

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

REPL Bill Burlington, Regional Counsel  
 ATTN Mid-Atlantic Region

SUB January 1998 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                              135  
 Answered                              143

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

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

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 Bivens                                  1  
 FTCA                                      1  
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 (\$ in Thousands)

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

Bill Burlington, Regional Counsel, on February 23, 1998, will be in Manchester, Kentucky, for a trial in the Bivens case Dunlap v. Luttrell et al.; February 27 I will be in Washington, D.C. for training.

Randi Everett, Legal Tech, USP Terre Haute, will be in annual training February 17-20.

Randy Smith, Paralegal, FCI Elkton, will be on annual leave February 17-20.

Mike Robar, Paralegal, FCI Manchester, will be in training the week of February 17-20.

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

FCI Butner - On January 29, 1998, Michelle Fuseyamore addressed a meeting of local state and federal law enforcement officials regarding MOU's for Bureau emergency assistance to non-federal correctional agencies.

FCI and LSCI Butner - This is an update on a decision by Granville County Register of Deeds to discontinue the practice of issuing marriage licenses to inmates unless they appear in her office to submit an application. The FCI & LSCI Wardens submitted a letter asking her to reconsider her decision and offering to bring her to the complex periodically to process the applications. Through her attorney the Registrar returned a letter declining the offer and stated that Turner v. Safley (recognizing an inmate's right to marriage) did not impose an obligation upon her to come to the institution to accommodate the inmates.

FCI Butner - Three video-conference hearings were held this month.

FMC Lexington - On January 13, 1998, Magistrate J.B. Johnson, E.D. Ky., and his law clerk, Ms. Kauffman, toured FMC Lexington for approximately four hours. They appeared to greatly enjoy the tour and asked many questions about various aspects of the institution. After the tour was completed, Warden Holland made the comment that he felt we had just "won friends with the Court."

**Prisoner Litigation Reform Act:**

White v. McGinnis, 131 F.3d 593 (6th Cir. 1997): In this Michigan case, the 6th Circuit held an inmate must exhaust under PLRA before bringing a 1983 case. The inmate had vaguely alleged exhaustion would be futile, but the court refused to excuse exhaustion. The court did not address the issue raised in Garrett v. Hawk (availability of monetary

relief). We will be distributing to all MXR legal staff, sample language to be used whenever they raise the defense of exhaustion of administrative remedies. The language tries to point out why the Garrett v. Hawk decision is wrong.

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

**SETTLEMENTS:**

FPC Alderson - Pointdexter v. U.S. - We recently sent this case to Central Office seeking settlement authorization in the amount of \$50,000. This case involved an inmate driver hitting a civilian. The inmate was cited. We now have an independent medical exam which suggests plaintiff will incur \$28,000 worth of future medical expenses. We drew a pro-plaintiff judge. The Chief of Civil, Stephen Horn, strongly recommends that we settle this case quickly before the judge interjects himself into the settlement process at the final pretrial settlement conference in March.

Gutierrez v. U.S. - We were informed on January 14, 1998, by the AUSA in this case that the plaintiff had accepted our Offer of Judgment for \$140,000 plus costs (actual costs \$7,711.02). This is the case where the inmate while in USMS custody in a local jail in Michigan, fell out of the top bunk and permanently damaged his left elbow. Subsequently, he was returned to BOP custody where there was a delay in surgery and some mix-ups during post-surgery rehab.

FCI Memphis - Martin, et al. V. Hawk, et al. - This is the case we have been reporting where the Director is still a Bivens defendant. The case involves the implementation of the BOP's new bed board policy several years ago. We obtained approval from Wally Cheney to settle this case for \$12,000. Our settlement included the inmate plaintiffs filing administrative tort claims. Those three tort claims have now been received in the regional office and we determined that settlement was appropriate in the amount of \$4,000 for each claimant. At this point, we are awaiting claimants' responses to our settlement offer.

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

Farmer v. Moritsugu, et al., D.D.C. - On January 22, 1998, Judge Kessler issued an order in this case granting summary judgment for the defendants with respect to the claim that the BOP and Dr. Moritsugu failed to promulgate a new policy for the treatment of transsexualism. However, she denied summary judgement on all of the other claims, which included a claim that Dr. Moritsugu failed to enforce the existing transsexual policy. We believe that appeal of the denial of qualified immunity for Dr. Moritsugu should be pursued in this case, based on the Fourth Circuit's reasoning in Rish v. Johnson, et al., 1997 WL 776553. As in Rish, the evidence in the Farmer

case does not support this District Court's decision that Dr. Moritsugu possessed actual knowledge of a violation of the inmate's clearly established constitutional rights. Accordingly, the denial of Q.I. should be appealed. We have discussed this issue with Rwanda Davis and Joyce Zoldak, as they have taken the lead role in this case. We have also discussed the issue with Stacy Ludwig, the AUSA assigned to the case. They all seem to be in agreement that an appeal is warranted, but we are unsure as to the ultimate decision for appeal.

FCI Cumberland - Van Wagner v. Bidwell, et al. - Inmate Van Wagner filed four Bivens/FTCA cases alleging the BOP failed to provide safe and legal medical care by employing physician assistants who are not licensed under the State of Maryland medical standard and licensure guidelines for medical practitioners. The judge ruled that the medical care at FCI Cumberland did not amount to deliberate indifference to a serious medical need, and Maryland law specifically exempts physician assistants working at FCI Cumberland from the state licensure requirement. With these four losses, at least we should be able under the PLRA to preclude Van Wagner from being able to file *in forma pauperis*.

FCI Memphis - Graham v. U.S. - This is an FTCA action for lost property arising out of the disturbance on October 20, 1995. We were granted permission to argue that in light of the discretionary function exception to the FTCA, the Court does not have jurisdiction to hear this case. We received an order from the court denying our Motion to Dismiss. Because of the similarity between this case and Johnson (another riot FTCA discretionary function exception case where the court denied our Motion and DOJ Appellate staff did not authorize immediate appeal), we are not recommending appeal of this ruling. Trial has been set for Friday, February 6th.

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

USP Terre Haute - Yanez v. US - This FTCA trial was held this month. The inmate claimed that staff at USP Terre Haute lost his hobby craft material when he was transferred. Judgment was entered in the favor of the U.S.

FCI Manchester - Dunlap v. Luttrell and Dunlap v. USA - On February 5, 1998, AUSA's Dave Bunning and Wende Morris will be in the institution for staff interviews and trial preparation. Trial is scheduled for February 23, 1998. 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.

FCI Memphis - Johnson v. U.S. - 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 discretionary function exception. The court denied our motion and the case proceeded to trial on January 21, 1998, and was continued/completed on January 30, 1998. At the close of plaintiff's proof, the Government moved for judgment as a matter of law arguing again that the discretionary function exception barred recovery, or in the alternative, that plaintiff had not made out a prima facie case of negligence. Having drawn a blurred line between discretionary decisions and their ministerial implementation, the court concluded that the BOP's development of a procedure to remove inmate personal property was protected by the discretionary function exception, but that the ministerial implementation was subject to negligence analysis. Throughout, plaintiff contended that we should not have removed the property or that we should have returned the inmates to the same cells they occupied prior to the disturbance. At the Judge's insistence that plaintiff could have the merits considered only if he challenged the ministerial implementation, plaintiff included that in his challenge. The Judge then ruled in favor of the Government and dismissed the complaint, but it is unclear as to whether that ultimate decision was based upon the discretionary function exception or lack of negligence.

FCI Beckley - Depew v. Hawk and Olson - Last month we reported that an attorney's right to have privileged communications with an inmate at FCI Beckley had been restricted. Since then the Warden has been contacted by the Massachusetts State Bar and was informed that the law firm whose envelope was used had notified the State Bar and was requesting an investigation. All relevant information was provided to the State Bar. The inmate involved has filed suite in the District Court in Massachusetts requesting an injunction and money damages. A hearing was set for February 3, 1998, in Boston (the court gave the inmate's attorney until Monday, February 9, 1998, to show cause why venue was proper in Boston).

FCI Beckley - Padilla v. Outlaw, et al. - Summary judgement was entered in this Bivens action wherein an inmate alleged his Eighth Amendment rights were violated by staffs failure to protect him from a gang assault. The inmate also alleged inadequate medical care. The Magistrate's R&R recommended that our Motion for Summary Judgment be granted on the merits of the case. However, she rejected our argument that the PLRA precluded the action as the inmate had not exhausted his

administrative remedies. The Magistrate relied on Garrett v. Hawk. The District Court accepted that portion of the report and recommendation which dismissed the case and did not adopt the exhaustion findings of the Magistrate.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:**

USP Terre Haute - Kennert, et al. v. U.S., et al. - This case is filed pro se and involves very vague allegations by the plaintiff that he was beaten. The three named defendants, two Lieutenants and the Warden, who have not been served. Each stated in their rep requests that they were acting within the scope of their employment and they had never beaten the inmate. The Department is requiring that new rep request memos be prepared wherein the staff are required to state specifically if they ever had physical contact with this inmate during the time frame in question, and if so, exactly what happened. The Department feels that the term "beaten" can be interpreted different ways and they want the actual facts for the given situation. Without these specifics, the Department will no longer be granting representation, particularly in cases involving allegations of excessive force.

FCI Milan - Antone v. Pontesso - This is a Bivens action filed by an inmate at Milan alleging that a staff member made sexual statements about him to another inmate, which caused 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 charges were sustained against one officer for failure to follow internal BOP reporting requirements for immediate use of force (no charges of excessive force were sustained).

Representation was not recommended for the staff member where charges were sustained for disrespectful conduct and making statements that endanger the safety of an inmate. Representation was recommended for all other defendants, including the defendant who was disciplined for failure to follow BOP policy since no excessive force was found. We were concerned that providing representation to a staff member who was found guilty of verbally abusing an inmate might adversely impact the AUSA's ability to represent the other defendants who had done nothing wrong. We are awaiting the Department's response.

**SIGNIFICANT FTCA CLAIMS:**

FCI Butner - The Estate of Bryant Woodruff, an inmate who committed suicide at FCI Butner on April 25, 1997, has filed two Tort Claims on behalf of his two children. The tort claim

alleges staff were negligent in failing to prevent the decedent from harming himself, despite having knowledge of his suicidal tendencies. Total damages claimed are \$10 million.

**MEDICAL MALPRACTICE CASES UPDATE:** None

**SIGNIFICANT ADMINISTRATIVE REMEDIES:** None

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:**

**FCI Manchester - Yahveh v. Chandler** - In this Bivens case, the court, as part of the PLRA screening process, indicated the inmate's RFRA claims would not be addressed, as the City of Borne case invalidated RFRA. The AUSA and I (with considerable help from Jeff Shorba) now have the briefs that the Department did which argue that RFRA is still the standard when addressing religious claims involving the federal government.

**USP Terre Haute - Inmate Cash, Willis, Reg. No. 16227-057,** has filed a BP-9 at Terre Haute alleging that being forced to shower with other naked men violates RFRA because of his Muslim faith.

**ALTERNATIVE DISPUTE RESOLUTION EFFORTS:** None

**18 U.S.C. § 3621(e) LITIGATION:**

**FCI Morgantown - Pelissero & Hayes v. Thompson** - 4th Circuit -  
**FCI Morgantown - Pelissero & Hayes v. Thompson** - 4th Circuit -  
The Government's brief was due February 2, 1998, in these consolidated appeals. The District Court upheld the BOP's Program Statement 5162.02, Crimes of Violence, as applied to a 2-point sentencing enhancement and a conviction for being a Felon in Possession of a Firearm. We expect oral argument to be set soon.

**LSCI Butner - Hambrick v. Lappin** - LSCI Butner inmate challenges his denial of one year off due to a two-point enhancement for having firearms involved in a drug conspiracy.

**FCI Milan - Keinlen v. Scibana** - After further review it was determined Keinlen is eligible for the year off as his state conviction was for negligent homicide which is specifically outside of the FBI definitions used in RDAP the program statement. Arrangements were made for his immediate release to CCC.

**FCI Manchester - Pendergrass v. Chandler** - This habeas petition concerning the denial of early release eligibility under § 3621 for 21 USC § 841(a)(1) and 18 USC § 2 conviction was recommended for dismissal on December 22, 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. Subsequently this case was dismissed with prejudice on January 26, 1998.

**FCI Manchester - Moore v. Chandler** - This habeas petition concerning the denial of early release eligibility under § 3621 was dismissed with prejudice on January 26, 1998.

**FCI Manchester - King v. Chandler** - This habeas petition concerning the denial of early release eligibility under § 3621 was dismissed with prejudice on January 5, 1998.

**FCI Manchester - Wooley v. Chandler** - This habeas petition concerning the denial of early release eligibility under § 3621 was dismissed with prejudice on January 5, 1998.

**FCI Lexington - Jones v. Beeler** - We received a final dismissal order from Judge Forester in this 922(g) case.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

**FCI Beckley** - Inmate Roger Lee McKenzie, Reg. No. 05233-088, was indicted on January 27, 1998 for possessing contraband (marijuana). The inmate was observed ingesting a balloon during a visit. The inmate's visitor, his wife, has also been indicated. Arraignment is set for February 13, 1998.

**FCI Beckley** - Inmate Jeffrey Robert Levering, Reg. No. 03594-028, was indicated on January 27, 1998 for possessing contraband (a weapon). Arraignment is set for February 13, 1998 in Beckley.

**UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:**

**FCI Beckley** - Inmate Jackie Cockrane, Reg. No. 06458-058, plead guilty to escape from FPC Beckley on September 22, 1997. He was sentenced on January 6, 1998, and received a 27-month consecutive sentence.

**FCI Beckley** - Inmate Jamel Wingate, Reg. No. 53173-053, plead guilty to possession of contraband (a weapon) on January 21, 1998. Sentencing is scheduled for April 13, 1998, in Huntington.

**FCI Beckley** - Inmate Claude Shafer, Reg. No. 03736-084, received an 18-month consecutive sentence on January 26, 1998 for his escape from FPC Beckley.

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

REHABILITATION ACT: None

**Ensign Amendment Cases:**

**FCI Milan - Norman v. Pontesso** - Plaintiff initially filed a Bivens action against BOP officials based upon implementation of both the Ensign and Zimmer Amendments. Subsequent to the initial complaint, plaintiff filed a motion for a permanent injunction against "any statute" that restricts from viewing "transmitted and/or motion pictures material that is being restricted for being sexually explicit." Plaintiff's original complaint contends that the BOP has violated his rights under the First, Fourth and Eighth Amendments by restricting him from viewing movies or television programs that are rated R, X, or NC-17. His new motion suggests that this restriction is facially in violation of the First Amendment. The Magistrate Judge recommended dismissal of the Bivens portion of the complaint, as the BOP officials have qualified immunity against plaintiff's claims for damages. The Justice Department filed a responsive pleading to the permanent injunction, stating that plaintiff has no First Amendment right, or indeed any constitutional right, to view any transmitted pictures or motion pictures regardless of whether their content is sexually explicit, and therefore his request for injunctive relief is without merit.

**Dismissals Under PLRA: None**

|      | ALD | ASH | BEC | BUT* | CUM | LEX | MAN | MEM | MIL | MRG | PET | SEY |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|
| V    | 0   | 0   | 0   | 0    | 0   | 0   | 0   | 0   | 0   | 1   | 0   | 0   |
| FTCA | 0   | 0   | 0   | 0    | 1   | 0   | 0   | 0   | 0   | 0   | 0   | 0   |
| HC   | 0   | 0   | 0   | 1    | 1   | 0   | 0   | 0   | 1   | 0   | 0   | 1   |
| OTH  | 0   | 0   | 1   | 0    | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   |
| TOT  | 0   | 0   | 1   | 1    | 2   | 0   | 0   | 0   | 1   | 1   | 0   | 1   |

\*Represents both the FCI and LSCI

See CAS, email

UNITED STATES GOVERNMENT

# memorandum

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

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ATTN OF: Mid-Atlantic Region

SUBJECT: January 1998 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Nancy Redding, Executive Assistant

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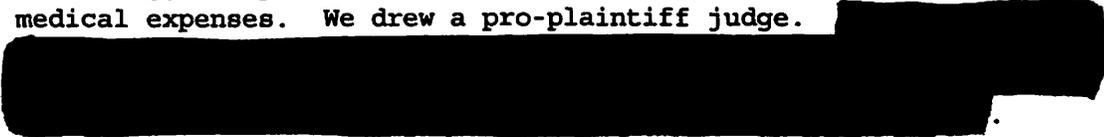
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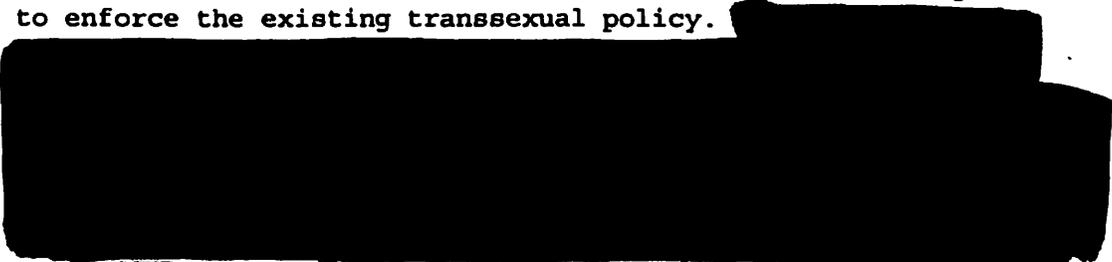
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**UPDATE ON CASES, TRIALS OR HEARINGS, ETC. NOTED IN PRIOR REPORTS:**

USP Terre Haute - Yanez v. US - This FTCA trial was held this month. The inmate claimed that staff at USP Terre Haute lost his hobby craft material when he was transferred. Judgment was entered in the favor of the U.S.

FCI Manchester - Dunlap v. Luttrell and Dunlap v. USA - On February 5, 1998, AUSA's Dave Bunning and Wende Morris will be in the institution for staff interviews and trial preparation. Trial is scheduled for February 23, 1998. 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.

FCI Memphis - Johnson v. U.S. - 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 discretionary function exception. The court denied our motion and the case proceeded to trial on January 21, 1998, and was continued/completed on January 30, 1998. At the close of plaintiff's proof, the Government moved for judgment as a matter of law arguing again that the discretionary function exception barred recovery, or in the alternative, that plaintiff had not made out a prima facie case of negligence. Having drawn a blurred line between discretionary decisions and their ministerial implementation, the court concluded that the BOP's development of a procedure to remove inmate personal property was protected by the discretionary function exception, but that the ministerial implementation was subject to negligence analysis. Throughout, plaintiff contended that we should not have removed the property or that we should have returned the inmates to the same cells they occupied prior to the disturbance. At the Judge's insistence that plaintiff could have the merits considered only if he challenged the ministerial implementation, plaintiff included that in his challenge. The Judge then ruled in favor of the Government and dismissed the complaint, but it is unclear as to whether that ultimate decision was based upon the discretionary function exception or lack of negligence.

FCI Beckley - Depew v. Hawk and Olson - Last month we reported that an attorney's right to have privileged communications with an inmate at FCI Beckley had been restricted. Since then the Warden has been contacted by the Massachusetts State Bar and was informed that the law firm whose envelope was used had notified the State Bar and was requesting an investigation. All relevant information was provided to the State Bar. The inmate involved has filed suite in the District Court in Massachusetts requesting an injunction and money damages. A hearing was set for February 3, 1998, in Boston (the court gave the inmate's attorney until Monday, February 9, 1998, to show cause why venue was proper in Boston).

FCI Beckley - Padilla v. Outlaw, et al. - Summary judgement was entered in this Bivens action wherein an inmate alleged his Eighth Amendment rights were violated by staffs failure to protect him from a gang assault. The inmate also alleged inadequate medical care. The Magistrate's R&R recommended that our Motion for Summary Judgment be granted on the merits of the case. However, she rejected our argument that the PLRA precluded the action as the inmate had not exhausted his administrative remedies. The Magistrate relied on Garrett v. Hawk. The District Court accepted that portion of the report and recommendation which dismissed the

case and did not adopt the exhaustion findings of the Magistrate.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:**

USP Terre Haute - Kennert, et al. v. U.S., et al. - This case is filed pro se and involves very vague allegations by the plaintiff that he was beaten. The three named defendants, two Lieutenants and the Warden, who have not been served. Each stated in their rep requests that they were acting within the scope of their employment and they had never beaten the inmate. The Department is requiring that new rep request memos be prepared wherein the staff are required to state specifically if they ever had physical contact with this inmate during the time frame in question, and if so, exactly what happened. The Department feels that the term beaten can be interpreted different ways and they want the actual facts for the given situation. Without these specifics, the Department will no longer be granting representation, particularly in cases involving allegations of excessive force.

