these claims or a check Treasury; one claim was just recently transferred from another Region.

*Incorrect figure corrected.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, will be in the Regional Office July 15-17, 1997.

This month we welcome Michael Pybas and Joan Brooks to the Regional Office. Joan comes to us from Central Office, where she worked in the FOIA section. Michael Pybas rejoins the Regional Office (having left for a four year tour at FDC Miami), this time in the role of Deputy Regional Counsel. We are delighted to have Michael and Joan with us. We would also like to thank Mike Bredenberg and Rick De Aguiar for the assistance they provided to our office during our time of staff shortage.

We would like to congratulate Randy Smith on his selection as the paralegal at FCI Elkton. In this role, he will be doing shared services whereby he will service both Elkton and Ashland.

Milt Williams, Paralegal, FCI Petersburg, will be on annual leave July 13-26, 1997.

Debbie Munson, Attorney, FCI Beckley, will be on annual leave July 18-25, 1997.

Mike Robar, Paralegal, FCI Manchester, is the Acting Executive Assistant at the institution from June 30-July 7.

Randy Smith, Paralegal, FCI Ashland, will be on a house hunting trip to Elkton August 3-12.

Jeanette Hafer, a paralegal intern, will be training in the legal office at USP Terre Haute July 7-23.

The following staff at USP Terre Haute will be on leave as indicated: Rick Schott, Attorney, July 1-3; Teresa Marvel, Paralegal, July 7-11; and Randi Everett, Legal Tech, July 21-25.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FCI Petersburg - We have been contacted by Techlaw, a private environmental firm who has been hired by the Army, regarding the landfill at FCI Petersburg. Techlaw has filed two FOIA requests, and is asking to speak with Petersburg staff who have information about a landfill which the Army and FCI Petersburg use. We believe the purpose of these contacts is to try and hold the Bureau partially responsible for the cleanup of the landfill. At the time we created the landfill, we issued a permit to the Army, wherein they agreed to assume full responsibility for the landfill. We will be asking for Marianne Cantwell's assistance at a meeting we hope to set up with the Army in the near future.

USP Terre Haute - Non Contact Attorney Visits - We reported last month that Terre Haute recently instituted a consistent policy of not allowing contact attorney visits for inmates in the special housing units. This action was prompted in part by an influx of Black Gangster Disciple gang members out of Chicago. We recently learned that attorneys for the inmates have filed motions in Chicago challenging this action. Warden Clark recently modified the visiting arrangements to allow limited contact visits with attorneys.

FCI Elkton - City Tax of Bureau Employees - We are currently appealing an attempt by the City of Salem, to impose a 1% city work tax on employees from FCI Elkton, who were temporarily stationed at a warehouse within the City of Salem. We are not confident that we will prevail before the City, and will probably elect not to pursue the matter for fear of straining our new relationship with local leaders.

Prisoner Litigation Reform Act - Filing Fees - McCoy v Wigglesworth, 1997 WL 309600 (6th Cir. 1997). In this decision, the 6th Circuit holds the duty to calculate the initial filing fee, the duty to calculate subsequent deductions, and the duty to forward fees to the District Court all rest with the custodian. This decision has been called to the attention of legal staff in the 6th Circuit, with directions to ensure that their staff are aware that we must comply with court orders to deduct fees from an inmate's account.

FCI Memphis - At the request of the U.S. Probation Office, a Confirmation of Loss and Declaration of Victim Losses on behalf of Warden Luttrell was submitted in the cases of U.S. v. Walters, Green, Torres and Negron, the riot prosecution cases. This information was provided pursuant to the Mandatory Victims Restitution Act of 1996 which provides for restitution to victims directly and proximately harmed as a result of the commission of a criminal offense.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

FCI Milan - Craig Oliver v Palmitier and Eleanor Brown - In this habeas petition, we had an inmate seek to apply the recent decision in Young v Harper, 117 S.Ct. 1148 (1997) to a work-release program run from a contract jail. We argued that the facts in Young limited the holding to persons who had been released from confinement and who were on a program that was functionally equivalent to parole.

FCI Manchester - Dunlap v Fields, et al. - We were informed that this Bivens jury trial has been pushed back and will probably go to trial in September. This suit alleges use of excessive force by staff. In view of the Supreme Court's recent decision in Lewis v Balisok, we hope to file a motion to dismiss arguing that unless and until inmate Dunlap

successfully challenges a DHO finding that he assaulted staff, he cannot proceed with either a Bivens or FTCA suit claiming staff assaulted him.

SETTLEMENTS: None

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Beckley - Keats v. Olson - Objections were filed to the Magistrate's R&R in this habeas case. The Magistrate concluded that the inmate's sentence commenced when the BOP accepted him into custody to serve his federal sentence, even though the state had primary jurisdiction and the federal sentence was to run consecutive to the state sentence. The BOP's mistake (in accepting him in custody instead of sending him to the state) effectively turned the consecutive sentence into a concurrent sentence. The Magistrate also found that there had been a due process violation, which could possibly lead to Bivens liability for those who computed the sentence.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FPC Seymour Johnson - Milton v. Flowers, et al. - This is a Bivens case that was originally filed in 1993. The Judge ordered a contempt hearing on plaintiff's request for sanctions. The hearing was held on Friday, June 20, 1997, at 10:00 a.m. in Raleigh with Warden Flowers, Randy Meeks, Charlie Hamilton (retired AUSA previously involved in the case), Kathy Harris and Bill Burlington in attendance. When the pro se plaintiff had not appeared by 10:30, the Judge stated that he would not rule on the motion. The Judge agreed to consider a motion for attorney's fees and costs (totaling \$6,500), and to order the plaintiff to show cause in ten days why the remaining issue should not be dismissed. The AUSA filed the motion on June 24, 1997. If the Judge awards attorney's fees and costs against the plaintiff, it is unlikely he will pursue the remaining issue.

FCI Petersburg - Campbell v. Kesler, et al. - This Bivens case involves an alleged assault on inmate Campbell by Officer Kesler in February 1996. In an order filed May 30, 1997, the court granted all defendants' motion to dismiss/motion for summary judgment except the claim of excessive force against Kesler. The court cited a material issue of fact as to whether the alleged assault occurred and whether Kesler was involved. The court also noted that while the injuries to Campbell (hematoma to both arms) was not serious, the court could not say at the time they were de minimis as a matter of law. The court referred the matter to the Magistrate Judge for an R&R. At the Court's suggestion and with the approval of the Warden, Magistrate Judge William Prince has set the matter for a hearing on Monday, September 15, 1997, at FCI Petersburg. Anita Henry, AUSA, tentatively plans to come to

the institution on September 4 and 5 for trial and witness preparations.

FCI Petersburg - Platshorn v. Hahn - An evidentiary hearing was held on June 4, regarding the aggregation of a parolable sentence with a non-parolable sentence. Platshorn who was released on parole from the parolable portion of the sentence, seeks to have SGT earned on the parolable sentence applied to the consecutive non-parolable sentence. John White, RISA, testified at the hearing and presented an excellent explanation of the computation by BOP. The AUSA and Milt Williams, Paralegal, FCI Petersburg, got the impression that regardless of § 4161 maximum rate of SGT, Magistrate Judge Lowe intends to somehow hold that Platshorn is entitled to additional SGT. On June 30, 1997, Magistrate Judge Lowe ordered the BOP to provide the court by July 11 a copy of the P.S. in existence prior to 5880.30.

FCI Milan - Idema v. Pontesso - A hearing was held on June 9, 1997, regarding this habeas petition. The Judge acknowledged that referral and CCC placement decisions were at the BOP's discretion. BOP staff advised the Judge that CCC referral for Idema would be completed pending disposition of the incident reports the inmate had received.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS: None

MEDICAL MALPRACTICE CASES UPDATE: None

SIGNIFICANT ADMINISTRATIVE REMEDIES:

FCI Manchester - There have been five administrative remedies filed at Manchester resulting from a training incident on June 3, 1997, in which inmates were exposed to gas. The exposure was caused by a sudden change in the wind direction and an After Action Team has completed its report.

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES: None

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FPC Alderson - Gary v. Hemingway - This is a new 3621 case. The petition asks the Court to declare the inmate eligible for early release under the authority granted to the Court in 5 U.S.C. § 706(1), due to the Bureau of Prisons unreasonable delay in promulgating a new program statement.

FCI Milan - Alston v. Pontesso - This habeas petition challenges the denial of a year-off under the provisions of 3621 since petitioner had been convicted of a firearms

offense. The court dismissed the case for failure to exhaust administrative remedies.

FCI Beckley - A hearing has been set for July 16th in the early release cases involving Beckley inmates regarding the length of time it is taking the new rule to be adopted in determining eligibility for the year off. Debbie Munson, Attorney, FCI Beckley, is working with Roy Nanovic from your office on a declaration giving a status report on the rulemaking procedure.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Petersburg - Jenks Request for Telephone Tapes - As part of a Jenks Act request, a judge in the Eastern District of Virginia has held that an inmate witness' telephone tapes are in the possession of the prosecuting AUSA, and consequently, FCI Petersburg must copy and produce the tapes for defense counsel. The inmate witness was a pre-trial inmate. Because he did not work, he was able to make 1300 calls during a six month period. We are asking the AUSA to file a motion to reconsider asking to limit the number of calls we must produce.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:

FCI Milan - As previously reported inmate Morrison was criminally charged with two counts of attempted murder, two counts of aggravated assault, and one count of witness tampering. Trial was held the first week of June and the inmate pled to one count of witness tampering after the Judge separated the trial based on the two separate victims and the inmate had been found not guilty on one count of attempted murder and aggravated assault.

USP Terre Haute - Inmate Howard Kelly, Reg. NO. 00525-032, plea bargained for 57 months consecutive, no fine, and three years supervised release for Mailing Threatening Communications.

FMC Lexington - US v. Alvarez - Defendant Alvarez, Reg. No. 37691-004, was tried for allegedly stabbing inmate Joffre, Reg. No. 33902-004, in Bluegrass Housing Unit in January 1997, apparently in a dispute over usage of a microwave oven. Despite being prepared by the AUSA, when inmate Joffre took the stand for direct questioning, Joffre answered each question by loudly stating that the defendant had stabbed him. A mistrial was declared after all but one juror voted to acquit Alvarez. Another trial has tentatively been docketed for August 1997.

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES: None

DISMISSALS UNDER PLRA:

FCI Memphis - Harrison v. USA - Inmate's request to the Sixth Circuit to voluntarily dismiss this case was granted on June 19, 1997. The inmate's reason for seeking dismissal was the fact that he could not pay the filing fee now or within 30 days.

	ALD	ASH	BEC	BUT	CUM	LEX	MA
BIV	0	2	0	0	0	1	0
FTCA	0	0	0	1	0	0	0
HC	0	1	0	2	0	1	0
OTH	0	0	0	1	0	0	0
TOT	0	3	0	4	0	2	0

	ALD	ASH	BEC	BUT	CUM	LEX	MA
BIV	0	3	3	7	3	5	1
FTCA	0	0	0	3	0	0	0
HC	7	2	3	7	1	2	5
OTH	0	1	0	2	3	0	0
TOT	7	6	6	19	7	7	6

BUT represents both the FCI and the LSCI

DATE: Mid-Atlantic Regional Office, Annapolis Junction, MD 20

REPL Bill Burlington, Regional Counsel
ATTN Mid-Atlantic Region (MARO)

SUB July 1997 Monthly Report

TO Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Received	140	146	201	133	142	172	154					
Answered	178	130	135	193	202	164	158					
TORT CLAIMS	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
# Pending	213	180	179	183	181	196	203					
# Received	37	51	66	41	70	69	56					
# Answered	64	39	65	43	52	60	63					
# Pending	180	179	183	181	196	203	197					
# Over Six Month	4		3	4*	4*	4	3*					
FOI/PRIVACY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
# Pending	66	43	42	50	65	51	52					
# Received	36	33	51	43	40	46	69					
# Answered	62	39	45	24	46	53	50					
# Pending	43	42	50	65	51	52	77					
# Over 30 Days	23	21	18	29	28	21	32					
LITIGATION	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Cases Pending	265	353 [✧]	352	353	339	343	339					
New Cases Received	25	17	19	13	16	16	23					
Habeas Corpus	16	6	12	6	7	11						
Bivens	5	6	6	6	6	5						
FTCA	2	1	1	1	1	4						
Other	2	0	0	0	2	3						
Cases Closed	11	18	4	12	20	14						
Cases Pending	251	352	353	339	343	339	348					
Lit Reports Completed	19	21	17	18	17	15						
Cases/Hearings or Trials		0	0				1					
Settlements/Awards	3	0	0				0					
\$ Settlements/Awards	\$95	0	\$3.	(\$180			0					

(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for on
[✧]Incorrect figure corrected.

DATE: Mid-Atlantic Regional Office, Annapolis Junction, MD 20

REPL Bill Burlington, Regional Counsel
ATTN Mid-Atlantic Region

SUB August 1997 Monthly Report (MARD)

TOWallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DE

Received 140 146 201 133 142 172 154 184
Answered 178 130 135 193 202 164 158 189

TORT CLAIMS JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DE

Pending 213 180 179 183 181 196 203 197
Received 37 51 66 41 70 69 56 91
Answered 64 39 65 43 52 60 63 52
Pending 180 179 183 181 196 203 197 210
Over Six Month 4 3 4* 4* 4 3 1*

FOI/PRIVACY JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DE

Pending 66 43 42 50 65 51 52 77
Received 36 33 51 43 40 46 69 27
Answered 62 39 45 24 46 53 50 72
Pending 43 42 50 65 51 52 77 63
Over 30 Days 23 21 18 29 28 21 32 37

LITIGATION JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DE

Cases Pending 265 353* 352 353 339 343 339 348
New Cases Received 25 17 19 13 16 16 23 6
Habeas Corpus 16 6 12 6 7 11 4
Bivens 5 6 6 6 5 0
FTCA 2 1 1 4 1
Other 2 0 0 2 3
Cases Closed 11 18 4 12 20 14 19
Cases Pending 251 352 353 339 343 339 348 335
Lit Reports Completed 19 21 17 18 17 17 23
Cases/Hearings or Trials 0 0
Settlements/Awards 3 0 0 0 0 1
\$ Settlements/Awards \$95 0 \$3. (\$180 0 \$0.2
(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for th
*Incorrect figure corrected.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel: I will be in the Regional Office/Regents University, September 8-9. September 10-14 I will attend ADR Training at Duke University. I will be participating in a Legal Management Review at FCI Sheridan September 22-26.

Michael Pybas, Deputy Regional Counsel, will travel to Lexington, Kentucky, September 15-16, to meet with the Civil Division in the U.S. Attorney's Office, and to conduct staff assists at FMC Lexington and FCI Manchester. On September 8 he will conduct a training session for CMC's from around the Region about the current eligibility determinations for time off in conjunction with DAP.

September 15th we welcome David Recker, Honors Attorney, to the Regional Office. David comes to us from the state of Minnesota where he attended William Mitchell Law School. We will sadly say goodbye to Rochelle Gross who has accepted a position (and a nice promotion) with the FBI. Rochelle has been given a reporting date of September 15th. A big thank you to Saku Papino for her assistance in the Regional Counsel's Office.

On August 27th the Chief of Civil and her staff in the Eastern District of Kentucky took Randy Smith, Paralegal, FCI Ashland, to lunch and presented him with a letter and certificate of appreciation for all the litigation support he has provided the office during his time at Ashland. Randy will now be located at FCI Elkton, but will handle Ashland and Elkton.

Matthew Mellady, Attorney, FCI Memphis, will be attending the Tennessee state-wide conference on the PLRA sponsored by the U.S. District Court for the Western District of Tennessee on September 12, 1997. Earlier this month, the legal office at Memphis coordinated a survey of 110 inmates conducted by representatives of the Bureau of Census.

Carolyn Lanphear, Paralegal, FCI Cumberland, will be on annual leave September 8-12.

