



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

Tower II, 8th Floor
400 State Street
Kansas City, KS 66101-2421

April 21, 1999

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

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: Quarterly Report (2nd QTR FY 1999)
(January 1, 1999 - March 31, 1999)

LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS

LITIGATION:

	INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
1Qtr	NCR	127	65	17	32	19	48	483	69	16	5	0.00
2Qtr	NCR	181	111	15	37	18	62	503	75	12	3	0.00
3Qtr												
4Qtr												

NUM - Number of total lawsuits filed in the month
HC - Number of habeas corpus actions filed in the reporting period
FTC - Number of FTCA actions filed
BIV - Number of Bivens actions filed
OTH - Number of other actions filed, e.g., mental health, mandamus
ANS - Number of litigation reports completed
PEN - Number of cases pending
CLD - Number of cases closed
H/T - Number of hearings or trials
SET - Number of settlements
AWD - Number of Awards

**North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 2**

ADMINISTRATIVE CLAIMS:

1st QTR (Oct - Dec)	2nd QTR (Jan-Mar)	3rd QTR (Apr - Jun)	4th QTR (Jul - Sep)
228	236		

Pending 288

ADMINISTRATIVE REMEDIES

1st QTR (Oct - Dec)	2nd QTR (Jan-Mar)	3rd QTR (Apr - Jun)	4th QTR (Jul - Sep)
668	624		

FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS

	FOI/PA Received	FOI/PA Processed
1st QTR	202	207
2nd QTR	219	221
3rd QTR		
4th QTR		

ADVERSE DECISIONS

Appleby-el v. USA, Case No. 97-N-0671, ADX Florence

Plaintiff alleged he slipped and fell because the cell floor was wet after he showered. The R&R recommends denial of government's motion to dismiss and for summary judgement. The R&R was

North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 3

received after the 10 day period in which to file objections. Settlement with plaintiff is being discussed.

Knowles v. BOP, et al., Case No. 97-Z-2645, FCI Florence

Petitioner sentence deemed non-parolable while he was at FCI Greenville, due to representations made by AUSA. When complaint was filed, we asked the court whether the sentence was to be parolable. We were advised that it was to be parolable, and so advised the inmate. A parole hearing was held and petitioner was released on parole. He filed a motion for costs, as he was a prevailing party. We were unfortunately unable to find any precedent supporting the assertion that he should not receive costs. On January 21, 1999, pursuant to a stipulation for dismissal and costs, the court entered an order directing the USA to pay \$346.18 in costs to petitioner in this mandamus action.

Christopher Lopez v. Randy Davis, Case No. 98-4158, FPC Yankton

Roderick Walter v. Al Herrera, Case No. 98-4192, FPC Yankton

Duane Larison v. Al Herrera, Case No. 98-4142, FPC Yankton

Peter Betz v. Al Herrera, Case No. 98-4174, FPC Yankton

In each of these cases the Court found that the BOP acted beyond its statutory authority when it used firearms enhancements as a basis for denying inmates early release eligibility under 18 U.S.C. 3621(e)(2)(B). A notice of appeal has been filed in Lopez and we anticipate doing the same in the other cases. There are currently nine cases which have been consolidated into one appeal before the Eighth Circuit (Bellis v. Davis). The appeal brief in Bellis is due by March 12, 1999, and oral argument has been slated for the second week of May 1999.

Scroger v. J.W. Booker, Jr., Case No. 98-3260-RDR, USP Leavenworth

In this case, Scroger received a 2 level enhancement because loaded accessible firearms as well as drugs were discovered. Here, the court determined that the BOP does not have authority to create an additional eligibility requirement which conflicts with the plain language of the statute. This court's holding was limited to invalidating the improper eligibility requirement. The court further stated that the BOP's interpretation of 3621(e)(2)(B) abrogating the statutory term "convicted" was not within its discretion and was entitled to no deference by the court.

Ward v. J. W. Booker, Jr., Case No. 98-3274-RDR, USP Leavenworth

Ward was convicted of a violation of 21 U.S.C. 841(a)(1) Possession with intent to distribute heroin. His offense level was increased by 2 points because firearms were possessed in connection with the offense. The merits were not addressed in this case, instead ripeness and failure to exhaust available administrative remedies were asserted.

