

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8756

DEE FARMER,

Plaintiff-Appellant,

vs.

MICHAEL QUINLAN, Director
GERRY T. WILLIFORD, Regional Director
JULIAN PARKER, Regional Designator
ROBERT MATTHEWS, Warden
LARRY E. DUBOIS, North Central Regional Director
WILLIE BRASWELL, Correctional Counselor
MARY ELLEN THOMS, North Central Regional Designator
JOHN DOE #1
JOHN DOE #2

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE HONORABLE JACK T. CAMP, PRESIDING

OPENING BRIEF ON BEHALF OF APPELLANT

DEE FARMER
Register Number 23288-037
Federal Correctional Institution
9595 West Quincy Avenue
Littleton, Colorado 80123

In Propria Persona

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appellant Dee Farmer, without the benefit of counsel

in accordance with Circuit No. 92-8756) submit:

DEE FARMER,

I. Trial Judge

Plaintiff-Appellant,

Jack T. Camp, District Judge

Northern District of Georgia

75 Spring Street, S.W.

Atlanta, Georgia 30335

vs.

MICHAEL QUINLAN, Director

GERRY T. WILLIFORD, Regional Director

JULIAN PARKER, Regional Designator

ROBERT MATTHEWS, Warden

LARRY E. DUBOIS, North Central Regional Director

WILLIE BRASWELL, Correctional Counselor

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Atlanta, Georgia 30335

Defendants-Appellees.

Attorney for Defendant-Appellees

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Federal Correctional Institution

THE HONORABLE JACK T. CAMP, PRESIDING

In Proper Persona

DEE FARMER

Register Number 23288-037

Corporate Disclosure Statement:


Federal Correctional Institution

9595 West Quincy Avenue

this action is a corporation.

Littleton, Colorado 80123

In Proper Persona



* Dee Farmer expresses his appreciation to Rassia Lerner, Attorney at Harvard Law School and Wayne Alexander of Odysseys Prisoner Legal News for their invaluable assistance in the research and preparation of this brief.

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Appellant Dee Farmer, without the benefit of counsel
in accordance with Circuit Rule 27-1(a)(1) submit:

I. Trial Judge

Jack T. Camp, District Judge
Northern District of Georgia
75 Spring Street, S.W.
Atlanta, Georgia 30335

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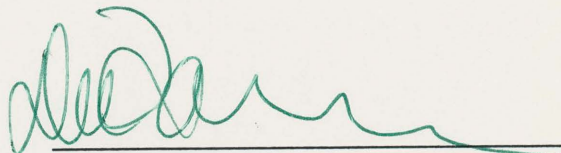
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Corporate Disclosure Statement: None of the parties to
this action is a corporation.



Dee Farmer
Appellant

STATEMENT REGARDING ORAL ARGUMENT

The issues before this Court are of a legal nature and oral argument will not substantially assist the Court in its determination. Thus, the appellant does not request oral argument.

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JURISDICTIONAL STATEMENT

I. DISTRICT COURT JURISDICTION:

The district courts' jurisdiction was based on Title 28, United States Code, Section §1331 and §1343(a).

II. APPELLATE JURISDICTION:

1. The appellate courts' jurisdiction is based on Title 28, United States Code, Section §1291.

2. The judgment sought to be reviewed was entered on July 8, 1992.

3. Appellant filed no motion which claimed to toll the time within which to appeal.

4. Appellant filed a timely notice of appeal on July 27, 1992.

5. The district court granted appellant leave to proceed in forma pauperis on appeal on October 20, 1992.

6. This case is not a direct appeal from a decision of a magistrate.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting defendants' cross-motion for summary judgment and denying Farmers' counter-motion for summary judgment since there was no genuine issue to the material facts that the defendants' withheld Farmers' personal legal materials from him resulting in his inability to file a response to a dispositive motion, present substantial legal arguments, file a motion to alter or amend judgment, motion for reconsideration, or an appeal in the case which was pending in the District of Maryland and subsequently dismissed on legal grounds?

2. And, whether Farmer was entitled to summary judgment as a matter of law on his claims of denial of access to the courts?

3. Did the district court err in its finding that the failure to exhaust administrative remedies required the dismissal of Farmers' "damage claim" that he was deprived of a constitutionally protected liberty interest when defendant Braswell denied him access to the prison administrative remedy procedure?

4. Did the district court err in its finding that prison regulations did not create a constitutionally protected liberty interest, and therefore Farmer could not state a claim upon which relief could be granted in defendants placing him in a special-type housing because of his HIV positivity?

STATEMENT OF THE CASE

Nature of the Case:

Appellant Dee Farmer (hereinafter "Farmer" is a federal prisoner, who is serving a twenty year term of imprisonment within the Federal Bureau of Prisons facilities and Appellees are employees of the Federal Bureau of Prisons (hereinafter "Defendants"). This case involves issues of access to the courts, protected liberty interest created by prison regulations, and exhaustion of administrative remedies.

Course of Proceedings and Disposition Below:

Farmer filed the original complaint pro se on June 16, 1990 while a hold-over inmate at the United States Penitentiary, Atlanta, Georgia (hereinafter "USP-Atlanta"). (R1-1) The suit, brought under 28 U.S.C. §1331 alleged a violation of federal constitutional rights in the defendants denial of Farmers' legal materials necessary for his access to the courts. (R1-1-2)¹ On November 9, 1990 Farmer amended his complaint asserting that he was deprived without due process of law of a liberty interest created by prison regulations by defendants housing him in a special type housing based on his HIV (Human Immunodeficiency Virus), he was denied access to the administrative remedy procedure, and denial of access to the

1 Farmer filed and served upon the defendants a motion for temporary restraining order. (R1-2-1) The Court denied the motion on June 26, 1990. (R1-3-1)

courts. (R1-22 and R1-23) also see Order of May 6, 1991, p.2., n. 1 (R2-32-2). Defendants filed their answer to the amended complaint on June 14, 1991. (R2-35)²

On August 3, 1990 defendants filed a motion to dismiss and a supporting memorandum (R1-10). That motion was premise on nine different grounds, including failure to exhaust administrative remedies. (R1-10-4) Defendants received and filed a response, motion to dismiss complaint, as amended, to the amended complaint prior to the filing of the amended complaint with the district court. (R1-13) On October 17, 1990 defendants filed an amendment to their motion to dismiss complaint, as amended. (R1-15-1) Farmers' opposition to defendants motion to dismiss complaint, as amended was filed on November 9, 1990. (R1-20-1) On November 20, 1990 defendants filed a reply brief to Farmers' opposition. (R1-25-1) And, on November 28, 1990 Farmer filed a response to defendants reply brief. (R2-26) Farmer supplemented that response on December 18, 1990. (R2-27)

On November 9, 1990 Farmer filed his first motion for summary judgment, statement of material facts and supporting memorandum. (R1-21) Defendants filed a response in opposition contending that Farmers' first motion for summary judgment was premature because discovery had not been completed. (R1-14)³

On May 6, 1991 the Court entered an Order granting in part and denying in part defendants motion to dismiss complaint

2 On March 30, 1991 Farmer filed a motion seeking leave to file a second amended complaint. (R2-29) The Court denied that motion on ay 6, 1991. (R2-32).

as amended, dismissing all of Farmers' claim except his claim of denial of access to the courts. (R2-32) Defendants filed a motion to alter or amend judgment reasserting their qualified immunity defense on May 21, 1991. (R2-33) And, on June 17, 1991 Farmer filed a motion for reconsideration. (R2-36) Defendants filed their opposition to Farmers' motion for reconsideration on June 28, 1991. (R2-39) And, on July 1, 1991 Farmer filed opposition to defendants motion to alter or amend judgment. (R2-40) On August 14, 1991 the Court entered an Order denying defendants motion to alter or amend judgment, and granting in part and denying in part Farmers' motion for reconsideration. (R3-52) Farmer filed a second motion for reconsideration on September 15, 1991, reasserting his claim that defendants deprived him of a protected liberty interest created by prison regulations by confining him in a special type housing because of his HIV status. (R3-53) On September 11, 1991 defendants filed a response to Farmers' second reconsideration motion. (R3-54) The Court entered an Order denying inter alia Farmers' second motion for reconsideration on September 30, 1991. (R3-56)