Bob Blackburn, Legal Tech, USP Terre Haute, will be on annual leave September 22-16; and Teresa Marvel, Paralegal, will be on annual leave September 19-24.

Mike Robar, Paralegal, FCI Manchester, attended his first meeting as a member of the Risk Management Committee for medical treatment. These meetings are held once each quarter. Mike will be on a recruiting trip to Ft. Knox on September 18-19.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FCI Butner - Two video conference mental health hearings were held at Butner in August.

Butner Complex - The North Carolina Department of Environment, Health and Natural Resources issued a notice of violation of various provisions of the Clean Air Act related to installation of certain generators, boilers, etc., at the Complex, without obtaining appropriate permits, and has assessed a fine in the amount of \$3,563. This matter is being handled by Marianne Cantwell, OGC, who has drafted a response advising the state that the complex is not subject to civil penalties because the federal government has not waived sovereign immunity under the Act.

FCI Milan - On August 15 a status conference was held with Judge Cohn regarding Idema v. Pontesso (three separate actions). The Judge indicated one of the three cases has been dismissed, but no written order has been received. The judge inquired into the status of the CCC referral for inmate Idema. The judge was advised the referral was withdrawn by the Warden based on Idema's continued institutional misconduct. The Judge requested additional information on exhaustion of administrative remedies regarding CCC placement and the RDAP program.

Prisoner Litigation Reform Act

Filing Fees - Eastern District of Kentucky - As a result of language from McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997) that by filing a civil action or appeal, "...the prisoner waives any objection to the withdrawal of funds from the trust account by prison officials to pay the prisoner's court fees and costs...", one Magistrate Judge has indicated he expects the Bureau to withdraw funds even if the inmate has not signed a consent form authorizing such withdrawal. I am working with the Chief of Civil, Jane Graham, to try and convince the Magistrate and Clerk that the PLRA did not repeal the statute which created our inmate deposit fund, and thus, we cannot withdraw funds from such accounts without a prior consent from the inmate.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

FCI Lexington - Velda Reed and Sharon McGuire v. Reno - We have now fully briefed this case and are waiting for the Sixth Circuit to set a date for oral argument. This is an age discrimination case which challenges the Bureau's determination that all institution positions are subject to the 36 year old maximum age requirement.

SETTLEMENTS:

LSCI Butner - Funderburk v. USA - Parties filed a stipulation

Funderburk \$183.35 for the loss of his personal property. We felt we would not be able to prevail on the issue of liability were this case to proceed to trial.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Manchester - Kevin Shehee v. Michael Robertson, et al., No. 96-173. This is a Bivens retaliation case in which the inmate claims that he was fired from his commissary job and prevented from ordering hobby craft materials in retaliation for filing an administrative remedy request. The Magistrate Judge's R&R of August 21, 1997 recommended denial of motions to dismiss filed on behalf of staff at Manchester, the Regional Director and Senior Deputy Regional Director, and the National Appeals Administrator. Objections were filed to the recommendations, particularly on the issues of long arm jurisdiction, respondeat superior and qualified immunity. Three of the administrators were left in the lawsuit simply because they signed administrative remedy responses, and the former Warden and the Regional Director were kept in the Bivens action because they delegated authority to sign the responses for them to others.

FCI Ashland - Jack J. Pearson v. Dan Dove, No. 97-75. On August 19th the Magistrate Judge entered an R&R recommending that an order be entered compelling the Bureau of Prisons to transfer this inmate from FCI-Ashland to FCI-Coleman, to facilitate his need to be closer to his attorney in Tampa during the pendency of his appeal. The Court placed great reliance on the population figures from "Monday Morning Highlights" submitted by the inmate, reasoning that since Ashland was more overcrowded than Coleman there was no good reason why he should not be moved. Objections were filed based on the lack of authority and jurisdiction of the courts to designate the place of an inmate's confinement, and failure to meet mandamus requirements. Also objections were lodged based on 18 USC §3625 forbidding judicial review of certain Bureau functions relating to inmates, and failure to make findings required by 18 USC §3626(a) of the Prison Litigation Reform Act prior to the entry of any prospective relief in a prison case (specifically the identification of a violation of the federal right of a prisoner). The week before the entry of the R&R, the inmate's Unit Team approved his transfer request, which was subsequently approved by the Warden and Region. He is scheduled to be transferred in early September to FCI-Coleman.

FMC Lexington - Magistrate Peggy Patterson made a significant ruling in a Bivens case arising out of FMC Lexington. Relying on Street v. Bradford, 886 F.2d 1472 (6th Cir. 1989), a non-Bivens securities case, Magistrate Patterson ordered that the Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment, be construed only as a Motion to Dismiss, and the declarations supporting summary judgment shall be

party may move for summary judgment asserting the opposing party will not be able to produce sufficient evidence at trial only after the parties have been afforded sufficient time for discovery. The Chief of Civil received confirmation from the office of the Magistrate that in the future Bivens cases should only be addressed with a Motion to Dismiss. Our position is that Patterson's ruling based on Street is distinguishable from our Bivens cases, where defendants are shielded by qualified immunity. Legal staff in the Eastern District of Kentucky will argue no violation of any clearly established right and that the defendants acted reasonably within the scope of their duties, along with other 12(b) and PLRA defenses.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Petersburg - Campbell v. BOP - This Bivens case alleging assault by staff was set for hearing on September 15, 1997. Campbell had been granted permission by the court to permit two inmates to assist him at the hearing although they could not actually participate in the hearing. Campbell never named the two inmates he wished to assist him. Campbell then filed a motion for appointment of counsel which the court denied. After talking to the Clerk of the Court and being advised of the effects of filing a motion to dismiss the case, Campbell decided to dismiss the suit. The Judge issued an order dismissing the case with prejudice on September 3, 1997.

FCI Memphis - Coval Baker v. USA - This is an alleged failure to protect FTCA case arising out of the unprovoked attack by inmate Paulino on inmate Baker. Trial was to begin Friday morning but had to be delayed until 1:00 p.m. because the Judge failed to writ out the inmate. USMS and R&D staff worked quickly to get the inmate to court by 1:00 p.m. The pro se inmate was permitted to call one inmate and one staff member as witnesses. At the conclusion of the plaintiff's case, AUSA Quarles moved for a judgment as a matter of law as the plaintiff had failed to establish a prima facie case of negligence. After a few moments of consideration, the Judge granted the motion and ruled in favor of the government. It is interesting to note that plaintiff did not present any new evidence that had not already been rebutted in prior pleadings. Nothing new was revealed that made the trial any more detailed than the pleadings already before the court.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS:

FCI Memphis - Leonard Bourque, #T-MXR-97-056. This claim stems from the expungement of an incident report and lost UNICOR wages. Inmate Bourque had a positive UA and originally health services staff indicated he was not on any medication

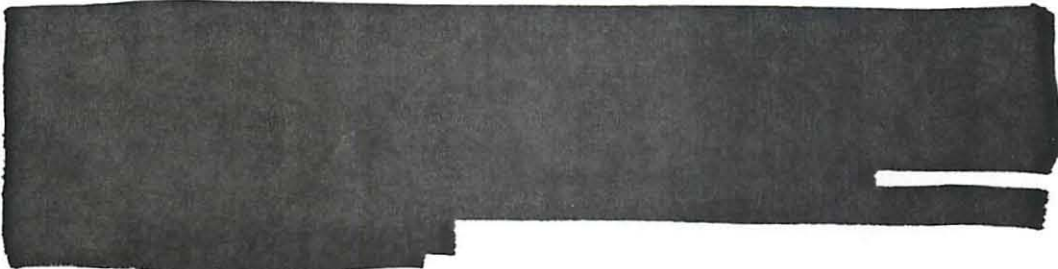
hearing the DHO again contacted Health Services since the inmate's defense was he was on medication causing the positive result. This time health services did report he was in fact on medication which could cause positive test results. The incident report was expunged. The inmate filed the tort claim stating that due to staff negligence in not reporting the medication, the government is liable for his lost wages. Memphis' denial of the claim was based on the fact the inmate has neither a liberty nor property interest in either a prison job or the wages to be earned from that job. Memphis did not want to set a precedent wherein inmates whose incident reports were expunged based on some improper part of the staff's investigation could receive back pay for the time they were away from their job.

MEDICAL MALPRACTICE CASES UPDATE: None

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES: None

FCI Beckley - Clarence Perkins v. Lt. Barnard, et al. - This Bivens action alleges that the inmate's rights under the Eighth and Fourteenth Amendments have been violated because the inmate (a Sunni Muslim) had to submit to a pat search by a female officer. One concern we have in responding to the claim, is that the inmate does not raise RFRA as the standard which governs this religious issue. We will be seeking guidance as to whether we must raise RFRA to the court where the inmate fails to mention it.



ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FCI Milan - Scott v. Pontesso - Received this habeas petition this month wherein the inmate alleges BOP's inclusion of previous convictions as a basis for non-eligibility for the one year off provisions of VCCLEA is not a permissible interpretation of the statute.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Petersburg - United States v. Ruffo - (Jenks request for telephone tapes) - FCI Petersburg continues to assist defense counsel in listening to some 1300 phone calls that were made by a pretrial inmate (Reiners) who is listed as a cooperating witness. The defense has refused to tell us from which master tapes they taped calls, which then requires us to preserve each master tape. With Doug Curless' help, we have asked the AUSA to argue that defense counsel must either tell us when they record a call from a master tape (so we will know whether to preserve it) or start providing us with new blank tapes so our supply is not depleted.

FCI Cumberland - On August 29, 1997, Warden Bidwell and I met with officials from the Baltimore FBI and U.S. Attorney's office regarding what they perceive as an increase in the number of requests for criminal prosecution that have been coming out of FCI Cumberland. Initially, the U.S. Attorney's office had suggested that they do not have the manpower to take all the cases we want prosecuted, and that they wanted us to refer some of the cases to the local county prosecutor. Warden Bidwell very effectively argued that he opposed that position and that he felt it would be extremely unfair to place that federal prosecutorial burden on the state. We also presented proposed prosecution guidelines that would clarify what cases should be prosecuted, as the U.S. Attorney's office recently indicated they would not prosecute an escape from the camp. They agreed to reconsider that case.

FCI Memphis - United States v. Corteous Bosley - In this case, the inmate walked away from the satellite camp and was gone for three days. He was subsequently arrested when the car he was riding in was stopped for a routine traffic stop. The driver of the vehicle was cited for two traffic offenses, two other passengers were arrested for possession of marijuana, and inmate Bosley was discovered to have an outstanding warrant for escape. Local law enforcement turned him over to the U.S. Marshals. The U.S. Attorney's office agreed to prosecute.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT: None

REHABILITATION ACT:

USP Terre Haute - Furino v. FBOP, et al. - In this Bivens action alleging that the BOP is forcing him to work in job assignments that exacerbate his AIDS condition, the inmate raises jurisdiction under the Rehabilitation Act.

ENSIGN AMENDMENT CASES: None

FCI Beckley - Maydak v. Bidwell - Filed by two inmates just before the Act was found to be unconstitutional, this habeas

into FCI Beckley. The case has been referred to DOJ, and a response is due in October.

DISMISSALS UNDER PLRA: None

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
BE	0	0	1	0	0	0	0	0	0	0	0	0
FTCA	0	0	0	0	0	0	0	0	0	0	0	1
HC	0	1	0	0	1	0	0	0	0	1	0	0
OTH	0	0	0	0	0	0	0	0	0	0	0	0
TOT	0	1	1	0	1	0	0	0	0	1	0	1

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
BIV	0	3	4	7	4		6	1	1	3	0	2
FTCA	1	0	0	3	0		0	0	2	1	5	2
HC	9	5	3	9	2		2	6	10	11	5	3
OTH	0	1	1	2	3		0	1	0	0	1	0
TOT	10	9	8	21	9		8	8	13	15	11	7

BUT represents both the FCI and the LSCI

memorandum

DATE: October 7, 1997 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel

ATTN OF: ~~Mid-Atlantic Region~~

SUBJECT: ~~September 1997 Monthly Report~~

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT
NOV	DEC									
Received	140	146	201	133	142	172	154	184	157	
Answered	178	130	135	193	202	164	158	189	169	
TORT CLAIMS	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT
NOV	DEC									
# Pending	213	180	179	183	181	196	203	197	210	
# Received	37	51	66	41	70	69	56	91	72	
# Answered	64	39	65	43	52	60	63	52	74	
# Pending	180	179	183	181	196	203	197	210	217	
# Over Six Month	4*	2*	3*	4*	4*	4*	3*	1*	1*	
FOI/PRIVACY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT
NOV	DEC									
# Pending	66	43	42	50	65	51	52	77	63	
# Received	36	33	51	43	40	46	69	27	56	
# Answered	62	39	45	24	46	53	50	72	68	
# Pending	43	42	50	65	51	52	77	63	39	
# Over 30 Days	23	21	18	29	28	21	32	37	15	
LITIGATION	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT
NOV	DEC									
Cases Pending	265	353*	352	353	339	343	339	348	335	
New Cases Received	25	17	19	13	16	16	23	6	13	
Habeas Corpus	16	6	12	6	7	9	11	4	8	
Bivens	5	6	6	6	6	4	5	0	1	
FTCA	2	3	1	1	1	2	4	1	3	
Other	2	2	0	0	2	1	3	1	1	
Cases Closed	11	18	4	31	12	20	14	19	17	
Cases Pending	251	352	353	339	343	339	348	335	331	
Lit Reports Completed	19	21	17	18	17	12	15	23	10	

Cases/Hearings or Trials	1	0	0	1	1	3	1	1	0
Settlements/Awards	3	0	4*	2	0	0	0	1	0
\$ Settlements/Awards (\$ in Thousands)	\$95	0	\$3.007	\$180	0	0	0	\$0.2	0

*We are in the process of obtaining settlement approval from the Central Office for this claim.

*Incorrect figure corrected.

**ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS,
MOVES, ETC.**

Bill Burlington, Regional Counsel: I will attend New Attorney Training October 20-25 in Washington, D.C.; October 27th I will be in Morgantown; and I will be in Elkton October 29.

In October we will welcome Diane Gossman and Clarrisa Green, our new Legal Instrument Examiners to the Regional Office. Diane comes to us from USP Terre Haute, and Clarrisa from the Central Office. We welcome both Diane and Clarrisa to the Mid-Atlantic Region.

Mike Robar, Paralegal, FCI Manchester, will be a member of the Health Services Operational Review Team October 6-9, 1997, and he will be on annual leave October 13-17, 1997.

At USP Terre Haute: Rick Schott, Attorney and Teresa Marvel, Paralegal, will be attending LMR training; Randi Everett, Legal Tech, will be on annual leave October 3-17; and Teresa Marvel, Paralegal, will be on annual leave October 14-17.

Debbie Munson, Attorney, FCI Beckley, will be on annual leave October 9-14.

Randy Smith, Paralegal, FCI Elkton, will be the Institution Duty Officer October 7-14 and will be on annual leave October 15-17.

Joe Tang, Attorney, FMC Lexington, will be the institution duty officer September 30-October 7.

Milt Williams, Paralegal, FCI Petersburg, will participate in the New Attorney Training in Washington, D.C., October 20-24.

Michelle Fuseyamore, Attorney, FCI Butner, Mike Bredenberg, Attorney, LSCI Butner, along with Bill Burlington, provided DOJ honors program recruitment sessions at the following law schools: Regents University, University of North Carolina, Campbell University, North Carolina Central University and Duke University.

**SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH,
HAZARDOUS WASTE SITES, ETC.:**

FCI Elkton - The City of Salem, Ohio, has pursued

enforcing a 1% employee income tax on FCI Elkton employees. For a short period of time during the start-up phase, FCI Elton employees were assigned to a rented warehouse within the city confines. The City of Salem has requested the BOP to withhold the tax from income. We have argued that no agreement between the City of Salem and the Secretary of the Treasury has been signed, and accordingly the BOP is not authorized to withhold such funds. The City has countered that the income tax can be charged by the city against each employee. To date, Regional Counsel has argued that employees may not be taxed absent the agreement. The City of Salem has scheduled a City Tax Board of Review Hearing for October 29, 1997, in Salem. We plan to represent the interests of the BOP in this matter.