FCI Milan - Antone v. Pontesso - This is a Bivens action filed by an inmate at Milan alleging that a staff member made sexual statements about him to another inmate, which caused 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 charges were sustained against one officer for failure to follow internal BOP reporting requirements for immediate use of force (no charges of excessive force were sustained).

Representation was not recommended for the staff member where charges were sustained for disrespectful conduct and making statements that endanger the safety of an inmate. Representation was recommended for all other defendants, including the defendant who was disciplined for failure to follow BOP policy since no excessive force was found.

 We are awaiting the Department's response.

**SIGNIFICANT FTCA CLAIMS:**

FCI Butner - The Estate of Bryant Woodruff, an inmate who committed suicide at FCI Butner on April 25, 1997, has filed two Tort Claims on behalf of his two children. The tort claim alleges

b2

staff were negligent in failing to prevent the decedent from harming himself, despite having knowledge of his suicidal tendencies. Total damages claimed are \$10 million.

**MEDICAL MALPRACTICE CASES UPDATE:** None

**SIGNIFICANT ADMINISTRATIVE REMEDIES:** None

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:**

**FCI Manchester - Yahheh v. Chandler** - In this Bivens case, the court, as part of the PLRA screening process, indicated the inmate's RFRA claims would not be addressed, as the City of Borne case invalidated RFRA. The AUSA and I (with considerable help from Jeff Shorba) now have the briefs that the Department did which argue that RFRA is still the standard when addressing religious claims involving the federal government.

**USP Terre Haute - Inmate Cash, Willis, Reg. No. 16227-057,** has filed a BP-9 at Terre Haute alleging that being forced to shower with other naked men violates RFRA because of his Muslim faith.

**ALTERNATIVE DISPUTE RESOLUTION EFFORTS:** None

**18 U.S.C. § 3621(e) LITIGATION:**

**FCI Morgantown - Pelissero & Hayes v. Thompson** - 4th Circuit - The Government's brief was due February 2, 1998, in these consolidated appeals. The District Court upheld the BOP's Program Statement 5162.02, Crimes of Violence, as applied to a 2-point sentencing enhancement and a conviction for being a Felon in Possession of a Firearm. We expect oral argument to be set soon.

**LSCI Butner - Hambrick v. Lappin** - LSCI Butner inmate challenges his denial of one year off due to a two-point enhancement for having firearms involved in a drug conspiracy.

**FCI Milan - Keinlen v. Scibana** - After further review it was determined Keinlen is eligible for the year off as his state conviction was for negligent homicide which is specifically outside of the FBI definitions used in RDAP the program statement. Arrangements were made for his immediate release to CCC.

**FCI Manchester - Pendergrass v. Chandler** - This habeas petition concerning the denial of early release eligibility under § 3621 for 21 USC § 841(a)(1) and 18 USC § 2 conviction was recommended for dismissal on December 22, 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. Subsequently this case was dismissed with prejudice on January 26, 1998.

FCI Manchester - Moore v. Chandler - This habeas petition concerning the denial of early release eligibility under § 3621 was dismissed with prejudice on January 26, 1998.

FCI Manchester - King v. Chandler - This habeas petition concerning the denial of early release eligibility under § 3621 was dismissed with prejudice on January 5, 1998.

FCI Manchester - Wooley v. Chandler - This habeas petition concerning the denial of early release eligibility under § 3621 was dismissed with prejudice on January 5, 1998.

FCI Lexington - Jones v. Beeler - We received a final dismissal order from Judge Forester in this 922(g) case.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

FCI Beckley - Inmate Roger Lee McKenzie, Reg. No. 05233-088, was indicted on January 27, 1998 for possessing contraband (marijuana). The inmate was observed ingesting a balloon during a visit. The inmate's visitor, his wife, has also been indicated. Arraignment is set for February 13, 1998.

FCI Beckley - Inmate Jeffrey Robert Levering, Reg. No. 03594-028, was indicated on January 27, 1998 for possessing contraband (a weapon). Arraignment is set for February 13, 1998 in Beckley.

**UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:**

FCI Beckley - Inmate Jackie Cockrane, Reg. No. 06458-058, plead guilty to escape from FPC Beckley on September 22, 1997. He was sentenced on January 6, 1998, and received a 27-month consecutive sentence.

FCI Beckley - Inmate Jamel Wingate, Reg. No. 53173-053, plead guilty to possession of contraband (a weapon) on January 21, 1998. Sentencing is scheduled for April 13, 1998, in Huntington.

FCI Beckley - Inmate Claude Shafer, Reg. No. 03736-084, received an 18-month consecutive sentence on January 26, 1998 for his escape from FPC Beckley.

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

**REHABILITATION ACT:** None

**Ensign Amendment Cases:**

FCI Milan - Norman v. Pontesso - Plaintiff initially filed a

Bivens action against BOP officials based upon implementation of both the Ensign and Zimmer Amendments. Subsequent to the initial complaint, plaintiff filed a motion for a permanent injunction against any statute that restricts from viewing transmitted and/or motion pictures material that is being restricted for being sexually explicit. Plaintiff's original complaint contends that the BOP has violated his rights under the First, Fourth and Eighth Amendments by restricting him from viewing movies or television programs that are rated R, X, or NC-17. His new motion suggests that this restriction is facially in violation of the First Amendment. The Magistrate Judge recommended dismissal of the Bivens portion of the complaint, as the BOP officials have qualified immunity against plaintiff's claims for damages. The Justice Department filed a responsive pleading to the permanent injunction, stating that plaintiff has no First Amendment right, or indeed any constitutional right, to view any transmitted pictures or motion pictures regardless of whether their content is sexually explicit, and therefore his request for injunctive relief is without merit.

**Dismissals Under PLRA: None**

New Litigation Cases by Institution and Type  
Received During the Month of January 1998

|      | ALD | ASH | BEC | BUT* | CUM | LEX | MAN | MEM | MIL | MRG |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|
| BIV  | 0   | 0   | 0   | 0    | 0   | 0   | 0   | 0   | 0   | 1   |
| FTCA | 0   | 0   | 0   | 0    | 1   | 0   | 0   | 0   | 0   | 0   |
| HC   | 0   | 0   | 0   | 1    | 1   | 0   | 0   | 0   | 1   | 0   |
| OTH  | 0   | 0   | 1   | 0    | 0   | 0   | 0   | 0   | 0   | 0   |
| TOT  | 0   | 0   | 1   | 1    | 2   | 0   | 0   | 0   | 1   | 1   |

\*Represents both the FCI and LSCI



|                                 |                |               |
|---------------------------------|----------------|---------------|
| <b>Lit Reports Completed</b>    | <b>15</b>      | <b>12</b>     |
| <b>Cases/Hearings or Trials</b> | <b>2</b>       | <b>2</b>      |
| <b>Settlements/Awards</b>       | <b>1</b>       | <b>2</b>      |
| <b>\$ Settlements/Awards</b>    | <b>\$147.7</b> | <b>\$52.0</b> |
| <b>(\$ in Thousands)</b>        |                |               |

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

Bill Burlington, Regional Counsel, will be on annual leave March 9-13; and in ART March 30-April 3.

We would like to congratulate Mike Robar on his recent marriage. We wish Mike and his new bride a lifetime of happiness together.

Carolyn Lanphear, Paralegal, FCI Cumberland, will be in ART March 16-20. Carolyn will make a presentation at the next staff recall on March 11, on the new P.S. 1380.06 "Disclosing Potential Impeachment Information Regarding Employees."

Michelle Fuseyamore, Attorney, FCI Butner, will be the complex Duty Officer March 17-24; and Mike Bredenberg, Attorney, LSCI Butner, will be the complex Duty Officer March 24-31.

Teresa Marvel, Paralegal, USP Terre Haute, will be in ART March 2-6, 1998.

Joe Tang, Attorney, FMC Lexington, will be in ART the week of March 16-20, 1998.

Matthew Mellady, Attorney, FCI Memphis, is in ART this week.

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

**Annexation of FCI Morgantown** - We have recently been approached by the Mayor of Morgantown, Charlene Marshall, with another proposal to annex FCI Morgantown into the city. Margaret Hambrick is scheduled to meet with Mayor Marshall on March 3, 1998. Apparently, the mayor has enlisted support for the annexation from the West Virginia Congressional delegation.

**U.S. Attorney Office Orientation - FCI Elkton** - We are planning an orientation session at FCI Elkton on Wednesday, April 29, 1998. Representatives from the Cleveland, U.S. Attorney's Office have been invited to attend. We are off to a rather "shaky" start dealing with this office, as they tend to go to the Department, rather than to us, when faced with a new prisoner lawsuit.

**FCI Butner** - Three mental health commitment hearings were held during the month.

**FCI Butner** - Medical staff at FCI Butner have discontinued HIV medication for inmate Dee Farmer due to his refusal to allow proper blood tests to be conducted to determine the impact these medications are having on his system as part of his treatment. A treatment refusal form was prepared which the inmate refused to sign. We anticipate that Mr. Farmer will file an action in the D.C. District Court.

**FCI Manchester** - On referral from the institution's Supervisory Contract Specialist, Mike Robar, Paralegal, contacted Jane Crowell, Commercial Law Branch, concerning an issue related to the original mine reclamation bond for the Manchester property. There is approximately \$10,000 remaining on the bond and the BOP has a boulder requiring removal. The state mine reclamation office issued a contract for the boulder's removal and with Ms. Crowell's assistance, we were able to issue a permit for the work. At issue was the authority for the contractor to enter institution grounds, potential government liability, possible mineral rights, and scope of the bond. Work began on this project on March 2, 1998.

**Prisoner Litigation Reform Act:** None

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

**SETTLEMENTS:**

**FPC Alderson** - Poindexter v. US - This old FTCA case arose 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 was the extent of physical damages to the driver of the other car. The case has been settled for \$40,000.

**FCI Memphis** - Martin, et al. v Hawk, et al. - The three plaintiffs in this case have accepted the \$4,000 each settlement offer under FTCA. This is the Bivens case where the Director was still a defendant regarding the implementation of the BOP's change in our bed board policy.

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FCI Manchester** - Dunlap v. Luttrell, et al. - On February 23-25, this Bivens excessive force case was tried to a jury. After two full days of testimony the

jury deliberated less than one hour, concluding that the four defendants did not use excessive force in subduing an unruly inmate. This case also involved an FTCA claim for failure to train and supervise the officers, and failure to provide proper medical care to the inmate after the use of force incident. The Judge was visibly angry at the government for canceling an outside medical exam, and ordered that such an exam take place before she decides the FTCA claim.

**FMC Lexington - Dumphord v. Reno, et al.** - Judge Karl Forester allowed plaintiff to pursue the \$2255 portion of his lawsuit, which alleges cruel and unusual punishment under the Eighth Amendment in the alleged denial of treatment of plaintiff's facial keloids. Judge Forester ruled the Court was aware at the time of sentencing of the facial keloid condition and based its sentence on the belief the BOP would follow the Court's recommendation and accommodate plaintiff's serious medical condition. Accordingly, the Court opined plaintiff may pursue his \$2255 claim because the Eighth Amendment violation allegation is linked to the execution of plaintiff's sentence.

**FCI Beckley - Temple v. Olson** - In this habeas case, a state had primary jurisdiction, sentenced the inmate to a sentence to be served concurrent with his federal sentence already imposed, and ordered the inmate be transferred to the U.S. Marshals. The Marshals took custody of the inmate and placed him in a private correctional facility. The inmate was subsequently prosecuted and sentenced on a second federal charge. When the inmate was transferred to a Bureau facility, ISM realized the state had primary jurisdiction over the inmate and returned him to the state. When the inmate completed his state sentence and was returned to federal custody, he argued he should receive credit toward his federal sentence for the time spent in state custody since his federal sentence commenced when the state initially transferred him to the Marshals. He also argued the denial of credit violated the rule that an inmate can't be forced to serve his sentence in installments. The Magistrate has recommended relief be granted which would mean the inmate has been held beyond his release date. Objections will be filed.

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

**FMC Lexington - Reed v. Reno** - This age discrimination case challenges the BOP's 36 year old limit for entry into a primary law enforcement position. This case has been set for oral argument in the 6th Circuit on

Tuesday, April 21st.

FCI Beckley - Depew v. Hawk and Olson - This inmate filed suit in Massachusetts because his right to have unprivileged communications with his attorney had been restricted for one year. He requested an injunction and money damages. A hearing was held in Boston February 3, 1998. A Motion to Dismiss for Lack of Venue and Motion in Opposition to the Preliminary Injunction were filed, as the only tie to Massachusetts was that the inmate's attorney was located there. At the hearing the Judge noted his discontent that an attorney's privileged correspondence rights had been curtailed and indicated he was inclined to issue a preliminary injunction. However, he allowed the attorney time to respond to the Bureau's Motion to Dismiss. The attorney attempted to cure the venue problems by adding himself as a named plaintiff. A response has been filed.

FCI Petersburg - Patsel v. US - This tort action involves Patsel's allegation of improper medical treatment for a stroke on July 5, 1994. He complained to staff at approximately 8:00 a.m. and was subsequently taken to the outside hospital at approximately 1:00 a.m. the next morning, where he was diagnosed with a stroke. Trial had been set in the matter for March. The physicians assistants rendering medical care and Patsel were deposed by the AUSA. Patsel's attorneys at the time indicated they were having problems obtaining an expert witness willing to state that but for the action of FCI Petersburg medical staff, the outcome of Patsel's medical condition would be different. In a Rule 41 stipulation, the action was dismissed with prejudice on February 5, 1998.

FCI Petersburg - Platshorn v. Hahn - This previously reported sentence computation case regarding de-aggregation of parolable and non-parolable sentences was appealed by Platshorn on December 22, 1997. The Fourth Circuit docketed the case on January 26, 1998, and directed that pursuant to Local Rule 34(b) the case be submitted on informal briefs. Platshorn's informal brief is due on March 16, 1998, and the government's informal response due 14 days after service of appellant's brief.

FCI Petersburg - Vinson v. Dewalt - Inmate Vinson filed his petition in December 1996, seeking jail time credit under 3585(b) for time served on a state sentence, and for time spent under restrictive conditions of bail, along with GCT for the time periods. The November 19, 1997, MRR recommended denial of his petition. Vinson

then filed a notice of appeal with the Fourth Circuit on December 5, 1997. Judge Jackson, denied the petition in a final order on December 8, 1997, and declined to issue a certificate of appealability, and noted the premature appeal. On January 7, 1998, Vinson filed a Motion with the Fourth Circuit seeking immediate release. The AUSA filed a response with the Circuit on January 13, 1998, opposing the motion for immediate release and contesting the court's jurisdiction to hear the appeal. The District Court issued an order on February 18, 1998, denying Vinson's Motion to Proceed In Forma Pauperis on appeal finding the appeal frivolous. Action is awaited from the Fourth Circuit.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:**

FCI Milan - Antone v. Pontesso, et al. - We are still awaiting a decision by the Department regarding granting of representation in this case which involves allegations of use of excessive force and fear for his (the inmate's) safety after a staff member made sexual statements about him. In our letter to the Department we recommended that representation be granted to all the defendants except one officer. Representation was not recommended for the staff member where charges were sustained for disrespectful conduct and making statements that endanger the safety of an inmate.

**SIGNIFICANT FTCA CLAIMS:** None

**MEDICAL MALPRACTICE CASES UPDATE:** None

**SIGNIFICANT ADMINISTRATIVE REMEDIES:** None

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:**

FCI Butner - An inmate filed an administrative remedy when the institution denied his proposal to establish a "Gay Men's Christian Collation" (sic) at FCI Butner. The stated goal of the proposed group was to allow gay inmates to fellowship, and dispel the myths and stereotypes surrounding gays through spiritual awareness. The request was denied on the ground that there were ample opportunities available to all inmates of the Christian faith for fellowship, and that these meetings were available to all inmates without regard to sexual orientation. Further, if the inmate was interested in having a particular person from the community come in and minister to him individually, a visit could be arranged for this purpose.

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None

18 U.S.C. § 3621(e) LITIGATION:

FCI Morgantown - Pelissero & Hayes v. Thompson (4th Circuit) - This two point enhancement and Felon in Possession of a Firearm appeal has been scheduled for oral argument before the Fourth Circuit on Friday, April 10.

FCI Elkton - Boucher v. LaManna - Petitioner challenges the denial of early release consideration. The inmate received a two-point enhancement for possession of a weapon during a drug offense. Response is due March 14, 1998, and we plan to file a Motion to Dismiss for failure to exhaust, as the early release determination was made under the new policy.

FCI Elkton - Dipolito v. LaManna - Petitioner challenges the denial of early release consideration. Response is due March 2, 1998. The inmate received a two-point enhancement for possession of a weapon during a drug offense.

FCI Milan - Scott v. Pontesso - Inmate alleges BOP inclusion of previous convictions as a basis for non-eligibility for the one-year off provisions of RDAP is not a permissible interpretation of the statute. In a January 28, 1998, R&R the Magistrate recommends the action be dismissed as the BOP's determination that prior convictions make an inmate ineligible is a discretionary decision vested with the BOP.

FCI Petersburg - Goddard v. Dewalt - When the BOP originally responded to this petition we argued it should be dismissed for failure to exhaust and/or petitioner is not entitled to the requested relief, and the Fifth Circuit's decision in Venegas should be followed. The court was informed that the Eastern District of Virginia's decision in Fuller, along with Pelissero (out of Morgantown), are on appeal to the Fourth Circuit. Subsequent to our filing, the Fourth Circuit issued a per curiam opinion affirming the Fuller decision. On February 12, 1998, in a filing to the district court we advised them of this decision by the Fourth Circuit and that Pelissero is still pending.

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

**UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:**

**FCI Elkton - Inmate Lesley Dumersier, Reg. No. 63154-061,** was indicted by a federal grand jury for biting the Food Service Administrator during an attempt to gain control of Dumersier and place him in restraints. On February 25, 1998, Dumersier appeared before the Magistrate Judge for arraignment. Dumersier was appointed an attorney from the Federal Public Defenders Office and pled not guilty.

**FMC Lexington - Inmate Michael Kite, Reg. No. 04697-028,** was sentenced in the Eastern District of Kentucky on February 10, 1998, to 51 months for Possession of a Weapon (shank).

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

**REHABILITATION ACT: None**

**Ensign Amendment Cases: None**

**Dismissals Under PLRA: None**

New Litigation Cases by Institution and Type  
Received During the Month of February 1998

|      | ALD | ASH | BEC | BUT<br>* | CUM | ELK | LEX | MAN | MEM | MIL | MR |
|------|-----|-----|-----|----------|-----|-----|-----|-----|-----|-----|----|
| BIV  | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 1   | 0   | 1   | 2  |
| FTCA | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 0   | 0   | 1   | 0  |
| HC   | 0   | 0   | 0   | 1        | 0   | 1   | 0   | 0   | 1   | 1   | 0  |
| OTH  | 0   | 0   | 0   | 0        | 0   | 2   | 0   | 0   | 0   | 0   | 0  |
| TOT  | 0   | 0   | 0   | 1        | 0   | 3   | 0   | 1   | 1   | 3   | 2  |

\*Represents both the FCI and LSCI

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

|      | ALD | ASH | BEC | BUT<br>* | CUM | ELK | LEX | MAN | MEM | MIL | M |
|------|-----|-----|-----|----------|-----|-----|-----|-----|-----|-----|---|
| BIV  | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 1   | 0   | 1   |   |
| FTCA | 0   | 0   | 0   | 0        | 1   | 0   | 0   | 0   | 0   | 1   |   |
| HC   | 0   | 0   | 0   | 2        | 1   | 1   | 0   | 0   | 1   | 2   |   |
| OTH  | 0   | 0   | 1   | 0        | 0   | 2   | 0   | 0   | 0   | 0   |   |
| TOT  | 0   | 0   | 1   | 2        | 2   | 3   | 0   | 1   | 1   | 4   |   |

\*BUT represents both the FCI and the LSCI



|                          |         |        |    |
|--------------------------|---------|--------|----|
| Lit Reports Completed    | 15      | 12     | 14 |
| Cases/Hearings or Trials | 2       | 2      | 1  |
| Settlements/Awards       | 1       | 2      | 0  |
| \$ Settlements/Awards    | \$147.7 | \$52.0 | 0  |
| (\$ in Thousands)        |         |        |    |

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

Bill Burlington, Regional Counsel, has the following travel planned during the month: April 9-10, Richmond, Virginia, for 4th Circuit Appeal in Pelisserro and Hayes; April 20-21, Cincinnati, Ohio, for 6th Circuit Appeal in the Velda Reed case; and April 28-29, Elkton, Ohio, for orientation for the U.S. Attorney's Office.