On November 6, 1991 defendants filed a cross-motion for summary judgment and statement of material facts. (R3-59) Farmer filed three motions for an extension of time in which to file a response to defendants' cross-motion for summary judgment. (R4-61, 63 & 64) The Court entered an Order on February

3 For these reasons, on September 30, 1991 the Court denied Farmers' first motion for summary judgment. (R3-56)

11, 1992, denying defendants' motion for summary judgment with leave to renew after Farmer filed a response, and granting Farmer an extension in which to file his response. (R4-65) On February 21, 1992 Farmer filed opposition to defendants' motion for summary judgment, a counter-motion for summary judgment, statement of material facts, and supporting brief. (R4-67) The defendants renewed their cross-motion for summary judgment on March 2, 1992. (R4-68) And filed a response to Farmers' counter-motion for summary judgment, and in support of their cross-motion for summary judgment and statement of material facts on March 10, 1992. (R4-69) District Judge Jack T. Camp granted defendants cross-motion for summary judgment and denied Farmers' counter-motion for summary judgment on July 7, 1992. (R4-72) A judgment of dismissal was entered the following day, July 8, 1992. (R4-73) On July 27, 1992 Farmers' notice of appeal was timely filed. (R4-74) And, on October 20, 1992 the Court granted Farmer leave to proceed in forma pauperis on appeal. (R4-75)

STATEMENT OF THE FACTS

Each of the hereinafter listed facts are taken directly from the defendants' statement of material facts (R3-59) and plaintiffs' statement of material facts (R4-67), which are exhibits nine and ten of Appellants' Record Excerpts.

Appellant Dee Farmer is a federal prisoner committed to the custody of the Attorney General of the United States for a twenty year term of imprisonment, as a result of conviction in the United States District Court of Maryland for "access device" fraud. He also has a thirty year consecutive sentence to serve with the State of Maryland for fraud-type convictions. (Record ("R"), Excerpts ("E"), Page ("P"), Paragraph ("PR") - - RE9-P1-PR1 & RE10-P1-PR1) From March 9, 1989 until April, 1990 Farmer was an inmate at the United States Penitentiary, Terre Haute, Indiana (hereinafter "USP-Terre Haute"). (RE9-P2-PR3 & RE10-P2-PR2) During the majority of Farmers' confinement at USP-Terre Haute he was confined in controlled housing. (RE9-P2-PR3 & RE10-P2-PR3) After spending about one year in controlled housing the defendants approved Farmers' release from controlled housing and redesignated him to the Federal Correctional Institution, Marianna, Florida (hereinafter "FCI-Marianna"). (RE9-P2-PR3 & RE10-P2-PR3) Prior to Farmer being transferred from USP-Terre Haute all of his property, including legal materials was packed and shipped to FCI-Marianna, the institution designated to receive him. (RE9-P4-PR8 & RE10-P4-PR10) There exist a genuine dispute between Farmer and the defendants as whether he could have carried needed legal

materials with him. (RE9-P3-4-PR7 & RE10-P3-4-PR7-9) At the time of Farmers' transfer he was involved in the case of Dee Farmer v. William Donald Schaffer, Governor of the State of Maryland, Civil Action No. HM 89-3044 (hereinafter "Maryland case") which was an active pending case in the United States District Court of Maryland. (RE9-P4-5-PR10 & RE10-P5-6-PR12-15) After having been granted two extension of time Farmer had until May 29, 1990 to file a responsive pleading to the motion to dismiss, or in the alternative summary judgment (hereinafter "dispositive motion") which was pending in the Maryland case. (RE9-P5-6-PR12 & RE10-P6-7-PR17)

On April 30, 1990 Farmer arrived at the United States Penitentiary, Atlanta, Georgia (hereinafter "USP-Atlanta") en route from USP-Terre Haute, where he was placed as a hold-over inmate awaiting further transportation to FCI-Marianna, the institution designated to receive him. (RE9-P2-PR4 & RE10-P2-3-PR4) While a hold-over inmate at USP-Atlanta defendants decided that Farmer was not appropriate for FCI-Marianna after all and continued his confinement as a hold-over inmate until they determined which institution he should be redesignated and transferred too. (RE9-P3-PR5-6 & RE10-P3-PR5) Bureau of Prisons, Program Statement 5030.2 entitled, 'Holdovers' In Federal Institutions, states: "any inmate in-transit when such restrictions (or other circumstances precluding acceptance) are established will be transported to the receiving institution or returned to the sending institution. These inmates may not be retained in institutions as holdovers." (RE10-P3-PR6)

Nevertheless, after learning that he would remain a hold-over inmate at USP-Atlanta Farmer requested of the defendants to retrieve his personal legal materials that had been shipped to FCI-Marianna, so he could meet the May 29, 1990 deadline in the Maryland case. (RE10-P7-PR18)⁴ These request by Farmer was inclusive of speaking with defendant Matthews on several occasions, (RE10-P7-PR19), and speaking and writing letters to USP-Atlanta's Paralegal and sending copies of those letters to defendant Matthews. (RE10-P7-8-PR20) Defendant Matthews recalls speaking with Farmer, but claims not to "recollect" Farmer asking him about retrieving or being denied his personal legal materials. (RE9-P12-PR35) Specifically, on May 17, 1990 defendant Matthews received an "Inmate Request to A Staff Member" from Farmer concerning retrieving his personal legal materials from FCI-Marianna. (RE10-P8-PR21) However, again defendant Matthews claimed to not "recollect" or "recall" receiving any request from Farmer about the denial of his personal legal materials. (RE9-P12-13-PR36) Farmer also contended that defendant Williford and Quinlan received letters from him about the denial of his personal legal materials. (RE10-P9-10-PR25,27,30) As aforementioned, these defendants also claimed to not "recollect" or "recall" receiving letters from Farmer about the denial of his personal legal materials. (See Footnote Four) Further, it was alleged by Farmer that the Federal Bureau of

4 Each of the defendants claim to not "recollect" or "recall" receiving request from Farmer about retrieving or the denial of his personal legal materials. (QUINLAN RE9-P10-PR25; WILLIFORD RE9-P12-PR32; MATTHWES RE9-P12-13-PR36) Because the failure to recollect or rcall does not dispute the claims that the defendants received request from Farmer about retrieving and the denial of his personal legal materials^s the Court properly drew the inference in Farmers' favor finding that the defendants did receive the request, but simply failed to recollect or recall.

(hereinafter "Bureau") unwritten policy and practice is to disallow personal legal materials to inmates being transferred from one federal institution to another. And, that defendant Quinlan, Director of the Bureau, was knowledgeable of this unwritten policy and practice and failed to take any corrective actions. (RE10-P3-4,10-PR7-9,28-29) The defendants denied this claim, of course. (RE9-P3-4,9-10-PR7, 22-24)

Farmer attempted to file several administrative remedies, including one about the denial of his personal legal materials, by requesting of defendant Braswell, USP-Atlanta Holdover Counselor, to provide him with the appropriate forms. (RE10-P8-PR22) Despite submitting numerous request to defendant Braswell with copies of those letters to defendant Matthews and Williford, Farmer was continuously denied access to the Bureau's Administrative Remedy Procedure. (RE10-P8-PR22)⁵ Finally, on May 16, 1990 Farmer received an Informal Resolution form from Counselor Braswell, prepared it about the denial of his personal legal materials and returned it to defendant Braswell for processing. (RE10-P8-PR23) On or about May 24, 1990 after defendant Braswell was unable to resolve Farmers' complaint about the denial of his personal legal materials, he provided Farmer with a Request for Administrative Remedy form (commonly called "BP-9"), which Farmer completed about the denial of his personal legal materials and returned to defendant Braswell for submission to defendant Matthews for response. (RE10-P8-PR24) Though that request was denied defendants claim that defendant Matthews was not responsible for the denial. (RE9-P13-PR27) On June 20, 1990 Farmer filed an Regional Administrative Remedy

Appeal from the denial of his Request for Administrative Remedy (BP-9), about the denial of his personal legal materials. (RE10-P9-PR26) Farmer contended that Bureau regulations (28 C.F.R. §542.11) imposed a duty upon defendant Matthews and Williford to investigate and respond to his administrative complaints. (RE10-P8-9-PR24) The defendants, however, claimed as they did with defendant Matthews, that defendant Williford was not responsible for the denial of Farmers' Regional Administrative Remedy Appeal, which occurred on July 18, 1990. (RE9-P11-PR31)