FCI Milan - On September 22, 1997, the Warden and Kevin Walasinski, institution attorney, met with the FBI and Chief of the Criminal Division for the U.S. Attorney's Office to discuss criminal referral procedures.

FCI Milan - On September 29, 1997, a draft response to an EPA request regarding FCI Milan's participation in hazardous waste which was stored at a hazardous waste facility in Ohio was forwarded to the OGC's office.

FCI Elkton - On October 20, 1997, Randy Smith, Paralegal, will attend the Cleveland U.S. Attorney's quarterly meeting. After the meeting he will meet with the Chief of the Civil Division to discuss FCI Elkton's litigation, docket assignments, meet the AUSA assigned to handle FCI Elkton, etc. Randy has been asked to share a brief summary of the institution legal staff's role in the institution and his role in providing assistance to the U.S. Attorney's Office.

FCI Ashland - Randy Smith, Paralegal, has been asked to meet with the Assistant U.S. Attorney who has been assigned to handle criminal matters at FCI Ashland. Randy has requested that the SIS attend this meeting also. Last month Randy met with the SIS to discuss criminal referrals. He also met with the local FBI Agent and the SIS to discuss criminal referrals and prosecutions.

FCI Butner - Two mental health videoconference hearings were held this month.

Prisoner Litigation Reform Act

FCI Memphis - On September 12, 1997, the District Court sponsored a one-day training seminar on the PLRA.

Representatives from the State of Tennessee, Tennessee Department of Corrections, and three Federal District Courts, Corrections Corporation of America, and FCI Memphis attended. Significant items discussed included IFP status, collection of filing fees, judicial screening, three strikes provisions, administrative remedies and access to courts issues. The most significant aspect of this meeting is that the Court will now be using a form that requires an inmate to authorize staff to withdraw filing fees as a condition of filing a complaint and seeking IFP status. We are waiting express authorization from the District Courts to remove all prior IFP forms, which do not include this authorization, from the inmate law library.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

FCI Butner - Reish v. Johnson - On October 2, 1997, the Fourth Circuit heard oral arguments in this Bivens suit, with the issue being whether three Butner staff were entitled to Qualified Immunity. We contended that in the specific factual context of this case, the law was not clearly established that plaintiff's allegations state a violation of the 8th Amendment. Plaintiffs have alleged that Butner staff failed to provide them with adequate protective equipment when they cleaned environmental surfaces that were contaminated with blood and other body fluids. Plaintiffs contend that they were exposed to HIV and Hepatitis B.

SETTLEMENTS:

Guitterez v. US - This is the FTCA case where the inmate fell from a top bunk in a County Jail while in USMS' custody permanently damaging his elbow. He subsequently returned to BOP custody for surgery and alleges the surgery was not provided in a timely manner and that the medical care provided was substandard. Our original offer of \$60,000 was refused by the plaintiff. We recently were granted approval from your office for the AUSA to have settlement authority up to \$150,000. The AUSA then offered \$135,000 plus costs (the mediation amount). The plaintiff refused the offer and made a counteroffer of \$210,000 (complaint seeks \$300,000). The AUSA then filed a Motion under Rule 68 for an Offer of Judgement in the amount of \$140,000 plus costs. Plaintiff's counsel verbally responded to the AUSA that his client is not willing to accept less than \$200,000. This case is on the trailer

docket which begins October 7, 1997.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Beckley - Keats v. Olson - The District Judge adopted the Magistrate's R&R in this habeas case on the issue of when the inmate's sentence commenced. The Judge concluded that the inmate's sentence commenced when the BOP accepted him into custody to serve his federal sentence even though the state had primary jurisdiction and the federal sentence was to run consecutive to the state sentence. The BOP's mistake (in accepting him in custody instead of sending him to the state) effectively turned the consecutive sentence into a concurrent sentence. The Judge rejected the Magistrate's conclusion that there had been a due process violation, finding it unnecessary to consider whether or not the inmate had a right to notice and a hearing before the credit was removed from his sentence computation.

FMC Lexington - LaVista v. Beeler, et al. - Judge Wilhoit adopted a favorable R&R and dismissed this Bivens seeking both monetary and injunctive relief. The dismissal was based on qualified immunity, sovereign immunity and failure to exhaust. The Recommendation is significant because Magistrate Patterson had previously ordered our typical Motion to Dismiss, or in the alternative, for Summary Judgment, in Bivens cases to be construed only as a Motion to Dismiss. The Recommendation will be used as a "guide" for our arguments, particularly qualified immunity, in our future Motions to Dismiss in Bivens cases. Particularly important is Judge Wilhoit's adoption of Magistrate Patterson's reasoning that although there is no case law applying the PLRA to a Bivens action, the plain language of 42 U.S.C. § 1997e(a) appears to require exhaustion of remedies in Bivens actions brought by prisoners, regardless of the particular relief requested. The U.S. Attorney's Office has been contacted to request Judge Wilhoit's approval for publication of this Recommendation and Order.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Memphis - Friday, October 3, 1997, the four inmates involved in the 1995 disturbance at FCI Memphis were sentenced as follows: Larry Walters - 92 months consecutive sentence, 3 years supervised release term, \$200 special assessment and \$555 restitution to BOP; Phillip Green - 84 months consecutive sentence, 3 years

special release term and \$50 special assessment; Brian Torres - 48 months consecutive sentence, 3 years supervised release term, \$500 special assessment and \$111 restitution to BOP; and Santos Negrón - 37 months consecutive sentence, 3 years supervised release term; \$500 special assessment and \$111 restitution to BOP. The Judge specifically said that Walters, Torres and Negrón were sentenced at the low range of the guidelines because they had not assaulted any staff or inmates. The Judge stated that Green was given a downward departure based on the testimony of a former staff member that Green was seen pulling inmates from a burning unit.

FCI Petersburg - Estate of Shelton Parker v. US
(D.S.C.) - This FTCA action followed the suicide of inmate Parker at FCI Petersburg. Our response to the case stated that under Virginia law suicide remains a common law crime and decedent's participation in an immoral or unlawful act bars recovery by decedent's personal representative. Also, during discovery plaintiff's counsel was provided copies of taped conversations where Ms. Parker agreed to provide funds to pay for the killing of two intended victims. Apparently, the plaintiff's counsel, faced with the information provided in discovery, agreed to stipulate to dismissal of the case without prejudice. The order was signed on September 4, 1997. The statutes of limitation under both the FTCA and Bivens have run.

FCI Petersburg - Kerry Lee Baker v. Stephen DeWalt - A MRR was issued in this case on September 12, 1997, recommending that the BOP has failed to execute Baker's 100 month federal sentence as directed by the sentencing court. The magistrate recommended that the BOP be ordered to turn Baker over the Commonwealth of Virginia on October 2, 1997, to serve 36 months of his federal sentence concurrent with state sentence. Essentially, the case involved imposition of a 100 month federal sentence on Baker who was in primary federal custody. The federal court ordered 36 months of the 100 month sentence to run concurrent with an 8 year state sentence Baker was currently serving. However, at the time of federal sentencing Baker was not serving the state sentence. Response was filed that because Baker was in primary federal custody and Virginia had indicated to the BOP his state sentence was to be served consecutive to the federal sentence, the BOP was unable to designate a state facility for service of 36 months of the federal sentence concurrently with the state sentence. John White, RISA, and Milt Williams discussed the matter with the Virginia DOC, who agreed to accept Baker. Then the

Virginia DOC institution was designated for service of the remainder of Baker's federal sentence. Baker was transported by USMS on October 3, 1997.

FPC Seymour Johnson - Milton v. Flowers, et al. - Former Regional Director Gil Ingram was being sued in his individual capacity in this longstanding Bivens action in the Eastern District of North Carolina. Even though it was not disputed that the Regional Director was in contact with his subordinates by mail and telephone and that he actually visited the state in person, the Court found nothing to show that these contacts were for any purpose other than official BOP business. Therefore, the Court found insufficient minimum contacts with the State of North Carolina to establish personal jurisdiction over the Regional Director, and dismissed him from the suit.

FCI Memphis - Martin, et al. V. Hawk, et al. - This case involves the Bureau's policy which removed bed boards from Bureau institutions in March of 1995. The Director is still in this case as a Bivens defendant. Trial has tentatively been set in Memphis in January. We are considering trying to convert this case to a FTCA claim so that settlement negotiations can be undertaken.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

SIGNIFICANT FTCA CLAIMS: None

MEDICAL MALPRACTICE CASES UPDATE: None

FCI Morgantown - McNeal v. US - We recently received a very favorable ruling, wherein an inmate had claimed due to our negligence, he had contracted TB. In rejecting this claim, the court held the policy of the BOP, regarding the testing of all new inmates, the follow-up with all positive PPD's, and the isolation/treatment of potentially infectious inmates was not negligent. Inmate McNeal was initially a PPD negative inmate, who later had a positive PPD test, but was never an infectious case of TB. We have requested that this decision be published.

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:

FCI Beckley - Perkins v. Barnard, et al. - This Beckley inmate filed a Bivens suit alleging a pat search by a female officer violated his constitutional rights. The inmate did not allege a violation of RFRA. Central Office agreed that the response would address the constitutional issue only and that RFRA would not be mentioned.

FCI Cumberland - Muhammad v. FBOP, et al. - This inmate complained that the lack of hot vegetables as part of common fare meals violated his religious beliefs. Significantly, the District Court of Maryland (*sua sponte*) held that the proper analysis for this claim was under Turner v. Safley, specifically finding that the Supreme Court had invalidated RFRA as unconstitutional in the case of City of Boerne v. Flores. Under the Turner analysis the Court held that the inmate failed to state a cause of action and dismissed the case.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

Alderson and Beckley - Given the adverse decisions from the Southern District of West Virginia, we have begun to process for early release, inmates who were convicted of being a felon in possession of a firearm, or who received a two-point sentencing enhancement. We will also be required to treat as eligible, an inmate at Butner Camp (Edward Fuller) who won a similar two-point enhancement case at FCI Petersburg.

FPC Alderson - Lobbins v. Hemingway - An Order to Show Cause was entered, requiring a response to why the BOP had not redetermined petitioner's eligibility status in light of Wiggins v. Wise, the controlling authority in this district that struck down Section 9 of P.S. 5162.02. Prior to the date the response was due, petitioner motioned the court for release pending a decision on the habeas petition. Objections were filed. A decision was made to redetermine the eligibility status of those inmates in this district affected by the Wiggins decision and who will not fall under the new program statement when it is issued. It was determined that inmate Lobbins is eligible for early release consideration and she was placed in a halfway house. A motion to dismiss the habeas petition has been filed.

FPC Alderson - Gary/Thompson/Griffin v. Hemingway - The

Magistrate ordered the BOP to file a status report regarding the implementation of the new program statement on early release eligibility. A response was filed notifying the court that the Bureau would reevaluate the three inmates' eligibility for early release. Motions to dismiss the habeas petitions in Thompson and Griffin were filed since the inmates are now deemed eligible for early release consideration. filed.

FPC Alderson - Dukes v. Hemingway - A motion to dismiss has been filed in this habeas petition. The inmate is now deemed eligible for early release consideration pursuant to Wiggins.

FCI Milan - Idema v. Pontesso - on September 5 this habeas petition challenging improper expulsion from the RDAP program was dismissed by the court.

FCI Cumberland - Weeks v. Bidwell - This habeas petition challenges P.S. 5162.02 § 9's definition of crime of violence and seeks a sentence reduction under 3621(e) (2) (B).

FMC Lexington - McGriff v. Beeler - Judge Forester entered a favorable ruling that the BOP's interpretation of a two-point weapons enhancement for a drug conspiracy offense, 18 U.S.C. § 841/846, as a violent crime for early release purposes is a permissible construction of the VCCLEA statute. This represents the first decision on the merits in this district pertaining to 3621(e) challenges to BOP's interpretation of the two-point enhancement. The U.S. Attorney's Office has been contacted to request Judge Forester's permission to publish this opinion.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Beckley - On September 8, 1997, FPC Beckley inmate Arley Brooks plead guilty to escape from the camp. He was sentenced to an 18 month consecutive sentence on September 30.

FCI Beckley - On September 9, 1997, FPC Beckley inmate Michael Lanham plead guilty to assaulting staff. Sentencing is scheduled for November 24, 1997.

FCI Beckley - On September 22, 1997, FPC Beckley inmate

Jackie Cockrane plead guilty to escape from the camp. Sentencing is scheduled for October 14, 1997.

FCI Petersburg - US v. Ruffo (Jenks request for telephone tapes) - FCI Petersburg continues to assist defense counsel in listening to some 3589 phone calls that were made by a pretrial inmate (Reiners) who is listed as a cooperating witness. The institution has been informed that taping will continue until February or March of next year. Given the length of time the taping will require, the Warden is going to move the defense attorney from the Warden's conference room to another location in the institution. The new area is not as nice as the Warden's conference room, so we expect the defense will object to the new location. I shared with Doug Curless, an article in the Richmond Times, where the defense is now trying to disqualify the prosecuting AUSA, claiming that he will need to be a witness in this case, as he will be required to explain why he allegedly withheld information regarding activities of his cooperating witness, inmate Edward Reiners.

FCI Morgantown - On October 27, 1997, Warden Thompson and I will meet with U.S. Attorney William Wilmoth and officials from the FBI regarding the prosecution of institution crimes. We recently had an introduction of alcohol (and possibly drugs) case that they refused to prosecute. We will try to establish prosecution guidelines for Morgantown that are similar to those used in other MXR institutions.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT: None

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES:

FCI Beckley - Maydak v. Bidwell - This case was filed by two inmates just before the Act was found to be unconstitutional. This petition challenges the prohibition on nude publications coming into FCI Beckley. The case has been referred to DOJ for a response. An extension of time in which to respond was granted - response is now due in November.

DISMISSALS UNDER PLRA: None

New Litigation Cases by Institution and Type
Received During the Month of September 1997

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	M
BIV	0	0	0	0	0	0	0	0	0	0	
FTCA	0	0	0	0	0	0	0	0	0	0	
HC	3	0	1	0	1	0	0	0	0	2	
OTH	0	0	1	0	0	0	0	0	0	0	
TOT	3	0	2	0	1	0	0	0	0	2	

New Litigation Cases by Institution and Type
Received Calendar Year to Date

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	M
BIV	0	3	4	7	4	0	6	1	1	3	
FTCA	1	0	0	3	0	0	0	0	2	1	
HC	12	5	4	9	3	0	2	6	10	13	
OTH	0	1	2	2	3	0	0	1	0	0	
TOT	13	9	10	21	10	0	8	8	13	17	

BUT represents both the FCI and the LSCI

DATE: Mid-Atlantic Regional Office, Annapolis Junction, MD 20

REPL Bill Burlington, Regional Counsel
ATTN Mid-Atlantic Region

SUB October 1997 Monthly Report

TO Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Received	140	146	201	133	142	172	154	184	157	133		
Answered	178	130	135	193	202	164	158	189	169	144		
TORT CLAIMS	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
# Pending	213	180	179	183	181	196	203	197	210	217		
# Received	37	51	66	41	70	69	56	91	72	71		
# Answered	64	39	65	43	52	60	63	52	74	64		
# Pending	180	179	183	181	196	203	197	210	217	226		
# Over Six Month	4			3	4*	4*	4	3	1*			0
FOI/PRIVACY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
# Pending	66	43	42	50	65	51	52	77	63	39		
# Received	36	33	51	43	40	46	69	48	56	61		
# Answered	62	39	45	24	46	53	50	72	68	40		
# Pending	43	42	50	65	51	52	77	63	39	60		
# Over 30 Days	23	21	18	29	28	21	32	37	15	21		
LITIGATION	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Cases Pending	265	353*	352	353	339	343	339	348	335	331		
New Cases Received	25	17	19	13	16	16	23	6	13	9		
Habeas Corpus	16	6	12	6	7	11	4	8	4			
Bivens	5	6	6	6	6	5				3		
FTCA	2	1	1	1	1	4				0		
Other	2	0	0	0	2	3				2		
Cases Closed	11	18	4	12	20	14	17	17	15			
Cases Pending	251	352	353	339	343	339	348	335	331	325		
Lit Reports Completed	19	21	17	18	17	17	17	10	8			
Cases/Hearings or Trials		0	0					1	1			
Settlements/Awards	3	0								1		
\$ Settlements/Awards	\$95	0	\$3.(\$180					\$0.2	\$0.05			

(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for th
*Incorrect figure corrected.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel will be at FCI Memphis, November 12-13th.