We would like to congratulate Rick and Terri Schott on the birth of their second daughter, Caroline Franceis. We also learned that former MARO attorney Darrel Waugh and his wife, Melanie, are the proud parents of a new baby girl, Jordan. Congratulations to Kathleen White for completing the Paralegal Training Program.

Congratulations to Marian Callahan, Attorney, MARO, for being selected as Employee of the Quarter for the Regional Office.

Congratulations to Joe Tang, Attorney, FMC Lexington, for being recognized with a time-off award for making it to work all three days while FMC Lexington was on crisis status due to the heavy snowfall and staff having difficulty in getting to work.

Mike Robar, Paralegal FCI Manchester, is the institution duty officer April 7-14.

Teresa Marvel, Paralegal, USP Terre Haute, is the institution duty officer, and Kathy Harris, Paralegal, Mid-Atlantic Regional Office, is regional office duty officer March 31-April 6.

Matthew Mellady, Attorney, FCI Memphis, will be away from the institution April 22-23, for a department head/executive staff retreat. He is heading the committee responsible for planning the first day of the retreat. Several sessions have been planned to include topics on leadership, communication, teamwork, professionalism, and appropriate staff/inmate interaction.

Randy Smith, Paralegal, FCI Elkton, will be the institution duty officer April 7-14.

Dawn Tanner, Legal Assistant, FCI Petersburg, will be on annual leave April 12-18, 1998.

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

**FCI Morgantown** - I am talking with the City Attorney about possible costs associated with the City of Morgantown annexing the institution into the city. Margaret Hambrick met with Mayor Marshall on March 3, 1998. The meeting appears to have made Margaret feel more supportive of annexation, as she feels we have a common interest with the city in controlling the type of growth that occurs adjacent to the institution. Very soon, I expect we will be asking for the position of Central Office (Wally indicated the Director will want to be briefed) on this proposal. Margaret indicated the City has the support of the West Virginia Congressional delegation, and that the City will likely ask those officials to intervene on its behalf with the Director.

**FCI Elkton** - We are planning an orientation session at FCI Elkton on Wednesday, April 29, 1998. Representatives from the Cleveland U.S. Attorney's Office will attend for the training and a tour of the institution.

**Medical Care Recovery Act, 42 U.S.C. § 2651** (FCI Petersburg and FCI Ashland) - We now have two institutions that are seeking to recover the cost of medical care which was incurred to treat injuries caused by a third party. We note that BOP still does not have written procedures to guide staff through this process. In the case at Ashland, Randy Smith has received assistance from the Air Force, as they do have regulations which address issues such as how to compensate a private attorney who obtains the settlement from which the government is paid.

**FCI Butner - After Action Report** - The After Action review of the March 11, 1998, hostage taking incident at FCI Butner revealed that the mature, calm response of several key staff, resulted in this incident being resolved in less than one hour. Staff had spent a great deal of time in the months before this incident on Crisis Management Training. That training was instrumental in bringing this incident to a quick, successful resolution.

**FCI Manchester** - As reported in February, the State Mine Reclamation Office issued a contract for removal of a boulder which would be financed by an already existing bond, for which the BOP issued a work permit. This project has been completed. The assistance of the Commercial Law Branch in obtaining the permit was greatly appreciated.

**FCI Butner** - One video conference mental health hearing was held during the month.

**FCI Memphis** - On April 17, the Chief Judge of the District Court will be at FCI Memphis for a tour.

**FCI Memphis** - A letter was recently forwarded to the U.S. Attorney's Office in the Western District of Tennessee asking that steps be taken to have the recent favorable discretionary function exception ruling published. The U.S. Attorney has agreed and a letter will be sent to the Court. This case arose out of the October 20, 1995, disturbance at Memphis.

**Prisoner Litigation Reform Act:**

**FMC Lexington** - Dumphord v. Reno, et al. - In a 64 page, scathing Preliminary Injunction/Denial of Qualified Immunity Order, Judge Karl Forester ruled that exhaustion was not required under the PLRA, as it was futile. The court held there were several reasons exhaustion was futile, one of which was the lack of monetary relief. The order did not cite Garret v. Hawk, nor did it cite White v. McGinnis, 131 F.3d. 593 (6th Cir. 1997), a Michigan case which requires exhaustion under PLRA when attempting to bring a section 1983 case. As relief, the court ordered that we allow a private physician to treat the inmate, "in his sole discretion." We are attempting to appeal the order, while at the same time seeking to reach a settlement which will include vacating this order.

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

**SETTLEMENTS:**

**FCI Memphis** - Martin, et al. V. Hawk, et al. - Although claimants signed the vouchers accepting our offer of settlement (\$4,000 each for the three plaintiffs), claimant's attorney now contends that we orally agreed to a transfer of one of the claimants as part of our negotiated settlement. In response to this contention, Matthew Mellady, Attorney, FCI Memphis, drafted a letter specifically refuting that such an agreement was reached at the settlement conference or at any time thereafter. This letter reiterated our position that the Bureau of Prisons will not compromise the security of its institutions or the integrity of its classification system by agreeing to a transfer as part

of a settlement. Finally, we informed claimant's attorney that claimant is free at any time to make an administrative request for a transfer and that staff at his institution would make an appropriate administrative determination independent of the law suit or any tort claim.

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FCI Manchester - Dunlap v. Luttrell** - As we reported last month, this FTCA case, alleging failure to train and supervise the officers, and failure to provide proper medical care to the inmate after a use of force incident, has not yet been concluded, as the Judge ordered that the inmate be examined by an independent physician. The government was allowed to select an outside physician to perform one exam, and the plaintiff was allowed to select one physician. Both exams have now been completed and neither indicates any injuries that could be attributed to the use of force incident.

**FCI Cumberland - Weeks v. Bidwell** - On March 10, 1998, Judge Nickerson entered an order following Roussos, Downey, and the unpublished opinion in Fuller, voiding Section 9 of P.S. 5162.02 (2-point firearm enhancement disqualifies an inmate from early release). The Court ordered the BOP to redetermine the eligibility of inmate Weeks within 45 days without considering the 2-point firearm enhancement. We attempted to get the Court to hold off on a decision until after the oral argument in Pelissero before the Fourth Circuit. We are going to wait until the Pelissero oral argument on April 10th to decide the full extent of the applicability of the Weeks decision or proceed with an appeal of that decision.

**FCI Memphis - US v. William Taylor** - Inmate William Taylor, with the assistance of another inmate, Alfred Mauldin, recently filed a petition for writ of habeas corpus in the Western District of Tennessee. In dismissing the case during the screening process, the Court issued an injunction berating inmate Mauldin for filing frivolous petitions on his own behalf and on the behalf of other inmates. The Court voiced their concern that the advice Mauldin would provide other inmates would be "hopelessly inadequate and could result in another inmate having sanctions imposed against him." The Court ordered that Mauldin is restrained and enjoined from conducting any further legal or quasi-legal activities in the Western District of Tennessee on behalf of any person other than

himself. He is also enjoined from conducting any legal research or assisting in the preparation of legal documents for other inmates. The Court concluded by saying "this injunction is necessary to protect other, less-knowledgeable inmates from misleading and erroneous advice, and the Court from the necessity of spending valuable judicial time and resources on the results of this frivolous advice..."

**FMC Lexington - Shelton v. St. Clair, et al.** - This Bivens action alleges racial and religious discrimination through verbal comments of a UNICOR supervisor. In his order dated March 13, 1998, Judge Wilhoit stated: "The Court reiterates the Magistrate Judge's comments that if they occurred, the comments of Ms. St. Clair were disgusting and vulgar. This does not change the fact that said conduct would not violate clearly established constitutional rights of Mr. Shelton as abusive language or other verbal harassment by prison officials does not necessarily state a constitutional violation."

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

**FMC Lexington - Velda Reed v. Reno** - This age discrimination case challenges the BOP's 36 year old limit for entry into a primary law enforcement position. This case has been set for oral argument in the 6th Circuit on Tuesday, April 21st. I will attend with AUSA Lee Gentry. We have been in the 6th Circuit on this case before, but this time we go before the court having won at the District Court level. This case has broad potential impact on BOP personnel and retirement practices.

**FCI Beckley - Depew v. Hawk and Olson** - This inmate filed suit in Massachusetts because his right to have privileged communications with his attorney had been restricted for one year. He requested an injunction and money damages. A hearing was held in Boston on February 3, 1998. A Motion to Dismiss for Lack of Venue and Opposition to the Preliminary Injunction was filed, as the only tie to Massachusetts was that the inmate's attorney was located there. The attorney attempted to cure the venue problem by adding himself as a named plaintiff. A response was filed. A second hearing was held in Boston on March 16. FCI Beckley's Attorney Advisor, Inmate Systems Manager, and Deputy Regional Counsel were present at the hearing. On March 25, 1998, the Judge dismissed FCI Beckley's Warden as a defendant, denied the plaintiff's motion to amend the complaint (and add the attorney as a plaintiff),

transferred the case to the Southern District of West Virginia and denied plaintiff's motion for a preliminary injunction. We were pleased with the support provided by the two Assistants in the District of Massachusetts that were assigned to this case. They did an outstanding job.

**USP Terre Haute - Cosmo-Cosby v. Brandenburg, et al.** - This case is set for trial on April 13, 1998. The plaintiff alleges that staff assaulted him following a routine search of his cell on September 23, 1996, in SHU. Additional defendants have been dismissed from the suit. A correctional officer and a Lieutenant remain as Bivens defendants.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:**

**FCI Milan - Antone v. Pontesso, et al.** - We finally received the response from the Department regarding representation in this case. This is the case that we recommended representation not be granted to correctional officer Duby where charges were sustained for disrespectful conduct and making statements that endanger the safety of an inmate. The Department granted representation to all the defendants, except Officer Duby. It is interesting to note that the representation letter was signed by Donald M. Remy, Deputy Assistant Attorney General, instead of Helene Goldberg. As soon as we received telephonic notice, Kevin Walasinski, Attorney, FCI Milan, called Mr. Duby into his office and informed him of the Department's decision and provided him with a memo explaining that representation had not been granted and that he would be responsible for providing his own attorney. Officer Duby expressed his deep disappointment with the BOP and DOJ stating that inmate Antone had succeeded in his goal of dividing staff. He was visibly shaken, angered and distressed. His anger was directed to the BOP and DOJ and not the local legal department. Kevin was later contacted by a member of the Union's E-board to confirm representation was denied. The Union representative was also not happy with the agency's position, and indicated the Union may pay the representation costs.

**SIGNIFICANT FTCA CLAIMS:**

**FMC Lexington** - The conservator for Kenneth Dixon, a forensic study case at FMC Lexington, filed an administrative tort claim for \$500,000. The claim alleges negligence on behalf of FMC Lexington staff in delaying administration of psychotropic medications. The claim further alleges staff negligently failed to prevent Dixon from grotesquely gouging out his right

eye with his thumb.

**FCI Butner** - Former inmate Jean Stafford, through her attorney, has filed a tort claim with a sum certain of \$3 million dollars alleging that she was sexually assaulted by three staff members during her incarceration. Ms. Stafford was interviewed in 1996 when another inmate made allegations of sexual assault. At that time she denied that she had been sexually assaulted. After her release, she was again interviewed by BOP OIA staff at her residence and again denied ever being sexually assaulted. These new allegations have been referred to the FBI.

**FCI Memphis** - We recently denied a tort claim filed on behalf of Barbara Danner, a former contract employee. Ms. Danner claimed compensatory damages in the amount of \$300,000 as the result of alleged discrimination and retaliatory acts, as well as contractual damages in the amount of \$164,840 resulting from the alleged arbitrary termination of her contract with the BOP. Ms. Danner was employed as a Medical Lab Tech at FCI Memphis from October 1994 to September 1996. She makes several claims, including being subjected to sexual harassment by a former HSA and intimidation via threats of criminal indictment for fraud by a Special Agent of the DOJ's Office of the Inspector General.

**MEDICAL MALPRACTICE CASES UPDATE:** None

**SIGNIFICANT ADMINISTRATIVE REMEDIES:** None

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:**

**FCI Petersburg** - Norton and Goodwin v. US, et al. - This is a Bivens case filed by two inmates at FPC Petersburg alleging violation of their rights to practice the Asatru Free Assembly religion because the BOP deliberately delayed the approval for the group meeting at the camp. An answer was previously filed. The inmates have submitted several requests for discovery, and the AUSA has objected to their requests with the exception of those items being submitted with our Motion for Summary Judgment, which was filed on March 27. We argued that the issue is moot as the Asatru Free Assembly is being provided space and time for group meetings at the camp, and requested essentials of their faith have been ordered and provided to the group, with the exception of tapes which are being reviewed for security and good order concerns. We also raised qualified immunity and

failure to exhaust. Norton and Goodwin have attempted to assert that the exhaustion by a former inmate satisfies their exhaustion requirement.

**ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None**

**18 U.S.C. § 3621(e) LITIGATION:**

**FCI Morgantown - Pelissero & Hayes v. Thompson - 4th Circuit** - This two point enhancement and Felon in Possession of a Firearm appeal has been scheduled for oral argument before the Fourth Circuit on Friday, April 10th.

**FCI Manchester - Moore v. Chandler** - This § 3621 case was dismissed with prejudice on January 26, 1998, for petitioner's failure to provide a change of address to the Court when released on writ. However, Judge Coffman has apparently re-opened this case, as FCI Manchester received a February 23 order allowing petitioner to reply to the government's prior response.

**FCI Cumberland - Frank v. Henry** - Petitioner challenges the denial of early release consideration. The inmate received a two-point enhancement for possession of a weapon during a drug offense.

**FCI Cumberland - McPeek v. Henry** - In this habeas petition the inmate alleges he is improperly being denied the benefits of the RDAP based on his 18 U.S.C. § 922(g) conviction.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

**FCI Butner** - Inmate Earl Price, Reg. No. 18599-032, was referred for criminal prosecution for the recent hostage situation.

**FCI Petersburg** - On January 21, 1998, Thomas Gibson, Reg. No. 32341-037, was referred for prosecution. On January 16, 1998, the SIS office received a telephone call from a female civilian. The civilian indicated inmate Gibson was somehow involved in having the tires on her car slashed/flattened. SIS staff reviewed inmate Gibson's telephone calls, which revealed inmate Gibson ordering a male on the street to puncture and flatten all of the tires on the civilian's vehicle. The following morning when the civilian attempted to leave for work, her tires were flat. Inmate Gibson was

placed in administrative detention pending an SIS investigation and his involvement into the incident. This case was referred to the FBI.

**FPC Petersburg** - On February 15, 1998, at approximately 1:20 a.m., after completing two separate counts, it was determined that inmate Calvin Smith, Reg. No. 27531-083, was missing; inmate Smith was placed on escape status. The FBI/USM were notified and the case was referred to USM for prosecution (pending). On February 16, 1998, at approximately 5:45 a.m. inmate Smith returned to the institution and was placed in SHU pending further investigation.

**UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:**

**FCI Beckley** - Jamel Wingate, Reg. No. 53173-053 pled guilty to Possession of Contraband (a weapon). Sentencing is scheduled for May 11, 1998.

**FCI Beckley** - Roger McKenzie, Reg. No. 05233-088, was indicted for Possession of Contraband (Marijuana). Trial is set for April 14. We expect him to plead guilty to the charge.

**FCI Beckley** - Jeffrey Levering, Reg. No. 03594-028, signed a plea agreement for Possession of Contraband (a weapon). A plea hearing is scheduled for April 20, 1998.

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

**REHABILITATION ACT:** None

**Ensign Amendment Cases:**

**FCI Beckley** - Maydak v. Bidwell, et al. - Inmate Maydak originally challenged the Ensign Amendment. Subsequently, in an amended complaint, he also alleged Bivens liability when what he identifies as commercial photographs were rejected by staff at FCI Beckley as personal photographs. The Court had previously stayed the Ensign Amendment portion of the suit pending the outcome of the Amatel case. The Judge also granted the Defendants an additional 60 days to respond to the Bivens portion of the lawsuit once the individual defendants were served. To date, there has been no service. In December 1997, inmate Maydak motioned the court to reconsider his request for an injunction that had been previously denied. On March 18, 1998, the Judge remanded the inmate's request for an injunction.

to the magistrate for reconsideration. On March 19, 1998, the Magistrate requested a status report indicating the location of each plaintiff. A response was subsequently filed. To date, the Magistrate has not requested a response be filed outlining the Bureau's position to the inmate's motion for reconsideration. A motion in opposition to the request for an injunction will be filed shortly based on mootness.

**Dismissals Under PLRA: None**

**New Litigation Cases by Institution and Type  
Received During the Month of March 1998**

|      | ALD | ASH | BEC | BUT<br>* | CUM | ELK | LEX | MAN | MEM | MIL | MR |
|------|-----|-----|-----|----------|-----|-----|-----|-----|-----|-----|----|
| BIV  | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 0   | 0   | 0   | 1  |
| FTCA | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 0   | 0   | 0   | 0  |
| HC   | 0   | 0   | 0   | 0        | 0   | 2   | 0   | 1   | 1   | 1   | 0  |
| OTH  | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 0   | 0   | 0   | 0  |
| TOT  | 0   | 0   | 0   | 0        | 0   | 2   | 0   | 1   | 1   | 1   | 1  |

\*Represents both the FCI and LSCI

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

|      | ALD | ASH | BEC | BUT<br>* | CUM | ELK | LEX | MAN | MEM | MIL | MR |
|------|-----|-----|-----|----------|-----|-----|-----|-----|-----|-----|----|
| BIV  | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 1   | 0   | 1   |    |
| FTCA | 0   | 0   | 0   | 0        | 1   | 0   | 0   | 0   | 0   | 1   |    |
| HC   | 0   | 0   | 0   | 2        | 1   | 3   | 0   | 1   | 2   | 3   |    |
| OTH  | 0   | 0   | 1   | 0        | 0   | 2   | 0   | 0   | 0   | 0   |    |
| TOT  | 0   | 0   | 1   | 2        | 2   | 5   | 0   | 2   | 2   | 5   |    |

\*BUT represents both the FCI and the LSCI

●Corrected figure - one case

counted in both Jan. and Feb.



|  |         |        |    |        |
|--|---------|--------|----|--------|
| Lit Reports Completed                      | 15      | 12     | 14 | 8      |
| Cases/Hearings or Trials                   | 2       | 2      | 1  | 4      |
| Settlements/Awards                         | 1       | 2      | 0  | 1      |
| \$ Settlements/Awards<br>(\$ in Thousands) | \$147.7 | \$52.0 | 0  | \$30.0 |

\*Corrected figures

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

Bill Burlington, Regional Counsel, will be in the Regional Office May 11-13.

We would like to congratulate Vicki Petricka, Unit Secretary, FCI Phoenix, on her selection as Paralegal Trainee, MARO. Vicki is scheduled to join us sometime during the week of June 15th. We say farewell to Kathy White, wishing her the very best of luck in her new assignment as Paralegal Specialist, FOIA Unit, Central Office. Kathy's last day with us is June 5, 1998.

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

**Annexation of FCI Morgantown** - Margaret Hambrick has written the Director in an attempt to spell out the pros and cons of the city's annexation proposal. Ms. Hambrick believes there are good reasons to consider the city's proposal, and she wanted to involve the Director before she is contacted by the West Virginia congressional delegation.

**U.S. Attorney Orientation--FCI Elkton** - On April 29th, FCI Elkton hosted 21 people from the Cleveland and Akron U.S. Attorney Offices. Warden LaManna, Randy Smith, Michael Pybas and Bill Burlington presented a short orientation/training program, then hosted a lunch and tour of the facility.

**FCI Elkton** - Randy Smith, Paralegal, FCI Elkton, has been invited to be the guest speaker by Kent State University and the Ohio Paralegal Association at the Paralegal Association Spring Dinner May 8, 1998.

**FCI Ashland** - Randy Smith, Paralegal, FCI Elkton, will travel to FCI Ashland May 19-20 to attend a deposition. A former employee, Jack Rohr, was injured when he fell off a North American Van Lines truck and suffered a significant head injury. The employee sued North American for damages on grounds of negligence. North American Van Lines has requested to take the deposition of another BOP employee who was present when the accident occurred and the employee agreed to the deposition. We are still waiting on the attorney to satisfy the procedures in 28 C.F.R. § 16.22 *et seq.* In order to obtain approval for the employee to give the deposition.