North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 4

Guido v. Booker, Case No. 98-3266-RDR, USP Leavenworth

In this case, the BOP was ordered to consider Guido's early release eligibility notwithstanding his two-level enhancement for weapons possession. The court relied heavily on the Fristoe v. Thompson case as binding authority. We have until March 8th to inform the court of the status of Guido's re-evaluation.

Collins v. Bureau of Prisons, et al., 97-WM-1533, USP Florence

The Court dismissed the United States on sovereign immunity, however, it recommended the case go forward as plaintiff described in sufficient detail circumstances of his alleged assault by 4 correctional officers in the SHU on January 1996 at the USP. The Court ruled that, if true, the allegations would violate the 8th Amendment. This is a "he said, we said" matter that will probably go to trial.

SETTLEMENTS OR JUDGMENTS

Joseph L. Davis v. Page True, et al. D. Kan., Case No. 96-3316-GTV, USP Leavenworth

Joseph L. Davis v. Warden Sieter, et al. S. D. of Ill., Case No. 97-809-JPG, FCI Greenville

After consultation with the named defendants, and being informed of the reasons why it would be in the best interest of the government to settle this case, Warden Booker agreed to settle the Leavenworth civil action arising out of the October, 1995 transfer of Davis from FCI Greenville to USP Leavenworth. In conjunction with the Leavenworth civil action, a determination was made to also settle a case filed by Davis against FCI Greenville staff.



b2 & b5

Bailey v. United States, Case No. 96-680-JPG, USP Marion

This was originally filed as a mixed FTCA/Bivens action. We originally offered \$33 in settlement of the administrative claim. The Bivens claim was dismissed and a tort claim seeking \$209.55 for property loss remains. In response to our motion for summary judgement, claims for loss of property totaling \$102 was dismissed, leaving a total claim for \$107. The AUSA has recommended that a settlement offer be made for the amount of \$107.00. Due to the fact that the plaintiff has sought to amend his complaint and to include additional Bivens defendants and the cost of preparing for and conducting a trial will far exceed \$107.

North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 5

Teich v. U.S.A., et al., Case No. CV-S-98-01213-HDM, MCFP Springfield

Plaintiff's filed a Bivens/FTCA action wherein they allege wrongful death of a quadriplegic inmate who died at the medical center. A settlement agreement was made for \$88,000.00. The Magistrate was pressing for a \$100,000 settlement and the AUSA stated that cases in her district were usually worth more than the estimated value of \$6,000 - \$50,000 range. Furthermore, the AUSA believed that if the Judge had been presented with the facts, a potential verdict would have exceeded the settlement amount of \$88,000.

DECISIONS OF INTEREST

Snow v. USA, 98-CV-0161-PER, FCI Greenville

While incarcerated at FCI Greenville, plaintiff filed suit under the FTCA claiming that during an open movement, he was struck on the head and was rendered unconscious by unknown persons who "inflicted mutilation upon his sexual organs destroying his genitalia." Plaintiff alleged that the BOP was negligent in that employees failed to prevent the unknown persons from obtaining a weapon and failed to prevent the assault and mutilation.

The discretionary function exception to the FTCA was argued in a motion to dismiss. The court found that the protection of inmates falls within the discretion of prison officials and that prison officials could not have breached their duty under 18 U.S.C. 4042 (providing that the BOP provide safekeeping and protection for inmates). Judge Riley dismissed the case for lack of subject matter jurisdiction holding that the discretionary function exception is a jurisdictional prerequisite to the suit. The court did however, indicate that Snow may be able to state a Bivens, Eighth Amendment claim in this matter.

Dodds v. Del Muro, Case No. 95-3011-RDR, USP Leavenworth

On January 15, 1999, the Tenth Circuit Court of Appeals affirmed the decision of the district court. In this case, the plaintiff sought damages because of alleged denial of medical care when staff failed to examine his January 1993 TB test results and also because he was not informed of the test results. Approximately a year later medical staff discovered plaintiff had active TB, and that plaintiff's January 1993 test result had been positive. It was undisputed in this case that plaintiff had to be tested at least three times, and that plaintiff went without medical treatment for TB for thirteen months after the positive test result was noted in his medical records. However, the facts do not entitle plaintiff to relief if no deliberate indifference to a serious medical need of plaintiff was demonstrated.