Farmer was able to use the segregation law library on at least three separate occasions while a hold-over inmate at USP-Atlanta. (RE9-P6-PR13 & RE10-P10-PR31) There exist a genuine dispute between Farmer and the defendants whether the segregation law library was sufficiently adequate to meet constitutional standards. (RE9-P6-PR13 & RE10-P9-10-PR31)⁶ Farmer could not have filed his response to the dispositive motion in the Maryland case without his personal legal materials. (RE10-P11-12-PR34) "Pointedly, Farmer could not respond to the [dispositive] motion because he did not have the records of his Maryland convictions which were the subject of the suit and needed not only to incorporate [into the] response, but also as exhibits to the response." (RE10-P11-12-PR34) The documents inclusive of the very motion itself and case law needed by Farmer to prepare his response to the dispositive motion in the Maryland case was in his personal legal materials. (RE10-P11-12-PR34) Further, while he was a hold-over inmate at

5 The Court dismissed the claims against defendant Braswell for failure to exhaust administrative remedies; thus, ignoring inter alia his contribution to the denial of Farmers' personal legal materials. (R2-32)

USP-Atlanta Farmer was in contact with his legal representatives in the State of Maryland; however, none of them represented him in the Maryland case or were willing to assist him despite his request for their assistance. (RE10-P11-PR33) Nor, did Farmer have any other legal representation in the Maryland case. (RE10-P11-PR33) There is no dispute about these facts. (RE9-P6-PR13) "[D]efendants' argument that [Farmer] had an attorney in the Maryland is irrelevant especially in light of the fact that [Farmer] states that attorney did not represent him or participate in the Maryland case." (quoting Order of Court (R4-72)).

On May 29, 1990 Farmer served upon the defendants a motion for temporary restraining order. (RE10-P13-PR37) And, on June 6, 1990 that motion and Farmers' complaint was filed in this case. (R1-1 & R1-2) Farmers' motion and complaint sought to have the defendants provide him with his personal legal materials. (R1-1 & R1-2)

On June 11, 1990 while Farmer was still a hold-over inmate at USP-Atlanta, United States District Judge Herbert F. Murray granted the dispositive motion in the Maryland case, noting Farmers' failure to file any response. (RE10-P12-PR35) In granting the dispositive motion Judge Murray concluded that Farmers' case was indistinguishable from Whittelesy v. Circuit Court of Baltimore County, 897 F.2d 143 (4th Cir. 1990). (RE10-P12-13-PR36) In that case the Fourth Circuit held:

"In this case we must decide whether a federal habeas corpus petitioner has fulfilled the statutory requirements of exhaustion of state court remedies, 28 U.S.C §2254(b), despite having deprived the state court system of the opportunity to pass upon his habeas

claims by escaping from prison, fleeing to another state, committing crimes in that other state, and being imprisoned there for those crimes. The district court held that petitioner failed to exhaust his state court remedies since his own conduct had denied the state courts "a full and fair opportunity to first consider the claims."

We Affirm."

(RE10-P12-13-PR36) Farmer could have argued in response to the dispositive motion in the Maryland case, which also relied upon Whittlesey that his case was distinguishable from Whittlesey inasmuch he has never escaped from custody, but was merely attempting to challenge a consecutive sentence. (RE10-P12-PR36)

On June 20, 1990 after having been redesignated by the defendants to the United States Medical Center for Federal Prisoners, Springfield, Missouri (herinafter "USMCFP-Springfield") Farmer departed USP-Atlanta en route to his newly designated institution - - USMCFP-Springfield. (RE9-P3-PR36) On July 23, 1990 Farmer received his personal legal materials. (RE10-P14-PR38) By this time, however, the time for filing a motion to alter or amend judgment, reconsideration, and notice of appeal had expired. (RE10-P14-PR38)

On November 9, 1990 Farmer filed an amended complaint contending that he was deprived of his personal legal materials while a hold-over inmate at USP-Atlanta and upon his arrival at USMCFP-Springfield. Consequently, he was unable to present his substantial argument in opposition to the dispositive motion in the Maryland case, was unable to file a motion to alter or amend judgment, was unable to file for reconsideration and was unable to file a notice of appeal. The amended complaint also

asserted a claim against defendant Braswell for deliberate and intentional denial of access to the Bureau's Administrative Remedy Procedure in violation of a constitutionally protected liberty interest created by Bureau regulation 28 C.F.R. §542.10. And that the defendants deprived him of a constitutionally protected liberty interest created by Bureau regulation 28 C.F.R. §549.12 by designation, transferring and confining him at USMCFP-Springfield as a special-type housing because of his HIV status. The amended complaint sought damages for the denial of personal legal materials and the denial of access to the Bureau's Administrative Remedy Procedure, and both damage and injunctive relief was requested on the special-type housing claim. (R1-22 & R1-23)⁷ On May 6, 1991 the Court dismissed all of Farmers' claims for failure to exhaust administrative remedies, except for the claim of deprivation of access to the courts. (R2-32) On June 17, 1991 Farmer filed a motion for reconsideration arguing that he was not required to exhaust administrative remedies on the claims against defendant Braswell for denial of access to the Bureau's Administrative Remedy Procedure, and that he had exhausted administrative remedies regarding the special type housing claim. (R2-36) The Court, on August 14, 1991, considered Farmers' motion for reconsideration and reaffirmed its' dismissal of Farmers' claims against defendant Braswell for failure to exhaust administrative remedies, and found that Farmer had exhausted his administrative remedies on the special-type housing claim, but

6 The Court decided this fact in favor of the plaintiff: "[d]efendants argument that plaintiff had an adequate opportunity to utilize the law library is irrelevant to his claim that defendants withheld his personal legal papers which he alleges was necessary in order to respond to a motion to dismiss. (R4-72-7,8)

dismissed that claim for failure to state a claim upon which relief could be granted, finding no constitutionally protected liberty interest prohibiting the segregation of Farmer based on his HIV status. (R3-52) Farmer filed a second motion for reconsideration reasserting that his placement in special-type housing based on his HIV status violated a constitutionally protected liberty interest. (R3-53) On September 30, 1991, the Court again found that there was not any constitutionally protected liberty interest prohibiting the segregation of Farmer based on his HIV status. (R3-56) "The only remaining claims [were Farmers'] assertion that he was denied access to legal materials resulting in [prejudice]. Therefore, [Farmer] ha[d] no claims against defendants not involved in the denial of legal materials. The remaining defendants in the suit [were] Quinlan, Williford and Matthews." (R3-56) Defendant filed a cross-motion for summary judgment on this remaining claim of denial of access to the courts, on November 6, 1991. (R3-59) In that motion the defendants claimed that eventhough Farmer was deprived of his personal legal materials while a hold-over inmate at USP-Atlanta they were entitled to summary judgment as a matter of law, because (1) Farmer failed to contact the District of Maryland Court for an extension of time; (2) he had access to an adequate law library; (3) he had access

7 The amended complaint also asserted a claim of denial of access to the courts in the transfer of Farmer from the Northeast Region, where his criminal appeals and criminal trial attorneys are located. (R1-22 & R1-23) In its' Order of May 6, 1991, the Court denied this claim for failure to exhaust administrative remedies. (R2-32) Farmer in his motion for reconsideration asserted that he had exhausted his administrative remedies. (R2-36) On August 14, 1991, the Court reconsidered this claim and dismissed it on legal grounds. (R3-52) Farmer does not raise this issue on appeal.