FCI Elkton - On April 30, 1998, Randy Smith, Paralegal, contacted Judge Ashley Pike, Probate Judge, regarding the issue of inmate marriages and the state's requirement that individuals personally appear before him or a clerk to obtain a marriage license. Judge Pike confirmed that there are no waivers or exceptions to the state's law, however, he did clarify that it was not necessary for both individuals to appear at the same time. The Captain and Randy then visited the Columbiana County Court House regarding potential security concerns. Since the Captain did not have any security concerns, Randy is recommending to the Warden that the institution use escorted trip procedures to transport inmates to the Court House when necessary.

FCI Petersburg - Recovery under the Medical Care Recovery Act, 42 U.S.C. § 2651, et. seq. - In November 1996 inmate Gregory Demonsones, Reg. No. 18969-016, sustained a broken wrist when the government vehicle he was driving was struck by a POV driven by a State Farm insuree. The BOP spent \$14,839.03 in medical bills for Demonsones' treatment. After submitting a demand for reimbursement, State Farm Insurance remitted a check for the full amount which was deposited into the U.S. Treasury.

Prisoner Litigation Reform Act: None

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

SETTLEMENTS:

FMC Lexington - Dumphord v. Reno - In our last report we notified you that we received an adverse Preliminary Injunction in this case, which involves an extremely severe case of facial keloids. After much work by Joe Tang and the staff at Lexington, the Preliminary Injunction order has now been vacated as part of a settlement agreement. Aside from agreeing to allow inmate Dumphord to be seen by his private plastic surgeon, the Bureau agreed to pay approximately \$30,000 in attorney fees. When apprised of the settlement, Judge Karl Forester seemed pleased that the matter was resolved and that Dr. Dowden would be allowed to continue treating inmate Dumphord.

FCI Memphis - Martin, et al. V. Hawk, et al. - As previously reported we were able to convert this Bivens suit to a FTCA claim and settle it administratively for \$12,000 (\$4,000 to each of the three claimants). On

April 13, 1998, the Judge signed the Order of Dismissal (with prejudice) and on April 17, 1998, the Judgment was entered on the docket sheet. On May 1, 1998, we received a copy of plaintiffs' Motion to Set Aside Judgment. Plaintiffs argued that at the time of settlement, their request for attorney fees arising from a discovery dispute was still pending. They asked the Court to set aside the Judgment and affirm the Magistrate's Order for attorney fees prior to entry of any final judgment.

FCI Petersburg - Jenkins v. U.S. - This is the FTCA action brought by the estate of a deceased former FCI Petersburg inmate who was scalded and stabbed by a former Correctional Officer at that facility (who was then convicted of assault). This action was brought in the District of Columbia and the central issue is which state law would be applied with respect to scope of employment. Based on a careful analysis, a settlement offer of \$7,500, an amount which plaintiff's counsel stated they would accept, was made last week. We are awaiting word back from the AUSA.

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

USP Terre Haute - McGhee v. Clark - On April 7, 1998, Judge Larry McKinney entered an order upholding our Inmate Financial Responsibility Program. Inmate McGhee had claimed the IFRP was unconstitutional, as it amounts to an improper delegation by a court to the Bureau to set the timing of when a fine will be paid. Judge McKinney rejected this claim, holding that in this case, the sentencing court properly set the amount of the fine, and made the fine payable immediately. The Bureau, through the IFRP, then properly set about to collect what the court said was due. The Court distinguished U.S. v. Mortimer and U.S. v. Johnson, as cases where the court actually delegated to the BOP or Probation, the authority to establish when the fine was payable, whereas in this case, the J&C said the fine was payable immediately. We will seek to have this case published.

FPC Seymour Johnson - On April 20, 1998, Chief Judge Graham Mullen, W.D. North Carolina, entered an order that inmate Aubrey Hilliard be released to a CCC in the Charlotte area for the last six months of his one year and one day sentence. Apparently, Judge Mullen does not like the sentencing guidelines and wanted to put this inmate on home confinement, but the guidelines prohibit it. His April 20th order was an attempt to do what the guidelines forbid, and came after a letter

from Maryellen Thoms, Warden, FPC Seymour Johnson, that we would consider Hilliard for a 60 day CCC placement, beginning October 6, 1998. The AUSA, Tax Division, BOP and Roy McLeese, Solicitor General's Office, all recommend that an immediate appeal or Petition for Writ of Mandamus be filed.

**FCI Manchester - Shehee v. Robertson, et al.** - By order filed March 30, 1998, the court denied our objections to the Magistrate Judge's R&R. This included issues of respondeat superior, in personam jurisdiction, and qualified immunity for several of the defendants. The U.S. Attorney's Office agreed with our determination this matter should be appealed and have contacted the Department in this regard. In the interim, a protective order of appeal was suggested. Notice of Appeal was filed April 28.

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

**FMC Lexington - Velda Reed v. Reno** - This age discrimination case was argued before the 6th Circuit on Tuesday, April 21st. The panel of Judges, Ryan, Lay and Daughtery, did not give any indication of how they felt about the government's position that persons over 36 cannot be hired into a primary law enforcement position in an institution. It will probably be several months before we receive a decision.

**In Re Lincoln - FMC Lexington** - On April 29, 1998, an emergency hearing was held to hear inmate Lincoln's claim that he was illegally being held beyond his release date. In fact, inmate Lincoln was not released the week of April 20th, as he refused to sign the installment schedule for payment of his fine, as required by 18 U.S.C. 3624(e). This hearing was complicated by the U.S. Attorney's Office and Probation, concluding that our form (from the IFRP Program Statement) constitutes an impermissible delegation of a court function to the Probation Officer. While I believe their position is incorrect, I have written Jeff Shorba with some language that we could use to modify the form, thus eliminating any confusion about the fact that the installment agreement relates only to collection of a fine, where a court has previously determined both the amount of, and timing for payment of the fine. After the hearing, inmate Lincoln signed a revised form and was released.

**FCI Beckley - Temple v. Olson** - In this habeas case, a state had primary jurisdiction, sentenced the inmate to

a sentence to be served concurrent with his already imposed federal sentence, and ordered the inmate transferred to the U.S.M.S. The Marshals took custody of the inmate and placed him in a private facility. The inmate was subsequently prosecuted and sentenced on a second federal charge and transferred to a BOP facility. BOP ISM staff realized the state had primary jurisdiction and returned the inmate to state custody. The inmate argued his federal sentence commenced when the Marshals took custody of him. The Magistrate recommended granting the petition. The District Court Judge, in a scathing opinion, declined to adopt the Magistrate's recommendations, holding that under the plain meaning of § 3585(a), a federal sentence does not commence until he is both in custody and awaiting transportation to a correctional facility designated by the BOP and subject to the authority of the BOP. In evaluating the inmate's argument that he was forced to serve his sentence in a piecemeal fashion, violating the common law prohibition against installment sentenced, the Judge noted that this prohibition may have been effectively banished in light of the Sentencing Reform Act of 1987. He also noted that while the argument is often raised by prisoners, he could not find one case in which a prisoner emerged victorious.

FMC Lexington - Kevin Jones v. J.T. Holland, et al. - A TRO hearing was held on April 10, 1998, in this Bivens case pertaining to plaintiff's allegations he was denied pain medication and treatment for his kidney stones and back pain. Medical staff and legal staff preparing for this hearing firmly believe plaintiff has been afforded proper medical care. Plaintiff has been prescribed a large variety of psychotropic and non-narcotic painkillers, but has continued to insist he needs Percocet, a narcotic painkiller. He has been tested for kidney stones, which were ruled out. Tests for a slipped disk have been inconclusive. He has never manifested pain symptoms justifying narcotic relief, and plaintiff has a long documented history of drug abuse and manipulation.

Judge Wilhoit deferred ruling on the TRO and continued the hearing pending test results regarding the alleged blood in plaintiff's urine. Judge Wilhoit also strongly suggested FMC staff counsel plaintiff and get him to do a cystogram procedure with analgesics he can bear. Jones has twice previously refused the exam. Wilhoit also expressed his disagreement with our discontinuation of Jones' narcotics, since they had previously been prescribed elsewhere. Judge Wilhoit then held up a copy of the 64 page Dumphord opinion by

Judge Forester and said "with the ink hardly dry on this opinion, I find it hard to believe you all could let this happen again." Subsequent to the hearing Jones did have a cystoscopy and the findings were normal. The tests ordered by Judge Wilhoit have been filed as a status report and we do not anticipate Judge Wilhoit will grant any injunction requiring us to give Jones narcotics.

USP Terre Haute - Shaheed v. Officer Timothy Kimbler - This Bivens case is scheduled for trial on May 18, 1998. This case involves allegations of improper use of force while escorting the inmate from SHU to the Lt.'s Office.

USP Terre Haute - Cosby v. Martin, et al. - Trial had been scheduled for April 13, 1998, in this Bivens case. However, after the defendant was brought from Florence to USP Terre Haute for the trial, he filed a motion for voluntary dismissal of the case. The case was dismissed without prejudice.

FCI Cumberland - The Warden at Cumberland received a letter from Brett Kimberlin asserting judgment had been issued in his favor and against the government regarding the Zimmer Amendment. Inmate Kimberlin requested immediate return of all electric musical instruments, R-NC and x-rated movies, and repair of all weight lifting equipment. He attached to his letter two "Default" notices, signed by the Deputy Clerk of the U.S. District Court for the District of Columbia, declaring the BOP and DOJ were in default. Research into this issue revealed that Central Office had provided a litigation report to the AUSA, but the AUSA failed to file a timely response. A response was being filed by the AUSA last week to reopen the matter.

FCI Cumberland - Horton v. Henry - This habeas petition alleged the petitioner's due process rights were violated when he was moved from state custody to federal custody through a writ ad prosequendum, returned to state custody, and then transferred back to federal custody without the issuance of a second writ, and that he was detained without the issuance of a commitment order. Petitioner had previously litigated the exact same issues in 1995, when he appealed his conviction to the Fourth Circuit. In an order dated April 25, 1998, Judge Motz dismissed the petition based on the government's argument that the petition was a clear abuse of the writ.

REPRESENTATION NOT RECOMMENDED FOR STAFF: None

#### SIGNIFICANT FTCA CLAIMS:

FCI Manchester - Rose v. BOP, et al. - This wrongful death claim was brought under the FTCA by the widow of inmate Robert Rose, Reg. No. 04192-032, who died in our custody on October 11, 1996. The immediate cause of death was atherosclerotic cardiovascular disease, resulting from probably acute myocardial infarction. The multi-layer mortality chart review contains the conclusion that an appropriate standard of care was provided. However, the plaintiff alleges the Health Services Manual and community standards were not met.

#### MEDICAL MALPRACTICE CASES UPDATE:

FCI Elkton - Westfall v. Dr. Mupanduki, et al. - This is a Bivens action alleging the defendants were deliberately indifferent to his serious medical need of bladder cancer by failing to provide routine medical procedures every three months. The information contained in the defendant's request for government representation shows that inmate Westfall was provided with a cystoscopy within four months from the date of the last procedure. Although some delay did occur, it is due to inmate Westfall's conduct while at the community hospital which resulted in hospital staff refusing to provide the cystoscopy. However, the cystoscopy was subsequently rescheduled and performed with negative results.

#### SIGNIFICANT ADMINISTRATIVE REMEDIES:

FCI Manchester - Daniels, Willie - With the help of Wendy Roal and Warden Chandler, we resolved this difficult Rehabilitation Act issue, by agreeing that inmate Daniel's decision to quit smoking, had mooted his claim. Daniels originally claimed by placing him in a wheelchair-accessible-cell in a non-smoking unit, we treated him differently than non-disabled inmates. FCI Manchester also agreed to convert cells in a current smoking unit to handicap accessible, in case future disabled inmates desire to be in a smoking unit.

FDC Milan - The legal office at Milan just received their first two administrative remedies arising from the pilot common fare program. It is interesting to note that both remedies were filed out of the FDC.

NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES: None

ALTERNATIVE DISPUTE RESOLUTION EFFORTS: None  
18 U.S.C. § 3621(e) LITIGATION:

FCI Morgantown (4th Circuit) - Pelissero and Hayes v. Thompson On April 10th, this 2-point enhancement/Felon in Possession, early release case was argued to the 4th Circuit. The panel was prepared to rule that the new rule mooted these cases. We pointed out that the new rule did not apply, as both appellants entered a drug treatment program prior to October 1997. When this was pointed out, Judge Billy Wilkens responded "you realize that admission hurts your case." By this comment, I believe Judge Wilkens may have been suggesting that the panel was prepared to strike down the Program Statement, Definition of the Term, Crimes of Violence, and had hoped to avoid that result by upholding the new rule, a la Bush v. Pitzer.

FCI Memphis - Lanxter v. Luttrell - This habeas petition arises from our denial of plaintiff's request for early release under §3621(e). This denial was based on plaintiff's sentence enhancement for his possession of a firearm during a drug trafficking offense. The Court analyzed plaintiff's request under the new regulation and denied plaintiff. The Court concluded that given the placement of sentence-reduction authority in a wholly discretionary statute focused on prison management, and given the plainly precatory and non-mandatory language of the authority to reduce a sentence, it seems clear that § 3621(e)(2)(B) does not create any cognizable and enforceable right to a sentence reduction. This section of the statute clearly insulates the BOP's regulatory enactments from judicial review under the APA. The Court specifically criticized the reasoning of both the Third and Ninth Circuits (Roussos and Downey) and their analysis of the BOP's categorization of offenses. On April 1, 1998, a letter was sent to the U.S. Attorney's Office requesting they seek publication of the decision.

FPC Alderson - Debbie Munson, Attorney, was recently informed that lawsuits will soon be served challenging the Bureau's new rule.

FCI Cumberland - Weeks v. Bidwell - This is the adverse decision previously noted where a Judge voided Section 9 of P.S. 5162.02 (2-point enhancement disqualifies an inmate from early release eligibility). We had until April 25 to reevaluate Weeks' eligibility for early release without consideration of the 2-point firearm

enhancement. As a result of that redetermination, Weeks' transfer packet has been prepared and forwarded to the CCC, and it is expected he will be released to the halfway house on May 5, 1998, for completion of the community transitional services phase of the drug program.

FCI Cumberland - Frank v. Henry - This is another habeas previously reported wherein the inmate challenges his denial of early release based on a 2-point firearm enhancement. In light of the fact that this case presents the same facts and is before the same Judge who rendered the adverse decision in Weeks, we have decided to follow the Weeks decision and reevaluate Frank's eligibility for early release absent the 2-point firearm enhancement. As a result of our redetermination, Frank is now eligible for immediate transfer to a halfway house, and the appropriate contacts and paperwork have been prepared. The AUSA will be filing documentation with the court stating our concession.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

FCI Beckley - Aubrey Frett, Reg. No. 02463-094 and James Howard, Reg. No. 40763-066 were involved in an assault on another inmate. Both inmates had weapons in their possession. The cases are expected to be presented to the grand jury soon.

FCI Beckley - Anthony Suber, Reg. No. 64119-061 was caught on tape receiving marijuana from a female visitor. The inmate was dry-celled and three balloons of marijuana were recovered. The female visitor used another woman's identification to gain access to the institution. Both cases are expected to be presented to the grand jury soon.

FCI Elkton - Wilfredo Oyola-Diaz, Reg. No. 20734-050, has been referred to the FBI and U.S. Attorney's Office Criminal Division for possession of marijuana. Institutional staff received a tip that inmate Diaz was bringing in drugs after visits. A subsequent search of his locker revealed two balloons containing marijuana. Inmate Diaz was visiting at the time of the search and was placed in a dry cell after the visit. The following day inmate Diaz excreted four balloons containing marijuana. The FBI has indicated that the U.S. Attorney's Office may decline prosecution. If this occurs, Warden LaManna and Randy Smith, Paralegal, are planning to call the Chief of the Criminal Division

to encourage prosecution.

**UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:**

**FCI Beckley** - Roger McKenzie, Reg. No. 05233-088, pled guilty to the charge of Possession of Contraband (marijuana) on April 11, 1998.

**FCI Beckley** - Jeffrey Levering, Reg. No. 03594-028, pled guilty to the charge of Possession of Contraband (a weapon) on April 20, 1998.

**FCI Beckley** - Brian Clarke, Reg. No. 12541-014 is charged with Possession of Contraband (weapon). Trial is scheduled to start May 12, 1998. He has indicated that he will plead guilty.

**FCI Beckley** - Fred Brunet, Reg. No. 18375-018 is charged with Possession of Contraband (marijuana, heroin, pills). Trial is scheduled to start May 27, 1998. He has indicated that he will plead guilty.

**FCI Manchester** - Inmate Gammon, Reg. No. 03600-028, entered a guilty plea under 18 USC § 1791 for attempting to obtain a prohibited object (marijuana) into FCI Manchester in violation of 21 USC § 802. In October 1997, inmate Gammon received an express mail package marked "legal mail" containing the marijuana. Staff discovered the attempted introduction through phone monitoring procedures. Sentencing is scheduled for July.

**FCI Manchester** - USA v. Clark - In this case involving an inmate-on-inmate assault, the defendant alleges racial discrimination in the manner such cases are referred for prosecution. Accordingly, the defendant sought discovery of incident reports, DHO decisions, supporting memoranda, and policy regarding criminal referrals. Responsive documents were provided to the AUSA on April 30. Certain documents were sanitized and a protective order will be sought to prevent the inmate from possessing these documents in the institution.

**FCI Elkton** - The case of U.S. v. Dumersia is presently scheduled for May 26, 1998. This is the case where an inmate bit a staff member during efforts to restrain the inmate and place him in cuffs.

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

REHABILITATION ACT: None

Ensign Amendment Cases: None

Dismissals Under PLRA:

USP Terre Haute - Shabazz v. Clark, et al. - This Bivens action alleging mistreatment in violation of plaintiff's federally protected rights was dismissed without prejudice on March 26, 1998, for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a).

**New Litigation Cases by Institution and Type  
Received During the Month of April 1998**

|      | ALD | ASH | BEC | BUT<br>* | CUM | ELK | LEX | MAN | MEM | MIL | MR |
|------|-----|-----|-----|----------|-----|-----|-----|-----|-----|-----|----|
| BIV  | 0   | 1   | 0   | 0        | 1   | 1   | 1   | 0   | 0   | 1   | 0  |
| FTCA | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 1   | 0   | 0   | 0  |
| HC   | 0   | 0   | 0   | 0        | 1   | 0   | 0   | 0   | 0   | 0   | 0  |
| OTH  | 0   | 0   | 0   | 0        | 0   | 0   | 0   | 0   | 1   | 0   | 0  |
| TOT  | 0   | 1   | 0   | 0        | 2   | 1   | 1   | 1   | 1   | 1   | 0  |

\*Represents both the FCI and LSCI

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

|      | ALD | ASH | BEC | BUT<br>* | CUM | ELK● | LEX | MAN | MEM | MIL | MR |
|------|-----|-----|-----|----------|-----|------|-----|-----|-----|-----|----|
| BIV  | 0   | 1   | 0   | 0        | 1   | 1    | 1   | 1   | 0   | 2   |    |
| FTCA | 0   | 0   | 0   | 0        | 1   | 0    | 0   | 1   | 0   | 1   |    |
| HC   | 0   | 0   | 0   | 2        | 2   | 2    | 0   | 1   | 2   | 3   |    |
| OTH  | 0   | 0   | 1   | 0        | 0   | 2    | 0   | 0   | 1   | 0   |    |
| TOT  | 0   | 1   | 1   | 2        | 4   | 5    | 1   | 3   | 3   | 6   |    |

\*BUT represents both the FCI and the LSCI

●Corrected figure (case counted twice)

# memorandum

DATE: June 8, 1998 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

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

SUBJECT: May 1998 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                            135   187   229   160   168  
 Answered                            143   181   178   201   174

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

# Pending                            230   195   179   190   191  
 # Received                            68    54    75    62    42  
 # Answered                            91    71    58    60    38  
 # Pending                            195   179   190   191   195  
 # Over Six Month                    0      0      0      0      0

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

# Pending                            13    23    12    23    24  
 # Received                            43    24    54    54    36  
 # Answered                            34    34    41    53    42  
 # Pending                            23    12    23    24    18  
 # Over 20 Working Days            1    2\*    0      0    4\*\*

\*File has been requested from archives. \*\*One file requested from archives; another request archives sent wrong file.