Michelle Fuseyamore, Attorney, FCI Butner, conducted training for department heads on Administrative Remedies and revised the tracking system to improve timeliness of responses.

Carolyn Lanphear, Paralegal, FCI Cumberland, will be on annual leave November 17-21.

During the month, Debbie Munson, Attorney, FCI Beckley, held a training and question/answer session for staff regarding the new PS 5162.04. She specifically addressed the Southern District of West Virginia case law and its impact on inmates both under the old and new program statements. She will hold a similar seminar at FPC Alderson on November 6, 1997.

Teresa Marvel, Paralegal, USP Terre Haute, will be on annual leave November 24-28; and Rick Schott, Attorney, will be on annual leave November 28.

Joe Tang, Attorney, FMC Lexington, will be on annual leave November 24-28.

Kathy Harris, Paralegal, Regional Office, will be on annual leave November 24-28.

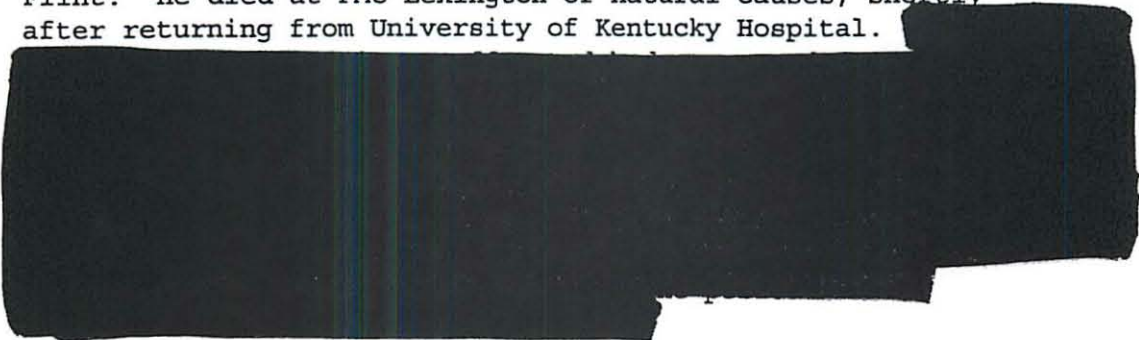
Milt Williams, Paralegal, FCI Petersburg, would like to welcome Dawn Tanner as the new legal assistant at Petersburg. Dawn will start on November 23. Dawn's number will be FTS 700/285-7465 or 804/733-7881, x465. Dawn is not unknown to legal as she provided part-time clerical support to legal during John Jackson' tenure at Petersburg.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FCI Elkton - City of Salem, Ohio, Wage Tax on FCI Elkton Employees - On October 29th, I appeared before the city of Salem, Tax Review Board, where I argued that the city could not impose a 1% wage tax on our employees, as their official duty station was FCI Elkton, which is not within the city limits of Salem. The city of Salem is attempting to impose the tax for 4 months when our employees were forced to work out of warehouse that was within the city. We abandoned the warehouse work site when the FCI was officially given to us. While I argued against the tax, I feel the city has a strong argument that they can impose the tax on our employees under these circumstances.

FMC Lexington - Inmate Death - Sturman, Reuben #24602-048 - I have asked Margaret Hambrick to appoint a team consisting of

litigation from inmate Sturman's family. Inmate Sturman was a well-known dealer in pornography, and a good friend of Larry Flint. He died at FMC Lexington of natural causes, shortly after returning from University of Kentucky Hospital.

 b2

FCI Butner - On October 2, 1997, eight law clerks from the Eastern District of North Carolina toured the facility.

Butner Complex - The Granville County register of Deeds has notified Warden Lappin that she will no longer issue marriage licenses for inmates unless they appear in her office to make application for a license. The Wardens at the FCI and LSCI will be sending a response asking her to reconsider her decision, and offering to transport her to the complex quarterly to process applications. If the Registrar maintains her position, this issue could potentially end up in litigation.

FCI Butner - We are docketed to present an oral argument in the Fourth Circuit Court of Appeals on December 4, 1997. The appellant Glen Sharkany, an inmate hospitalized in the mental health division at FCI Butner, filed an appeal challenging the district court's ruling that he is suffering from a mental disease or defect as a result of which his release would present a danger to others. In accordance with our brief filed on October 2, 1997, we will argue that based on the record, the district court's finding on the inmate's mental status was not clearly arbitrary or unwarranted, and that its finding on dangerousness was not clearly erroneous.

FCI Milan - November 20-21, Kevin Walasinski, Attorney, FCI Milan, and two Milan staff will travel to Cleveland to testify regarding Milan's mail procedures in an asset forfeiture hearing.

FMC Lexington - Joe Tang, Attorney, FMC Lexington, along with the DAP Coordinator, conducted a training session for all unit and case managers, regarding the new PS 5162.04 "Categorization of Offenses." Joe assisted in outlining the new policy statement and giving examples for the unit staff to use to apply the policy.

FMC Lexington - Joe Tang, Attorney, conducted the weekly A&O training session at Lexington, to include information on administrative remedies, torts, FOI, and the legal aid

program. Joe also attended a compassionate release meeting and a meeting of the research proposal committee.

Prisoner Litigation Reform Act

FMC Lexington - LaVista v. Beeler et al. - Judge Wilhoit dismissed this entire Bivens action on the grounds Plaintiff had not exhausted his administrative remedies. Judge Wilhoit ruled the PLRA provision requiring exhaustion has broad applicability in Bivens cases, including this action where Plaintiff requested both monetary and injunctive relief. We recently received a Notice of Appeal from plaintiff's attorneys, so we anticipate the Sixth Circuit to rule on this issue in the near future. This means that we now have cases pending in both the 4th and 6th Circuits that raise exhaustion under PLRA.

FCI Cumberland - Gibbs v. Bureau of Prisons, et al. - In this Bivens action, plaintiff alleged he was improperly denied medical and mental health treatment at FCI Cumberland. The judge granted our Motion for Summary Judgment adopting the requirement that full exhaustion of administrative remedies by federal prisoners is required prior to initiating a Bivens action.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.): None

SETTLEMENTS:

FCI Milan - Ahart v. USA - This FTCA case involving loss of inmate property when transferred from Milan, was settled for \$50.00. The original FTCA claim was for \$200.00.

Guitierrez v. US - This is the FTCA case where the inmate fell from a top bunk in a county jail while in USMS custody permanently damaging his elbow. He subsequently returned to BOP custody for surgery and alleges the surgery was not provided in a timely manner and that the medical care provided was substandard. This case was stricken from the October trial docket by the Judge. The AUSA thinks it will probably be placed on the February docket. Meanwhile, negotiations continue. The government made a Rule 68 Offer of Judgment in the amount of \$140,000 plus costs (\$6,000-\$7,000). In return plaintiff's attorney offered a structured settlement of \$150,000 payable now with three annuity payments of \$15,000 each in the years 2002, 2012, and 2022 (supposedly coinciding with the former inmate's future surgical needs). The AUSA asked our assistance in determining how we could make an offer of a structured settlement that would stay within our \$140,000. We have asked the Litigation Branch's assistance with these calculations.

FCI Memphis - Martin, et al. v. Hawk, et al. - This is a Bivens action stemming from the change in BOP policy in March

of 1995 regarding the removal of bed boards. The Director is still in the case as a Bivens defendant. We recently received a consolidated settlement offer from plaintiffs' attorney to dismiss all claims if the government would agree to pay \$20,000 and transfer plaintiff Martin to FCI Phoenix. We made it clear that we will not transfer an inmate as part of a settlement agreement. We did not foreclose the possibility of an appropriate administrative transfer if the inmate makes the request through the appropriate procedures. The District Court Judge has referred the case to the Magistrate Judge for a settlement conference to take place later in November. In preparation for the settlement conference, I will make a trip to Memphis and Matthew Mellady and I will meet with the AUSA to discuss strategy and possibility of settlement. Trial is scheduled for January 1998.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Butner - Luther v. Vanyur - The Magistrate has rendered an adverse recommendation where the Bureau denied an inmate credit towards his federal sentence for three years spent in federal custody. The inmate was sentenced on federal charges and ordered to surrender on a later date. In the interim, the inmate committed a new offense and received a state sentence. Two weeks after sentencing on the state charges the inmate was erroneously returned to federal custody. He remained in federal custody for over three years before the error was discovered, then he was returned to state custody. The Bureau denied credit based on the "no double credit" rule. The Magistrate concluded that Congress did not intend 18 USC § 3584 to apply where a state sentence was the second sentence to be imposed. The Magistrate further concluded that §3585 requires that the federal sentence begin to run when the inmate enters federal custody and the Bureau cannot interrupt the federal sentence by transferring the inmate to state custody, or by claiming that the inmate was erroneously in federal custody. The Magistrate did not think the fact that the inmate received credit toward his state sentence for that period of time warranted a different result. Objections will be filed.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Memphis - Graham v. Lutrell, et al. - This is an FTCA property claim arising out of the 10-20-95 disturbance. We were given permission to argue the discretionary function exception to the FTCA which precludes the court from asserting subject matter jurisdiction over the case. We anticipate a ruling on our Motion for Summary Judgment any day. However, a trial date is currently set for November 24, 1997.

FCI Memphis - Adams, et al. V. US - These are consolidated cases arising as a spin-off from the portal-to-portal case. In these cases staff are claiming they should be compensated

for pre-shift and post-shift time spent in key lines and walking to and from their posts. Along with four lieutenants and one officer, legal staff at Memphis spent three days searching for and copying archived documents, as well as formulating responses to other discovery requests.

FCI Petersburg - Betty Jenkins v. US - The plaintiff (estate of Jenkins Langston, who died after release from prison from causes unrelated to the complaint) filed this Bivens/FTCA action. The complaint is based on an assault by former correctional officer Almarita Scott Holliday in the SHU at Petersburg in 1994. The Officer threw hot water on Jenkins and stabbed him with an ink pen. Ms. Holliday was convicted in the Eastern District of Virginia of misdemeanor assault and was sentenced on March 11, 1996, to a 30-day jail term. A proposed answer, administrative claim material, and venue and lack of subject matter materials as to constitutional claims has been provided to the AUSA. Milt Williams, Paralegal, is currently working on summary judgment materials which will argue that she was outside the scope of her duties as a government employee, and thus, under the FTCA, the government is not liable for her assault and battery. The AUSA has filed a motion to dismiss the action for lack of subject matter jurisdiction, improper venue (filed in D.D.C.), and failure to state a claim. The Civil Rights Division still has this case under investigation.

FCI Petersburg - Platshorn v. Hahn - The long awaited MRR in this sentence computation case was issued on October 15 and recommended that Platshorn's petition be dismissed. This case involves Platshorn's complaint that the BOP required him to serve his parolable sentence before commencing service of his non-parolable sentence; and the BOP has improperly refused to apply good time earned while serving the parolable sentence to his non-parolable sentence. Petitioner's primary argument was once sentences are aggregated they cannot be de-aggregated. The magistrate recognized that the method used by the BOP to compute Platshorn's 33 year non-parolable sentence, after parole from the parolable sentence allows him to be released earlier than if the sentences had remained aggregated and that he earns the maximum of SGT allowable. The MRR still suggests the Magistrate does not fully understand the computation or the BOP's policy on de-aggregation. Petitioner's attorney has filed an objection to the report and the AUSA and Milt Williams are working on a response.

FCI Memphis - Cornett v. US - This is a hybrid Bivens and FTCA case stemming out of an inmate-on-inmate assault, and loss of plaintiff's property during a transfer to another BOP facility. The Court previously dismissed all Bivens claims and stated that the sole remaining claim is the FTCA loss of property. A non-jury trial has been set for Friday, November 14. We had offered \$200 for the property at the administrative level. The inmate is claiming the legal property lost is valued at \$3,711.

REPRESENTATION NOT RECOMMENDED FOR STAFF:

FCI Milan - Antone v. Pontesso, et al. - This is a Bivens action filed by an inmate at Milan alleging that a staff member made sexual statements about him to another inmate causing the plaintiff to fear for his safety. The plaintiff also alleges that staff used excessive force while returning him to his cell in SHU. There are three OIA investigations based on the allegations in this complaint. One allegation regarding a statement by staff was investigated locally and not sustained. The second complaint of sexual comments made by staff to another inmate about the plaintiff was investigated locally and the staff member was given a letter of reprimand from the Warden for being unprofessional. The third investigation is being handled by OIA and is pending. This investigation involves the issue of use of excessive force. From the facts it appears no excessive force was used, but staff failed to prepare the proper paperwork required by policy when they did have to use force to return Antone to his cell. We are in the process of preparing the requests for representation in this case.

SIGNIFICANT FTCA CLAIMS:

FCI Memphis - Barbara Danner, former contract employee - T-MXR-97-358 - This is a rather complex claim arising out of Ms. Danner's allegation that her contract (she was a contract medical lab tech) was arbitrarily terminated in retaliation for her complaints of sexual harassment and because of her husband's (he is a correctional officer) administrative complaints about allegedly unwarranted disciplinary actions against him. Ms. Danner also claims that the investigation concerning her alleged fraudulent completion of her time cards is an attempt to intimidate her through threats of criminal indictments. Finally, Ms. Danner is involved in a dispute over a previous FOIA request she submitted to the Central Office.

FCI Ashland - Administrative tort claim T-MXR-96-663, filed by former Ashland inmate Pulliam, Dickie Lee, Reg. 04064-084 has been settled by the Office of General Counsel in the amount of \$10,000. Claimant was injured in a sports accident at FCI, Ashland in August, 1995. Claimant was x-rayed, and no action was taken. An orthopedist in November, 1995, recommended an MRI be performed. No MRI or further action was taken, and the inmate was released to writ in December, 1995. He was returned to the institution in March 1996, and an MRI was performed. The MRI was evaluated in June 1996 and surgery was recommended. The inmate was released via good conduct release in July 1996. BOP Office of Quality Assurance concluded that the standard of care was breached, and settlement was reached in the administrative claim process.

MEDICAL MALPRACTICE CASES UPDATE: None

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES: None

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FCI Petersburg - 4th Circuit - Fuller v. Moore - On October 1st, the 4th Circuit held oral arguments in this 3621(e) case involving a 2 point sentence enhancement. The panel indicated from the bench that they were going to follow Downey and Roussos, but we have not yet seen any opinion.

FCI Morgantown - 4th Circuit - Hayes v. Thompson - We recently were given notice that counsel has been appointed in this case, and has been asked by the 4th Circuit to brief whether the Bureau's Program Statement, "Crimes of Violence" should have been subjected to full APA notice and comment. I fear that this question was raised in the Fuller case, but was not really discussed by the district court. We won the Hayes case in the District Court, with an explicit finding that the Program Statement was an "interpretive rule" that did not require notice and comment. The 5th Circuit decision in Veneqas v. Henman will help our position in this case.

