IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 08-15969

J. TONY SERRA, JEANINE SANTIAGO, VICTOR J. CORDERO, and all others similarly situated,

Plaintiffs – Appellants

v.

HARLEY LAPPIN, Director of the Bureau of Prisons, BG COMPTON, Warden of Lompoc Prison, and ROBERT F. McFADDEN, Head of The Western Regional Office of The Bureau of Prisons,

Defendants – Appellees

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLANTS

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D. Assertion That The Appeal Is from A Final Order That Disposes of All Parties' Claims That Establish The Court of Appeals Jurisdiction

This appeal is from an order denying a motion to dismiss for lack of subject matter jurisdiction under Federal Rules of Civil Procedure (hereafter "FRCP") Rule 12. Such orders are immediately appealable to determine the existence of subject matter jurisdiction. *Compania Mexicano De American S.A. v. U. S. District Court* 859 f.2D 1354, 1358 (9th Cir. 1988).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in refusing to permit Appellants to file an Amended Complaint 1) to allege violation of the FTCA; 2) to allege Defendants-Appellees (hereafter "Appellees") acted in their individual capacities; 3) to allege that Appellees deprived Appellants of education and training while in prison; and 4) to allege violation of property rights of Appellants?

The Court, when considering a request to amend the Complaint should grant leave to amend when the amendment could state a valid cause of action. *Gaubaut v. Federal Home Loan Bank* 863 F.2d 59, 69 (D.C. Cir. 1988)

2. Did the District Court err in holding that Appellants' claims under *Bivens* are barred by sovereign immunity for monetary damages against the United States?

3. Did Appellants fail to state a claim for injunctive relief under *Bivens*?

4. Did the Court err in holding that Appellants failed to state a claim under the International Covenant of Civil and Political Rights (hereafter "ICCPR"), United Nations Covenant on Prisoner Rights and the Law of Nations?

STATEMENT OF THE CASE

Appellants Serra, Santiago and Cordova brought suit against Appellees Harley Lappin, Director of The Bureau of Prisons (hereafter"Lappin"), BG Compton, Warden of Lompoc Prison (hereafter "Compton") and Robert F. McFadden, Head of The Western Regional Office of The Bureau of Prisons (hereafter "McFadden") for violation of their constitutional rights under *Bivens* and under International Law. Jurisdiction was asserted under 28 U.S.C. 1331, 1343, 2201 and *Bivens*. (Excerpt No. CR 03)

The Second Amended Complaint filed on July 20, 2007 alleges that the three Appellants were prisoners at federal facilities in Lompoc and Dublin, California, and that they were forced to work at low wages of less than one dollar ($1.00) per hour for Federal Prison Industries (known as and hereafter "UNICOR"). (Excerpt No. CR 03-04) The prisoners were required to make cable or diary products or work on the prison campgrounds to support UNICOR. Appellant Serra was paid nineteen cents ($.19) per hour.

In the first claim for relief, Appellants claim a violation of the Fifth and Thirteenth Amendments to the U. S. Constitution by Appellees' failure to pay

prisoners adequate and equitable wages that Appellants were entitled to under the U.S. Constitution. (Excerpt No. CR 07-08)

In the second claim for relief, Appellants allege a violation of the ICCPR and the United Nations Covenant on Prisoner Rights by failing to pay equitable wages to Appellants while incarcerated at federal facilities. (Excerpt No. CR 08-09)

The third claim for relief under the Sherman Act is not being pursued here.

On October 15, 2008, Appellees appeared and filed a Motion to Dismiss the claims against them for lack of subject matter jurisdiction and failure to state a claim. (Excerpt No. CR 014)

On January 22, 2007, Appellant filed an opposition. (Excerpt No. CR 015)

On April 3, 2008, after full briefing and oral argument, the District Court issued its Order granting Appellees' Motion to Dismiss and denied Appellants' request to amend the Complaint. (Excerpt No. CR 024)

The Court held that constitutional claims are barred by sovereign immunity, and that the UN Treaty is not binding on the Court and that the amendment would be futile. (Excerpt No. CR 027 and 031)

On April 3, 2008, the District Court ordered the file in this case to be closed.