Massey and Otten v. Helman et al, Case No. 97-1401, FCI Pekin

This case was initially filed as a class action alleging that the BOP Health Services policy was

North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 6

unconstitutional. The complaint was joined by Dr. Otten who alleged that he was removed from his position as Clinical Director after assisting the plaintiff in this litigation. The class claims were disallowed in June of 1998. On February 4, 1999, the court ruled that plaintiff Massey could not proceed on his claims based upon his failure to exhaust his administrative remedies. The court relied heavily upon the Alexander v. Hawk opinion in reaching its decision. The court dismissed Dr. Otten's claims on jurisdictional grounds. This is the third Bivens action for monetary damages that has been dismissed in the Central District for failure to exhaust.

Taylor v. U.S. BOP, et al., 10th Cir. 1999, Case No. 98-3176, USP Leavenworth

In this unpublished decision, the Tenth Circuit Court of Appeals affirmed the decision of the district court's denial of the petitioner's writ of habeas corpus. In this case, the petitioner challenged the denial of his early release. The petitioner is serving a sentence for violations of 21 U.S.C. 841 (a)(1) and possession of a firearm by a convicted felon in violation of 922 (g)(1). In reaching this decision, the Court concluded that even if the BOP had exceeded its discretion in finding that a section 922 (g) violation is a crime of violence, Taylor would not have been eligible for early release because he had a prior conviction for aggravated assault.

Rahman v. Keohane, et al., W.D. MO. Civil No. 97-3279-CV-S-RGC, MCFP Springfield
Inmate Rahman is serving a life sentence for crimes associated with the bombing of the World Trade Center in New York City. This lawsuit alleged some 41 violations of plaintiff's constitutional rights, as well as violations of the RFRA of 1993. On March 30, 1999, the Western District of Missouri dismissed the case.

PENDING CASES OF INTEREST

Warden, et al. v. Perrill, Case No. 95-S-13, FCI Englewood

This case involves allegations that inmates on a prison work assignment were exposed to asbestos. There are seventeen inmate plaintiffs represented by counsel. The U.S. Attorney's Office filed a motion to dismiss on behalf of all represented defendants, alleging, inter alia, that the Bivens claim was precluded by Demko and the Inmate Accident Compensation Act. The motion to dismiss was pending for three years. The Magistrate Judge assigned to the case recently issued a report denying the motion to dismiss on the Demko grounds.

Bustillo v. Hawk, Case No. 95-WM-2242, ADX Florence

On November 24, 1998, a hearing (video) was held on plaintiff's motion for a preliminary injunction. In an Order filed March 17, 1999, the Court denied the motion. In citing SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991), the Court noted that plaintiff had failed to show any evidence of retaliation for exercise of his First Amendment rights to seek judicial redress; that plaintiff

North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 7

failed to show evidence of an Eighth Amendment violation or that he will suffer irreparable injury if the injunction is not issued; that plaintiff failed to show competent evidence [actually showed none] that he was denied due process in taking of property and in disciplinary hearings; defendants submitted competent evidence showing that plaintiff has visited the law library and has regular access to legal materials for use in his cell and that defendants showed competent evidence why he was not allowed to use an ink pen and that plaintiff failed to show any actual injury.

Garrett v. Hawk, et al., Case No. 96-Z-1379, ADX Florence

This Bivens action (which was up on appeal of the administrative exhaustion initial dismissal) is back in District Court for further proceedings. The Court ordered plaintiff to show cause why the matter should not be dismissed for failure to prosecute. Plaintiff's counsel filed an inaccurate declaration to the court asserting that legal staff at Florence were not properly responding to his inquiries and stating that they had offered to provide him assistance in identifying proper defendants. Legal staff provided the USAO with a letter and declaration explaining that they did not and would not offer up BOP staff for personal liability as defendants but that they were willing to provide addresses for staff members if plaintiff's counsel would provide the names. Plaintiff's counsel has not been forthcoming with identifiable staff names.

Patricia Good Voice Flute v. Pine Medical Center, et al., #98-1735, NCRO/FPC Duluth/FCI Sandstone

Dr. Homeister, from FPC Duluth is a defendant as well as the Pine Medical Center, St. Mary's Duluth Clinic Health System and the Sandstone Medical Group. Plaintiff contends that BOP doctors and contract medical facility were responsible for the wrongful death of her inmate husband who suffered from a fatal heart attack while at FCI Sandstone. NCRO Legal staff have primary responsibility for this case.