FCI Beckley - Weaver v. Olson - This habeas petition challenges the early release provisions of 5162.02, "Definition of Terms, Crime of Violence." Pursuant to the new PS 5162.04, "Categorization of Offenses," inmate Weaver's instant offense is to be evaluated under old PS 5162.02, as he entered the drug program at Beckley prior to October 9, 1997. As case law in the Southern District of West Virginia provides that Section 9 of 5162.02 (the 2-point enhancement provision) is invalid, the section may not be relied upon to determine an inmate ineligible for early release. Based on the controlling court decision (Wiggins v. Wise), inmate Weaver was deemed eligible for early release. A Motion to Dismiss for mootness was filed.

FCI Manchester - Cobb v. Chandler - This habeas petition concerning the denial of early release eligibility under 3621 for § 842(a)(1) conviction with a two-level enhancement was recommended for dismissal on October 14, 1997. The magistrate determined the BOP's decision whether to grant early release was precluded from judicial review except issues involving cognizable constitutional claims or statutory interpretations contrary to well-settled case law. Consequently, the Magistrate found no "liberty interest" or equal protection violation present and no binding case law prohibiting use of a sentencing enhancement in early release cases. The limited judicial review authority notwithstanding, the Magistrate noted the policy was a permissible construction of the statute. However, she also rejected our argument that the

petitioner lacked standing to bring this action because any delay in reviewing our decision would cut into the time remaining to serve.

FCI Manchester - King v. Chandler - This habeas petition concerning the denial of early release eligibility under 3621 for § 841(a)(1) and § 922(g) convictions was recommended for dismissal on October 14, 1997. Findings were along the same lines as in Cobb.

FCI Manchester - Boone v. Chandler - This habeas petition regarding the denial of early release eligibility for a § 841(a)(1) offense during which firearms were present was recommended for dismissal on October 14, 1997. Findings were along the same lines as in Cobb.

FMC Lexington - Ferrell v. Beeler - Judge Forester dismissed with prejudice this habeas petition challenging the BOP's interpretation of § 922(g) as a crime of violence. We also received a favorable R&R on the merits in Fisher v. Beeler (2 point weapons enhancement) and Jones v. Beeler (922(g) case). Accordingly, all VCCLEA cases arising out of FMC Lexington have either been dismissed or have favorable R&R's.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:
None

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Morgantown - On October 27, 1997, Warden Thompson, Mike Pybas, and I met with U.S. Attorney William Wilmoth regarding the prosecution of institution crimes. The FBI was invited, but were unable to attend. We were asking for the establishment of prosecution guidelines. Mr. Wilmoth listened carefully to the details of several cases that we referred, but where prosecution was initially declined. I suspect that part of the problem may be an FBI office that has been tasked with many other duties, and may not feel they have the manpower to make prosecution of institution crimes a top priority.

FCI Beckley - On October 27, 1997, inmate Michael Hargrave, #03816-088, was sentenced to 6 months home detention and 5 years probation for Possession of Contraband (marijuana). The inmate had been released from federal custody prior to his sentencing for this offense. Had he still remained incarcerated at the time of sentencing, I have no doubt that he would have received a term of incarceration, rather than home confinement.

FMC Lexington - A trial is set for former FMC Lexington inmate Jeffrey Long, #25024-008, for November 24, 1997, in the E.D. of Kentucky. Long is charged with Attempted Escape, arising out of the discovery of escape paraphernalia in his possession in 1996.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT:

FMC Lexington - On October 29, 1997, inmate Michael Kite, #04697-028, was found guilty of Possession of a Weapon (shank) found in his possession in the housing unit.

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES: None

DISMISSALS UNDER PLRA:

FCI Memphis - Graves v. Luttrell, et al. - On October 2, 1997, the District Court entered an Order to Comply with PLRA, Order Assessing Filing Fee, and Order of Dismissal in this case. Plaintiff attempted to sue several staff members under theories of negligence, cruel and unusual punishment, and due process. Plaintiff, however, failed to pay the filing fee or properly complete and submit both an IFP affidavit and a Prison Trust Fund Account Statement. Noting that plaintiff failed to demonstrate he had attempted or exhausted any administrative procedures, the Court dismissed all of his substantive claims as frivolous. The Court also ordered him to complete and file the IFP Affidavit and the Trust Fund Account Statement within 30 days of the Order. The Court further ordered him to cooperate fully with prison officials in carrying out this Order.

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
BIV	0	0	0	0	0	0	0	0	0	2	0	0
FTCA	0	0	0	0	0	0	0	0	0	0	0	0
HC	0	0	1	0	2	0	0	1	0	0	0	0
OTH	1	0	0	1	0	0	0	0	0	0	0	0
TOT	1	0	1	1	2	0	0	1	0	2	0	0

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
BIV	0	3	4	7	4	0	6	1	1	5	0	2
FTCA	1	0	0	3	0	0	0	0	2	1	6	3
	12	5	5	9	5	0	2	7	10	13	5	4
OTH	1	1	2	3	3	0	0	1	0	0	1	0
TOT	14	9	11	22	12	0	8	9	13	19	12	9

BUT represents both the FCI and the LSCI

DATE: Mid-Atlantic Regional Office, Annapolis Junction, MD 20

REPL Bill Burlington, Regional Counsel

ATTN: ~~Mid-Atlantic Region~~

~~SUB~~ November 1997 Monthly Report

TO Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Received	140	146	201	133	142	172	154	184	157	133	153	
Answered	178	130	135	193	202	164	158	189	169	144	128	
TORT CLAIMS	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
# Pending	213	180	179	183	181	196	203	197	210	217	226	
# Received	37	51	66	41	70	69	56	91	72	71	55	
# Answered	64	39	65	43	52	60	63	52	74	64	37	
# Pending	180	179	183	181	196	203	197	210	217	226	243	
# Over Six Month	4			3	4*	4*	4	3	1*			1**
FOI/PRIVACY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
# Pending	66	43	42	50	65	51	52	77	63	39	60	
# Received	36	33	51	43	40	46	69	48	56	61	56	
# Answered	62	39	45	24	46	53	50	72	68	40	51	
# Pending	43	42	50	65	51	52	77	63	39	60	67	
# Over 30 Days	23	21	18	29	28	21	32	37	15	21	23	
LITIGATION	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Cases Pending	265	353 ^o	352	353	339	343	339	348	335	331	325	
New Cases Received	25	17	19	13	16	16	23	6	13	9	17	
Habeas Corpus	16	6	12	6	7		11	4	8	4	8	
Bivens	5		6	6	6		5			3	3	
FTCA	2		1		1		4			0	2	
Other	2		0	0	2		3			2	4	
Cases Closed	11	18	4		12	20	14	1	17	15	14	
Cases Pending	251	352	353	339	343	339	348	335	331	325	329	
Lit Reports Completed	19	21	17	18	17	1	1	2	10		10	
Cases/Hearings or Trials		0	0					1				4
Settlements/Awards	3		0					0				1
\$ Settlements/Awards	\$95	0	\$3.	(\$180				\$0.2		\$0.05	\$1.7	

(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for th

^oIncorrect figure corrected.

**Waiting for further information from institution regarding status.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

Bill Burlington, Regional Counsel, will be at FCI Milan, December 2-4 for a Leal Management Review and then at the 4th Circuit for oral argument. December 8-10, I will be in the Regional Office for strategic planning. I will be on annual leave December 22-30.

Joe Tang, Attorney, FMC Lexington, will be on annual leave December 29-January 2.

Legal staff at USP Terre Haute will be on annual leave as follows: Bob Blackburn - December 8-12; Rick Schott - December 24.

Matthew Mellady, Attorney, FCI Memphis, will be on annual leave December 22-26.

Milt Williams, Paralegal, FCI Petersburg, will be on annual leave December 22-24; and Dawn Tanner, Legal Assistant, will be on annual December 29-January 2.

Kathy Harris, Paralegal, will be on annual leave December 22-January 2.

Dave Recker, MARO Honors Attorney, will be in Institution Familiarization Training at FCI Cumberland, December 8-12, and will attend the DOJ LEI "Agency Civil Practice" Course in Washington, D.C. on December 17-18.

Marian Callahan, MARO Attorney, will participate in the DOJ LEI "Advanced FOI/PA" Course on December 2nd in Washington, D.C.

Kathy White, MARO Paralegal Trainee, will be at the MSTC in Denver December 1-12, 1997.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FCI Elkton - City of Salem, Ohio, Wage Tax on FCI Elkton Employees - We have reached a tentative agreement to settle a claim by the City of Salem that we owe them money based on our locating a warehouse within the city limits. The City had claimed that we owed the money based on wages earned by our employees during the four months we used the warehouse during the activation period. When we entered the lease, we did not realize that the warehouse was within the city limits. Both the institution and the city are pleased that this matter has now been concluded.

FCI Milan - Warden Scibana and Kevin Walasinski, Attorney, met with the AUSA's from the E.D. Mich. on November 24, 1997. Warden Scibana was the presenter for their "brown bag" luncheon.

FCI Beckley - Debbie Munson, Attorney, held a training and question/answer session for the staff at FPC Alderson regarding the new P.S. 5162.04. Specifically, she addressed the S.D. W.Va. Case law and its impact on inmates under both the old and new program statements.

FCI Memphis - Matthew Mellady, Attorney, attended a CLE Seminar on Selected Ethical Issues sponsored by the U.S. Attorney's Office for the Western District of Tennessee, on November 24, 1997.

FCI Manchester - Mason Kessinger, AUSA, E.D. Ky., visited the institution on November 7, 1997, for a tour and staff interviews. AUSA Linda Wawzenski, N.D. Ill., was in the institution on November 12, 1997, conducting a deposition of an inmate witness for the plaintiffs in a wrongful death FTCA action arising out of MCC Chicago.

FCI Manchester - Mike Robar, Paralegal, was Day Watch Operations Lieutenant on November 20, 1997, while the institution lieutenants were participating in a department planning retreat. Mike will be the Acting Executive Assistant December 1-4. On November 25, 1997, he attended a special Health Services' Risk Management Committee Meeting for organization and planning purposes. Mike recently assisted the Health Services Department by researching state law and state regulations because the institution was having difficulty obtaining copies of autopsy reports from the Clay County Coroner. The situation has been resolved and the Coroner advises he will provide preliminary reports in three to six days and final reports shortly after their completion.

FCI Butner - Two mental health videoconference hearings were held during the month.

FCI Butner - Tours were held for the following groups: Magistrates and Clerks for the Eastern District of Tennessee on November 10, 1997; Wataru Kitamura, Assistant Judge, District Court, Japan on November 12, 1997; and North Carolina Department of Corrections and Assistant Attorney Generals on November 21, 1997.

Prisoner Litigation Reform Act

FCI Cumberland - Willet v. Bidwell - We received a favorable unpublished decision from the Fourth Circuit which affirmed the district court's dismissal of this case for failure to exhaust administrative remedies under the PLRA. Unfortunately, the opinion simply affirmed without discussion the decision of the district court. We are preparing a memo which can be used by our staff to distinguish the Garrett decision.

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.):

SETTLEMENTS:

FCI Memphis - Martin, et al. V. Hawk, et al. - This is the Bivens case arising out of implementation in 1995 of the new bed board policy and the Director is still a defendant. On Wednesday, November 26, 1997, the AUSA, Bill Burlington, and Matthew Mellady attended a settlement conference before Magistrate Judge Allen. Plaintiffs' counsel indicated that the current figure (\$20,000 proposed by plaintiffs) was based on plaintiffs' desire for \$5,000 each and \$5,000 in legal fees. The government stated its position up front: the case must be converted from Bivens to FTCA, and the BOP would not consider transfer of an inmate as part of a negotiated settlement. Plaintiffs' counsel did state "off the cuff" that one of the plaintiffs would "probably be satisfied with a letter of apology from the Bureau of Prisons." We interpreted all this information to mean that at least two of the plaintiffs were not necessarily concerned with receiving cash settlement. We made a counter-offer of \$9,000. They rejected that offer, but counsel stated that he believed the third plaintiff would be willing to accept \$4,000. Although we were not convinced the other two plaintiffs were also demanding the same amount, we did consider it a count-offer of \$12,000. Still focusing on plaintiffs' counsel's statements, we offered \$10,500, and told counsel we were not concerned with how it was divided. Plaintiffs' counsel contacted the attorney of the third plaintiff with our initial offer. He wanted to again contact him and let him visit the plaintiff at FMC Fort Worth to inform him of our latest offer. That meeting is scheduled for December 2, 1997. We have been authorized by the Central Office to go as high as \$12,000, with the understanding that would be our final offer.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Memphis - Cornett v. US - This FTCA case involved a cell fire after the inmate was taken to SHU in preparation for transfer. Staff did not properly secure his personal property prior to the cell fire. The inmate had been assaulted by other inmates. We offered the inmate \$200 at the administrative stage for the lost property. He declined the offer and filed a Bivens/FTCA cause of action. All Bivens claims were dismissed, as well as all personal injury claims. A hearing was held November 14, 1997, to determine the extent of the damages (lost property only). Plaintiff had "conservatively" valued his property at \$3,711 (plaintiff stated that the "probative" value of such property, which he anticipated would secure his release, was \$3 million). Plaintiff, the only witness to take the stand, was questioned for an hour by the Judge and cross-examined by the AUSA. The Court acknowledged that much of plaintiff's personal property was not new and was in fact used, that plaintiff did receive some of his legal materials (plaintiff has alleged all his legal property had been destroyed), and that plaintiff could make new copies of much of his legal materials for 10 cents a

copy. An order has been received and based on those three factors the Court substantially reduced plaintiff's damages to an award of \$1,665.23.

FCI Manchester - Dunlap v. Luttrell and Dunlap v. USA - These consolidated FTCA and Bivens actions allege injuries as a result of use of excessive force. On November 4, 1997, the Court denied our motion to dismiss. In its order, the Court refused to extend the reasoning in Edwards v. Balisok and Heck v. Humphrey to either the FTCA or Eighth Amendment claims. The Court found the inmate's failure to file his administrative remedies on the DHO hearing in a timely manner resulting in the Central Office rejecting his appeal did not bar his complaint, since the Bureau's actions did not allow him to exhaust his administrative remedies. The Court also found that since the length of the inmate's sentence was not affected by the underlying discipline action because no good time was taken, there is no relief relating to the fact or duration of his confinement to be obtained under a writ of habeas corpus. This case is now scheduled for a jury trial in February 1998.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FMC Lexington - Dumphord v. Reno, et al. - On Wednesday, November 26th, we had a temporary restraining order/preliminary injunction hearing regarding the care this inmate is receiving at FMC Lexington for his facial keloids. This was a case where the Judge (Karl Forrester) recommended at sentencing that this inmate be treated by his personal physician while he was at Lexington. Unfortunately, Lexington did not respond to this recommendation and did not allow the inmate to see the physician who had extensively treated him in the Lexington community prior to incarceration. The Judge noted during the first five minutes of Wednesday's hearing that the inmate's facial condition had deteriorated. The rest of the hearing did not dispel the Judge's opinion that we were not providing appropriate care. We expect an adverse order from the Judge soon.

FCI Memphis - Coley v. Burkhart - This case involves an inmate's allegation that former FPC Millington Warden Ron Burkhart discriminated against the inmate in denying him an escorted trip to his father's funeral. After our initial motion for Summary Judgment asserting Qualified Immunity, the Court determined there were too many material fact issues to grant our motion prior to discovery. After discovery, we filed a renewed Motion for Summary Judgment. On November 17, 1997, the Court granted our motion and dismissed the case. The two summary judgment motions contained much the same information. However, between the time the newest district court judge ruled on the first motion to the time she ruled on our last motion, two new law clerks began working for her and, we believe, worked on this case. Additionally, during the

interim we had a trial before this same Judge. The shared sentiment (BOP and AUSA) is that the court came to realize that prisoner lawsuits and their allegations require more scrutiny.

FCI Memphis - Graham v. Luttrell - The trial in this case scheduled for November 24, 1997, was continued to February 1998. This is an FTCA property claim arising out of the October 1995 disturbance. Because we argued the Discretionary Function Exemption precludes the Court from asserting jurisdiction, it appears the court has continued the matter to adequately consider our motion to dismiss.