On April 17, 2008, Appellants filed a Notice of Appeal. (Excerpt No. CR 017)

STATEMENT OF FACTS

Appellant Serra was a prisoner incarcerated at the Federal Prison Camp at Lompoc, California from May 15, 2006 to February 12, 2007. Appellant Serra worked on the campgrounds as a camp waterer and in effect supported the work at UNICOR making cable and also making dairy products. Appellant Serra and other prisoners working at UNICOR, a self-supporting arm of the Justice Department, are paid as low as $19.00 per month for working twenty days a month at five hours per day, or approximately nineteen cents ($.19) per hour. (Excerpt No. CR 03)

Appellant Cordero was a prisoner incarcerated at the Federal Prison Camp at Lompoc, California for two years in 2003 to 2004. Appellant Cordero worked for UNICOR for one hundred forty-five dollars ($145.00) per month. He objects to this method of payment as in violation of UN Covenant on Prisoner Rights, ICCPR, the Fifth and Thirteenth Amendments to the U.S. Constitution, Federal Law and the Sherman Act 15 U.S. 1, 2, 15. (Excerpt No. CR 04)

Appellant Santiago is a prisoner at the Federal Corrections Institute, Camp Parks in Dublin, California and also has worked for UNICOR from September 2006 to the present. Her monthly earnings are sixty dollars ($60.00). Her rights under the UN Covenant on Prisoner Rights, ICCPR, the Fifth and Thirteenth Amendments to the U.S. Constitution and Federal Law are being violated. (Excerpt No. CR 04)

All Appellants filed notices for relief with the Bureau of Prisons (hereafter "BOP") prior to filing this lawsuit.

Appellees Lappin, Compton and McFadden are employees of the Federal Bureau of Prisons. (Excerpt No. CR 04)

On July 20, 2007, Appellants filed a class action lawsuit seeking monetary damages, injunctive and declaratory relief due to the Appellees' violation of Appellants' constitutional rights including 1) the Fifth and Thirteenth Amendments to the U.S. Constitution; 2) the ICCPR; and 3) the Sherman Act 15 U.S. 1, 2, 15. (Excerpt No. CR 07)

SUMMARY OF THE ARGUMENT

Appellants have a right to amend the Complaint in order to state a valid cause of action under the FTCA, for a claim against Appellees in their individual capacities, and for a claim for false imprisonment, and for violation of Appellants' rights under Federal Law to receive education and training while incarcerated.

Appellants state a valid claim under the Fifth Amendment to the U.S. Constitution and *Bivens*; and the Appellees are not entitled to absolute immunity for constitutional violations. *Schurer v. Rhodes* 416 U.S. 232, 239 (1973).

Last, the ICCPR and the UN Covenant on Prisoner Rights provides a basis for jurisdiction against Appellees for prolonged and arbitrary detention such as in this case when the Appellants have been held in prison without payment of

equitable remuneration for their work. *Kim Ho Ma v. Ashcroft* 257 F.3d 1095 (9th Cir. 2001).

STANDARD OF THE REVIEW

A. Legal Standards Applicable To A Motion to Dismiss for Lack of Subject Mater Jurisdiction

Federal District Courts are courts of limited jurisdiction and can only adjudicate cases that the U.S. Constitution or where Congress has granted courts authority to hear and decide cases. U.S. Constitution, Article III, Section 2.

A Federal Court must dismiss a case if it lacks jurisdiction over the subject matter of a case. FRCP Rule 12(b)(1). Under FRCP Rule12(b)(1), Appellant has the burden of proving that the subject matter exists. *Thornhill Public v. General Telephone & Electric* 554 F.2d 730, 733 (9th Cir. 1979). This burden is met by showing probative facts. *Groundhog v. Keeler* 442 F.2d 674, 677 (10th Cir. 1971).

B. Standard of Review for A Request to Amend Complaint under A Motion to Dismiss

A District Court denial of a Motion to Dismiss based on sovereign immunity is appealable to determine the basis of subject matter jurisdiction. The rule is meant to effectuate the guarantee that sovereign immunity governments are to be protected from the burden of litigation. *Rush Presbyterian St. Lukes Medical Center v. Hellenic Republic* 877 F.2d 574, 576 (7th Cir. 1989), cert. denied 493 U.S. 937 (1989).

The existence of subject matter jurisdiction under the U.S. Constitution and Federal Law 28 U.S.C. 1331 and 1343 is a matter of law that can be reviewed de nova. *Adler v. Federal Republic of Nigeria* 107 F.2d 720 (9th Cir. 1997).

Also, the Court should grant a Motion to Amend when there are valid grounds for a claim with an amendment. *Gaubaut v. Federal Home Loan* 863 F.2d 57, 69 (D.C. Cir. 1988).