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

Cases Pending                        338   331   329   314   273  
 New Cases Received                 7    16\*   4\*    11    16  
 Habeas Corpus                        4    7    4    3    6  
 Bivens                                1    5\*   0\*    6    5  
 FTCA                                  1    2    0    1    2  
 Other                                  1    2    0    1    3  
 Cases Closed                         14    19   21   62   28  
 Cases Pending                        331   329   314   273   261  
 Lit Reports Completed                15    12   14    8    13  
 Cases/Hearings or Trials            2    2    1    4    0  
 Settlements/Awards                  1    2    0    1    2  
 \$ Settlements/Awards                \$147.7 \$52.0 0 \$13.9\* \$9.0

(\$ in Thousands)

\*Corrected figures

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

Bill Burlington, Regional Counsel, will be at the MDC LA for a Legal Management Review June 1-4; and on annual leave June 15-19.

Michelle Fuseyamore, Attorney, FCI Butner, will attend Public Information Officer training at the MSTC June 1-5.

We welcome Betsy McCubrey, legal intern at FCC Butner, and Shannon Cheek, paralegal intern at FCI Manchester. Betsy comes to Butner from the University of North Carolina at Chapel Hill and will be working there until August. Shannon is a paralegal studies major at Eastern Kentucky University and will be with us until mid-August.

Kathy Smallwood, Paralegal, FCI Memphis and a member of the Memphis Hostage Negotiation Team, is attending the Crisis Management Training this week at FCI Beckley.

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

**FPC Seymour Johnson** - We reported last month that we had received an illegal court order to release this inmate to home confinement. After BOP and the AUSA protested, the Judge vacated the order and entered a strong recommendation for home confinement. We will not comply with the recommendation, as it would violate 18 USC 2634(c), which imposes a 10% of-sentence-limit on the length of time one can spend in home confinement.

**FCI Butner** - On May 12, 1998, FCI Butner received a Notice of Violation from the North Carolina Dept. Of Health and Natural Resources regarding alleged contamination of state waters, and failure to obtain permits for modifications to our lift station. Jeff Limjoco, Commercial Law Branch, worked with us on this. The response to the Notice of Violation was delivered on May 22, 1998.

**FMC Lexington** - United States v. White - On May 4, 1998, we received an order from Judge Frederic Smalkin, District of Maryland, that inmate White be permitted to have a word processor while in prison. Apparently, inmate White was an author prior to his conviction. While the order stated it was entered with the consent of the Government, the Criminal AUSA that prosecuted inmate White, agreed to approach Judge Smalkin, and eventually, the order was rescinded. However, the Judge's order (1998 WL 246562) is extremely sarcastic, stating that BOP "routinely ignores judicial sentencing recommendations: and "BOP chose not only to ignore this Order, but to contest it. It has won. The Court gives up." We plan to write Judge Smalkin.

**FCI Petersburg - United States v. Wondree** - On May 20, 1998, Judge Merhige entered an illegal order directing BOP to place inmate Wondree in home confinement for a period far in excess of the 10% limit of 18 USC 3624(c). A letter has been written to the court stating that the Order is contrary to federal statutes, and asking that it be changed to a recommendation.

**FCI Elkton - Randy Smith, Paralegal**, was invited by the U.S. Attorney's Office in Cleveland to attend a conference June 10, 1998, that the Chiefs and Deputy Chiefs of the Criminal Division within the Sixth Circuit will be attending. He will be discussing civil and criminal issues facing the BOP.

**FCI Manchester** - On May 27, 1998, Judge James P. Jones and Magistrate Judge Pamela M. Sargent of the Western District of Virginia, along with a member of their staff and four U.S. Probation Officers toured the institution and had discussions with the Warden, Executive Staff, CMC and paralegal. Both judges are new to the bench and wanted to familiarize themselves with the BOP and the institutions holding numerous defendants appearing before them. They expect to handle at least some of the case load for our new facility in Lee County. They also plan to visit Lexington, Ashland, Beckley and Alderson.

**Prisoner Litigation Reform Act:** None

**USP Terre Haute - Bates v. Clark** - On May 22, 1998, we received an order from the Northern District of Illinois, ordering Warden Clark to withdraw funds from Thomas Bates' (plaintiff in the underlying suit) trust fund account, despite his refusal to sign the withdrawal authorization. The Court cited Newlin v. Helman, 123 F.3d 429 (7th Cir. 1997) for the proposition that under the PLRA, an inmate impliedly consents to a withdrawal of money to pay the full filing fee, by the simple act of filing his complaint or appeal. The Court rejected Warden Clark's position that as Trustee, we still need a written consent from the inmate before we withdraw funds. Pursuant to the order, funds will be withdrawn from the inmate's trust fund account.

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

**SETTLEMENTS:**

**FCI Milan - Miller v. U.S.** - Plaintiffs Shantel Miller and Ruanesha Swims, a minor child, filed this complaint after denial of their administrative claim (sum certain \$250,000). It was determined to be in the best interests of the government to settle the case for \$1,500. The plaintiffs were

at FDC Milan for a social visit when the seven year old plaintiff's finger received a 3-cm laceration to her thumb, with a large amount of bleeding, when it was caught in the lobby door. The case was settled for several reasons: child and parent might be considered invitees under Michigan law; the doors involved were glass and very heavy which causes them to swing shut quickly; the chairs are positioned in the visiting room in such a way that the mother's view of the child playing with the door was obscured; under Michigan law negligence cannot be imputed to the parent; and under Michigan law a child under the age of seven cannot be found contributorily negligent.

**FCI Petersburg - Jenkins v. U.S.** - This is the FTCA case brought by the estate of a deceased former FCI Petersburg inmate who was scalded and stabbed by a former correctional officer at that facility (who was then convicted of assault). The case was settled for \$7,500 and the settlement release has been written very broadly to put an end to any further litigation over this incident.

**FCI Memphis - Martin, et al. v. Hawk, et al.** - As previously reported, we were able to convert this Bivens suit to an FTCA claim and settle administratively for \$12,000 (\$4,000 to each of three claimants). On April 13, 1998, the Judge signed the Order of Dismissal (with prejudice). On May 1, 1998, we received a copy of plaintiff's Motion to Set Aside Judgment. Plaintiffs argued that at the time of settlement their request for attorney's fees arising from a discovery dispute was still pending. They asked the Court to set aside the judgment and affirm the Magistrate's Order for Attorney's Fees prior to entry of any final judgment. On May 11, 1998, the Court denied plaintiffs' Motion stating the plaintiffs failed to raise their issues during the pendency of the settlement negotiations and in fact informed the court the case had been settled.

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FMC Lexington - Kevin Jones v. J. T. Holland, et al.** - Even though Judge Wilhoit dismissed the action with prejudice, the order did state that he (Judge Wilhoit) had determined at the April 10, 1998, preliminary injunction hearing that the defendants were deliberately indifferent to plaintiff's serious medical needs because the cause of the blood in plaintiff's urine had not been discovered and properly addressed. However, the Court dismissed the action in its entirety, since plaintiff received the relief he requested, to be seen by an outside urologist and obtain "some type of relief." Wilhoit made these factual findings based upon a preliminary injunction hearing, before the defendants could brief the issues with a Motion to Dismiss. The Court treated this case like a Bivens even though the plaintiff only sought

injunctive relief.

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

**FMC Lexington** - Joe Tang, Attorney, is coordinating monthly meetings with inmate Dumphord, former plaintiff in the Bivens case where a settlement agreement was reached. Joe, a member of Dumphord's unit team, a work detail supervisor, and at least one medical administration staff member meet with Dumphord in Health Services to briefly discuss any concerns he might have and anything which may impact the settlement agreement. These meetings are held to proactively discover issues which may threaten the settlement agreement, since Dumphord is known not to aggressively voice his complaints to staff. During the first meeting at the end of April, Dumphord said everything was great, his work, medical care, etc. He did raise some vague issues at his second meeting which staff will explore further.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:** None

**SIGNIFICANT FTCA CLAIMS:** None

**MEDICAL MALPRACTICE CASES UPDATE:**

**FMC Lexington** - Turner v. Ramirez, et al. - This Bivens case makes a number of allegations of inadequate medical care, in particular he alleges failure to properly treat his back condition and back pain. The response is due in June.

**FMC Lexington** - Gravenmier v. Holland, et al. - Bivens action where plaintiff alleges he has been deprived of adequate pain medication for his back condition. Although the complaint was filed as a Motion seeking injunctive relief, Judge Forester screened the case and let it go forth as a Bivens action against individual defendants. The response is due in July.

**SIGNIFICANT ADMINISTRATIVE REMEDIES:**

**FCI Butner** - Inmate Anderson Terry filed an administrative remedy claiming that his HIV status was erroneously released to another inmate by a member of the medical staff. The medical staff called for inmate "Terry," and another inmate with the same last name responded. The doctor proceeded to discuss HIV medication with this inmate and then realized it was the wrong "Terry." The doctor attempted remedial measures by not calling the correct Terry for another hour, and then calling him only by his first name. The administrative remedy was written in the format of a court complaint, and we expect that it will be filed.

**FCI Milan** - FCI Milan received a challenge to the Common Fare pilot program via an administrative remedy filed by inmate Peoples at the FDC. Peoples requested Common Fare program, but cited only health reasons for his placement into the program. He was denied entrance to the program, and the remedy response reflects this denial was based upon health reasons.

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:** None

**FCI Ashland** - Zayid v. Noe - On May 12, 1998, we received a favorable R&R which found that Father Noe, a Bivens defendant, did not violate inmate Zayid's right to practice his religion when he did not give the inmate a day off work on the October 1996, Day of Atonement. Unfortunately, Zayid had stated in his complaint that the City of Boerne decision ruled RFRA was unconstitutional. The court cited Boerne and held that RFRA does not now apply in the context of actions taken by the Federal government. We will file objections pointing out that we believe RFRA is still the applicable standard for claims against the Federal government. The Magistrate also followed the Garrett v. Hawk decision that exhaustion was not required in a Bivens suit, as the BOP Administrative Remedy system does not provide monetary relief. We will also object to this portion of the ruling.

**ALTERNATIVE DISPUTE RESOLUTION EFFORTS:** None

**18 U.S.C. § 3621(e) LITIGATION:**

After review by Nimish Patel, we have circulated a sample motion for MXR staff to use in defending suits which attack early release decisions under the Categorization of Offenses Program Statement. This motion was originally drafted by Debbie Munson.

**FPC Alderson** - Waddell v. Hemingway - This Alderson inmate completed a residential drug treatment program on January 20, 1995, prior to the BOP establishing any criteria to implement the new early release provision. Under OM 017-95 a conviction for armed bank robbery was identified as a crime of violence, and a conviction for unarmed was identified as a offense that may be a crime of violence, depending on the specific offense characteristic assigned. Based on Waddell's J&C, which at that time indicated she was convicted of both armed and unarmed robbery, she was declared ineligible. In April 1996, CN-01 to P.S. 5162.02 was issued indicating a conviction for

unarmed bank robbery was to be considered a crime of violence in all cases. Later, Waddell's J&C was amended to reflect a conviction of unarmed bank robbery only. Upon re-evaluation Waddell was still found ineligible based on the unarmed bank robbery. Waddell argues that the BOP has exceeded the scope of its authority and has retroactively applied CN-01 to deny her eligibility. She contends she would have been eligible in June of 1995 but for the erroneous J&C. A motion for summary judgment/motion to dismiss has been filed.

**FCI Milan - Rhodes v. Pontesso** - This habeas petition challenged the denial of eligibility for one year off under RDAP based on his 922(g) conviction. On May 4, 1998, we received notice the Court had adopted the 5th Circuit's position in Venegas v. Henman and denied the petition.

**FCI Milan - Scott v. Pontesso** - Inmate alleges BOP's inclusion of previous convictions as a basis for non-eligibility for the one year off provisions of RDAP, is not a permissible interpretation of the statute. On May 4, 1998, we received notice the Court adopted the R&R and denied/dissmissed the petition.

**FCI Milan - Kienlen v. Scibana** - Inmate alleges denial of one year off under RDAP improper based on previous state misdemeanor conviction for negligent homicide. BOP revisited their decision and granted inmate eligibility for one year off. We received notice on May 4, 1998, that the Court had dismissed the action as moot.

**FCI Cumberland - Jones v. Henry, et al** - Petitioner challenges the denial of early release under §3261(e). This denial was based on the inmate's current conviction of 18 U.S.C. § 924(c), Use of a Firearm During a Drug Trafficking Crime.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

**FCI Elkton** - On May 21, 1998, inmate Ernest Gaines, Reg. No. 36363-060, stole a 1997 Ford F-150 government vehicle and left prison property. Inmate Gaines was assigned to the Camp and worked on the landscape detail. The USMS apprehended Gaines at his wife's house in Akron, Ohio, approximately 60 miles from FCI Elkton. The government vehicle was found nearby in a garage. The USMS and FBI are conducting a joint investigation. The U.S. Attorney's Office plans to present the case to the Grand Jury in late June.

**UPDATE ON PREVIOUSLY REPORTED CRIMINAL MATTERS:**

**FPC Lexington** - Inmate Kimberly Lynn Osborne, pled guilty to fraudulent use of a social security number. Osborne was attempting to obtain financial aid money from the University

of Kentucky using a false social security number. She is scheduled to be sentenced before Judge Wilhoit on August 7, 1998. Lexington staff screening Osborne's mail discovered her "scam" and referred the matter to law enforcement authorities.

**FCI Elkton - U.S. v. Dumersia** has been rescheduled for August 24, 1998. This is the case where the inmate bit a staff member during efforts to restrain the inmate.

**FCI Elkton** - Last month we reported that inmate Wilfredo Oyola-Diaz had been referred to the FBI and U.S. Attorney's Office for possession of marijuana. Inmate Oyola-Diaz was caught bringing in drugs through the visiting room. The FBI had indicated that the U.S. Attorney's Office may decline prosecution. However, when Elkton staff suggested they would contact the U.S. Attorney's Office to encourage prosecution, the FBI stated they would do a follow-up by having an agent contact the spouse in New Jersey and question her regarding her involvement (she was the only visitor he had prior to being placed in dry cell status). We are monitoring this case.

**FCI Beckley** - The following inmates are scheduled for sentencing as indicated: Jeffrey Levering, June 15, 1998, Possession of Contraband (a weapon); Roger McKenzie, June 29, 1998, Possession of Contraband (marijuana); Fred Brunet, July 24, 1998, Possession of Contraband (marijuana, heroin, pills); and Brian Clarke, August 10, 1998, Possession of Contraband (a weapon).

**FCI Beckley** - Jamel Wingate was sentenced in May to 24 months consecutive for Possession of Contraband (a weapon).

**FCI Beckley** - Anthony Suber was indicted on May 28, 1998. He was caught on tape receiving marijuana from a female visitor. The inmate was dry-celled and three balloons of marijuana were recovered.

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

**REHABILITATION ACT:** None

**Ensign Amendment Cases:** None

**Dismissals Under PLRA:**

**FCI Memphis - Thomas v. Luttrell** - Plaintiff sued Warden

Luttrell and Officer Roby under Bivens alleging that among other issues, the officer verbally threatened to sexually abuse the inmate. Inmate exhausted his administrative remedies with regard to some, but not all, of the claims. However, the court found that verbal harassment and verbal abuse alone do not support liability under Bivens and therefore dismissed the associated claims as frivolous. The other claims were dismissed for failure to exhaust. Interestingly, the court screened the claims although it found that plaintiff had not paid any filing fees and that he failed to submit an in forma pauperis affidavit or a trust fund account statement. In addition to its order of dismissal, the court also ordered plaintiff to submit the forms and to pay the filing fees.

New Litigation Cases by Institution and Type  
 Received During the Month of May 1998

|      | ALD | ASH | BEC | BUT* | CUM | ELK | LEX | MAN | MEM | MIL | MRG | PET | SEY | THA | TOT |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| BIV  | 0   | 0   | 0   | 1    | 0   | 1   | 2   | 0   | 1   | 0   | 0   | 0   | 0   | 0   | 5   |
| FTCA | 0   | 0   | 0   | 0    | 1   | 0   | 0   | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 2   |
| HC   | 0   | 1   | 1   | 0    | 0   | 0   | 0   | 0   | 1   | 1   | 2   | 0   | 0   | 0   | 6   |
| OTH  | 0   | 0   | 0   | 0    | 2   | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 0   | 0   | 3   |
| TOT  | 0   | 1   | 1   | 1    | 3   | 1   | 2   | 1   | 2   | 2   | 2   | 0   | 0   | 0   | 16  |

\*Represents both the FCI and LSCI

New Litigation Cases by Institution and Type

Received Calendar Year to Date

|      | ALD | ASH | BEC | BUT* | CUM | ELK● | LEX | MAN | MEM | MIL | MRG● | PET | SEY | THA | TOT |
|------|-----|-----|-----|------|-----|------|-----|-----|-----|-----|------|-----|-----|-----|-----|
| BIV  | 0   | 1   | 0   | 1    | 1   | 2    | 3   | 1   | 1   | 2   | 2    | 2   | 0   | 1   | 17  |
| FTCA | 0   | 0   | 0   | 0    | 2   | 0    | 0   | 1   | 0   | 2   | 0    | 0   | 0   | 1   | 6   |
| HC   | 0   | 1   | 1   | 2    | 2   | 2    | 0   | 1   | 3   | 4   | 2    | 1   | 1   | 4   | 24  |
| OTH  | 0   | 0   | 1   | 0    | 2   | 2    | 0   | 1   | 1   | 0   | 0    | 0   | 0   | 0   | 7   |
| TOT  | 0   | 2   | 2   | 3    | 7   | 6    | 3   | 4   | 5   | 8   | 4    | 3   | 1   | 6   | 54  |

\*BUT represents both the FCI and the LSCI

●Corrected figure (case counted twice)

# memorandum

DATE: July 13, 1998 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

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

SUBJECT: June 1998 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Amy Whalen Risley, Executive Assistant

| ADMINISTRATIVE REMEDIES | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|-------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| Received                | 135 | 187 | 229 | 160 | 168 | 200 |     |     |     |     |     |     |
| Answered                | 143 | 181 | 178 | 201 | 174 | 194 |     |     |     |     |     |     |

| TORT CLAIMS      | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| # Pending        | 230 | 195 | 179 | 190 | 191 | 195 |     |     |     |     |     |     |
| # Received       | 68  | 54  | 75  | 62  | 42  | 49  |     |     |     |     |     |     |
| # Answered       | 91  | 71  | 58  | 60  | 38  | 83  |     |     |     |     |     |     |
| # Pending        | 195 | 179 | 190 | 191 | 195 | 154 |     |     |     |     |     |     |
| # Over Six Month | 0   | 0   | 0   | 0   | 0   | 1   |     |     |     |     |     |     |

| PRIVACY                | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| # Pending              | 13  | 23  | 12  | 23  | 24  | 18  |     |     |     |     |     |     |
| # Received             | 43  | 24  | 54  | 54  | 36  | 47  |     |     |     |     |     |     |
| # Answered             | 34  | 34  | 41  | 53  | 42  | 32  |     |     |     |     |     |     |
| # Pending              | 23  | 12  | 23  | 24  | 18  | 35  |     |     |     |     |     |     |
| # Over 20 Working Days | 1   | 2*  | 0   | 0   | 4** | 2*  |     |     |     |     |     |     |

\*File has been requested from archives. \*\*One file requested from archives; another request archives sent wrong file.

| LITIGATION               | JAN     | FEB    | MAR | APR     | MAY   | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|--------------------------|---------|--------|-----|---------|-------|-----|-----|-----|-----|-----|-----|-----|
| Cases Pending            | 338     | 331    | 329 | 314     | 273   | 261 |     |     |     |     |     |     |
| New Cases Received       | 7       | 16*    | 4*  | 11      | 16    | 13  |     |     |     |     |     |     |
| Habeas Corpus            | 4       | 7      | 4   | 3       | 6     | 7   |     |     |     |     |     |     |
| Bivens                   | 1       | 5*     | 0*  | 6       | 5     | 5   |     |     |     |     |     |     |
| FTCA                     | 1       | 2      | 0   | 1       | 2     | 1   |     |     |     |     |     |     |
| Other                    | 1       | 2      | 0   | 1       | 3     | 0   |     |     |     |     |     |     |
| Cases Closed             | 14      | 19     | 21  | 62      | 28    | 12  |     |     |     |     |     |     |
| Cases Pending            | 331     | 329    | 314 | 273     | 261   | 261 |     |     |     |     |     |     |
| Lit Reports Completed    | 15      | 12     | 14  | 8       | 13    | 21  |     |     |     |     |     |     |
| Cases/Hearings or Trials | 2       | 2      | 1   | 4       | 0     | 0   |     |     |     |     |     |     |
| Settlements/Awards       | 1       | 2      | 0   | 1       | 2     | 0   |     |     |     |     |     |     |
| \$ Settlements/Awards    | \$147.7 | \$52.0 | 0   | \$13.9* | \$9.0 | 0   |     |     |     |     |     |     |

(\$ in Thousands)

\*Corrected figures

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

Bill Burlington, Regional Counsel, was in the Regional Office June 30-July 2, 1998, and will be attending the National Legal Meeting July 26-July 31.