to counsel and legal representatives; (4) they were not personally involved; (5) they were entitled to qualified immunity; (6) Farmer failed to file a motion for reconsideration or appeal; and, (7) the Maryland case was dismissed on substantive legal grounds and not because of Farmers' failure to respond to the dispositive motion. (R3-59) Farmer filed a counter-motion for summary judgment contending that there was not any merit to the defendants arguments that (1) he was required to file a motion for extension of time, because he was not required to file such a motion to ensure his right of access to the courts, and the court was not required to speculate as to what determination another court would have made on such a motion; (2) he did not have access to an adequate law library and even considering arguendo that he did he could not have filed a response to the dispositive motion in the Maryland case without his personal legal materials; (3) it was undisputed that he did not have counsel in the Maryland case. And, the counsel and legal representatives he was in contact with was not willing to assist him in that case despite his request for their assistance; (4) that the defendants did not place into dispute the facts that they were personally involved by claiming not to "recollect" or "recall". And, the facts demonstrated that they were personally involved; (5) the law regarding inmates rights of access to the courts is clearly established; thus, the defendants were not entitled to qualified immunity; (6) it was undisputed that by the time Farmer received his personal legal materials, it was to late for him to file a motion to alter or amend judgment, motion for reconsideration or appeal; and, (7) that he had a substantial argument to present in opposition to the dispositive

motion in the Maryland case. That, the deprivation of his personal legal materials deprived him of the opportunity, if not right, to present that argument. Thus, despite that the Maryland case may have been dismissed on substantive legal grounds, he had substantial arguments which he was deprived from presenting to the court. And, that it would be speculative for the Court to determine that he was not prejudice on the basis that the case was dismissed on substantive legal grounds, because to do so would require the Court to determine that regardless of any argument that Farmer may have presented in the Maryland case, that Court still would not have ruled in his favor. That this type of speculation and second-guessing by the Court was contrary to sound judicial practice. (R4-67)

On July 7, 1992, the Court found that all of the arguments by the defendants were without merit, except their argument that the Maryland case was dismissed on substantive legal grounds resulting in no prejudice to Farmer in his failure to respond to the dispositive motion because of the deprivation of his personal legal materials. For this reason, the Court granted defendants cross-motion for summary judgment and denied Farmers' counter-motion for summary judgment. (R4-72)

Farmer brings this appeal from that grant of summary judgment to the defendants, well as the dismissal of his claims against defendant Braswell for failure to exhaust administrative remedies and dismissal of his claims against the other defendants for designating, transferring and confining him in a special-type housing based on his HIV status in violation of a protected liberty interest. (R2-32, R3-52 and R3-56)

STANDARD OF REVIEW

The Court of Appeals reviews orders granting summary judgment from the district court level, in favor of the appellees, de novo. Clark v. Coates & Clark, Inc., 929 F.2d 604 (11th Cir. 1991) Summary judgment is appropriate if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. See Rule 56(c), Federal Rules of Civil Procedure; Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). It is therefore incumbent upon this Court to first determine if there are any genuine issues as to any material fact and, if finding none, then to determine if either party is entitled to judgment as a matter of law.

This Court reviews the dismissal of claims for failure to state a claim upon which relief can be granted by construing the material allegations of the complaint as true and construing them liberally in the appellants' favor. Burch v. Apalachee Community Mental Health Services, 804 F.2d 1549, 1551-52 (11th Cir. 1986); Fundiller v. City of Cooper City, 777 F.2d 1436, 1439 (11th Cir. 1985); Conley v. Gibson, 355 U.S. 41 (1957).

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SUMMARY OF THE ARGUMENT

The District Court erred in granting summary judgment to the defendants rather than to Farmer in this case, because it is undisputed that defendants denied Farmer access to the courts by depriving him of his personal legal materials, without any penological objective. Consequently, Farmer was not able to oppose or present his substantial legal arguments to the Maryland Court in opposition to the dispositive motion in the Maryland case. And, was deprived of the right to seek collateral relief and appellate review of the dismissal of that case.

Plaintiff asserts that the District Court also erred in dismissing his claims of denial of access to the Bureau's Administrative Remedy Procedure against defendant Braswell. Inasmuch the Supreme Court of the United States has ruled that federal prisoners do not have to exhaust administrative remedies prior to bringing suit in the federal courts against federal prison officials for damages.

Finally, Farmer argues that the District Court was incorrect in its finding that the Bureau's regulations did not create a constitutionally protected liberty interest, which prohibited the placement of Farmer in a special-type housing because of his HIV status.

ARGUMENT

I. DENIAL OF ACCESS TO THE COURTS BY WITHHOLDING FARMERS' PERSONAL LEGAL MATERIALS.

Persons imprisoned for criminal convictions relinquish many constitutional rights guaranteed to unconvicted citizens. This does not mean, however, that inmates are without any constitutional rights. "Even persons who have been lawfully deprived of certain rights and imprisoned are not deprived of all rights; among the remaining rights is access to the courts." Shango v. Jurich, 965 F.2d 289, 291 (7th Cir. 1992) An inmate access to the courts is the most fundamental of his rights; "all other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden." Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973) In recognition of this fact, the state and federal courts have repeatedly declared that "all prisoners [have] a constitutional right of access to the courts." Gregory v. Nunn, 875 F.2d 413 (7th Cir. 1990) The Supreme Court of the United States provided the cornerstone: "that access [to the courts] must be 'adequate, effective and meaningful.'" Bounds v. Smith, 430 U.S. 817 . . . (1977)." Id.

To prove a violation of this crucial right, an inmate must meet both prongs of a two part test. See, Chandler v. Baird, 926 F.2d 1057 (11th Cir. 1991) also see, DeMallory v. Cullen, 855 F.2d 442, 448 (7th Cir. 1988) Under the first prong the inmate must show that prison officials failed to "assist in the preparation and filing of meaningful legal papers." Bounds v. Smith, 430 U.S. 817 (1977); Wright v.

Newsome, 795 F.2d 964 (11th Cir. 1986) To meet the second prong, the inmate must generally "articulate facts indicating some prejudice such as being unable to do timely research on a legal problem or being procedurally or substantially disadvantaged in the prosecution of a cause of action." Chandler v. Baird, 926 F.2d 1063.

II. PRONG 1: THE DENIAL OF FARMERS' PERSONAL LEGAL MATERIALS DEPRIVED HIM OF MEANINGFUL ACCESS TO THE COURTS.

"[T]he right of access [to the courts] can be violated when prison staff deny inmates access to legal papers. See e.g., Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986) (per curiam)" (quoting Sowell v. Vose, No. 91-1034 (1st Cir. Aug. 6, 1991)⁸ This Court has explicitly held that when prison officials deny inmates their personal legal papers a claim may be stated for denial of access to the courts.

"[T]he allegations that prison officials seized Wrights' pleadings and law books and destroyed other legal papers clearly states a claim of denial of access to the courts."

Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986)

In Chanlder v. Baird, 926 F.2d 1059, 1063 (11th Cir. 1991) this Court affirmed its' position that the denial of personal legal materials to an inmate stated a violation of the constitutional right of access to the courts.

⁸ The First Circuit Court of Appeals decision in Sowell v. Vose is included in the Appellants' Record Excerpts as Exhibit 12.

The decisions of other federal courts do not reach a different conclusion. For example, Konisberg v. Ciccone, 285 F.Supp 585, 599 (1968) aff'd, 417 F.2d 161 (8th Cir. 1969) cert. denied, 397 U.S. 936 (1970) (shipping inmates personal legal materials home without consulting him); Adams v. Carlson, 352 F.Supp 882, 890-91 (1973) (inmate should be afforded reasonable access to legal materials with special consideration to those who are working on particular deadlines); United States ex rel. Mayberry v. Prasse, 225 F.Supp 752, 754 (E.D.Pa. 1963) ("reasonable access to the courts means the right of a prisoner to prepare, serve, and file legal papers and prosecute legal actions affecting his personal liberty.") Recent decision are consistent in the finding that the denial of personal legal materials to an inmate states a claim of denial of access to the courts. Gregory v. Nunn, 895 F.2d 413 (7th Cir. 1990) (prison officials accepted and lost inmates legal materials) Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986) (failure to forward inmates legal property from institution he was confined in prior to escaping to his new institution) (citing cases).