Boyce v. Hershberger, Case No. 983238-GTRV, D.Kan., NCRO

Convicted spy Christopher Boyce has filed suit in the District of Kansas alleging that his constitutional rights were violated when he was transferred from a state facility in Minnesota to ADX Florence. Boyce is represented by counsel in this matter and claims that he was transferred solely because of articles he wrote while in state custody. Boyce will settle the case if moved to FCI Sheridan.

Greenville Disturbance Cases

In the aftermath of the October, 1995 disturbance at FCI Greenville, some thirteen law suits have been initiated alleging a panoply of civil rights violations. Because staff action was the subject of a civil rights investigation and OIA inquiry, representation requests were scrupulously processed. Due to misconduct of some employees during the disturbance aftermath, and conflicts between employees, several staff were granted outside counsel and several others were denied representation. The Union has been paying for representation by private counsel for some employees. The representation issue

North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 8

has been a contentious subject for Greenville staff. Processing and supervising these cases has been a major drain on regional office staff. Several of these cases are moving toward a probable trial. We have settled one, and hope to settle several more.

RELIGIOUS FREEDOM RESTORATION ACT CASES

None.

UPCOMING HEARINGS OR TRIALS

Waclaw v. Gilkey, et al., Case No. 99-CV-0526, MCC Chicago

Inmate alleges he should remain at MCC Chicago, and not be transferred to FDC Oakdale pursuant to an INS detainer. Petitioner was transferred to FDC Oakdale. He subsequently filed motion to hold the respondents in contempt of court for the transfer while the habeas petition was pending. The Court ordered the plaintiff to file a brief in support of motion to show cause and Respondents to file a motion to dismiss. Status hearing held on March 18, 1999. The judge dismissed the case without prejudice for want of prosecution on April 1, 1999. Counsel for the plaintiff failed to appear at the last two status hearings, and failed to file any further motions/responses.

Merritt v. Hawk, et al., Case No. 95-Z-2653, ADX Florence

A hearing was held regarding plaintiff's attempt to reactivate a TRO request he filed in late 1995. Specifically, plaintiff was concerned that his placement in an ADX general population unit put his life in jeopardy. At the hearing, plaintiff asserted that he only wanted to be guaranteed no physical contact with other inmates and single recreation. He is already receiving those things and the BOP does not intend to do otherwise with him. The hearing turned into a settlement conference with no final outcome. Clearly, the TRO will not be issued, as the court does not believe a threat to his immediate safety exists. Oral argument on the outstanding motions in the underlying case set for April 22, 1999.

Martinez v. Counts, et al., Case No. 90-3224-CV-S-4, MCFP Springfield

The issue was whether a decision to have inmate Martinez work while he was on pre-trial status resulted in punishment prohibited by the Fifth Amendment. On March 30, 1999, a verdict was given in favor of the defendants. Inmate Martinez has advised the legal staff that he will pursue another appeal. The jury deliberated for about one hour and the Judge's evidentiary rulings were quite favorable to inmate Martinez.

North Central Region
Regional Counsel Quarterly Report
2nd Quarter, FY 1999
Page 9

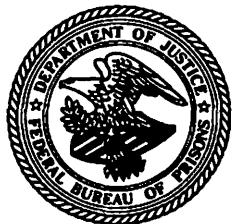
CRIMINAL MATTERS

U.S. v. Riddle and Black, USP Florence

Inmate Black pleaded guilty to aggravated assault and was sentenced to 73 months consecutive. Inmate Riddle changed plea to guilty of Voluntary Manslaughter and 4 counts of assault on staff and is set for sentencing May 11.

U.S. v. Miller, Case No. 98-10046, FCI Pekin

The defendant was found guilty in November of 1998 of Possession of Contraband Inside a Penal Institution and Possession with Intent to Distribute Heroin. This finding placed the inmate in "Career Offender" status. On March 5, 1999, he was sentenced to a consecutive term of imprisonment of 210 months.