This month we welcome Vickie Petricka, Paralegal Trainee, to the Regional Office. Vickie comes to us from FCI Phoenix, where she was the Unit Secretary in the WITSEC Unit. We also learned this month that Diane Gossman, Legal Instruments Examiner (LIE), has been selected as LIE at USP Terre Haute. Diane should report to Terre Haute on August 30th. We will all miss Diane, as she has done an outstanding job for us.

We bid a fond farewell to Lynn Bouchillon, Paralegal, FCI Milan. After over seven years of service at Milan, Lynn will be reporting to FLETC as an Attorney-Advisor. Best of luck to Lynn and his family.

Congratulations to Milt Williams, Paralegal, FCI Petersburg, for his selection as Employee of the Year at that institution. Milt will be on annual leave July 12-18, 1998.

Joe Tang, Attorney, FMC Lexington, acted as host for the guest speaker for the Asian-Pacific Heritage Month celebration. The guest speaker was Frank Woo, Lexington-area Chinese-American businessman who recently made national headlines after being refused entry into China because of his dissident activities. Mr. Woo's presentation on the differences between the governments and penal systems in the U.S. and China was well received.

Debbie Munson, Attorney, FCI Beckley, will be on annual leave July 20-24. On June 16, 1998, Debbie delivered a presentation to the Community Relations Board regarding the role of an institution attorney and the types of legal issues that relate to the management of a correctional facility.

Teresa Marvel, Paralegal, USP Terre Haute, will be on annual leave July 12-18, 1998.

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

**Judge Payne:** E.D. Va. - In a criminal case, Richmond AUSA Joan Evans stated that she was before Judge Payne on a sentencing matter. The inmate to be sentenced had a drug problem, and Judge Payne stated in open court that his experience was the BOP rarely followed his recommendations. He then asked for a copy of the BOP's report to Congress on 18 USC § 3621, which we provided. Apparently, Judge Payne wants to see what resources we have before he enters a recommendation. This is the fourth Judge (others include Judge Forrester, Lexington;

Judge Smalkin, Baltimore; Judge Mullin, Charlotte) to recently express their opinion that the BOP regularly disregards their recommendations at the time of sentencing.

**FCI Cumberland** - Bill Burlington and Carolyn Lanphear, Paralegal, FCI Cumberland, attended an exploratory meeting between the U.S. Attorney's office for the District of Maryland, and various federal agencies on July 1, 1998. Various issues were discussed on how to improve the efficiency of handling cases and the relationship between the U.S. Attorney's Office and other agencies. Another meeting is tentatively scheduled for September.

**FCI Butner** - On June 11, 1998, FCI Butner received a Notice of Violation from the North Carolina Department of Health and Natural Resources regarding late filing of quarterly reports for our air permit. (The permit was issued in September of 1997; we have had two quarterly reports become due, which were filed late.) The notice requested an explanation as to how we would prevent late filings in the future. The institution responded that the due dates for the report would be loaded into our time management system to ensure timely reporting in the future.

Last month we reported a NOV from the same state agency on the lift station and alleged contamination of the wetland. We have not yet received any comment or decision on the response which we submitted to the state agency. However, we have received an evaluation of the lift station containment area from an engineering firm. The evaluation concluded the containment area was sufficiently above bedrock, but that the soil needs to be compacted to be in compliance with state regulations.

**FCI Beckley** - Law Clerks from the Southern District of W.Va. toured the facility on June 25, 1998. After a four-hour comprehensive tour, the Law Clerks departed the facility with a very different picture of the institution than that painted by inmates. An invitation has been extended to the Judges to also tour the facility.

**FCI Memphis** - With the assistance of the Cecil C. Humphreys School of Law at the University of Memphis, the Legal Office has arranged an institution tour for participants of the Tennessee Prelaw Fellowship Program. This program was designed to attract African-American, Tennessee resident college students to consider applying for admission to the two state law schools.

**Prisoner Litigation Reform Act:**

**FMC Lexington - Jones v. Holland** - We have forwarded an appeal recommendation in this case, where during a Preliminary Injunction hearing, Judge Wilhoit found we violated the 8th Amendment by refusing to adequately investigate an inmate's complaint that he had blood in his urine. Aside from contesting this factual finding, we are recommending that we appeal the court's failure to require exhaustion of administrative remedies in this Bivens case. The Sixth Circuit now has two published decision requiring inmates to exhaust in 1983 cases, Brown v. Toombs, 1998 WL 136185 (6th Cir. 1998) and White v. McGinnis, 131 F.3d 583 (6th Cir. 1997). Unfortunately, neither decision addresses the claim that monetary relief was not available in the state system.

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

**SETTLEMENTS:** None

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FMC Lexington - Reed v. Reno** - On June 8th, the Sixth Circuit ruled that the Bureau's mandatory age requirement for primary law enforcement positions did not violate the Age Discrimination in Employment Act, 29 U.S.C. 633a, or the Veterans Preference Act. This opinion is the first published opinion which approves of the Bureau's policy since the initiation of FERS in 1986. This is a major victory for the BOP. We do not expect it to be appealed.

**LSCI Butner - Hamrick v. Lappin** - In an unpublished decision, the District Court held that the Bureau of Prisons may not use a two point enhancement to make the inmate ineligible for early release. The court dismissed the complaint, but remanded it to the Bureau to redetermine the inmate's eligibility without taking the two point enhancement into account. (Note: the inmate is scheduled to be released in the year 2004.)

**FCI Petersburg - Goodard v. Dewalt** - On June 11, 1998, Judge Leonie M. Brinkema issued an order granting this habeas petition on the issue of using a 2-point enhancement for determining early release under § 3621(e). The government had requested that the court delay their ruling on the issue pending a decision by the Fourth Circuit in the Pelissero case. However, the court ruled that the issue of a 2-point enhancement for a firearm has been resolved in this circuit in the case of Fuller v. Moore, 97-6390, 1997 WL 791681 (4th Cir. December 29, 1997). The court went on to grant Goodard's petition remanding the case to the BOP to review his

eligibility pursuant to the opinion. The court declined to order his release noting it was left to the discretion of the BOP. Goddard has an INS detainer, but qualified for the exception to policy and was subsequently granted an early release to the INS detainer after review by the Central Office.

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

**FCI Morgantown - Rosenbaum v. Siha, et al** - This is a mixed Bivens/FTCA case with several issues, but primarily involving medical care at FCI Morgantown. A status conference was held by the Judge on Thursday, July 2, 1998, via telephone. During this conference, the Judge informed the plaintiff that the Director is an improper defendant in an FTCA claim. She advised plaintiff's counsel to file an amended complaint against the U.S. Regarding the Bivens claim, the Judge expressed concern over whether the plaintiff had a meritorious claim. The judge was of the opinion that the plaintiff's Bivens claims lacked specificity and appeared quite weak. Once the amended complaint is filed and properly served, we will have thirty days in which to respond. We are working with the Litigation Branch on the issue of service regarding Director Hawk Sawyer since it appears she was only named as a defendant in the FTCA portion of the case.

**FCI Petersburg - U.S. v. Wondree** - On June 8, 1998, Judge Merhige issued an order vacating his illegal order of May 20, 1998, which directed the BOP to place inmate Wondree on home confinement for the remainder of his sentence. He changed the order to make it a recommendation.

**FCI Petersburg - Platshorn v. Hahn** - This government filed its appellee's brief in the Fourth Circuit in this sentence computation case on June 19, 1998. Platshorn is now represented pro bono by the law firm Morgan, Lewis and Bockius LLP, who were the attorneys in the Chatman-Bey case. Essentially, Platshorn seeks to have the order of his sentence reversed so that he may serve the non-parolable sentence first. They essentially argue that under the aggregation principles of 18 U.S.C. § 4161, once aggregated, sentences may not become deaggregated for any reason. They suggest that if computed with the non-parolable sentence first, then Platshorn would be eligible for release on the consecutive parolable sentence after he reached the mandatory release date on the non-parolable sentence. They seek to have time served on a non-parolable sentence count toward parole eligibility on a consecutive parolable sentence. The government argued that

Platshorn is not entitled to the requested relief as the method computed by BOP with parolable sentence first, he has received the earliest possible parole of 10 years; and he is only serving the 33 non-parolable sentence and is earning the maximum rate of SGT permitted by law on this sentence. The government also argued that oral argument should not be necessary in this case.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:**

We had an interesting representation issue, where an institution staff psychologist had been reported to a state licensing agency by another staff member. We called Paul Brown, as the employee asked that he be represented before the board by a government attorney, since the complaint arose from his activities as a BOP employee. Paul Brown stated that the employee could request representation, and that it seems likely he would be represented by a DOJ attorney. It would seem this same rationale should apply to cases where an inmate files a complaint with a state licensing agency, an unfortunate, but rather common occurrence.

**SIGNIFICANT FTCA CLAIMS:**

**FCI Cumberland - T-BOP-98-044** - This claim for \$1 million was filed for former inmate James Habron, Reg. No. 18656-083, by his attorney. The claim alleges the BOP's failure to properly diagnose and treatment claimant's eye infection lead to "effective loss of vision in his right eye." The medical records show that claimant was seen numerous times by Cumberland medical staff beginning December 9, 1996. A consultant ophthalmologist was contacted via telephone for advice and the inmate was ultimately referred to the ophthalmologist who saw claimant on January 6, 1997. The claimant was followed by the outside ophthalmologist until his transfer from Cumberland to a halfway house on June 10, 1997. Claimant was instructed by the outside ophthalmologist that he should follow-up with his own ophthalmologist upon release. Since claimant's release he has only sought care from an optometrist not an ophthalmologist. We have forwarded the case to Dr. Duggirala for review. Dr. Duggirala has agreed to have the case reviewed by a ophthalmologist who teaches at Temple Medical School, has his own private practice, and would be willing to testify as an expert witness. This will be more economical than utilizing AFIP and will also provide us an expert witness if needed.

**MEDICAL MALPRACTICE CASES UPDATE:**

**FMC Lexington - Qureshi v. BOP, et al.** - This Bivens case was filed against several Lexington medical staff alleging 8th Amendment violations regarding being denied necessary consultations, treatment and drugs (Percocet) for his

neurological condition. The case was dismissed by order of Judge Wilhoit dated June 5, 1998.

**FMC Lexington - Turner v. Ramirez, et al.** - This Bivens case raised numerous allegations of inadequate medical care by defendants at FCI Greenville, FMC Fort Worth and FMC Lexington. Our response is due in July.

**FMC Lexington - Walls v. Holland, et al.** - This Bivens action alleges general improper treatment and conditions for his medical care and confiscation of his seizure medications in violation of his rights under the 8th Amendment. The response is due in August.

**SIGNIFICANT ADMINISTRATIVE REMEDIES:**

**FCI Milan** - A BP-9 was filed by inmate Chase on June 15, 1998, challenging his removal from the common fare pilot program. The institution has proposed a response that the inmate was removed because they feel his request for common fare is based more on a dietary concern than a religious one. The draft response is currently being reviewed by the Regional Counsel's office.

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:**

**FCI Beckley - Perkins v. Barnard** - This is a Bivens suit alleging a pat search by a female officer violated the inmate's constitutional rights. The inmate did not allege a violation of RFRA. A Motion to Dismiss was filed in November and the Magistrate has recommended our Motion be granted.

**FCI Petersburg - Norton, et al. V. USA, et al.** - This previously reported Bivens/Civil rights case complaining about exercise of their religion to practice the Asatru religion at FPC Petersburg was dismissed without prejudice under Rule 41(a)(1), F.R.Civ.P. on May 13, 1998, although a fax copy of the dismissal was not received until June 18, 1998. The inmate had complained that the government, and the Chaplain in particular, purposely delayed approving the practice of the Asatru religion at the camp. The religion was subsequently approved for group practice at the camp and religious materials were purchased for the group. The inmate plaintiffs subsequently filed a motion requesting that the action be dismissed, although stating they still believed their constitutional rights had been violated. As a result of this case the Warden established a local religious issues committee at Petersburg consisting of the AW(P), Captain, Chaplains, and Paralegal.

**ALTERNATIVE DISPUTE RESOLUTION EFFORTS:** None

**18 U.S.C. § 3621(e) LITIGATION:**

**LSCI Butner - Hamrick v. Lappin - and FCI Petersburg - Goddard v. Dewalt - refer to write-up under section entitled "Adverse Decisions or Significant Decisions."**

**FCI Cumberland - Snyder v. Henry, et al. - Petitioner challenges the denial of early release under § 3621(e), pursuant to P.S. 5162.02., § 9. The inmate received a two-point enhancement for possession of weapons during a drug offense.**

**FCI Cumberland - Wooding v. Henry, et al. - Petitioner challenges the denial of early release under 3621(e), pursuant to P.S. 5162.02, § 9. The inmate received a two-point enhancement for possession of a firearm during a drug offense.**

**FCI Cumberland - Davis v. Henry, et al. - Petitioner challenges the denial of early release under § 3621(e), pursuant to P.S. 5162.02, § 9. The inmate received a two-point enhancement for possession of a firearm during a drug offense.**

All three of these inmates are using the Fuller v. Moore (unpublished decision out of FCI Petersburg) and Weeks v. Bidwell (District Court decision from Maryland) as support for their petitions.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

**FCI Beckley - Roger McKenzie, Reg. No. 05233-088, was sentenced on June 29, 1998, for Possessing Contraband (Marijuana) to a 9-month consecutive term of imprisonment.**

**FCI Beckley - Jeffrey Levering, Reg. No. 03594-028, was sentenced on June 30, 1998, to a 30-month consecutive term of imprisonment for Possession of Contraband (a weapon). The Judge applauded the Government and the BOP for their efforts to keep control over the facility by bringing such charges and prosecuting these types of cases. The inmate responded to the Judge by stating that the fact that he was convicted for having a weapon has had a deep impact at the institution.**

**FCI Memphis - Legal staff at the institution have been advised by the Criminal Division, Western District of Tennessee, that they will take a satellite camp escape case to the Grand Jury in July. Inmate Borteous Bosley, Reg. No. 15182-076, escaped**

from the camp on August 1, 1997, and has been housed in SHU since his return to custody on August 5, 1997.

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

**REHABILITATION ACT:** None

**Ensign Amendment Cases:** None

**Dismissals Under PLRA:**

**FCI Milan - Harris, et al. v. Pontesso** - we received a favorable R&R in this Bivens case recommending dismissing this action based on failure to exhaust pursuant to the PLRA.

**FCI Milan - Bonner v. Pontesso** - We received an order dated June 5, 1998, dismissing defendants Elliott and Burget under PLRA pursuant to the Court's review of our Waiver of Reply. An R&R dated June 16, 1998, recommends dismissal of defendants Grayer, Leonard, Lawless, Pontesso, Serrano, Brown and Zych, pursuant to 42 U.S.C. 1997(e)(g), based on the Waiver of Reply filed. Only two defendants remain, if the Court adopts this R&R.

New Litigation Cases by Institution and Type  
 Received During the Month of June 1998

|      | ALD | ASH | BEC | BUT* | CUM | ELK | LEX | MAN | MEM | MIL | MRG | PET | SEY | THA | TOT |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| BIV  | 0   | 0   | 0   | 0    | 0   | 0   | 3   | 0   | 0   | 0   | 0   | 0   | 0   | 2   | 5   |
| FTCA | 0   | 0   | 0   | 0    | 0   | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 0   | 0   | 1   |
| HC   | 0   | 0   | 0   | 1    | 2   | 0   | 0   | 0   | 0   | 2   | 0   | 1   | 0   | 1   | 7   |
| OTH  | 0   | 0   | 0   | 0    | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   |
| TOT  | 0   | 0   | 0   | 1    | 2   | 0   | 3   | 1   | 0   | 2   | 0   | 1   | 0   | 3   | 13  |

\*Represents both the FCI and LSCI

New Litigation Cases by Institution and Type

Received Calendar Year to Date

|      | ALD♦ | ASH | BEC♦ | BUT* | CUM | ELK● | LEX | MAN | MEM | MIL | MRG● | PET | SEY | THA | TOT |
|------|------|-----|------|------|-----|------|-----|-----|-----|-----|------|-----|-----|-----|-----|
| BIV  | 0    | 1   | 0    | 1    | 1   | 2    | 6   | 1   | 1   | 2   | 2    | 2   | 0   | 3   | 22  |
| FTCA | 0    | 0   | 0    | 0    | 2   | 0    | 0   | 2   | 0   | 2   | 0    | 0   | 0   | 1   | 7   |
| HC   | 1    | 1   | 0    | 3    | 4   | 2    | 0   | 1   | 3   | 6   | 2    | 2   | 1   | 5   | 31  |
| OTH  | 0    | 0   | 1    | 0    | 2   | 2    | 0   | 1   | 1   | 0   | 0    | 0   | 0   | 0   | 7   |
| TOT  | 1    | 2   | 1    | 4    | 9   | 6    | 6   | 5   | 5   | 10  | 4    | 4   | 1   | 9   | 67  |

\*BUT represents both the FCI and the LSCI ●Corrected figure (case counted twice) ♦Case counted for BEC should have been ALD.

# memorandum

DATE: August 7, 1998 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

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

SUBJECT: July 1998 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Amy Whalen Risley, Executive Assistant

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

Received                    135   187   229   160   168   200   214  
Answered                    143   181   178   201   174   194   156

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

# Pending                    230   195   179   190   191   195   154  
# Received                    68    54    75    62    42    49    45  
# Answered                    91    71    58    60    38    83    67  
# Pending                    195   179   190   191   195   154   138  
# Over Six Month            0      0      0      0      0      1      0

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

# Pending                    13    23    12    23    24    18    35  
# Received                    43    24    54    54    36    47    52  
# Answered                    34    34    41    53    42    32    57  
# Pending                    23    12    23    24    18    35    30  
# Over 20 Working Days    1    2\*    0    0    4\*\*   2\*   3\*

\*File has been requested from archives. \*\*One file requested from archives; another request archives sent wrong file.

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

Cases Pending                338   331   329   314   273   261   261  
New Cases Received            7    16\*   4\*   11    16    13    36  
Habeas Corpus                4    7    4    3    6    7    11  
Bivens                        1    5\*   0\*   6    5    5    3  
FTCA                         1    2    0    1    2    1    2  
Other                         1    2    0    1    3    0    20  
Cases Closed                 14    19    21    62    28    12    25  
Cases Pending                331   329   314   273   261   261   272  
Lit Reports Completed        15    12    14    8    13    21    7  
Cases/Hearings or Trials      2    2    1    4    0    0    0  
Settlements/Awards          1    2    0    1    2    0    0  
\$ Settlements/Awards        \$147.7 \$52.0 0 \$13.9\* \$9.0 0 0

(\$ in Thousands)

\*Corrected figures

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

Bill Burlington, Regional Counsel, August 31-Sept. 2, 1998 will be at the MSTC Denver for Sentencing Training.

This month we welcome Alicia Daniels-Lewis to the Regional Office, as our new Honors Attorney. Alicia comes to us from North Carolina Central University, in Durham. Alicia, is married and has a 12 year old son. We look forward to Alicia starting work with us on August 31, 1998. We also bid a fond adieu to Dave Recker, who will be moving in early September to FCC Florence, Colorado. Dave has done a great job during his year with us, and will be missed by everyone. We wish Dave the best of luck in his new challenging assignment.

Milt Williams, Paralegal, FCI Petersburg, and Randy Smith, Paralegal, FCI Elkton, will attend the Sentence Computation Training in Aurora August 31-September 2.

As of August 5, 1998, we bid farewell to Shannon Cheek, the summer intern at FCI Manchester from Eastern Kentucky University. We thank her for the excellent assistance she provided.

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

**FCI Petersburg** - Judge Robert Merhige, Federal District Judge, Eastern District of Virginia, retired in June. Robert Jaspen, Chief of Civil for the E.D. of Virginia resigned from the U.S. Attorney's Office to take a job in the Staff Attorney's Office of the Fourth Circuit. During his approximately 23 years in the U.S. Attorney's Office, Bob has handled numerous FCI Petersburg cases.