In the instant case, "plaintiff [Farmer] has demonstrated that he asked prison officials to retrieve his personal legal materials which were forwarded so that he would not miss court deadlines. Plaintiffs' request were not granted." (quoting, Order of Court (R4-72-9)).⁹ Specifically, while plaintiff Farmer was confined at the federal prison in Indiana (USP-Terre Haute) prison officials decided to transfer him to the federal prison in Florida (FCI-Marianna). All of Farmers' property, including

legal materials were packed and shipped to the Florida prison. And, Farmer was placed on a bus en route himself to the Florida prison. Thus, Farmer and his property were en route to the Florida prison. The property by U.S. Mail and Farmer by prison bus. Though, Farmers' property made it to the Florida prison he did not. What occurred: Farmer got far as Atlanta, Georgia. There, he was confined at the federal prison, USP-Atlanta, as a hold-over inmate awaiting further transportation (another prison bus) to the Florida prison. However, while in hold-over status at the Atlanta prison, prison officials decided that Farmer was not appropriate for the Florida prison and would not be transferred there after all. Thus, he would have to remain at the Atlanta prison as a hold-over inmate until prison officials decided what prison he would be designated, transferred and imprisoned. In the meantime, Farmer had a case with a deadline approaching, which was pending in the federal court in Baltimore, Maryland. Without delay, Farmer continuously requested of the defendants that his personal legal materials be retrieved from the Florida prison, where they had been originally shipped, and provided to him, so he could meet his court deadlines. Irrespective of his verbal, written and administrative request the defendants made no effort to retrieve Farmers' personal legal materials. Thus, Farmer had no access to any of his legal materials while he was a hold-over inmate at the Atlanta prison. This denial of personal legal materials to

9 The district courts' findings are only reversible under the clearly erroneous standard.

Farmer "necessary for his defense and proof contentions" satisfy the first prong of a constitutional claim of denial of access to the courts."¹⁰ Gregory v. Nunn, 895 F.2d at 414.

III. PRONG 2: THE DENIAL OF FARMERS' PERSONAL LEGAL MATERIALS WAS PREJUDICIAL.

In applying the second prong of the two-part test to inmates denial of access to the courts claims,

"[t]he courts have found that an "actual injury" is a prerequisite to recovery in some cases, but not in others. They have distinguished between the two groups of cases either by dividing the specific deprivations involved into relatively well-defined classes, some of which must be accompanied by a showing of an actual injury and others not. . . or by locating them along a "deprivation spectrum." Chandler v. Baird, 926 F.2d 1057, 1063 (11th Cir. 1991) . . . Whatever the structure of their approach, the key to the courts' analysis has been the degree to which the cases before them implicated the core value identified by the Supreme Court in Bounds v. Smith: the prisoners ability to participate meaningfully in the legal process . . ."

Sowell v. Vose, at pp. 4.

The court in Sowell went on to state: "In some cases the courts have found the "prejudice inherent in the facts." Chandler v. Baird, 926 F.2d 1063. Thus where "the challenge is systematic, embracing the basic adequacy of materials and legal

10 Indeed, "[F]armer could not respond to the [dispositive] motion because he did not have the records of his Maryland convictions which were the subject of the suit and needed not only to incorporate [into the] response, but also as exhibits to the response. (RE10-P11-12-PR34) Thus, his right of access to the courts was abridged.

assistance made available to all or subgroups of the prison population . . . [or where] the conditions challenged obviously go to the heart of any meaningful access to libraries, counsel or courts." id., imposition of an "actual injury" requirement would be superfluous. A prisoner need not show that the deprivation caused him an independent injury where the deprivation is so significant as to constitute an injury in and of itself." (quoting Sowell v. Vose, at pp. 5.)

The Sowell Court concluded the detriment prong by stating:

"On the other hand in cases involving "ancillary features," such as library schedules, the provision of notary services and the availability of supplies (such as papers, pens, and pencils), the deprivation may affect merely comfort or convenience without depriving a prisoner of access to the courts. A court cannot make the assumption that any alleged administrative arrangement actually impede a prisoner's ability to file meaningful legal papers" Peterkin v. Jeffes, 855 F.2d at 1041. In such cases, where direct access to legal knowledge or assistance is not at stake, "an actual injury test can be helpful in determining whether an unconstitutional abridgment of access to the courts has occurred." Id.

This distinction is crucial in Farmers' case, which the district court dismissed for the failure to meet the detriment prong. Although, the district court in deciding the detriment prong against Farmer stated: "[t]his is a close question." Farmer asserts that the acts and prevailing state of the law demonstrates that the district court was incorrect about the question being "close" and in deciding the question. This prong has been applied in the majority of cases involving claims of denial of

access to the courts. Hudson v. Robinson, 678 F.2d 462, 466 (3d Cir. 1982) ("It is possible that a combination of several factors might, taken together, lead to a finding that a prisoner has been denied access to the courts, where no one of the factors, taken alone, would do so. However, it must first be shown that the proceeding involves access to the courts . . . and that some actual injury, that is, an "instance in which an inmate was actually denied access to the courts," id., has occurred.") (citations omitted) Hussman v. Spardin, 812 F.2d 1019 (7th Cir. 1987) ("The mere assertion by appellant . . . that legal papers, transcripts and law books were intentionally kept from him fails, without more, to demonstrate a constitutionally significant deprivation of meaningful access to the courts.") Shango v. Jurch, 965 F.2d 289, 292-93 (7th Cir. 1992) ("Our case law makes it clear that even to survive a motion for summary judgment, the plaintiff must "allege some quantum of detriment caused by the interruption and/or delay of plaintiffs' pending or contemplated litigation.") (citations omitted - -citing Chandler v. Baird, 926 F.2d 1057, 1062-63 (11th Cir. 1991)). Magee v. Waters, 810 F.2d 451 (4th Cir. 1987) ("Other circuits also have required a showing of injury or prejudice in cases involving minor or indirect restrictions on access to materials and assistance.") Mann v. Smith, 796 F.2d 79, 84, n. 5 (5th Cir. 1986); Cookish v. Cunningham, 787 F.2d 1 (1st Cir. 1986); Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1986) also see Martin v. Davies, 917 F.2d 336 (7th Cir. 1990) ("must plead prejudice, id. at 340) Geder v. Roth, 765 F.Supp 1357, 1358 (N.D.Ill. 1991) (same).

A. BECAUSE THE PREJUDICE WAS INHERENT IN THE FACT THAT FARMER WAS COMPLETELY DENIED ACCESS TO HIS PERSONAL LEGAL MATERIALS HE WAS NOT REQUIRED TO DEMONSTRATE PREJUDICE.

"Many circuits have understood Bounds to require some showing of prejudice or injury, that is, some showing of actual denial of access [to the courts], to support such a claim," that the withholding or denial of personal legal materials infringed upon their constitutional right of access to the courts. Chandler v. Baird, 926 F.2d at 1062. However, the Eleventh Circuit, "resist[s] making any sweeping declaration concerning the need for a prison inmate to establish prejudice arising out of alleged restrictions of his access to courts." Id. at 1063. In some instances, prejudice inheres in the specific facts. Id.

"It may be true that a prisoners' "legal property" (to the extent that it consist of his research notes, court documents and the like) is "core materials [], central to his right of access to the courts," Roman v. Jeffes, 904 F.2d 192, 198 (3d Cir. 1990), but that access to such property inherently prejudicial, . . . [however], "an absolute denial of access to all legal materials, like an absolute denial of access to a law library or other basic form of legal assistance, might be deemed inherently prejudicial . . ."

(quoting Sowell v. Vose, at pp. 6)

It is undisputed that while at the Atlanta prison Farmer encountered an "absolute" denial of "all" his "legal property" which consisted of his "research notes, court documents and the like," and went to the "core . . . of [his] access to the courts." Sowell v. Vose, supra.

Thus, notwithstanding this Courts' pronouncement in Chanler that "when an alleged deprivation is minor and short lived and does not implicate general policies, an inmate must articulate facts indicating some prejudice," Farmer asserts that the prejudice was inherent in the facts of this case. That is, the absolute denial of all his personal legal materials, which was neither minor or short lived, and implicated general policy.

(RE10-P3-4-PR17) It is difficult to imagine how an inmate may have "meaningful" access to the courts when he does not have access to his legal property containing the facts of his conviction and/or confinement that is generally necessary for the preparation of pleadings for submission to the courts.

It is therefore, that the district court erred in dismissing Farmers' claims for failure to articulate facts indicating prejudice. The prejudice was inter alia inherent in the fact that Farmer was completely denied access to all his legal materials necessary for any participation in his pending or contemplated cases.

B. THE DEPRIVATION OF FARMERS' LEGAL MATERIALS CAUSED ACTUAL INJURY INASMUCH HE WAS DEPRIVED OF THE RIGHT TO OPPOSE AND PRESENT SUBSTANTIAL LEGAL ARGUMENTS IN THE MARYLAND CASE.

Eventhough the district court found:

"Plaintiff has demonstrated that he asked prison officials to retrieve his personal legal materials which were forwarded so that he would not miss court deadlines. Plaintiffs' request were not granted."