REPRESENTATION NOT RECOMMENDED FOR STAFF:

FCI Milan - Antone v. Pontesso, et al. - This is a Bivens action filed by an inmate at Milan alleging that a staff member made sexual statements about him to another inmate causing the plaintiff to fear for his safety. The plaintiff also alleges that staff used excessive force while returning him to his cell in SHU. Of the two complaints investigated locally, one was not sustained and one was sustained with the staff member receiving a letter of reprimand. The O.I. investigation into the allegations regarding use of excessive force has been completed and is being reviewed by the Chief of O.I. prior to forwarding to you for approval. Once the institution receives the report, we will complete our recommendation regarding representation in this case and forward it to the Department. The legal staff at Milan are keeping the AUSA informed of the progress of these requests.

FTCA CLAIMS:

FCI Beckley - Eichler v. US - This FTCA case was filed in the W.D. Ky. It arises from an accident involving FCI Beckley's bus in July 1995. Eleven separate administrative tort claims were filed and subsequently denied. The claim is for more than \$1 million. The police report completed by the Kentucky police on the day of the accident indicates that the plaintiff was traveling at an unsafe speed and improperly tried to pass the bus. The report indicates no detected contributing factors on the part of the Bureau's bus.

FPC Alderson - Pointdexter v. US - Depositions of the plaintiff and her physician are scheduled for December 3, 1997. This is an old FTCA case arising from an accident involving an Alderson vehicle and an inmate driver. The vehicle struck another car, injuring its driver and damaging the vehicle. The only issue is the extent of physical damages to the driver of the other car. A medical examination by the government's retained expert will be conducted in early December. Trial is set in this case for March of 1998.

MEDICAL MALPRACTICE CASES UPDATE: None

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:

FCI Beckley - Perkins v. Barnard, et al. - This Bivens suit alleges a pat search by a female officer violated the inmate's constitutional rights. The inmate did not allege a violation of RFRA.

[REDACTED]

b2

FCI Ashland - Zavid v. FBOP - The plaintiff in this case was permitted to voluntarily dismiss his previously filed habeas petition and file an amended complaint as a Bivens action. At this time no defendant has been served. In March 1997, the magistrate judge recommended sua sponte dismissal for failure to state a claim. In October 1997, Judge Wilhoit in an order withdrew his reference to the magistrate judge's report, and issued a separate memorandum order and opinion. Judge Wilhoit dismissed all defendants except Father John Noe, Chief Chaplain at Ashland. Since the inmate specifically mentioned RFRA, our Motion to Dismiss will analyze the case under both RFRA and the First Amendment and show that his claim fails to meet either standard as the inmate was given the option to take the day off (the day of atonement in October 1996).

FCI Petersburg - Norton, et al. v. US, et al. - Inmates Richard Norton, Reg. No. 18441-083, and Michael Goodwin, Reg. No. 27766-004, filed this complaint naming several staff in their official capacity only and Chaplain Blankenship in his official and individual capacity. The inmates complain that their constitutional right to practice their religion, Asatru Free Assembly, has been denied. Basically, the inmates are complaining that Father Blankenship delayed their application to have their religion recognized at FPC Petersburg. Although neither inmate has exhausted, they cite to a released inmate's exhaustion on this issue as satisfying the exhaustion requirement. Plaintiffs request that the court establish the Asatru Free Assembly at FPC Petersburg, provide meeting space, materials, etc.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FCI Petersburg - Fuller v. Moore - On October 1st the Fourth Circuit held oral argument in this 3621(e) case involving a two point sentencing enhancement. The panel indicated from the bench that they were going to follow Downey and Roussos, but we have not received a decision. We recently filed a supplemental pleading bringing the Venegas v. Henman opinion to the court's attention, and asked the court not rule until two other cases before the Fourth Circuit (Hayes and Pelissaro) can be fully briefed and argued. We are hoping that a different panel has drawn the Hayes and Pelissaro

cases, and that we can convince this latter panel that Venegas has persuasively distinguished Downey and Roussos. We are also planning to file a motion urging the court to place inmate Fuller on bail pending the decision by the 4th Circuit.

FCI Beckley - Weaver v. Olson - This 2241 habeas petition challenges the early release provisions of P.S. 5162.02. Pursuant to the new PS. 5162.04, inmate Weaver's instant offense is to be evaluated under old P.S. 5162.02, as he had entered the drug program prior to October 9, 1997. However, based on Wiggins v. Wise which is controlling at FCI Beckley, inmate Weaver was deemed eligible for early release. a Motion to Dismiss was filed in October. In November, the Magistrate entered an R&R dismissing the action with prejudice since no case or controversy exists.

FCI Beckley - Dukes v. Hemingway - A Motion to Dismiss for mootness was previously filed in this habeas petition, since the inmate is now deemed eligible for early release consideration pursuant to Wiggins. A Judgement Order has now been entered dismissing the action with prejudice.

FCI Manchester - Cobb v. Chandler - This habeas petition challenges the BOP's denial of early release eligibility under § 3621 for § 841(a)(1) conviction with a two-level enhancement. The Court Order dated October 30, 1997, dismissed the case with prejudice.

FCI Manchester - Boone v. Chandler - This habeas petition concerning denial of early release for a §841(a)(2) offense during which firearms were present was dismissed with prejudice by order dated November 7, 1997.

FCI Petersburg - Goddard v. Dewalt - New habeas petition challenging denial of early release based on two point enhancement. This inmate transferred to Petersburg from Butner in March 1997, after completing the 500 hour residential drug program in July 1996. He was classified as ineligible for early release because of a two point enhancement for possession of a firearm. His sentence was drug conspiracy. He requests the court grant him a one year reduction to his sentence, citing to Downey. The inmate exhausted remedies through the BP-10 level with responses indicating that the two point enhancement was still valid at Butner. He did not appeal to the Central Office. Petersburg has the Fuller decision which has declared Section 9, of P.S. 516202 "void." Response is due January 1, 1998.

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:
None

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Butner - On December 3, 1997, Correctional Officer Delwynne Lennon was sentenced in U.S. District Court to 14 months incarceration, one year supervised release, and fined \$8,059.28 after pleading guilty to a charge of sexual abuse of a ward (the correctional officer was alleged to have had sex with a female camp inmate on four different occasions). Mr. Lennon was arrested at FCI Butner on June 10, 1997, by the FBI, and had been on home duty status for approximately 14 months prior to his arrest.

FMC Lexington - The trial set for November 24, 1997, for former FMC Lexington inmate Jeffrey Long has been continued until March 1998.

FCI Beckley - On November 14, 1997, inmate Jamel Wingate, Reg. No. 53173-053, was arraigned for Possession of Contraband (a shank). A pretrial hearing has been scheduled for January 5, 1998, and trial has been scheduled for January 21, 1998. Inmate Michael Lanham, Reg. No. 16120-016, was scheduled to be sentenced on November 24 for Assault of an Officer. The sentencing was rescheduled for December 8, 1997. Inmates Jackie Cockrane, Reg. No. 06458-058, and Claude Shafer, Reg. No. 03736-084, are scheduled to be sentenced on December 5, 1997, for Escape from FPC Beckley.

LSCI Butner - The institution received a court order from a magistrate judge in Tampa, Florida, directing the Warden to provide specific telephone tapes to the court for use by the defense in a criminal action. The judge found that the defense showed the requisite materiality as required by Fed. R. Crim. Pro. 17 and as such ruled that the request was not a "fishing expedition." Of significance, the court ruled that the tapes were not in the possession of the prosecution team in this case, and thus did not require a Brady, Giglio, or Jenks determination. The court also ordered costs be borne by the defense.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT: None

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES:

FCI Cumberland - Maydak v. Bidwell - This Ensign Amendment case is being handled in part by Marsha Edne, Department of Justice. Inmate Maydak recently amended his complaint to add an allegation that his first amendment rights were violated because staff rejected "personal photographs" which he obtained from a "commercial source." This issue has now come up at Beckley and Butner as inmates are apparently responding to advertisements to order from "fly by night" businesses, personal photographs. It is very difficult to distinguish these photos from true personal photos of wives/girlfriends, as the photos are printed on normal film paper and do not look

like the professional photos that appear in magazines such as Playboy. We are taking the position that the inmate can have the photos under our correspondence policy, provided we can verify he obtained them from a commercial source.

DISMISSALS UNDER PLRA: None

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
✓	0	1	0	0	0	0	1	0	0	0	0	1
FTCA	0	0	1	1	0	0	0	0	0	0	0	0
HC	0	3	2	0	0	0	0	0	0	0	0	2
OTH	0	0	2	0	0	0	0	0	1	0	0	0
TOT	0	4	5	1	0	0	1	0	1	0	0	3

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
BIV	0	4	4	7	4	0	7	1	1	5	0	3
FTCA	1	0	1	4	0	0	0	0	2	1	6	3
HC	12	8	7	9	5	0	2	7	10	13	5	6
OTH	1	1	4	3	3	0	0	1	1	0	1	0
TOT	14	13	16	23	12	0	9	9	14	19	12	12

BUT represents both the FCI and the LSCI

DATE: Mid-Atlantic Regional Office, Annapolis Junction, MD 20

REPL Bill Burlington, Regional Counsel
 ATTN: ~~Mid-Atlantic Region~~

~~SUB December 1997 Monthly Report~~

TO Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

ADMINISTRATIVE REMEDIES	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Received	140	146	201	133	142	172	154	184	157	133	153	15
Answered	178	130	135	193	202	164	158	189	169	144	128	11

TORT CLAIMS	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
# Pending	213	180	179	183	181	196	203	197	210	217	226	24
# Received	37	51	66	41	70	69	56	91	72	71	55	
# Answered	64	39	65	43	52	60	63	52	74	64	37	
# Pending	180	179	183	181	196	203	197	210	217	226	24	23
# Over Six Month	4			3	4*	4*	4	3	1*			1**

FOI/PRIVACY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE	
# Pending	66	43		42	50	65	51	52	77	63	39	60	67
# Received	36	33		51	43	40	46	69	48	56	61	56	27
# Answered	62	39		45	24	46	53	50	72	68	40	51	82
# Pending	43	42		50	65	51	52	77	63	39	60	67	13
# : 30 Days	23	21		18	29	28	21	32	37	15	21	23	

***This figure represents those requests in the office over 20 days; of these 3 we are

LITIGATION	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DE
Cases Pending	265	353 ^o	352	353	339	343	339	348	335	331	325	32
New Cases Received	25	17	19	13	16	16	23	6	13	9	17	
Habeas Corpus	16	6	12		6	7	11	4	8	4	8	
Bivens	5		6		6	6	5			3	3	
FTCA	2		1		1		4			0	2	
Other	2		0		0	2	3			2	4	
Cases Closed	11	18	4		12	20	14	1	17	15	14	
Cases Pending	251	352	353	339	343	339	348	335	331	325	329	3
Lit Reports Completed	19	21	17	18	17	1	1	2	10		10	
Cases/Hearings or Trials		0	0					1				
Settlements/Awards	3		0					0				
\$ Settlements/Awards	\$95	0	\$3.	\$180				\$0.2		\$0.05	\$1.7	

(\$ in Thousands)

*We are in the process of obtaining settlement approval from the Central Office for th
^oIncorrect figure corrected.
 **Waiting for further information from institution regarding status.

ITEMS OF INTEREST, PERSONAL LEAVE, BUSINESS TRIPS, MOVES, ETC.

This month we would like to recognize Dave Recker, Attorney Advisor, for having passed all components of the Minnesota Bar. Congratulations Dave!

We enjoyed having Donald Hawkins, Paralegal Trainee, Central Office, working in the regional office part of the month, and appreciated his assistance.

Bob Blackburn, Legal Tech, USP Terre Haute, will be in annual training January 12-16, 1998.

Joe Tang, Attorney, FMC Lexington, will be teaching Ethics during FMC Lexington's annual refresher training at various times from January through April 1998.

Randy Smith, Paralegal, FCI Elkton, will be in annual training January 5-9, 1998. Randy conducted training for case managers on two separate occasions and subsequently to Unit Staff at FCI Elkton regarding VCCLEA issues and categorization of offenses. He also attended a Lieutenant's retreat and provided training in inmate discipline, administrative remedies, and investigation of FTCA claims.

Mike Robar, Paralegal, FCI Manchester, will be in annual training January 26-30, 1998.

Debbie Munson, Attorney, FCI Beckley, along with the DHO, held a joint training session for staff regarding the changes to the PS on Inmate Discipline. Debbie will be teaching Ethics/Standards of Conduct class during annual refresher training. Beginning in January, Debbie will also be teaching an incident report writing class to new employees during IF.

SITUATION OF INTEREST, CONTACT WITH FEDERAL BENCH, HAZARDOUS WASTE SITES, ETC.:

FCI Beckley - An attorney's right to have privileged communications with an inmate at FCI Beckley has been limited to non-privileged correspondence only for one year. An envelope addressed to an inmate was not marked with the attorney's name or an indication that the person was an attorney. The envelope was opened and read: "Later this week I am sending you some more magazines; please drop me a note to let me know that you received them. They are coming in a return envelope from another Boston law firm so that if they are intercepted it won't be traceable to me. That way, letters to and from me won't enjoy any special scrutiny." The referenced envelope was later intercepted by Beckley's mail room staff. Once again, since an individual attorney's name was not specified, it was treated as general correspondence. The envelope contained bondage magazines, which were subsequently rejected in accordance with policy. The information was forwarded to your office for referral to Main

Justice requesting they refer the attorney to his state licensing board. The attorney has filed an appeal with the Regional Director.

Prisoner Litigation Reform Act: None

SUBSTANTIVE PLEADINGS (COMPLAINT, MOTION FOR SUMMARY JUDGMENT, ETC.): None

SETTLEMENTS:

FCI Memphis - Martin, et al. v. Hawk, et al. - This is the Bivens case arising out of FCI Memphis' implementation in 1995 of the new bed board policy and the Director is still a defendant. Last month we reported that we had been authorized to settle this case for as much as \$12,000, but had offered Plaintiffs \$10,500 at a settlement conference. Plaintiffs rejected that offer and counter-offered \$12,000. Plaintiffs have agreed to convert the case from Bivens to FTCA for settlement purposes. In that regard, plaintiffs have stated their intent to file administrative tort claims with the BOP. Once received, the administrative claims will be appropriately investigated and processed. Carolyn Sabol has delegated to the Region authority to settle these tort claims, even though they will be for \$4,000 each. This was done to expedite settlement and due to the fact Wally had already agreed to a total settlement of \$12,000.

ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:

FCI Butner - Rish v. Johnson - (4th Circuit) On December 18th, the Fourth Circuit granted our appeal in which we sought qualified immunity for three Butner staff. This case is six years old, and involved allegations that our staff violated the 8th Amendment by exposing inmate orderlies to HIV and Hepatitis by failing to provide adequate protective equipment. The 4th Circuit (1997 WL 776553) held there was no clearly established constitutional right in 1988-1992 to be provided with enough protective equipment so that one could practice Universal Precautions. There was one dissenting vote on the panel.

FCI Petersburg - Fuller v. Moore - (4th Circuit) On December 29th, the Fourth Circuit followed Downey and Roussos and held we could not consider a 2-point enhancement when determining whether an inmate was "convicted of a nonviolent offense." The decision was a per curiam, unpublished decision which has little value as precedent. We have brought this decision to the attention of Central Office staff. We have not advised staff within the 4th Circuit to do anything different, and we continue to work on a brief in another case (Pelissero) that raises the same issue. In anticipation of this ruling, inmate Fuller was placed on Supervised Release a week before the decision was issued.