**FMC Lexington** - Joe Tang, Attorney, assisted with coordinating a visit from the Chief of the Civil Division, E.D. Kentucky, and two civil AUSAs. This visit was arranged to educate the U.S. Attorney's staff about Lexington's medical services and improving interoffice relations. Medical staff gave a presentation on various aspects of the medical care provided at Lexington. The visitors were also given a tour, along with a question and answer session. The feedback from the visitors was very positive, and both parties feel a similar tour can be done in the future for pro se clerks, other U.S. Attorney's office staff, etc.

**FMC Lexington** - On July 10, 1998, Judge Forester wrote a letter to Warden Holland criticizing our use of a P.A. to perform a routine physical on a pre-sentenced 18 U.S.C. § 3552 inmate Forester referred to Lexington for a medical and psychological evaluation. Judge Forester was also critical of

the fact the medical summary did not specify which doctors reviewed x-rays and other test results. Judge Forester concluded the letter stating if we do not have the proper staffing to conduct these \$3552 evaluations in the future, he will no longer refer them to Lexington. The summary prepared by staff was a standard summary which Judges have never complained about in the past. Typically, Judges want a short summary written for non-medical persons. In response, Joe Tang, Attorney, FMC Lexington, assisted in preparing a letter to Judge Forester informing him that P.A.'s are qualified to do routine physical exams and prepare evaluation summaries, but his concerns were noted, and in the future Lexington would have physicians review the findings and prepare the summaries. We also provided Judge Forester with the more detailed information he was seeking. Joe personally delivered the letter to the Judge's law clerk. The law clerk, who leaves this month, is apparently the one who has been "pushing" the medical cases filed against the staff at FMC Lexington, as well as the Dumphord case.

**FOIA Appeal Decision** - An inmate at Terre Haute filed a FOIA request in early 1996 seeking a copy of his complete psychology file. Everything was released to him but what was considered MMPI raw test data. He appealed that decision to the regional office and we supported the withholding. The inmate appealed to OIP. OIP has been struggling with this issue since October of 1996 mostly due to staff turnover. We have had discussions with OIP staff on numerous occasions and have provided them information from our Psychology Administrator regarding Psychologist's Code of Ethics. This month we received a copy of OIP's letter to the former inmate which released the grid where the inmate filled in a circle to represent his response to a question, but supported our withholding of the actual MMPI raw test data. We are not sure if it made a difference in this case, but the inmate had been provided with a written summary of the test results. We were pleased to receive this favorable decision.

**Prisoner Litigation Reform Act:**

**FMC Lexington - Jones v. Holland** - We have just received a copy of the memo from the Civil Division, recommending against an appeal in this case. We still feel this case should be appealed, as the procedure followed by the court in this case represents the typical, current practice in the Eastern District of Kentucky--a practice that is at odds with the clear mandate of the PLRA. The U.S. Attorney and the Civil Division concede the errors by the court, but recommend against appeal based on the nominal award of attorneys fees. We still feel this is an excellent opportunity to receive a published appellate court opinion in a BOP case requiring exhaustion in a Bivens action under PLRA.

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

**SETTLEMENTS: None**

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FCI Memphis - Rowland v. US** - After Rowland violated the terms of his supervised release, the sentencing court imposed a second term of imprisonment. Upon completion of the second term, the U.S. Parole Commission claimed that it also had jurisdiction over Rowland and ordered him to serve yet another term of imprisonment for the same violations. As a result, Rowland brought a habeas corpus petition seeking his release. The District Court granted the petition and the Government appealed. On July 17, 1998, the Sixth Circuit affirmed the District Court's decision in favor of Rowland.

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

**FCI Petersburg - Bergquist v. US, et al.** - In a court order filed July 17, 1998, the government's Motion to Dismiss on procedural grounds (lack of formal service upon the U.S., and statute of limitations for filing the complaint) was denied. The court noted the pro se inmate complaint was received by the court prior to the SOL, although not stamped as officially filed until after the SOL. The court also noted because the court was responsible for service, the lack of service argument fails. Bergquist is now represented by counsel. The case involves allegations that medical staff's delay in diagnosing plaintiff's colon cancer resulted in his having to undergo extensive and painful chemotherapy. The AUSA will be at Petersburg on August 12, 1998, to review the medical operation and speak to medical staff prior to obtaining an expert witness. She will interview the former medical officer on August 13.

**FCI Petersburg - Platshorn v. Hahn** - The saga continues with this sentence computation case involving the issue of aggregation of parolable and non-parolable sentences. After both the appellant and appellee filed long informal briefs with the Fourth Circuit, Platshorn's attorney filed a reply brief, which is not permitted under the informal briefing rules of the Fourth Circuit, along with a motion to supplement the record. The AUSA filed a motion in opposition explaining that documents filed by Platshorn's attorney were incomplete and inaccurate.

**FCI Manchester - Shehee v. Robertson** - As previously reported, a Notice of Appeal was filed April 28, in this Bivens case as a protective measure. The AUSA has now received a decision from the Office of the Solicitor General approving the appeal for all but one defendant.

**USP Terre Haute** - The U.S. District Court for the District of Utah issued a TRO on July 10, 1998, prohibiting the BOP from transferring William Thurmond from the District or the State of Utah. A hearing was held on July 28, 1998, on the TRO in which Judge Jenkins ordered the BOP to prepare a declaration from Warden Clark basically stating that the Warden had reviewed the transfer documents, was willing to accept the inmate, and believed the inmate would be safe at USP Terre Haute. Inmate Thurmond was being housed in the Utah Department of Corrections because he had previously cooperated with authorities concerning a homicide at USP Terre Haute in 1983. Warden Clark reviewed the transfer packet and did not agree with the inmate being designated to USP Terre Haute. Legal staff at Terre Haute advised legal staff in the Western Regional Office and that office stated they would redesignate the inmate to another institution.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:** None

**SIGNIFICANT FTCA CLAIMS:** None

**MEDICAL MALPRACTICE CASES UPDATE:**

**FMC Lexington - Walls v. Holland, et al.** - Judge Forester denied plaintiff's Motion for a TRO to prevent his transfer back to his parent institution. Plaintiff alleges deliberate indifference to his medical needs, i.e., treatment of his hand which was damaged in an UNICOR accident at FCI Allenwood. This ruling is significant because Judge Forester gave us only two days to respond and a hearing was anticipated by the U.S. Attorney's Office.

**SIGNIFICANT ADMINISTRATIVE REMEDIES:** None

**NEW RFRA CASES AND UPDATES ON PREVIOUSLY REPORTED CASES:**

**FCI Beckley - Perkins v. Barnard, et al.** - This was a Bivens suit alleging a pat search by a female officer violated a male inmate's constitutional rights. The inmate did not allege a violation of RFRA. The case has been dismissed for Failure to State a Claim.

**ALTERNATIVE DISPUTE RESOLUTION EFFORTS:** None

**18 U.S.C. § 3621(e) LITIGATION:**

**FCI Morgantown - Kirby v. Bledsoe** - This case represents our first challenge to the new Program Statement 5162.04, Categorization of Offenses. Kirby was initially found ineligible under P.S. 5162.02 (922(g) conviction), and declined participation in RDAP since he was ineligible for the year off. Kirby exhausted his administrative remedies under the old program statement. Subsequently, Kirby was told he is not eligible under P.S. 5162.02 based on the Director's discretion. Kirby is challenging the new program statement on the basis that it is unlawful and is an attempt by the BOP to circumvent the will of Congress.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:-**

**FCI Beckley** - Fred Brunet, Reg. No. 18375-018, was scheduled to be sentenced for Possession of Contraband (Marijuana, Heroin, Pills) on July 24, 1998. The sentencing has been rescheduled for August 27. The female visitor who brought the drugs into the facility was sentenced in July to 15 months imprisonment.

**FMC Lexington** - On July 2, 1998, William Davis, Reg. No. 11187-058, and James Thornton, Reg. No. 04919-028, were indicted by a Lexington grand jury for Possession of Narcotics. A visitor, Antonio Ferrell, introduced narcotics to Davis in FMC Lexington's visiting room.

**FCI Beckley** - Brian Clarke, Reg. No. 12541-014, was sentenced on July 27, 1998 to 24 months imprisonment for Possession of Contraband (a weapon).

**FCI Cumberland** - On July 7, 1998, inmate Mark Bundy pled guilty to Assault with a Dangerous Weapon. The indictment was dismissed against inmate Marcel Washington. These two inmates were originally indicted for Retaliation against a Federal witness and assaulting another inmate on March 11, 1997.

**FMC Lexington** - The U.S. Attorney's Office finally chose to decline prosecution on inmate John Werner, Reg. No. 07251-050, for assaulting an officer in November 1997, during a struggle over a syringe Werner had in his possession. Werner had been continued over a number of grand juries in 1998, before the U.S. Attorney's Office decided to decline, based on the allegedly minor nature of the assault. Werner was subsequently released from our SHU and transferred to MCFP Springfield after Joe Tang, institution attorney, discovered the assaulted officer was uncomfortable with Werner's return

to Lexington's open population.

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

**REHABILITATION ACT: None**

**Ensign Amendment Cases: None**

**Dismissals Under PLRA:**

**FCI Milan - Demma v. Parker, et al - We received a favorable R&R reviewing the case under the PLRA based on the Waiver of Reply. The Court stated under the PLRA revisions to section 1915, the case should be dismissed.**

New Litigation Cases by Institution and Type  
 Received During the Month of July 1998

|      | ALD | ASH | BEC | BUT* | CUM | ELK | LEX | MAN | MEM | MIL | MRG | PET | SEY | THA | TOT |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| BIV  | 0   | 0   | 0   | 0    | 2   | 0   | 0   | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 3   |
| FTCA | 1   | 0   | 0   | 0    | 0   | 0   | 0   | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 2   |
| HC   | 0   | 1   | 1   | 0    | 5   | 0   | 0   | 0   | 0   | 1   | 2   | 1   | 0   | 0   | 11  |
| OTH  | 0   | 0   | 0   | 20   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 20  |
| TOT  | 1   | 1   | 1   | 20   | 7   | 0   | 0   | 0   | 0   | 3   | 2   | 1   | 0   | 0   | 36  |

\*Represents both the FCI and LSCI

New Litigation Cases by Institution and Type

Received Calendar Year to Date

|      | ALD♦ | ASH | BEC♦ | BUT* | CUM | ELK● | LEX | MAN | MEM | MIL | MRG● | PET | SEY | THA | TOT |
|------|------|-----|------|------|-----|------|-----|-----|-----|-----|------|-----|-----|-----|-----|
| BIV  | 0    | 1   | 0    | 1    | 3   | 2    | 6   | 1   | 1   | 3   | 2    | 2   | 0   | 3   | 25  |
| FTCA | 1    | 0   | 0    | 0    | 2   | 0    | 0   | 2   | 0   | 3   | 0    | 0   | 0   | 1   | 9   |
| HC   | 1    | 2   | 1    | 3    | 9   | 2    | 0   | 1   | 3   | 7   | 4    | 3   | 1   | 5   | 42  |
| OTH  | 0    | 0   | 1    | 20   | 2   | 2    | 0   | 1   | 1   | 0   | 0    | 0   | 0   | 0   | 27  |
| TOT  | 2    | 3   | 2    | 24   | 16  | 6    | 6   | 5   | 5   | 13  | 6    | 5   | 1   | 9   | 103 |

\*BUT represents both the FCI and the LSCI ●Corrected figure (case counted twice) ♦Case counted for BEC should have been ALD.



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

Bill Burlington, Regional Counsel, will be in Sentencing Training September 2 and September 9-11, he will be at Morgantown and the Regional Office.

Matthew Mellady, Attorney, FCI Memphis, has been assigned the collateral duty of being Acting Executive Assistant, at least through the end of the fiscal year.

Debbie Stevens, Attorney, FCI Beckley, held a training session for Drug Treatment staff and Case Managers on September 1 regarding early release considerations. During August Debbie attended the "Winner's Edge" seminar held at Beckley for Department Heads.

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

**FMC Lexington** - On August 7, 1998, staff learned that Gilberto-Pulido-Vega, Reg. No. 34955-004, who was hospitalized at the University of Kentucky Medical Center, was refusing important diagnostic testing to determine the extent of his internal gastrointestinal bleeding. UK staff were reluctant to proceed further, even though the condition was potentially life-threatening. Accordingly, a court order was obtained from Magistrate Todd, mandating all necessary treatment. The order was obtained on a Friday evening within two hours of initiating the process through the U.S. Attorney's Office.

**FMC Lexington** - On August 10, 1998, Charles Sparger, Reg. No. 05477-000, a recent arrival from Lorton, decompensated mentally and refused to take his insulin, eat, wear clothes, use the toilet, etc. Pursuant to the Health Services Manual governing medical emergencies and advice from legal, staff forced Sparger to submit to diagnostic tests, including blood draws, for the treatment of his diabetes. The medical staff believed there was enough of an immediate threat to Sparger's life that forced treatment was necessary. After Sparger continued to refuse his diagnostic testing and insulin, a medical due process hearing patterned after Washington v. Harper was held. A petition has been filed to commit Sparger for psychiatric care and treatment pursuant to 18 U.S.C. 4245, since this statute was amended to include D.C. Code offenders.

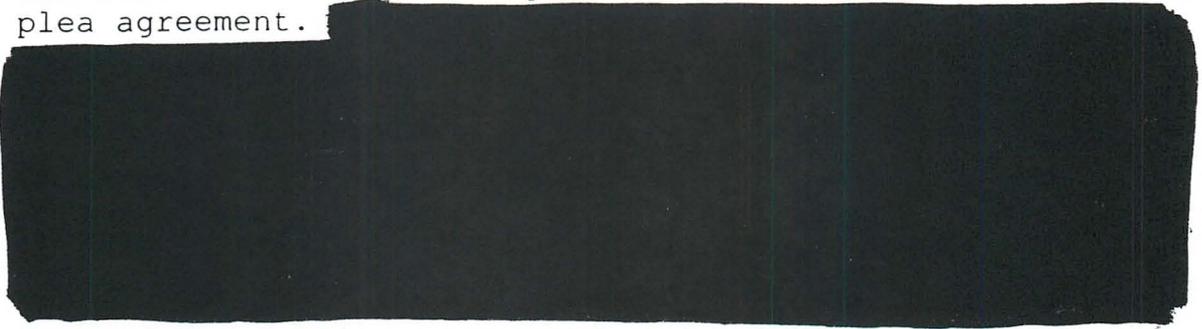
**FMC Lexington** - On August 28, inmate Howard Daves, Reg. No. 41436-019, was granted compassionate release. Judge William Kelley, Senior U.S. District Court Judge, Northern District of Georgia, reduced Daves' sentence to time already served. At the Judge's request, consideration of this matter was expedited and through good team work, our Regional Office was able to incorporate its input and recommendation to OGC on the same day the packet arrived from the institution.

**FCI Manchester** - A request for easement for natural gas transmission lines across Federal property by Delta Natural Gas Co., Inc., was received August 24, 1998. Although this is being handled by Facilities, Mike Robar, Paralegal, will coordinate with the Commercial Law Branch to ensure any concerns, including work permits are addressed.

**FCI Butner** - We have been contacted by a private individual who wants to purchase land across from the new Medical Center, on which he would operate a gas station and market. He has approached Warden Lappin, asking our permission to use the same sewage lift station that the Complex uses. Warden Lappin will be forwarding the request to Jim Jones, Administration Division, with a copy to Liz Nagy.

**FCI Ashland** - Inmate Avery has filed litigation challenging the Bureau's denial of 385 days of credit, which he claims was mandated by his plea agreement. Unbeknownst to the BOP, there was a plea agreement in 1982, which required the government to run Avery's federal sentence concurrent with any time which he might spend in a state institution, even if it occurred after his federal release on parole. In fact, after being paroled by the USPC, he was picked up by the state of Kentucky, where he spent 385 days in custody. When the USPC revoked his federal parole, they granted no credit for street time.

When FCI Ashland computed his sentence, we followed the decision of the USPC and gave him no credit for the time he spent with the state, even though by then, we knew of the plea agreement. Further, the Sixth Circuit ruled that the Bureau and USPC were contractually bound to follow the terms of the plea agreement.



**Prisoner Litigation Reform Act:**

**FCI Elkton - Three Strikes Provision of 28 USC §1915(g)** - We have our first case where we have asked the U.S. Attorney's Office to bar further in forma pauperis filings of an inmate, based on three of his previous cases being dismissed as frivolous, or for failure to state a claim. Despite [redacted]

in the statute allowing us to count dismissal of an "action" or "appeal" we have found a case, Adepegba v. Hammons, 103 F.3d 383 (5th Cir. 1996), which only allows you to count an action, where the action has been affirmed on appeal, or the inmate chooses not to appeal. We may argue that this case is wrongly decided.

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

**SETTLEMENTS: None**

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FMC Lexington - Walls v. Holland, et al.** - On July 29, Judge Forester denied Defendants' Motion to Stay Discovery in this medical deliberate indifference Bivens case. Plaintiff sent a non-Defendant physician a set of written questions "RE: Depositions," before the Defendants filed a response to the complaint. Judge Forester cited the local rules which exempt pro se litigants from Fed.R.Civ.P. 26(d) and (f). Judge Forester also found "insufficient basis for delaying discovery, which may even provide necessary information on the issue of qualified immunity." Judge Forester's reasoning is particularly curious since in response to a TRO request, the Defendants thoroughly fleshed out the factual issues by producing extensive medical records of multiple consultations with specialists, all of whom agreed nothing further should be done to treat plaintiff's hand which was damaged in UNICOR at FCI Allenwood. Judge Forester denied the TRO request, stating there was little likelihood of plaintiff prevailing on the merits in this complaint.

**FMC Lexington - Gravenmier v. Holland, et al** - Judge Forester denied plaintiff's Motion to Amend Complaint, in this medical Bivens case, citing among other reasons, the failure to exhaust administrative remedies, which "Courts have long required prior to hauling federal defendants into a Bivens lawsuit." Judge Forester cited the favorable PLRA individual-capacity exhaustion case from the Sixth Circuit, Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1988). Judge Forester's position on exhaustion in the Bivens context has been unpredictable in medical cases like Dumphord and subsequent cases, where he has ruled both ways in these cases.

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

**FCI Manchester - U.S. v. Clark** - This case is scheduled for trial on September 4 in London, Kentucky. The case involves an assault by Clark on another inmate over a pornographic magazine. The victim is adamant about testifying against Clark. The defense Clark is presenting is selective prosecution. He claims FCI Manchester only refers black assailants. We have done extensive discovery on this and may be required to provide testimony as to why those documents were not releasable in their original form.

**USP Terre Haute - Shaheed v. Kimbler** - This Bivens case is scheduled for trial October 13-15, 1998. The case alleges improper use of force by the defendant in SHU while escorting the inmate to the Lieutenant's Office.

**FCI Milan - Beckley v. Scibana** - The inmate filed an injunction and TRO requesting immediate medical care for a prothesis of his left shoulder and the resulting pain. The hearing took place on August 24, 1998, in front of a new Federal judge. The Judge heard testimony from Dr. Parker, Chief Medical Officer, and testimony from Beckley. The Court requested that Beckley continue to work with medical staff and that upon his placement into a CCC he could seek medical surgery at his own cost. The Court did not grant Beckley's request for an Order for Tylenol #3 and immediate surgical intervention. The Judge deferred to Dr. Parker's judgment.

**REPRESENTATION NOT RECOMMENDED FOR STAFF: None**

**SIGNIFICANT FTCA CLAIMS:**

**FCI Butner** - A former female camp inmate has filed a tort claim (represented by an attorney) alleging that she was forced to have sexual relations with an officer. She alleges both physical injury and emotional trauma arising from the incident. In December 1997 the staff member pled guilty to several counts and was sentenced to 14 months incarceration and one year of supervised release. The sum certain on the claim is \$500,000. We plan to argue that staff were not acting within the scope of their official duties when they engaged in these prohibited sexual acts.

**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 Cumberland - James v. Henry** - Petitioner challenges the denial of early release under 3621(e) pursuant to P.S. 5162.02, § 9. The inmate received a two-point enhancement for possession of a firearm during a drug offense.

**FCI Cumberland - Terrell Coleman v. Henry** - In this petition, inmate Coleman seeks early release despite his conviction for 26 U.S.C. §5861(d). Our Categorization of Offenses Program Statement considers this conviction "violent" under section 6. There is also a vacated Bailey conviction, so we will presume a 2 point enhancement for possession of the firearm, which in turn makes inmate Coleman ineligible under section 7. This is only our second challenge to the new program statement.