(R4-72-9) As a result of defendants failure to grant Farmers' request "he could not respond to a motion for summary judgment in the Maryland case and summary judgment was granted against him" (R4-72-4) "Plaintiff claims he had no opportunity to present any argument." (R4-72-4)

Irrespective of these facts,

"[t]he Court finds that plaintiff has not articulated facts indicating prejudice or disadvantage from not being able to respond to the pending dispositive motion in the Maryland case. The Court in the Maryland case based its' decision on legal grounds and plaintiff has not presented evidence that his failure to respond resulted in actual prejudice or procedural or substantive disadvantage."

(R4-72-10)

Neither, the Court or the government offered any legal authority or analysis to support their conclusion that when prison officials deprive an inmate of all his personal legal materials resulting in his inability to present argument in a pending case, which is subsequently dismissed on legal grounds, that the inmate has not been prejudice. In pronouncing this lawless, groundbreaking and unprecedented legal finding the district court ignored numerous elementary principles of our judicial system. And, while disregarding such elementary principles that are rudimentary to its' legal conclusions, the district court offered no legal pillar of its' own.

The first elementary principle that this "non-prejudice when case is dismissed on legal grounds" ignored is embedded in the First Amendment: "Congress shall make no law . . . prohibiting the

free exercise . . . of the people . . . to petition the Government for a redress of grievances." Certainly, this free right of the people to petition the Government means that the American people have unbridled access to the courts. That is, the courts are, figuratively speaking, always open to the people. The people are free to present any claim to the courts they choose. Even if they can't afford the court costs they are still able to present their case. And the people, both convicted and unconvicted, present all types of claims, defenses and immunities, even frivolous ones. This does not, of course, mean the courts accepts every claim, defense and immunity presented. But, the point is that the people are free to present their cases fully to the court for its' determination. When a person has been deprived of this elementary right of access to the courts they have been prejudice. That is, because there has been an actual denial of access to the courts. A instance when the person was denied the free access guaranteed to the people.

Just as the Supreme Court in analyzing the "deliberate indifference" standard held that policy considerations could not affect the decision whether an intent requirement is implicit in the word "punishment," Wilson v. Seiter, 115 L.Ed.2d. 271 (1991), such consideration should not affect the decision whether a prejudice or actual injury requirement must evolve from the word "access." The word "access" is at the core of the constitutional guarantee of access to the courts.

Every restriction upon an inmates access to law libraries, legal materials and counsel does not amount to a constitutional violation. Cookish v. Cunningham, 787 F.2d 1, 5 (1st Cir. 1986)

(per curiam) It is when the restriction impedes the inmates' "access" to the courts that a constitutional violation has occurred. Hudson v. Robinson, 678 F.2d 462, 466 (3d Cir. 1982) Thus, when the denial of Farmers' legal materials denied him "access" -- the ability to present opposition to the dispositive motion -- he was prejudiced. The actual injury requirement is implicit in the word "access."

Because the prejudice or actual injury requirement is implicit in the word "access," the federal district courts should not be in the business of second-guessing what decision would have been in a case where an inmate has been denied access to the court, i.e., the opportunity to present arguments, defenses or immunities. Eventhough, it very well may be that the inmates' claim is frivolous, non-frivolous or somewhere in-between, the inmate must still be given this "access." Who is to make the determination of frivolous, non-frivolous or somewhere in-between of the claims the inmate was prevented from presenting to the court?

Putting that question aside for a moment, here, Farmer, who is a federal prisoner with a thirty (30) year consecutive state sentence to be served in the future, brought a petition for writ of habeas corpus (28 U.S.C. §2254) in the federal court for the District of Maryland. In response to Farmers' petition, the State argued that the petition should be dismissed for failure to exhaust state remedies. The State made this argument despite the fact, that they had denied Farmer access to the state post-conviction remedies while he is serving his federal sentence. The State argued that Farmer had to wait until he completed his

twenty (20) year federal sentence, began serving his thirty (30) year consecutive state sentence and exhausted available state remedies before his 2254 petition could go forward in federal court. This argument was premise entirely on Whittlesey v. Circuit Court for Baltimore County, 817 F.2d 143 (4th Cir. 1990). In that case the Fourth Circuit held:

"The question is whether petitioners' simple willingness to present his claims to the state courts satisfies the exhaustion requirement, as the dissent contends, or whether petitioner has impaired what was a fair opportunity for presentation of his claims through his own unlawful conduct [of escaping]. We hold the latter view, and we affirm the judgment of the district court."

Farmer could have argued in opposition to the States' dispositive motion that 1) he had never escaped depriving the state of a fair opportunity to pass upon his claims; thus, his claims were distinguishable from Whittlesey, and 2) Congress explicitly provided that 2254,

- (a) Application to cases involving custody pursuant to judgment of a state court.
- (b) by a person in custody pursuant to a judgment of either a state or federal court, who makes application for a determination that custody which he may be subjectd in the future under a judgment of a state court will be in violation of the Constitution, laws or treaties of the United States."

Given the length of Farmers' sentences, it is wholly illogical to conclude that depriving him "access" -- the right to present his claims, arguments, defenses, etc., to the court, as guaranteed to "the people" -- was not prejudicial. Because

the denial of Farmers' legal materials deprived him of "access to the courts" for presentation of his substantial legal arguments, he was prejudiced, did suffer an actual instance of denial of access to the courts, and did suffer an actual injury.

The second fundamental principle that the non-prejudice when dismissed on substantial legal grounds ignores goes back to the question: "Who is to make the determination of frivolous, non-frivolous or somewhere in-between on an inmates' claim that he was prevented from presenting to a court?" In order for the district court, or any other court, to make such a determination, as here in Farmers' case, such a court would have to do two things: (1) assume and speculate what defenses, arguments, claims, etc., that the inmate, as here with Farmer, would have presented in the (Maryland) case, and (2) assume and speculate that irrespective of those defenses, arguments, claims, etc., the inmate (Farmer) case still would have been dismissed on substantial legal grounds.

One of the rudimentary principles of our judiciary is that one court will not speculate or second-guess what another court has or may have ruled in a given set of circumstances. See Mann v. Smith, 796 F.2d 79 (5th Cir. 1986) Certainly, the review of lower court decisions is generally left to the appellate courts (which Farmer was also prevented from seeking). This is evident from the collateral estoppel and res judicata doctrines, both prohibits generally one court from deciding a case that has already been determined by another court.

Farmer "articulated facts indicating some prejudice

such as being unable to do timely research or being procedurally or substantially disadvantaged in the prosecution of [the Maryland] case." Chandler v. Baird, 926 F.2d at 1063. Inasmuch, he demonstrated he was not able to do timely research to prepare and file a response to the dispositive motion that was pending in the Maryland case. And deprived of the procedural guarantee to present opposition to that dispositive motion,¹¹ and suffered a substantial disadvantage, because the dispositive motion rested upon legal grounds inapplicable to Farmers' case. And, eventhough Farmer had a substantial legal argument, which may have persuaded the Maryland court not to rely upon the "easily distinguishable case," he was "substantially disadvantaged" by the deprivation of the right to present those substantial legal arguments, as a result of the denial of his personal legal materials.

The question: Who is to make the determination of frivolous, non-frivolous or somewhere in-between on the claims the inmate was prevented from presenting to the court? Either that court or the appropriate appellate court, but another courts speculation on those unrepresented claims, arguments, defenses, etc., should not be permitted. And, when the inmate has been deprived of all opportunities to present his claims, arguments, defenses, etc., to both the lower and appellate court prejudice must be inferred.

11 The courts have deemed the right to respond to dispositive motions important enough to require notice to the inmate that such a motion has been filed and he has the right to respond. Moore v. City of Florida, 703 F.2d 516 (11th Cir. 1983)

C. THE DEPRIVATION OF FARMERS' LEGAL MATERIALS
CAUSED ACTUAL INJURY INASMUCH HE WAS DEPRIVED
OF THE RIGHT TO FILE A MOTION TO ALTER OR AMEND
JUDGMENT, MOTION FOR RECONSIDERATION, OR APPEAL
IN THE MARYLAND CASE.

The district court recognized that "[Farmer] also asserts that he did not receive his personal legal materials in time to file a motion to reconsider or an appeal." (R4-72) Though, the district court noted these claims, it did not consider or mention these facts in discussing why the defendants were entitled to summary judgment. The court simply concluded that the Maryland case was dismissed on legal grounds, and not because of Farmers' failure to respond. Ignoring completely that Farmer was denied the right to seek collateral relief in the lower court and appellate review in the Court of Appeals.