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

*Tower II, 8th Floor
400 State Street
Kansas City, KS 66101-2421*

July 9, 1999

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

FROM: JOHN R. SHAW, Regional Counsel

SUBJECT: **Quarterly Report (3rd QTR FY 1999)**
(April 1, 1999 - June 30, 1999)

LITIGATION, CLAIMS, AND ADMINISTRATIVE REMEDY STATISTICS

LITIGATION:

	INST	NUM	HC	FTC	BIV	OTH	ANS	PEN	CLD	H/T	SET	AWD
1Qtr	NCR	133	65	17	32	19	48	483	69	16	5	0.00
2Qtr	NCR	181	111	15	37	18	62	503	75	12	3	0.00
3Qtr	NCR	136	86	10	28	12	76	519	101	11	1	0.00
4Qtr												
Total	NCR	450	262	42	97	49	186	519	245	39	9	0.00

NUM - Number of total lawsuits filed in the month

HC - Number of habeas corpus actions filed in the reporting period

FTC - Number of FTCA actions filed

BIV - Number of Bivens actions filed

OTH - Number of other actions filed, e.g., mental health, mandamus

ANS - Number of litigation reports completed

PEN - Number of cases pending

CLD - Number of cases closed

H/T - Number of hearings or trials

SET - Number of settlements

AWD - Number of Awards

North Central Region
Regional Counsel Quarterly Report
3rd Quarter, FY 1999
Page 2

ADMINISTRATIVE CLAIMS:

1st QTR (Oct - Dec)	2nd QTR (Jan-Mar)	3rd QTR (Apr - Jun)	4th QTR (Jul - Sep)
228	236	262	

Pending 320

ADMINISTRATIVE REMEDIES

1st QTR (Oct - Dec)	2nd QTR (Jan-Mar)	3rd QTR (Apr - Jun)	4th QTR (Jul - Sep)
668	624	652	

Total for Fiscal Year 1944

FREEDOM OF INFORMATION ACT/PRIVACY ACT REQUESTS

	FOI/PA Received	FOI/PA Processed
1st QTR	202	207
2nd QTR	219	221
3rd QTR	232	255
4th QTR		

Total for Fiscal Year 653

North Central Region
Regional Counsel Quarterly Report
3rd Quarter, FY 1999
Page 3

ADVERSE DECISIONS

The following RDAP cases are being currently appealed:

South Dakota

1. **Bellis v. Davis** (enhancement, 922(g))
2. **Pierson v. Davis** (enhancement)
3. **Shields v. Davis** (enhancement)
4. **Miller v. Davis** (enhancement)
5. **Cook v. Davis** (enhancement)
6. **Clark v. Davis** (enhancement)
7. **Winston v. Davis** (enhancement)
8. **Walker v. Davis** (enhancement)
9. **Lopez v. Davis** (enhancement)
10. **Martin v. Davis** (enhancement)
11. **Betz v. Davis** (enhancement)
12. **Walter v. Davis** (enhancement)
13. **Larison v. Davis** (enhancement)

Oral argument was conducted on May 12, 1999, before the 8th Circuit in St. Louis. We await the 8th Circuit decision pertaining to these cases as this decision will effect a borage of other cases in the districts that are pending the Bellis decision.

We also have adverse opinions in five other cases.

Minnesota

1. **Zacher v. Tippy** (prior conviction)(brief filed)

Colorado

1. **Hicks v. Brooks** (enhancement)

Kansas

1. **Guido v. Booker**, 98-3266-RDR (enhancement)
2. **Scroger v. Booker**, 98-3260-RDR (enhancement)
3. **Ward v. Booker**, 98-3274-RDR (enhancement)

In these 3 cases, the District Court found that the Director of the Federal Bureau of Prisons exceeded her authority in denying relief to petitioner's under 18 U.S.C. section 3621 (e)(2)(B) based on a sentence enhancement for possession of a firearm.

North Central Region
Regional Counsel Quarterly Report
3rd Quarter, FY 1999
Page 4

Okai v. Federal Bureau of Prisons, Case No. 97-549-DRH, FCI Oxford/FCI Greenville

The plaintiff in this case used the Freedom of Information Act to request documents related to the October 1995 disturbance at FCI Greenville. The BOP released some documents and withheld others by asserting various exemptions under the FOIA. The Magistrate issued an R&R that denied the BOP the use of the "law enforcement records" exemption found at 5 USC § 522(b)(7)(C) for 19 documents. Subsequently, a Memorandum and Order issued by the Judge in this case, mistakenly denied the BOP exemptions under § 522(b)(7)(c). As a result, we have requested that the order be appealed and that the DOJ Office of Information Privacy handle the appeal.