**FCI Cumberland - Davis v. Henry; Wooding v. Henry; McPeek v. Henry**: In each of the above three cases, Judges from the District of Maryland have followed Fuller v. Moore, and Downey v. Crabtree, in finding our old Program Statement, Definition of the Term, Crimes of Violence invalid. In McPeek, in dicta, the court stated it would also invalidate the new Categorization of Offenses Program Statement as well, as Fourth Circuit law finds the crime of possession of a firearm not to be violent. We are asking the court to modify this latter portion of its opinion, as the new program statement was not before the court. We now have four separate opinions from the District of Maryland which are adverse to the Bureau.

**FCI Milan - Taylor v. Pontesso** -The government filed a brief in response to Taylor's appeal to the Sixth Circuit of his denial of 3621(e) eligibility based on a conviction of fugitive in possession of a firearm and fugitive in possession of ammunition. This case is governed by the P.S. "Crimes of Violence."

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

**FCI Memphis** - A referral has been made on Adrian Rodgers, Reg. No. 13979-076, who escaped from the Memphis satellite camp on August 28, 1998, and was subsequently arrested by the Memphis Police Department for DUI on August 30, 1998.

**FCI Butner** - Staff members John Powe and Willie Stewart were referred for prosecution for Sexual Abuse of a Ward. The cases were accepted and both staff members have resigned.

**FCI Beckley** - Anthony Suber, Reg. No. 64119-061, pled guilty to Possession of Contraband on August 4, 1998. This inmate was caught on tape receiving marijuana from a female visitor. The inmate was dry-celled and three balloons of marijuana were recovered. The female visitor used another woman's

identification to gain access to the institution. She is also being prosecuted.

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

**REHABILITATION ACT:** None

**Ensign Amendment Cases:** None

**Dismissals Under PLRA:**

**FCI Manchester - Foster v. Chandler, et al.** - This case was dismissed for failure to exhaust administrative remedies which was made mandatory by the PLRA.

New Litigation Cases by Institution and Type  
Received During the Month of August 1998

|      | ALD | ASH | BEC | BUT* | CUM | ELK | LEX | MAN | MEM | MIL | MRG | PET | SEY | THA | TOT |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| BIV  | 0   | 0   | 0   | 1    | 1   | 2   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 1   | 5   |
| FTCA | 0   | 0   | 0   | 1    | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 2   | 3   |
| HC   | 0   | 0   | 0   | 0    | 1   | 0   | 0   | 0   | 2   | 1   | 0   | 0   | 0   | 1   | 5   |
| OTH  | 0   | 0   | 1   | 2    | 0   | 0   | 0   | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 4   |
| TOT  | 0   | 0   | 1   | 4    | 2   | 2   | 0   | 0   | 2   | 2   | 0   | 0   | 0   | 4   | 17  |

\*Represents both the FCI and LSCI

New Litigation Cases by Institution and Type

Received Calendar Year to Date

|      | ALD♦ | ASH | BEC♦ | BUT* | CUM | ELK● | LEX | MAN | MEM | MIL | MRG● | PET | SEY | THA | TOT |
|------|------|-----|------|------|-----|------|-----|-----|-----|-----|------|-----|-----|-----|-----|
| BIV  | 0    | 1   | 0    | 2    | 4   | 4    | 6   | 1   | 1   | 3   | 2    | 2   | 0   | 4   | 30  |
| FTCA | 1    | 0   | 0    | 1    | 2   | 0    | 0   | 2   | 0   | 3   | 0    | 0   | 0   | 3   | 12  |
| HC   | 1    | 2   | 1    | 3    | 10  | 2    | 0   | 1   | 5   | 8   | 4    | 3   | 1   | 6   | 47  |
| OTH  | 0    | 0   | 2    | 22   | 2   | 2    | 0   | 1   | 1   | 1   | 0    | 0   | 0   | 0   | 31  |
| TOT  | 2    | 3   | 3    | 28   | 18  | 8    | 6   | 5   | 7   | 15  | 6    | 5   | 1   | 13  | 120 |

\*BUT represents both the FCI and the LSCI ●Corrected figure (case counted twice) ♦Case counted for BEC should have been ALD.

# memorandum

DATE: October 6, 1998 Mid-Atlantic Regional Office, Annapolis Junction, MD 20701

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

SUBJECT: September 1998 Monthly Report

TO: Wallace H. Cheney, General Counsel

ATTN: Amy Whalen Risley, Executive Assistant

| ADMINISTRATIVE REMEDIES | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|-------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| Received                | 135 | 187 | 229 | 160 | 168 | 200 | 214 | 225 | 191 |     |     |     |
| Answered                | 143 | 181 | 178 | 201 | 174 | 194 | 156 | 195 | 254 |     |     |     |

| TORT CLAIMS      | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| # Pending        | 230 | 195 | 179 | 190 | 191 | 195 | 154 | 138 | 149 |     |     |     |
| # Received       | 68  | 54  | 75  | 62  | 42  | 49  | 45  | 47  | 59  |     |     |     |
| # Answered       | 91  | 71  | 58  | 60  | 38  | 83  | 67  | 30  | 40  |     |     |     |
| # Pending        | 195 | 179 | 190 | 191 | 195 | 154 | 138 | 149 | 166 |     |     |     |
| # Over Six Month | 0   | 0   | 0   | 0   | 0   | 1   | 0   | 1   | 1   |     |     |     |

| RIVACY                 | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| # Pending              | 13  | 23  | 12  | 23  | 24  | 18  | 35  | 30  | 26  |     |     |     |
| # Received             | 43  | 24  | 54  | 54  | 36  | 47  | 52  | 52  | 54  |     |     |     |
| # Answered             | 34  | 34  | 41  | 53  | 42  | 32  | 57  | 56  | 43  |     |     |     |
| # Pending              | 23  | 12  | 23  | 24  | 18  | 35  | 30  | 26  | 37  |     |     |     |
| # Over 20 Working Days | 1   | 2*  | 0   | 0   | 4** | 2*  | 3*  | 1*  | 2   |     |     |     |

\*File has been requested from archives. \*\*One file requested from archives; another request archives sent wrong file.

| LITIGATION               | JAN     | FEB    | MAR | APR     | MAY   | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|--------------------------|---------|--------|-----|---------|-------|-----|-----|-----|-----|-----|-----|-----|
| Cases Pending            | 338     | 331    | 329 | 314     | 273   | 261 | 261 | 272 | 281 |     |     |     |
| New Cases Received       | 7       | 16*    | 4*  | 11      | 16    | 13  | 36  | 17  | 17  |     |     |     |
| Habeas Corpus            | 4       | 7      | 4   | 3       | 6     | 7   | 11  | 5   | 8   |     |     |     |
| Bivens                   | 1       | 5*     | 0*  | 6       | 5     | 5   | 3   | 5   | 3   |     |     |     |
| FTCA                     | 1       | 2      | 0   | 1       | 2     | 1   | 2   | 3   | 1   |     |     |     |
| Other                    | 1       | 2      | 0   | 1       | 3     | 0   | 20  | 4   | 5   |     |     |     |
| Cases Closed             | 14      | 19     | 21  | 62      | 28    | 12  | 25  | 10  | 15  |     |     |     |
| Cases Pending            | 331     | 329    | 314 | 273     | 261   | 261 | 272 | 281 | 284 |     |     |     |
| Lit Reports Completed    | 15      | 12     | 14  | 8       | 13    | 21  | 7   | 8   | 12  |     |     |     |
| Cases/Hearings or Trials | 2       | 2      | 1   | 4       | 0     | 0   | 0   | 1   | 0   |     |     |     |
| Settlements/Awards       | 1       | 2      | 0   | 1       | 2     | 0   | 0   | 0   | 0   |     |     |     |
| \$ Settlements/Awards    | \$147.7 | \$52.0 | 0   | \$13.9* | \$9.0 | 0   | 0   | 0   | 0   |     |     |     |

(\$ in Thousands)

\* Corrected figures

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

Bill Burlington, Regional Counsel, will be in the Regional Office October 13-16, 1998.

This month we say goodbye to Carolyn Lanphear, who will be leaving Cumberland for SERO. Carolyn has done an outstanding job at Cumberland, handling one of the most difficult litigation loads in the region. We will truly miss Carolyn. We wish her the very best of luck in Atlanta. On October 13<sup>th</sup>, we will welcome Denise Sparks into the Regional Office, as our new Legal Instruments Examiner. Denise comes to us from Beckley's ISM department. She will initially be assigned primary responsibility for the region's Administrative Remedy Program. Please welcome Denise to MXR! We are also pleased to welcome Francis Dent, Paralegal Specialist, to MXR, as our new Paralegal at FCI Ashland. Francis recently graduated from the paralegal program, and will be reporting to Ashland in November. Francis began her BOP career as a Correctional Officer at San Diego, and later, USP Atlanta. Welcome Francis!

Joe Tang, Attorney, FMC Lexington, will be the IDO October 13-20, 1998.

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

**FPC Seymour Johnson** - We recently received a court order on inmate James Thompson, where Chief Judge Graham Mullen, W.D. North Carolina, ordered that inmate Thompson serve 8 months of a 16 month term in home detention. Judge Mullen specifically states this is an order, not a recommendation. We have received similar orders from Judge Mullen in the past. The most recent such order was entered with inmate Aubrey Hilliard. In Hilliard, the Department of Justice was prepared to take Judge Mullen to the Fourth Circuit. Fortunately, Judge Mullen vacated the order. We have written Judge Mullen asking that he vacate the Thompson order. If he refuses, we may be asking for assistance to challenge this type of order in the Fourth Circuit.

**FMC Lexington** - The U.S. Attorney's Office for the Middle District of Florida formulated a list of questions regarding compassionate release candidate Daryl Kurtz' present physical and cognitive abilities, and his propensity for violence in the future, especially against children. The U.S. Attorney's Office also requested Kurtz be further evaluated by an independent examiner in order to determine Kurtz' long-term prognosis. FMC Lexington has scheduled Kurtz to be evaluated

by Cardinal Hill Rehabilitation Center, and responses to the questions will be drafted.

**FCI Petersburg** - Larry L. Gregg, AUSA, Alexandria has been named the new Chief of Civil. Mr. Gregg replaces Bob Jaspen, who is now a staff attorney with the Fourth Circuit.

**MXR** - Our office was contacted by the New York City FBI office (through the Northeast Regional Counsel's office) for assistance regarding former inmate Paul Kurtz, who was alleged to have passed himself off as an attorney in as many as 100 criminal matters in New York and Maryland and who had obtained legal visits with federal inmates in Otisville from January through May of 1998 under false pretenses. An FBI search of a Maryland residence had turned up two letters purporting to be from the Mid-Atlantic Regional Office, indicating Kurtz had been awarded half-way house contracts in Alexandria, Virginia and in Washington, D.C. Upon review by our Community Corrections office, it was determined that both letters were forgeries. The FBI will be following up with staff concerning this matter.

**Prisoner Litigation Reform Act:** None

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

**SETTLEMENTS:** None

**ADVERSE DECISIONS OR SIGNIFICANT DECISIONS:**

**FCI Manchester** - J.W. Dunlap v. United States - We recently received a favorable decision in the medical malpractice portion of this case. We had earlier won the Bivens, use of force portion of the case when a jury found our four defendants used appropriate force in subduing inmate Dunlap. In the medical portion of the case, the court found that we had provided substandard care, when we failed to carry out a physician's order to have Dunlap seen by an outside specialist. However, the court found that inmate Dunlap was not harmed by the delay, as he suffered no injuries that were attributable to the use of force incident.

**FMC Lexington** - Walls v. Holland, et al - In this medical deliberate indifference Bivens case, Judge Forester granted our motion to dismiss, citing among other reasons, the exclusive relief Plaintiff had under Inmate Accident Compensation, which barred any recovery for alleged subsequent negligent or deliberate indifference treatment of the same injuries. Plaintiff lost part of his hand in an UNICEF

accident at Allenwood. We will seek publication of this case, which was ruled upon unusually quickly, and perhaps indicates we have gained back some credibility with Judge Forester, the Judge in the Dumphord case.

**FCI Milan** - Antone v. Pontesso, et al. - This was a Bivens case alleging excessive use of force and harassment in which there were several O.I. investigations related to the same incidents. This is the case where one staff member was denied representation by DOJ. We received the R&R which recommends dismissing all defendants, including the staff member not represented by the government.

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

**USP Terre Haute** - Shaheed v. Kimbler - This Bivens excessive use of force case is scheduled for trial October 13-15, 1998.

**FCI Memphis** - Sheets v. DOJ - This Title VII case, alleging retaliation, sexual harassment, sexual discrimination and constructive discharge, is currently scheduled for trial on October 26, 1998. However, given extensions in discovery deadlines, it is unlikely that this case will go to trial on that date.

**FCI Memphis** - Littrell v. USA - This medical malpractice case involves an allegation that the BOP failed to timely diagnose Plaintiff's throat cancer. Plaintiff's administrative claim, with a sum certain of \$300,000, was denied, and this case was filed. The AUSA handling the case referred Plaintiff's medical records to an expert witness (a former VA physician) who opined that the BOP's medical treatment fell below the standard of medical care. Based on the expert's statement and review of state case law, it appears that Plaintiff has stated a prima facie case of negligence. Therefore, it is likely that we will seek authority to settle this case. Given several mitigating circumstances, any settlement will probably be significantly less than the amount originally sought.

**REPRESENTATION NOT RECOMMENDED FOR STAFF:** None

**SIGNIFICANT FTCA CLAIMS:** None

**MEDICAL MALPRACTICE CASES UPDATE:**

**FMC Lexington** - Hyman Maltz and Thalia Maltz v. USA - This FTCA case is filed in the District of New Jersey. Plaintiff, represented by counsel, alleges negligence by FMC Lexington medical staff for allegedly failing to diagnose Plaintiff's lung cancer, which was apparently discovered after plaintiff's release from custody. Our response is due in November.

**FMC Lexington** - O'Brien v. USA - Magistrate Wehrman's September 11, 1998, R&R recommends the granting of summary judgment for the defendant because of plaintiff's failure to provide a medical expert to refute the United States' position, and the lack of any significant and probative evidence to prove his claim. Plaintiff claims we failed to adequately diagnose and treat his back condition or provide him with proper mattresses.

**FCI Beckley** - Hames v. BOP, et al. - This Bivens complaint alleges deliberate indifference to the inmate's medical condition (keloids).

**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:**

**Orr v. Hawk (6<sup>th</sup> Circuit)** - On September 9<sup>th</sup>, the 6<sup>th</sup> Circuit struck down the Bureau's new rule on early release, finding that a 922(g) conviction could not be termed "violent." In so holding, the Court incorrectly assumed that the new rule applied to inmate Orr, as he completed a RDAP in September, 1994. Without briefing by the government, the court misconstrued the new rule, believing that the BOP would term his 922(g) conviction "violent." In fact, if the new rule did apply, inmate Orr's conviction would not be termed violent, yet he would not be released under the Director's discretion. We believe a Petition for Rehearing should be filed. The date for filing any such Petition is October 23, 1998.

**Pelissero v. Thompson (4<sup>th</sup> Circuit)** - In a 2-1 decision, a panel upheld the Bureau's old and new rules on early release. While the panel had been told the new rule did not apply to these inmates, the court nonetheless found that the new rule was applicable, and that it was a reasonable interpretation of the statute for the Bureau to deny early release to individuals whose conviction or conduct, included possession or use of a firearm. We expect a Petition for Rehearing to Banc to be filed, as this panel opinion is in conflict with an earlier, unpublished panel decision in **Fuller v. Moore**.

**FCI Cumberland** - There were a number of early release cases involving firearm possession that were pending or had recently been decided against the Bureau by several judges in the District of Maryland. Immediately following the Fourth Circuit's ruling in Pelissero v. Thompson upholding the Director's authority to deny eligibility for early release to inmates possessing firearms, motions to alter or amend judgment were filed in two such cases (decided within 10 days of the Pelissero ruling). On September 18, 1998, Judge Motz granted our motion, vacated the previous order granting habeas relief, and instead denied the petition for writ of habeas corpus in Wooding v. Henry. Similarly, on September 22, 1998, Judge Garbis did the same in the other case, Davis v. Henry. These were both cases under Program Statement 5162.02 ("old rule"). In addition, on September 23, 1998, Judge Messitte in Snyder v. Henry, an "old rule" case which was pending, denied habeas relief based on Pelissero. What is significant is that these judges in the District of Maryland have agreed with our view that Pelissero upholds not only the "new rule", Program Statement 5162.04, but the "old rule" as well.

**FCI Beckley** - Mangum v. Olson - This Habeas challenges the bank robbery provisions of P.S. 5162.02. A Motion to Dismiss/Motion for Summary Judgment was filed in September.

**FCI Milan** - Taylor v. Pontesso - This case was an old P.S. RDAP case which the BOP won at the District Court level on the issue of conviction of Fugitive in Possession of a Firearm and Fugitive in Possession of Ammunition. In light of Orr, the inmate appealed and the District Court has required briefing by October 15, 1998. Additionally, the Court wants a separate briefing on the separate issue of the inmate's request for bond. We are working with the Central Office and intend to defend the case in light of Orr.

**SIGNIFICANT NEW CRIMINAL REFERRALS SINCE LAST MONTH'S REPORT:**

**FMC Lexington** - The FBI is investigating the death of Tracy Hearlson, #246630-086, who was found dead on September 14, in a common area of the out-patient health clinic. Part of his head was caved-in, apparently crushed with a fire extinguisher. Three inmate suspects from the unit have been placed in administrative detention pending investigation.

**FCI Beckley** - On September 27, an employee from FCI Beckley's Chaplaincy Department was arrested by the FBI prior to reporting to work. The arrest arose from an ongoing investigation initiated by the institution. A criminal Complaint for Possession with Intent to Distribute Heroin was filed against the employee on September 28. The employee was officially terminated on September 29, 1998. A preliminary hearing is scheduled for October 9, 1998.

**FCI Manchester** - U.S. v. Clark - A pre-trial hearing was held in this case in London, Kentucky, on September 14, before Magistrate Judge Johnson. This hearing concerned a Defense motion to dismiss for selective prosecution. The motion was denied.

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

**REHABILITATION ACT:** None

**Ensign Amendment Cases:** None

**Dismissals Under PLRA:** None

New Litigation Cases by Institution and Type  
 Received During the Month of September 1998

|      | ALD | ASH | BEC | BUT* | CUM | ELK | LEX | MAN | MEM | MIL | MRG | PET | SEY | THA | TOT |
|------|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| BIV  | 0   | 0   | 1   | 2    | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 3   |
| FTCA | 0   | 0   | 0   | 0    | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 1   |
| HC   | 0   | 0   | 0   | 1    | 5   | 0   | 0   | 0   | 0   | 0   | 1   | 1   | 0   | 0   | 8   |
| OTH  | 0   | 0   | 1   | 2    | 0   | 0   | 1   | 0   | 0   | 0   | 0   | 0   | 0   | 1   | 5   |
| TOT  | 0   | 0   | 2   | 5    | 5   | 0   | 2   | 0   | 0   | 0   | 1   | 1   | 0   | 1   | 17  |

\*Represents both the FCI and LSCI

New Litigation Cases by Institution and Type

Received Calendar Year to Date

|      | ALD♦ | ASH | BEC♦ | BUT* | CUM | ELK● | LEX | MAN | MEM | MIL | MRG● | PET | SEY | THA | TOT |
|------|------|-----|------|------|-----|------|-----|-----|-----|-----|------|-----|-----|-----|-----|
| BIV  | 0    | 1   | 1    | 4    | 4   | 4    | 6   | 1   | 1   | 3   | 2    | 2   | 0   | 4   | 33  |
| FTCA | 1    | 0   | 0    | 1    | 2   | 0    | 1   | 2   | 0   | 3   | 0    | 0   | 0   | 3   | 13  |
| HC   | 1    | 2   | 1    | 4    | 15  | 2    | 0   | 1   | 5   | 8   | 5    | 4   | 1   | 6   | 55  |
| OTH  | 0    | 0   | 3    | 24   | 2   | 2    | 1   | 1   | 1   | 1   | 0    | 0   | 0   | 1   | 36  |
| TOT  | 2    | 3   | 5    | 33   | 23  | 8    | 8   | 5   | 7   | 15  | 7    | 6   | 1   | 14  | 137 |

\*BUT represents both the FCI and the LSCI   ●Corrected figure (case counted twice)   ♦Case counted for BEC should have been ALD.