It is undisputed that Farmer did not receive his personal legal materials until July 23, 1990. Because the judgment in the Maryland case was entered on July 11, 1990, it was too late for Farmer to file a motion to alter or amend judgment, motion for reconsideration or appeal. A collateral motion to a judgment of a federal district court is due within ten (10) days after entry of judgment. See, Rule 59 and 60, Federal Rules of Civil Procedure. And, an notice of appeal in a case not involving federal officials, as in the Maryland case, must be filed within thirty (30) days after entry of judgment. See, Rule 4, Federal Rules of Appellate Procedure. Thus, by the time Farmer received his personal legal materials, it was too late for him to file any collateral motions or notice of appeal to the judgment in the Maryland case.

In Sifgafus v. Brown, 416 F.2d 105 (7th Cir. 1969), the court held that the denial of inmates legal property, which prevents him from executing an appeal constituted a violation of the constitutional guarantee of access to the courts. also see, Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975).

Even considering arguendo that the district court was correct in its' conclusion that the Maryland case was dismissed on legal grounds, this does not negate the prejudice in the denial of Farmers' right to file an appeal.

In almost every prison case that the Supreme Court of the U.S. has reversed was first dismissed by the lower courts on legal grounds. Estelle v. Gamble, 429 U.S. 97 (1976); Hudson v. McMillian, 112 S.Ct. 995 (1992); Whitley v. Albers, 475 U.S. 312 (1986); Wilson v. Seiter, 115 L.Ed.2d 271 (1991).

If the inmate in Hudson, whose case was dismissed on legal grounds, had been unfortunate as Farmer, and had his personal legal materials withheld by prison officials depriving him of the right to file an appeal, it is probable that another court may have decided that the denial of legal materials resulting in the inability to file an appeal was not prejudicial because the case was dismissed on substantive legal grounds. But, the Hudson case teaches that this type of speculation can be utterly incorrect. Because, despite both the district court and Court of Appeals dismissing Hudson on substantive legal grounds the Supreme Court found that those courts' legal interpretations were wrong.

In the 1991-92 Supreme Court term this same situation occurred again in McCarthy v. Midigan, 112 S.Ct. 1081 (1992).

There, the lower courts had dismissed the inmates' case on substantive legal grounds -- failure to exhaust administrative remedies. Again, the Supreme Court reversed a long-standing legal standard, holding that federal prisoners were not required to exhaust administrative remedies prior to bringing damage actions in federal court against federal prison officials.

Here, the appellate or Supreme Court may very well have reversed the district court decision that Farmer could not petition the federal court for a writ of habeas corpus challenging his consecutive sentence he would be subject to in the future, until he had completed his twenty (20) year federal sentence, began serving that consecutive thirty (30) year state sentence and exhausted state court remedies.

As aforementioned, it is very likely that this decision would have been reversed on appeal since (1) the district court relied on a case where the inmates' own conduct of escaping deprived the state of a fair opportunity to pass upon his claims -- Whittlesey v. Circuit Court for Baltimore County, supra. (Farmer having never escaped); (2) even in Whittlesey at least one jurist dissented despite the inmate having escaped, and (3) Congress explicitly held that 2254 was applicable to inmates challenging consecutive sentences to be served in the future.

Defendants withholding of Farmers' personal legal materials disabling him from appealing the judgment in the Maryland case is not only prejudicial because of the probability that Farmers' appeal would have been successful, but also because Farmer suffered an instance of actual denial of "access" to the courts. U.S. ex rel.

"In an order entered June 11, 1990 in the Maryland case the court noted plaintiff was given additional time in which to respond to defendants' motion to dismiss or in the alternative summary judgment and plaintiff failed to respond. However, the courts ruling was based on legal issues." (R4-72-9) The reason Farmer was not able to respond is because defendants withheld his personal legal materials from him until July 23, 1990. (RE10-P14-PR38) Consequently, Farmer was not able to present his substantial legal argument in the Maryland case, file a motion to alter or amend judgment, motion for reconsideration or appeal, because his personal legal materials consisted of the very motion he was required to respond to, his legal research notes inclusive of state case law, records of his state convictions which were the subject of the suit, and all of the pleading filed in the Maryland case. Gregory v. Nunn, 895 F.2d 413, 414 (7th Cir. 1990) ("A delay or interruption in pending or contemplated litigation may indicate a deprivation of constitutional rights.") see also Chandler v. Baird, 926 F.2d 1057, 1062-63 (11th Cir. 1991) (same); Shango v. Jurich, 965 F.2d 289, 292-93 (7th Cir. 1992)

The facts demonstrate that (1) defendants withheld Farmers' personal legal materials from him, (2) causing him prejudice in being unable to file a responsive pleading, unable to file a motion to alter or amend judgment and unable to file an appeal. Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986). (Inmate who escaped from an institution was captured within three weeks and reincarcerated in a different institution, where a hearing was scheduled. The court found that the failure to forward the inmates' personal legal materials from the institution where he was confined prior to escaping to his new institution was a denial of access to

the courts.) By analogy, Farmer who got stuck at the Atlanta prison because defendants had a change of heart about his transfer was equally entitled to his personal legal materials to respond to a dispositive motion, file a collateral motion and/or appeal, as the inmate who escaped and was captured, and incarcerated in a different institution.

Accordingly, Farmer has met the requirements of both prongs of the two-part test which is a prerequisite to recovery on an inmates' claims that the denial of their personal legal materials infringed upon their constitutional right of access to the courts.

to his request to provide the administrative remedy forms. (21-22) He contends that these actions and omissions by defendant Braswell violated his constitutionally protected liberty interest, 28 C.F.R. §342.10 et seq.

The district court dismissed this claim against defendant Braswell:

"Plaintiff does not appear to have pursued any administrative claim with respect to plaintiff's claim against defendant Braswell for failure to provide necessary administrative forms and consequent denial of access to the process. This Court therefore does not have jurisdiction of the claim and dismisses plaintiff's claim in this action for denial of access to an administrative remedy while at [redacted]."

(21-23), Order of Court, Dec 3, 1981
On Dec 17, 1981 Farmer filed a motion for reconsideration.

(21-24)
The court will not reconsider its dismissal of plaintiff's claim against defendant Braswell unless defendant can demonstrate that he was denied access to an administrative remedy for this claim. [redacted] dismisses plaintiff's motion for reconsideration of the dismissal of plaintiff's claim against defendant Braswell.

V. THE DISTRICT COURT ERRED IN DISMISSING FARMERS' CLAIM OF DENIAL OF ACCESS TO THE BUREAU'S ADMINISTRATIVE REMEDY PROCEDURE AGAINST DEFENDANT BRASWELL FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Farmer claimed that Bureau of Prisons regulations governing its Administrative Remedy Procedure created a constitutionally protected liberty interest. See, 28 C.F.R. § 542.10, et seq. Specifically, while a hold-over inmate at USP-Atlanta Farmer continuously requested of defendant Braswell, who is the Hold-Over Counselor, to provide him with administrative remedy forms. See, Amended Complaint ¶18-21 (R1-22). However, Farmer claims defendant Braswell refused to respond to his request or provide the administrative remedy forms. (R1-22) He contends that these actions and omissions by defendant Braswell violated his constitutionally protected liberty interest, 28 C.F.R. §542.10 et seq.

The district court dismissed this claim against defendant Braswell:

"Plaintiff does not appear to have pursued any administrative claim with respect to plaintiffs' claim against defendant Braswell for failure to provide necessary administrative forms and consequent denial of access to the process. This Court therefore does not have jurisdiction of the claim and DISMISSES plaintiff claim in this action for denial of access to an administrative remedy while at USP-Atlanta."

(R2-32-5, Order of Court, May 6, 1991)

On June 17, 1991 Farmer filed a motion for reconsideration.

(R2-36)

"The Court will not reconsider its' dismissal of plaintiffs' claims against defendant Braswell since plaintiff has failed to demonstrate that he was denied access to an administrative remedy for this claim. The Court DENIES plaintiffs' motion for reconsideration of the dismissal of plaintiffs' claims against defendant Braswell.

(R3-52-5, Order of Court, August 14, 1991).

Because Farmer was no longer at USP-Atlanta any claim against defendant Braswell for injunctive relief was moot. Thus, he was only seeking damages against defendant Braswell.