Shockey v. T.C. Peterson, Case No. 99-247, FCI Sandstone

Petitioner alleges he was determined to be provisionally eligible for 3621e release in March 1996. A Change Notice to the Crime of Violence Program Statement in May, 1996 added his offense to a crime of violence. Petitioner was never advised and withdrew from a vocational program to participate in RDAP. His sentence was re-computed to reflect the one year off. Upon transfer, staff reviewed his 3621e eligibility and determined he was not eligible. His sentence was re-computed to reflect the loss of 3621e, which petitioner alleged the BOP cannot do as it is retroactive and violates ex post facto. Petitioner requested the restoration of 3621e release. Received an Adverse R&R recommending sentence to be recalculated to show year off. Petitioner is currently at the MCFP. After consultation with OGC staff it was determined to restore the Petitioner's eligibility, and the Petitioner will deemed eligible.

SETTLEMENTS OR JUDGMENTS

Strong v. United States , USP Leavenworth

FTCA action for lost/stolen luxury Cartier eyeglasses which were allegedly valued at \$950.00 In this case, Strong sought compensation to replace his Cartier prescription eyeglasses that were stolen from the Health Services Administrator's office in September 1997. Since there were several concerns about the factual circumstances surrounding the theft of these glasses, (box containing 13 pairs of inmate glasses were stolen), a decision was made to see whether or not the inmate would accept the original offer that was given to him in 1997, ie, replacement glasses (top of the line) from Duffins optical. Strong agreed to the offer as long as he would be able to have his eyes examined in the near future. On June 25, 1999, Strong saw the Duffins representative to pick his frames and on July 1, 1999, he had his eyes examined. This case was settled for approximately \$221.00 which will be paid out of the U.S. Attorney's Settlement Fund directly to Duffins optical.

DECISIONS OF INTEREST

Donna Buford, as legal guardian for Kendon Leger, a minor v. United States of America, Case No. 97-2263-JWL, USP Leavenworth

In this FTCA wrongful death action, plaintiff's decedent was killed in the USP, Leavenworth Special Housing Unit (SHU) by a fellow inmate during recreation. Plaintiff was represented by private counsel. After discovery, including depositions of numerous staff and inmate witnesses, the United States filed a motion for summary judgment citing the discretionary function exception to the FTCA as well as failure to state a claim under Kansas negligence law. The plaintiff's case after discovery alleged staff negligence in four security related areas: 1) Failure to conduct cell searches every ten days; 2) Failure to search the recreation pen; 3) Failure to utilize a transfrisker on inmates; 4) Failure to pat search inmates going to recreation. The court ruled in favor of the United States under the discretionary function exemption on all above issues, with the exception of the failure to pat search. Because Plaintiff submitted affidavits from both the murderer as well as an inmate witness which indicated they were not pat searched, the discretionary function exemption was not applied. However the court ruled in favor of the United States under pure negligence analysis regarding the pat search issue. The court held that before liability could be imputed under Kansas law, plaintiff must offer evidence indicating that prison employees knew, or should have known, of the risk posed by the aggressor to the victim, and then failed to take sufficient actions to prevent a subsequent attack. Because the evidence failed to establish during discovery that staff knew or should have known of an impending attack, the court dismissed this claim as well.

Nowicki v. J. T. O'Brien, 98-C-875-C, FCI Oxford

Petitioner alleges that we have violated 18 U.S.C §3658 by refusing to credit presentence time he spent in state custody against his current federal sentence. Respondents maintained that the time the petitioner is requesting was based solely on state charges before a federal detainer was lodged. The Court agreed and held that respondent properly refused to grant such credit because the time petitioner spent in state custody was not connected with offense for which the federal sentence was imposed. However, the Court noted that nothing in the record or in petitioner's allegations suggested that his custody was affected by the mere issuance of the probation warrant, as opposed to the lodging of the detainer. In Doyle v. Elsea, 658 F.2d 512 (7th Cir. 1981), the petitioner adduced evidence that he was unable to post bail as a direct result of the issuance of the federal warrant. Hence, the court in Doyle held that as a "practical matter" he was in pretrial custody "in connection with" his federal charges. As a result, the Doyle court found he was entitled to credit for time spent in pretrial custody prior to the detainer. Consistent with Doyle, the Court hints that the petitioner may be entitled to the time he seeks if he can make a similar showing and exhausts his remedies. The Court is in essence encouraging the petitioner to pursue a new angle.