FCI Memphis - Ashley v. US - This is an FTCA action for lost property arising out of the disturbance on October 20, 1995. We were granted permission to, and did argue that in light of the discretionary function exception to the FTCA, the Court does not have jurisdiction to hear this case. Although we have not yet received a copy, contact with the U.S. Attorney's Office reveals that the docket sheet shows that the Court granted our Motion to Dismiss/Motion for Summary Judgment based on the discretionary function exception.

FCI Milan - Norman v. Pontesso - The Magistrate's R&R dated December 23, 1997, dismissed all Bivens defendants claims and damages, but sue sponte amends the inmate complaint to include a motion for injunctive relief enjoining BOP from enforcing the Ensign Amendment. BOP has been ordered to respond to injunctive relief issue by January 21, 1998.

FCI Petersburg - Platshorn v. Hahn - In an order filed December 1, 1997, Judge Merhige adopted the MRR and dismissed this sentence computation case regarding deaggregation of parolable and non-parolable sentences upon parole from the parolable portion. The court dismissed the action stating that the BOP's deaggregation policy inures to the benefit of Platshorn. The court still has a problem with the use of the term "de-aggregation" in BOP policy, citing that under 18 U.S.C. §1461 once sentences become aggregated they remain so. A call was received from AUSA Prillaman indicating the Magistrate clerk wanted our input on whether or not the decision should be published. It was recommended that the decision not be published. Although we won the case, it is not very good law; the court simply refuses to understand that the word aggregation in this statute pertains to sentences of imprisonment and not sentences being served on parole, and that once released on parole, it is the application of the parole law which results in the non-parolable consecutive sentence being computed as standing alone. Platshorn filed a notice of appeal on December 22, 1997.

UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:

FCI Memphis - Johnson v. US - This is a FTCA claim for lost property arising out of the October 20, 1995, disturbance. In this case we were also permitted to argue the discretionary function exception. The Court has not yet ruled on our motion and a trial date of January 20, 1998, has been set. Because the Court has not yet ruled, it is highly unlikely that this case will go to trial on that date.

FCI Memphis - Martin v. Hawk - This case is currently set for a jury trial on January 26, 1998. However, as stated under the section on Settlements, we are currently involved in settlement negotiations. In addition, because of those negotiations we have filed a joint motion for continuance

seeking 45 additional days to try to settle this case prior to trial.

USP Terre Haute - Yanez v. USA - This FTCA case is scheduled for trial in Indianapolis on January 8, 1998. The case involves the alleged loss of \$1,800 worth of hobby craft material when the inmate transferred from USP Terre Haute to FCI Pekin.

REPRESENTATION NOT RECOMMENDED FOR STAFF:

FCI Milan - Antone v. Pontesso, et al. - This is a Bivens action filed by an inmate at Milan alleging that a staff member made sexual statements about him to another inmate causing the plaintiff to fear for his safety. The plaintiff also alleges that staff used excessive force while returning him to his cell in SHU. Of the two complaints investigated locally, one was not sustained and one was sustained with the staff member receiving a letter of reprimand. The O.I. investigation into the allegations regarding use of excessive force has been completed and is being reviewed by the Chief of O.I. prior to forwarding to you for approval. We received word that the report had been signed and issued to the institution, but it has not been received yet by the institution. Once the institution receives the report, we will complete our recommendation regarding representation in this case and forward it to the Department. The legal staff at Milan are keeping the AUSA informed of the progress of these requests.

FTCA CLAIMS:

FCI Butner - Inmate McPhaul, a paraplegic inmate, filed a tort claim after being severely burned on his legs. The hot and cold water taps, which had been installed by an inmate worker, were reversed in the shower. Due to his medical condition, the inmate could not feel the hot water scalding his legs. The severe burns to his legs were properly treated by medical staff. The claim was settled for \$1,000.

MEDICAL MALPRACTICE CASES UPDATE:

FCI Petersburg - Patsel v. US - This FTCA suit was brought by a former inmate alleging that failure to provide adequate medical treatment at Petersburg in July of 1992, resulted in a cerebral stroke. The trial has been calendared on the docket for March 24, 1998. On December 15, 1997, AUSA Kelley visited FCI Petersburg and spoke with medical staff who provided treatment to Patsel. According to the government's expert, the preliminary assessment of treatment is that there is no evidence that the outcome would have been different had Patsel been taken to a hospital sooner. Under Virginia law Patsel must present an expert to state the standard of care, there was a breach of that care, and a sooner diagnose of the stroke would have resulted in a better outcome. According to the AUSA, the deadline for naming of expert by plaintiff's counsel

is rapidly approaching and the deadline for discovery is almost over and no discovery has been requested. If plaintiff's counsel fails to come forth with an expert, then the case can be dismissed without going to trial.

SIGNIFICANT ADMINISTRATIVE REMEDIES: None

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:

FCI Manchester - Yahheh v. Chandler, et al. - This Bivens action concerning the alleged denial of access to facilities and services to practice a prison-based religion. The Court is allowing this case to proceed on the following constitutional claims only: denial of the right to practice one's religion of choice, and equal protection and racial discrimination claims concerning the denial of plaintiff's request to practice his religion. In a footnote, the Court expressly declined to review this claim under RFRA based on the Supreme Court's decision in City of Boerne. Kathy Hawk and the Bureau's Chief Chaplain Van Baaten are also named as defendants in this action.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

USP Terre Haute - Caputo v. Clark - (7th Circuit) In an unpublished opinion, the 7th Circuit upheld our policy on past convictions (here a misdemeanor aggravated assault conviction) making an inmate a violent offender who is not eligible for early release.

FCI Milan - Kienlen v. Scibana - In this habeas petition the inmate alleges the denial of one year off under §3621 is improper because it is based on a previous state misdemeanor conviction for negligent homicide. Petitioner argues BOP is using prior convictions outside of statute and that this misdemeanor offense does not meet BOP's definition of "crime of violence."

FCI Milan - Taylor v. Pontesso - Inmate alleged BOP improperly denied benefits under RDAP based on his 18 U.S.C. 922(g) conviction. The December 16, 1997, R&R recommends dismissal stating BOP's decision is within discretion granted by Congress to the BOP in implementing this program. The R&R specifically addresses the Davis, Hines, and Roussos cases and declines to follow them.

FCI Petersburg - Fuller v. Moore - see write-up under section entitled "Adverse Decisions or Significant Decisions."

SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:

FCI Elkton - On November 30, 1997, inmate Mark Tillman walked

by the USMS. The U.S. Attorney's Office has agreed to prosecute. We are waiting for the grand jury to meet so the case can be presented for indictment.

FCI Elkton - On November 15, 1997, inmate Leslie Dumersier became disorderly when ordered to submit to restraints and be escorted to SHU. Apparently, inmate Dumersier took a swing at a staff member and staff wrestled him to the ground. While attempting to place handcuffs on inmate Dumersier, he bit a staff member on the right hand. The FBI has referred the case to the U.S. Attorney's Office for review. The U.S. Attorney's Office has not agreed to prosecute the case, but has requested some documentation be corrected. The FBI feels that once the documentation is corrected, the case will be prosecuted.

FCI Elkton - On August 1 and 4, 1997, approximately 12-16 ounces of marijuana were discovered in FCI Ashland's power house. Presently, the FCI, in conjunction with the U.S. Attorney's Office, is investigating the case. This case may lead to the indictment of both inmates and staff.

UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:

FCI Petersburg - (U.S. v. Ruffo) Inmate Witness Edwards Renier. We were advised in December that the defense has finished listening to the phone tapes involving inmate Edward Renier. In all, Renier made 3,700 phone calls, and the defense spent several months at the institution listening to those tapes. We still need to see about obtaining permission to reuse some of the tapes, as Petersburg's tape library is very low. Doug Curless was working on this with us before the holidays.

FCI Cumberland - US v. Kenneth Creslaw and Robert Davis - Trial was scheduled for January 5, 1998, in this case but both defendants have signed a plea agreement. Defendant Creslaw pled guilty to 18 USC § 113(a)(5) Assault and 18 USC § 2 Aiding and Abetting. Defendant Creslaw pled guilty to 18 USC § 930(a) Possessing a Dangerous Weapon in a FCI.

FCI Beckley - On December 8, 1997, inmate Michael Lanham, Reg. No. 16120-016, received an eight month consecutive sentence for Assault on an Officer.

FCI Beckley - Inmates Jackie Cockrane, Reg. No. 06458-058, and Claude Shafer, Reg. No. 03736-084, were scheduled to be sentenced in December for Escape from FPC Beckley. The sentencings were delayed and have not yet been rescheduled.

SUCCESSFUL PROSECUTIONS OR ANY ACQUITTALS SINCE LAST MONTH'S REPORT: None

REHABILITATION ACT: None

ENSIGN AMENDMENT CASES:

FCI Milan - Norman v. Pontesso - see write-up under section entitled "Adverse Decisions or Significant Decisions."

DISMISSALS UNDER PLRA: None

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
B.L.	0	0	2	1	0	0	0	0	0	0	0	1
FTCA	0	0	0	0	0	0	1	0	1	0	1	0
HC	0	2	0	0	2	0	1	0	0	4	0	0
OTH	0	0	0	0	0	0	0	0	0	0	1	0
TOT	0	2	2	1	2	0	2	0	1	4	2	1

	ALD	ASH	BEC	BUT	CUM	ELK	LEX	MAN	MRG	MIL	MEM	PET
BIV	0	4	6	8	4	0	7	1	1	5	0	4
FTCA	1	0	1	4	0	0	1	0	3	1	7	3
P	12	10	7	9	7	0	3	7	10	17	5	6
Oil..	1	1	4	3	3	0	0	1	1	0	2	0
TOT	14	15	18	24	14	0	11	9	15	23	14	13

BUT represents both the FCI and the LSCI

memorandum

DATE: April 11, 1997

Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel
 ATTN OF: Mid-Atlantic Region

SUBJECT: QUARTERLY REPORT - January 1, 1997 thru March 31, 1997

TO: Nancy Redding, Executive Assistant
 Office of General Counsel

TORTS

NUM	PROP	PI	PPPI	WD	MED	SET	AMT	PEND	DEN	OD	A/O	A/P
133	109	19	3	0	2	14	\$1157	178	117	3	15	123

LITIGATION

NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
61	34	6	17	4	57	353	33	1	7	\$97,767

ADMINISTRATIVE REMEDIES

NUM	DHO	SPH	MED	MH	LEG	FD	GRT	DEN	PEN	OD
491	126	15	32	0	17	3	42	402	175	0

FOI/PRIVACY

NUM	ANS	PEN	OD
126	147	50	18

TRIALS AND HEARINGS:

FCI Memphis - Temple v. USA, 95-2707-G/V - A hearing was held on Friday, January 31, 1997, because the Judge had some questions regarding the facts of the case. This case involves a habeas petition regarding sentence computation. In addition to answering the Judge's questions, the government was also permitted to argue the merits of the case (failure to exhaust and no credit against federal sentence for credit already granted against a state sentence). However, there is a catch in this case. In response to a state court order which instructed that Temple be delivered to the custody of the federal government, Temple was delivered to CCA Mason, Tennessee (a private prison). This transfer did not involve the U.S. Marshals Service.

SETTLEMENTS:

Fitzpatrick & Oliver v. USA (FPC Millington): We were successful in reaching an agreement to settle these inmate driver auto accident cases for \$16,987 and \$12,773 respectively. This case involved an inmate driver who while speeding, rear-ended another vehicle. The inmate was cited by the police for following too closely. The court (Judge McCalla) made it extremely clear that he felt the government was at fault and should settle these cases. We were able to reach what we think were very reasonable settlement figures with both plaintiffs.

Leacock v. Reno (EEO suit - FPC Alderson): We were successful in settling this EEO suit (African American physician discharged from Alderson claims race was the motive) for \$65,000. This case was tried by a jury in November, with the jury awarding the physician \$30,000. The judge indicated he felt the jury verdict was against the weight of the evidence, but then hesitated to grant our motion for a new trial. He urged settlement at a figure one half the amount we would have been forced to pay, considering attorney's fees and costs. We were able to include a provision that there was no admission of discrimination in this settlement.

USP Terre Haute - Mitchell v. USA - This case has a lengthy history and was originally filed as a Bivens action against numerous defendants in May of 1994. The plaintiff alleged that staff had conspired to steal his property and embezzle his funds. Eventually, all the individual defendants were dismissed and only a FTCA action remained. A check issued from plaintiff's commissary account for \$7.00 was cashed after a stop payment order was issued. Plaintiff was offered \$7.00 settlement at the administrative claim stage but refused the offer. Case was settled for \$7.00.

FPC Alderson - Barrios v. U.S., Elder v. U.S., Wilson v. U.S. - These three FTCA cases alleged negligence based on an outbreak of salmonella poisoning at FPC Alderson. Each plaintiff requested relief in the amount of \$3,000. A settlement was reached with each plaintiff in the amount of \$1,000.

memorandum

DATE: July 14, 1997

Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel
 ATTN OF: Mid-Atlantic Region

SUBJECT: QUARTERLY REPORT - April 1, 1997 thru June 30, 1997

TO: Nancy Redding, Executive Assistant
 Office of General Counsel

TORTS

NUM	PROP	PI	PPPI	WD	MED	SET	AMT	PEND	DEN	OD	A/O	A/P
165	118	43	2	0	2	11	\$3608	205	97	4*	28	103

LITIGATION

NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
45	22	4	16	3	47	339	63	5	2	\$180,000

ADMINISTRATIVE REMEDIES

NUM	DHO	SPH	MED	MH	LEG	FD	GRT	DEN	PEN	OD
453	172	22	29	2	11	14	62	497	60	0

FOI/PRIVACY

NUM	ANS	PEN	OD
127	119	53	21

*We are in the process of obtaining settlement approval from the Central Office for three of these claims or a check from Treasury; one claim was just recently transferred from another Region.

TRIALS AND HEARINGS:

FCI Beckley - Keats v. Olson - oral arguments were held on April 10, 1997, regarding this habeas concerning jail credit. The Magistrate issued a R&R in this habeas case, to which the BOP filed objections. The Magistrate concluded that the inmate's sentence commenced when the BOP accepted him into custody to serve his federal sentence, even though the state had primary jurisdiction and the federal sentence was to run consecutive to the state sentence. The BOP's mistake (in accepting him in custody instead of sending him to the state) effectively turned the consecutive sentence into a concurrent sentence. The Magistrate also found that there had been a due

process violation, which could possibly lead to Bivens liability for those who computed the sentence.

USP Terre Haute - Locascio v. Clark - A hearing was held on May 12, 1997, before Judge McKinney. Locascio filed a TRO, preliminary injunction, and permanent injunction based on the fact that he was placed in administrative detention after a Prime Time Live interview with Sammy "The Bull" Gravano indicated that Locascio had conspired to kill John Gotti. In his complaint, Locascio alleged that he was being denied access to the court and his counsel since he was in AD and wanted to be released to the general population. Locascio was released to general population on Monday morning. This action was dismissed.

FCI Petersburg - Platshorn v. Hahn - An evidentiary hearing was held on June 4, regarding the aggregation of a parolable sentence with a non-parolable sentence. Platshorn who was released on parole from the parolable portion of the sentence, seeks to have SGT earned on the parolable sentence applied to the consecutive non-parolable sentence. John White, RISA, testified at the hearing and presented an excellent explanation of the computation by BOP. The AUSA and Milt Williams, Paralegal, FCI Petersburg, got the impression that regardless of § 4161 maximum rate of SGT, Magistrate Judge Lowe intends to somehow hold that Platshorn is entitled to additional SGT. On June 30, 1997, Magistrate Judge Lowe ordered the BOP to provide the court by July 11 a copy of the P.S. in existence prior to 5880.30.

FCI Milan - Idema v. Pontesso - A hearing was held on June 9, 1997, regarding this habeas petition. The Judge acknowledged that referral and CCC placement decisions were at the BOP's discretion. BOP staff advised the Judge that CCC referral for Idema would be completed pending disposition of the incident reports the inmate had received.