Federal prisoners have consistently been subject to an administrative exhaustion requirement, at least in cases where the relief sought could be obtained through the administrative process. The rule the Supreme Court overturned in McCarthy v. Madigan, 112 S.Ct. 1081 (1992) went one step further and required prisoners to exhaust administrative remedies even if those procedures could not provide the money damages the prisoner sought. This rule has its origin in Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. denied 444 U.S. 1086 (1980) and was justified by the supposed necessity preliminary to develop the facts so the Court could determine whether permitting a "Bivens" action was appropriate. The Brice court also stressed the need to reinforce the authority of prison officials and their chain of command. However, the Supreme Court in McCarthy found that Congress had not specifically mandated an exhaustion upon federal prisoners. The Court refused to find an exhaustion requirement in the general delegation of authority to the Attorney General to administer the federal prison system. Nor was it convinced by prison officials' rather perverse argument that the Civil Rights Act, which applies only to state prisoners somehow supports an exhaustion requirement for federal prisoners as well.

Balancing the interests at stake, the Court held that the prisoners' interest in avoiding the exhaustion requirement is great.

The risk of forfeiting a claim by missing one of succession of rapid filing deadlines, combined with the unavailability of damages in the administrative scheme, creates a situation in which the prisoner seeking only damages "has everything to lose and nothing to gain" from an administrative exhaustion requirement. 112 S.Ct. at 1090. Nor does the Bureau of Prisons have weighty interest in favor of administrative exhaustion, other than it's generalized interest in "encouraging internal resolution of grievances and in preventing the undermining of it's authority by unnecessary resort by prisoners to the federal courts." 112 S.Ct. at 1092.

Farmer's damage claims against defendant Braswell should not have been dismissed for failure to exhaust administrative remedies. And, this Court should reinstate those claims in light of the McCarthy decision.

VI. THE DISTRICT COURT ERRED IN FINDING THAT THE BUREAU'S REGULATIONS DOES NOT CREATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST PROHIBITING THE SEGREGATION OF HIV POSITIVE INMATES

Bureau of Prisons regulation 28 C.F.R. §549.12, entitled Housing provides:

"With the exception of the Bureau of Prisons rule setforth in subpart E of 28 CFR part 541, there shall be no special housing or quarantining established for HIV positive inmates."

This regulation is implemented through various Bureau Operations Memorandums and Program Statements. Thus, Farmer claimed that his placement at the federal prison hospital was a "special housing or quarantine" in violation of the aforementioned provision. The

district court originally dismissed these claims for failure to exhaust administrative remedies. (R2-32-5) On June 17, 1991 Farmer filed a motion for reconsideration asserting that he had exhausted available administrative remedies. (R2-36) And, on August 14, 1991, the Court held:

"Plaintiff's administrative claim MCFP #2172-R1 seeks relief for his segregation from the general prison population as a result of plaintiff's infection with AIDS virus. Plaintiff asserts that his placement in special housing is a violation of a constitutionally protected liberty interest. The same authority cited above would indicate that plaintiff can assert no claim under the due process clause for his segregation from other prisoners. Meachum, 427 U.S. at 224-25. Plaintiff attempts to avoid this authority by asserting that the prison authorities violated their own policies and procedures in various ways in placing plaintiff in special housing.

However, the policies and procedures of prison officials are typically not binding regulations that would give rise to a constitutionally protected liberty interest. Miller v. Henman, 804 F.2d 421 423-27 (7th Cir. 1986), cert. denied, 484 U.S. 844 (1987). This analysis has been applied explicitly in the context of prison system policies regarding inmates with AIDS. See, Muhammad v. Carlson, 845 F.2d 175, 178 (8th Cir. 1987) cert. denied, 489 U.S. 1068 (1989).

Accordingly, this Court DISMISSES plaintiffs' claims arising from administrative claim MCFP #2172-R1 for failure to state a claim upon which relief may be granted.

(R3-52-7-8, Order of Court, August 14, 1991).

On September 5, 1991 Farmer filed a motion for reconsideration arguing that because the policies prohibiting the segregation of HIV positive inmates is published in the Code of Federal Regulations at 549.12 the provisions were binding upon prison officials.

In it's Order of September 30, 1991 the Court wrote :

"Plaintiff now asks this Court to again reconsider his claim of special housing status. Plaintiff seeks relief from his segregation from the general prison population as a result of plaintiffs' infection with the AIDS virus. Plaintiff asserts that his placement in special housing is a violation of a constitutionally protected liberty interest. In it's Order entered on August 14, 1991 this Court determined that plaintiff could not assert a claim under the due process clause for his segregation from other prisoners. Plaintiff has asserted no new grounds upon which this Court should reconsider plaintiff's claim for special housing status. Accordingly, plaintiffs' motion for reconsideration is DENIED."

(R3-56-7)

Bureau of Prisons regulation 28 C.F.R. 549.12 create a constitutionally protected liberty interest; thus, the regulation is binding upon federal prison officials. In deciding whether defendants actions of segregating Farmer in a prison medical hospital, violates a constitutionally protected liberty interest created by regulation which prohibit "special housing or quarantining . . . for HIV positive inmates," we start our analysis with the Supreme Court decision in Hewitt v. Helms, 459 U.S. 460, 466-467 (1983).

In Hewitt, supra., the Court emphasized that only binding regulations create liberty interests protected by the Due Process Clause of the Constitution of the United States. Several circuits, including the Eighth Circuit Court of Appeals has held prior to Hewitt, supra., that the Bureau of Prisons regulations created constitutionally protected liberty interests. See, Burton v. Ciccone, 484 F.2d 1322, 1324 (8th Cir. 1973); Walker v. Hughes, 585 F.2d 1247 (6th Cir. 1983).

Since, the holding in Hewitt, supra., the Courts have continued to hold that the Bureau of Prisons regulations create liberty interest protected by the Due Process Clause, See, Henderson v. Carlson, 812 F.2d 874 2nd Cir. 1987); United States v. Smith, 774 F.2d 1005 (10th Cir. 1985). Though, the Seventh Circuit Court of Appeals in Miller v. Henman, 804 F.2d 421 (7th Cir. 1986) held that Bureau of Prisons internal policies did not create a constitutionally protected liberty interest, the Court specifically noted that Bureau of Prisons rules published in the Code of Federal Regulations that, "repository of rules with legal effects" would create a constitutionally protected entitlement. Id. at 426.

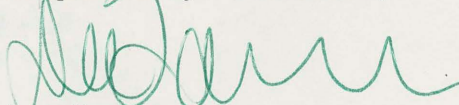
Here, the Code of Federal Regulations, Title 28, Section §549.12 mandate "there shall be no special housing or quarantining . . .for HIV positive inmates", creates a constitutionally protected entitlement, because the regulation not only in this particular provision, but as a whole (28 C.F.R. §549.10-20) use's language of an explicitly mandatory character as required by Hewitt, supra. The regulation is binding upon Bureau officials (see, Miller, supra.), and they give Farmer the expectancy that he will not be subject to special housing or quarantine because of his HIV positivity. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 11-12 (1979).

Accordingly, the district court erred in it's finding that 28 C.F.R. §549.12 did not create a constitutionally protected liberty interest.

CONCLUSION

For all the foregoing reasons, Farmer respectfully requests this Court to vacate the district court's grant of summary judgment to the defendants' on the access to the courts claim and enter judgment in his favor on that claim; reverse the district court's dismissal of Farmers' claims against defendant Braswell in light of McCarthy, and reverse the district court dismissal of Farmers' claim that prison regulations create a constitutionally protected liberty interest prohibiting the segregation of HIV positive inmates without due process of law. Any further or different relief this Court deems just and proper.

Respectfully submitted,



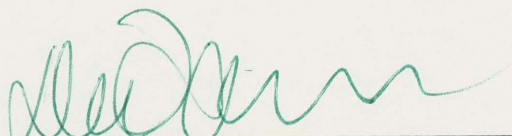
Dee Farmer
Appellant

CERTIFICATE OF SERVICE

The undersign hereby certify that a copy of the foregoing Appellants' Brief was mailed this _____ day of February, by placing the same in an envelope, first-class postage affixed, addressed to the hereinafter listed person(s), and delivering the same to the Counselor at Springfield Federal Prison Medical Center, Springfield, Missouri

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