North Central Region
Regional Counsel Quarterly Report
3rd Quarter, FY 1999
Page 6

Epps v. USA, et al., Case No. 99-3002, MCFP Springfield

In this habeas corpus case, petitioner alleged deliberate indifference to his medical needs by not considering him for a kidney transplant and/or compassionate release. The Court found that petitioner failed to demonstrate that respondents have been deliberately indifferent to his serious medical needs because he has failed to demonstrate that he is currently eligible for a transplant through the BOP and is being denied that transplant. The Court also found that while he was seeking admission into a transplant program, he has not, to date, provided evidence of financial ability to pay, nor a written letter of acceptance from a transplant program. There is nothing to preclude petitioner from being accepted into a transplant program, provided that he satisfies the eligibility requirements. Based on the record at the time, the Court recommended dismissal without prejudice to his right to pursue these claims in his district of confinement should he find the need to do so.

PENDING CASES OF INTEREST

Stewart v. Seiter, et al., Case No. 96-983-GPM, FCI Greenville

On April 11, 1999, the Court issued an order setting aside the default judgment against defendants Seiter and Allen previously entered by the Magistrate. The District Judge construed the previous orders as Reports & Recommendations and construed defendant's appeal as objections to the R & R. The Judge relied upon 42 U.S.C. §1997e(g), a section of the PLRA which provides that "[a]ny defendant may waive the right to reply to any action brought by a prisoner under section 1983 of this title or any other Federal law," and that "such waiver shall not constitute an admission of the allegations contained in the complaint." 42 U.S.C. §1997e(g)(1). This section also provides that "[n]o relief shall be granted to the plaintiff unless a reply has been filed." *Id.*

Turner v. USA, Case No. 97-S-1340, ADX Florence/USP Florence

The Court held a TRO hearing on plaintiff's claim that his life was in danger because he was being poisoned by ADX staff. A recommendation favorable to the government was issued and adopted by the Court. Additionally, Judge denied the government's Motion for Summary Judgement in underlying case. A favorable R&R which recommended dismissal was adopted in part and rejected in part. The Court dismissed the medical claims; punitive damage claims; request for a jury trial; and request for an advisory jury. Court declined to dismiss the negligence claim, finding that there is a genuine issue of material fact with respect to whether the defendant's employees had reason to know that placing inmate in the cell with plaintiff would lead to the altercation which ensued. Court notes that there are additional questions regarding the causation of plaintiff's injuries (due to his admission that he, not the other inmate, started the fight) which cannot be resolved on summary judgement.

North Central Region
Regional Counsel Quarterly Report
3rd Quarter, FY 1999
Page 7

Moore v. Cooksey, et al., Case No. 98-WM-2321, ADX Florence

Plaintiff claims violations of his 14th Amendment rights of due process. He claims that he was illegally placed in the ADX Control Unit, and that falsified documents were used to justify the placement. He also alleges that he falls under the Americans With Disabilities Act (ADA) because of his medical condition and that as a result he was not to be placed in the Control Unit as inmates with "major physical disabilities" cannot be placed in the Control Unit.

Merritt v. Pugh, Case No. 97-Z-2118, ADX Florence

Habeas petition wherein inmate seeks to challenge very old disciplinary actions. Court allowed him to amend petition after response already filed by government. Petitioner now seeks to challenge 62 separate disciplinary actions between 1988 and 1991. We renewed our objections to the amendment and argued prejudicial delay and failure to exhaust.

Williams v. Pitt & Bowens, Case No. 96-597-JPG, FCI Greenville

Magistrate Judge issued a Proposed Findings of Fact and Conclusions of Law in this case which arose out of the 1995 Disturbance at FCI Greenville. The Magistrate recommended that judgment be entered against plaintiff because of insufficient proof that the defendants caused the alleged constitutional violation.