FPC Seymour Johnson - Milton v. Flowers, et al. - This is a Bivens case that was originally filed in 1993. The Judge ordered a contempt hearing on plaintiff's request for sanctions. The hearing was held on Friday, June 20, 1997, at 10:00 a.m. in Raleigh with Warden Flowers, Randy Meeks, Charlie Hamilton (retired AUSA previously involved in the case), Kathy Harris and Bill Burlington in attendance. When the pro se plaintiff had not appeared by 10:30, the Judge stated that he would not rule on the motion. The Judge agreed to consider a motion for attorney's fees and costs (totaling \$6,500), and to order the plaintiff to show cause in ten days

why the remaining issue should not be dismissed. The AUSA filed the motion on June 24, 1997. If the Judge awards attorney's fees and costs against the plaintiff, it is unlikely he will pursue the remaining issue.

SETTLEMENTS:

FMC Lexington - Venus Michels v. USA - Plaintiff, who alleged she was coerced into sexual contact with ex-correctional officer Eddie Smith, accepted a final settlement of \$150,000. This is the final civil case arising out of the actions of Eddie Smith.

FMC Lexington - Lydia K. Porter v. USA - Plaintiff, who alleged negligent care by BOP staff after she had a tooth extraction and developed a serious infection, accepted a final settlement offer of \$30,000.

3rd Atty.

UNITED STATE

DATE: Mid-Atlantic Regional Office, Annapolis Ju

REPLY TO Bill Burlington, Regional Counsel
ATTN OF: Mid-Atlantic Region

SUBJECT: QUARTERLY REPORT - April 1, 1997 thru June 30, 1997

TO: Nancy Redding, Executive Assistant
Office of General Counsel

TORTS

NUM	PROP	PI	PPPI	WD	MED	SET	AMT	PEND	DEN	OD	A/O	A/P
165	118	43	2	0	2	11	\$3608	205	97	4*	28	103

LITIGATION

NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
45	22	4	16	3	47	339	63	5	2	\$180,000

ADMINISTRATIVE REMEDIES

NUM	DHO	SPH	MED	MH	LEG	FD	GRT	DEN	PEN	OD
453	172	22	29	2	11	14	62	497	60	0

FOI/PRIVACY

NUM	ANS	PEN	OD
127	119	53	21

*We are in the process of obtaining settlement approval from the Central Office for three of these claims or a check from Treasury; one claim was just recently transferred from another Region.

TRIALS AND HEARINGS:

FCI Beckley - Keats v. Olson - oral arguments were held on April 10, 1997, regarding this habeas concerning jail credit. The Magistrate issued a R&R in this habeas case, to which the BOP filed objections. The Magistrate concluded that the inmate's sentence commenced when the BOP accepted him into custody to serve his federal sentence, even though the state had primary jurisdiction and the federal sentence was to run consecutive to the state sentence. The BOP's mistake (in accepting him in custody instead of sending him to the state) effectively turned the consecutive sentence into a concurrent sentence. The Magistrate also found that there had been a due process violation, which could possibly lead to Bivens liability for those who computed the sentence.

USP Terre Haute - Locascio v. Clark - A hearing was held on May 12, 1997, before Judge McKinney. Locascio filed a TRO, preliminary injunction, and permanent injunction based on the fact that he was placed in administrative detention after a Prime Time Live interview with Sammy "The Bull" Gravano indicated that Locascio had conspired to kill John Gotti. In his complaint, Locascio alleged that he was being denied access to the court and his counsel since he was in AD and wanted to be released to the general population. Locascio was released to general population on Monday morning. This action was dismissed.

FCI Petersburg - Platshorn v. Hahn - An evidentiary hearing was held on June 4, regarding the aggregation of a parolable sentence with a non-parolable sentence. Platshorn who was released on parole from the parolable portion of the sentence, seeks to have SGT earned on the parolable sentence applied to the consecutive non-parolable sentence. John White, RISA, testified at the hearing and presented an excellent explanation of the computation by BOP. The AUSA and Milt Williams, Paralegal, FCI Petersburg, got the impression that regardless of § 4161 maximum rate of SGT, Magistrate Judge Lowe intends to somehow hold that Platshorn is entitled to additional SGT. On June 30, 1997, Magistrate Judge Lowe ordered the BOP to provide the court by July 11 a copy of the P.S. in existence prior to 5880.30.

FCI Milan - Idema v. Pontesso - A hearing was held on June 9, 1997, regarding this habeas petition. The Judge acknowledged that referral and CCC placement decisions were at the BOP's discretion. BOP staff advised the Judge that CCC referral for Idema would be completed pending disposition of the incident reports the inmate had received.

FPC Seymour Johnson - Milton v. Flowers, et al. - This is a Bivens case that was originally filed in 1993. The Judge ordered a contempt hearing on plaintiff's request for sanctions. The hearing was held on Friday, June 20, 1997, at 10:00 a.m. in Raleigh with Warden Flowers, Randy Meeks, Charlie Hamilton (retired AUSA previously involved in the case), Kathy Harris and Bill Burlington in attendance. When the pro se plaintiff had not appeared by 10:30, the Judge stated that he would not rule on the motion. The Judge agreed to consider a motion for attorney's fees and costs (totaling \$6,500), and to order the plaintiff to show cause in ten days why the remaining issue should not be dismissed. The AUSA filed the motion on June 24, 1997. If the Judge awards attorney's fees and costs against the plaintiff, it is unlikely he will pursue the remaining issue.

SETTLEMENTS:

FMC Lexington - Venus Michels v. USA - Plaintiff, who alleged she was coerced into sexual contact with ex-correctional officer Eddie Smith, accepted a final settlement of \$150,000. This is the final civil case arising out of the actions of Eddie Smith.

FMC Lexington - Lydia K. Porter v. USA - Plaintiff, who alleged negligent care by BOP staff after she had a tooth extraction and developed a serious infection, accepted a final settlement offer of \$30,000.

memorandum

DATE: October 9, 1997 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel

ATTN OF: Mid-Atlantic Region

SUBJECT: QUARTERLY REPORT - July 1, 1997 thru September 30, 1997

TO: Nancy Redding, Executive Assistant
Office of General Counsel

TORTS

NUM	PROP	PI	PPPI	WD	MED	SET	AMT	PEND	DEN	OD	A/O	A/P
210	123	65	15	0	7	21	5019	220	141	1*	58	99

LITIGATION

NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
42	23	8	7	4	48	331	50	2	1	\$183.55

ADMINISTRATIVE REMEDIES

NUM	DHO	SPH	MED	MH	LEG	FD	GRT	DEN	PEN	OD
499	157	11	45	2	25	2	47	468	58	0

FOI/PRIVACY

NUM	ANS	PEN	OD
176	197	39	15 (over 30 days) 29 (over 10 days)

*We are in the process of obtaining settlement approval from the Central Office for this claim.

TRIALS AND HEARINGS:

FPC Alderson - Mildred Thompson v. Hemingway - On July 22, 1997, Magistrate Mary Fienberg held a hearing to determine why the Bureau of Prisons had not yet published a new policy to replace the "Crimes of Violence" Program Statement which was declared void in Wiggins v. Wise. At the conclusion of the hearing, the Magistrate called both sides into her chambers and suggested that the Bureau should seriously consider "settling these cases," as she indicated the current Bureau position is causing a "public relations problem" for the Bureau with the Court.

It is clear from the hearing that BOP stands very little chance of prevailing with Magistrate Fienberg, if we take the position that we can consider conduct that was not the subject of a formal conviction when we make early release determinations. I tried to stress to Magistrate Fienberg that the Bureau feels strongly that Congress certainly didn't intend BOP to release early from prison, inmates whose crimes involved in any form, weapons. She did not seem to be persuaded. Ms. Thompson and all the other inmates at Alderson who prevailed on these suits against the Bureau have now been reclassified by staff as "eligible" for early release.

FCI Memphis - Coval Baker v. USA - This is an alleged failure to protect FTCA case arising out of the unprovoked attack by inmate Paulino on inmate Baker. Trial was to begin Friday morning but had to be delayed until 1:00 p.m. because the Judge failed to writ out the inmate. USMS and R&D staff worked quickly to get the inmate to court by 1:00 p.m. The pro se inmate was permitted to call one inmate and one staff member as witnesses. At the conclusion of the plaintiff's case, AUSA Quarles moved for a judgment as a matter of law as the plaintiff had failed to establish a prima facie case of negligence. After a few moments of consideration, the Judge granted the motion and ruled in favor of the government. It is interesting to note that plaintiff did not present any new evidence that had not already been rebutted in prior pleadings. Nothing new was revealed that made the trial any more detailed than the pleadings already before the court.

SETTLEMENTS:

LSCI Butner - Funderburk v. USA - Parties filed a stipulation of dismissal in this action. The Bureau agreed to pay inmate Funderburk \$183.35 for the loss of his personal property. We felt we would not be able to prevail on the issue of liability were this case to proceed to trial.

DATE: Mid-Atlantic Regional Office, Annapolis Junction, MD 20

REPL Bill Burlington, Regional Counsel
ATTN Mid-Atlantic Region

SUBQUARTERLY REPORT - July 1, 1997 thru September 30, 1997

TONancy Redding, Executive Assistant
Office of General Counsel

TORTS

NUM	PROP	PI	PPPI	WD	MED	SET	AMT	PEND	DEN	OD	A/O	A/P
210	123	65	15	0	7	21	5019	220	141	1*	58	99

LITIGATION

NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
42	23	8	7	4	48	331	50	2	1	\$183.55

ADMINISTRATIVE REMEDIES

NUM	DHO	SPH	MED	MH	LEG	FD	GRT	DEN	PEN	OD
499	157	11	45	2	25	2	47	468	58	0

FOI/PRIVACY

NUM	ANS	PEN	OD
176	197	39	15 (over 30 days) 29 (over 10 days)

*We are in the process of obtaining settlement approval from the Central Office for this claim.

TRIALS AND HEARINGS:

FPC Alderson - Mildred Thompson v. Hemingway - On July 22, 1997, Magistrate Mary Fienberg held a hearing to determine why the Bureau of Prisons had not yet published a new policy to replace the "Crimes of Violence" Program Statement which was declared void in Wiggins v. Wise. At the conclusion of the hearing, the Magistrate called both sides into her chambers and suggested that the Bureau should seriously consider "settling these cases," as she indicated the current Bureau position is causing a "public relations problem" for the

Bureau with the Court.

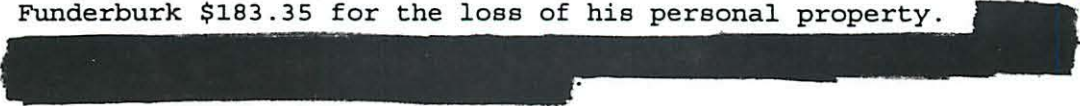
It is clear from the hearing that BOP stands very little chance of prevailing with Magistrate Fienberg, if we take the position that we can consider conduct that was not the subject

of a formal conviction when we make early release determinations. I tried to stress to Magistrate Fienberg that the Bureau feels strongly that Congress certainly didn't intend BOP to release early from prison, inmates whose crimes involved in any form, weapons. She did not seem to be persuaded. Ms. Thompson and all the other inmates at Alderson who prevailed on these suits against the Bureau have now been reclassified by staff as "eligible" for early release.

FCI Memphis - Coval Baker v. USA - This is an alleged failure to protect FTCA case arising out of the unprovoked attack by inmate Paulino on inmate Baker. Trial was to begin Friday morning but had to be delayed until 1:00 p.m. because the Judge failed to writ out the inmate. USMS and R&D staff worked quickly to get the inmate to court by 1:00 p.m. The pro se inmate was permitted to call one inmate and one staff member as witnesses. At the conclusion of the plaintiff's case, AUSA Quarles moved for a judgment as a matter of law as the plaintiff had failed to establish a prima facie case of negligence. After a few moments of consideration, the Judge granted the motion and ruled in favor of the government. It is interesting to note that plaintiff did not present any new evidence that had not already been rebutted in prior pleadings. Nothing new was revealed that made the trial any more detailed than the pleadings already before the court.

SETTLEMENTS:

LSCI Butner - Funderburk v. USA - Parties filed a stipulation of dismissal in this action. The Bureau agreed to pay inmate Funderburk \$183.35 for the loss of his personal property. b2



memorandum

DATE: January 16, 1998

Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

REPLY TO: Bill Burlington, Regional Counsel

ATTN OF: Mid-Atlantic Region

SUBJECT: QUARTERLY REPORT - October 1, 1997 thru December 31, 1997
FY-98 FIRST QUARTER

TO: Nancy Redding, Executive Assistant
Office of General Counsel

TORTS

NUM	PROP	PI	PPPI	WD	MED	SET	AMT	PEND	DEN	OD	A/O	A/P
154	137	16	1	0	0	12	14,645	229	96	0	23	97

LITIGATION

NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
46	24	5	10	7	29	338	40	3	2	\$1,715.23

ADMINISTRATIVE REMEDIES

NUM	DHO	SPH	MED	MH	LEG	FD	GRT	DEN	PEN	OD
443	131	7	48	1	30	4	27	364	131	2

FOI/PRIVACY

NUM	ANS	PEN	OD
144	169	13	5*

*Of the five in the office more than 20 days, we are awaiting files from archives on three of them.

TRIALS AND HEARINGS

FMC Lexington - Dumphord v. Reno, et al. - On Wednesday, November 26th, we had a temporary restraining order/preliminary injunction hearing regarding the care this inmate is receiving at FMC Lexington for his facial keloids. This was a case where the Judge (Karl Forrester) recommended at sentencing that this inmate be treated by his personal physician while he was at Lexington. Unfortunately, Lexington did not respond to this recommendation and did not allow the inmate to see the physician who had extensively treated him in the Lexington community prior to incarceration. The Judge

noted during the first five minutes of Wednesday's hearing that the inmate's facial condition had deteriorated. The rest of the hearing did not dispel the Judge's opinion that we were not providing appropriate care. We expect an adverse order from the Judge soon.

FCI Memphis - Cornett v. US - see Settlements below.

FCI Petersburg - Fuller v. Moore - On October 1st the Fourth Circuit held oral argument in this 3621(e) case involving a two point sentencing enhancement. The panel indicated from the bench that they were going to follow Downey and Roussos. On December 29th, the Fourth Circuit followed Downey and Roussos and held we could not consider a 2-point enhancement when determining whether an inmate was "convicted of a nonviolent offense." The decision was a per curiam, unpublished decision which has little value as precedent. We have brought this decision to the attention of Central Office staff. We have not advised staff within the 4th Circuit to do anything different, and we continue to work on a brief in another case (Pelissero) that raises the same issue. In anticipation of this ruling, inmate Fuller was placed on Supervised Release a week before the decision was issued.

SETTLEMENTS:

FCI Memphis - Cornett v. US - This FTCA case involved a cell fire after the inmate was taken to SHU in preparation for transfer. Staff did not properly secure his personal property prior to the cell fire. The inmate had been assaulted by other inmates. We offered the inmate \$200 at the administrative stage for the lost property. He declined the offer and filed a Bivens/FTCA cause of action. All Bivens claims were dismissed, as well as all personal injury claims. A hearing was held November 14, 1997, to determine the extent of the damages (lost property only). Plaintiff had "conservatively" valued his property at \$3,711 (plaintiff stated that the "probative" value of such property, which he anticipated would secure his release, was \$3 million). Plaintiff, the only witness to take the stand, was questioned for an hour by the Judge and cross-examined by the AUSA. The Court acknowledged that much of plaintiff's personal property was not new and was in fact used, that plaintiff did receive some of his legal materials (plaintiff has alleged all his legal property had been destroyed), and that plaintiff could make new copies of much of his legal materials for 10 cents a copy. An order has been received and based on those three factors the Court substantially reduced plaintiff's damages to an award of \$1,665.23.

FCI Milan - Ahart v. USA - This FTCA case involving loss of inmate property when transferred from Milan, was settled for \$50.00. The original FTCA claim was for \$200.