Good Voice Flute v. United States of America, Case No. 99-874, FPC Duluth/FCI Sandstone
FTCA action alleging that the medical treatment of a heart attack provided to inmate Harold Good Voice Flute by defendant and others was the proximate cause of his death at FCI Sandstone in 1996. This case is related to Patricia Good Voice Flute v. Pine Medical Center, et al., #98-1735, which NCRO is coordinating. The latter case was naming the Medical Center and doctors, as well as BOP staff. The plaintiff is now attempting to recover from the USA under FTCA.

RELIGIOUS FREEDOM RESTORATION ACT CASES

Patel v. Wooten, Case No. 96-M-0286, FCI Florence

RFRA case challenging religious diet at FCI Florence. The four individual defendants have received outside counsel and the plaintiff was appointed counsel. This case was originally dismissed by the District Court under RFRA, the 10th Circuit Court of Appeals reversed and remanded, with statement that RFRA was unconstitutional. Plaintiff's response was extended, pending attempts to settle (inmate wanted guarantee he would be allowed to purchase protein powder and bean pies from commissary at any BOP facility). Settlement cannot be accomplished because it is against national policy on protein powder.

North Central Region
Regional Counsel Quarterly Report
3rd Quarter, FY 1999
Page 8

UPCOMING HEARINGS OR TRIALS

Okai v. Verfurth, et al., Case No. 96-47, FCI Greenville (1995 Disturbance case)

This Bivens action alleging excessive use of force during the aftermath of the 1995 disturbance was set for a jury trial to begin on Wednesday, July 28, 1999. Paul Brown and Jesselyn Brown from Main Justice will be litigating the case.

McCoy v. Nelson, et al., Case No. 96-790, FCI Greenville (1995 Disturbance case)

A hearing has been set for July 16, 1999 at 8:30 AM to resolve the pending Plaintiff's Motion to Compel the Production of Documents. FCI Greenville was served with a subpoena for documents in this excessive use of force action. Some documents were provided, while others were withheld.

U.S. v. McElhiney, USP Leavenworth

On a daily basis, issues arise in connection with the prosecution of inmate Michael McElhiney, Reg. No. 04198-097. The trial date is July 19, 1999, unless postponed again. Several Sealed orders have been sent to the warden's office and Legal Office recently for delivery to McElhiney. Each order has been personally delivered by legal staff. Legal staff have been instructed that the information contained in the orders is not to be shared with the prosecutor or case agent. USP Leavenworth staff and NCRO staff continue to facilitate numerous legal calls and requests each week between McElhiney and Private Investigator, Goad.

CRIMINAL MATTERS

U.S. v. Riddle, USP Florence

Inmate pleaded guilty to voluntary manslaughter and 4 counts impeding staff. At sentencing, judge declined to sentence per the plea agreement and threw out the additional time for assaulting staff. Inmate sentenced to 10 years consecutive to outstanding terms.

U.S. v. Zepeda, Case No. 98-10073, FCI Pekin

Inmate charged with Assault with Intent to Commit a Felony following an incident on July 4, 1998. The inmate was sentenced to a consecutive term of 77 months on April 15, 1999. The government agreed to drop a second count of Possession of a Weapon Inside a Penal Institution in exchange for a waiver of appeal.

U.S. v. Alvarado, USP Leavenworth

Inmate Alvarado pled guilty on April 4, 1999 to possession of a weapon in violation of 18 U.S.C.

North Central Region
Regional Counsel Quarterly Report
3rd Quarter, FY 1999
Page 9

Section 1791(a)(2) was sentenced on June 21, 1999 to a (30) thirty month consecutive sentence, a \$100.00 Special Assessment and 3 years supervised released.

U.S. v. McElhiney, USP Leavenworth

On a daily basis, issues arise in connection with the prosecution of inmate Michael McElhiney, Reg. No. 04198-097. The trial date is July 19, 1999, unless postponed again. Several Sealed orders have been sent to the warden's office and Legal Office recently for delivery to McElhiney. Each order has been personally delivered by legal staff. Legal staff have been instructed that the information contained in the orders is not to be shared with the prosecutor or case agent. USP Leavenworth staff and NCRO staff continue to facilitate numerous legal calls and requests each week between McElhiney and Private Investigator, Goad.