ARGUMENT

A. Introduction

'FEDERAL . *Guidelines for Sentencing Manual* provides that judges in sentencing citizens should recognize "the need to provide the defendant with needed educational or vocational training, medical care or other corrective treatment in the most effective manner." 5E.D.I. 3(b).

The judge in the District Court has broad discretion to set sentencing conditions. But, he/she is limited by the requirement that the term "be primarily designed to meet the goals of rehabilitation of the defendant and the protection of the public. . . ." *United States v. Blue Mountain Bottling Company of Walla Walla* 929 F.2d 562, 528 (9th Cir. 1991). The Federal Sentencing laws must be geared toward the twin goals of rehabilitation and protection of the public. Incarceration will provide [defendant] with needed educational and vocational training, medical care, and other corrective treatments in the most effective manner. *United States v.*

Hawk, Wing 433 F.3d 622 (8th Cir. 2006). See also 18 U.S.C. 3583(a)(2)(D); *Federal Sentencing Guidelines*, Third Edition, Vol. 7, page 712.

Appellees, on the other hand, claim that the purpose of incarceration is punishment and hard labor, which is in violation of the sentencing guidelines. They cite Federal Prison Industries (hereafter "FPI") as the first program created by President Franklin D. Roosevent as a work system.

There are numerous investigations exposing UNICOR and BOP on its abuse and misuse of prisoners.

First, the GSA (Government Service Administration) investigation of UNICOR in 2000 concluded that "officials of FPI demonstrated a pattern of deceit with GSA officials. From misrepresentation about the program and its purposes to lying to federal agents and property officials about the use and location of federal property, the investigation revealed an on-going enterprise where FPI officials obtained federal property under false pretense and deposited the proceeds into their own general treasury." See Fraud Against The United States: Federal Prison Industries Case No. 1-00-0145, Office of Investigations, Office of Inspector General, U.S. General Services 2-7-1922, page 31-33, *Prison Legal News*, Vol. 18, No. 3, March 2007.

The BOP investigation of toxic wastes at federal prisons in recycling of old computers confirms toxic exposure of federal prisoners at three UNICOR-run

facilities at federal prisons (Edinton, Ohio; Texarcana, Texas; and Atwater, California) and recommended disciplinary action against UNICOR and Bureau of Prisons (hereafter "BOP") officials in five instances. See Federal Prison Admits Toxic Exposure of Inmates and Staff: Discipline of Officials Promised, http:www.peer.org/news/news_idphp?row id=580.

In 2006, the House Judiciary Committee report on UNICOR stated that it "is aware of recent reports concluding that employees as well as inmates in more of the recycling factories operated by FPI were exposed to toxic or hazardous substances." House Report 109-591 in The Federal Prison Industries Competition in Contracting Act of 2006 (HR2965) p. 45.

There are other investigations into the illegal activities of FPI and UNICOR. See Shumon, Aaron, "to get stuff and sell it for as much as we can get," Federal Prison Industries and Electrics Recycling, *Prison Legal News*, Vol. 18, No. 3, March 2007, page 1-7.

These studies show that UNICOR and Appellees are engaged in unlawful conduct of theft, conversion, conspiracy to steal and abusing and endangering the lives of federal prisoners, staff and federal prisons. They have unclean hands and should be denied relief.

/ / / / /

B. The Claims for Money Damages Are Not Barred by Sovereign Immunity.

The District Court dismissed the *Bivens* claims under the Fifth Amendment because of sovereign immunity. (Excerpt No. CR 027)

Plaintiff Appellants seek both money damages and equitable relief in their Complaint against the prison officials. They seek damages against the officials in their individual and in their official capacity.

1. Appellants' Damages Claims Against The United States Are Valid.

An action against an official in the United States government acting in his/her official capacity may be treated as a suit against the government. *Kentucky v. Graham* 473 U.S. 159, 166 (1985). Any lawsuit against an officer of the United States in his/her official capacity may be treated as a suit against the United States. *Balser v. Department of Justice* 327 F.3d 903, 908 (9th Cir. 2003).

Under 28 U.S.C. 2680(h), Congress has waived sovereign immunity for law enforcement officers or investigative officers of the United States in certain instances.

The FTCA permits a federal prisoner to sue the United States in federal court. *Palsy v. U.S.* 349 F.3d 418, 425 (7th Cir. 2003).

In *Butz v. Economu* 438 U.S. 478, 504-7 (1971) the U.S. Supreme Court held that a citizen who suffered an injury to a constitutionally protected interest could obtain damages against the responsible federal employee in the U.S.

District Courts under *Bivens*. Executive Officers do not have absolute immunity for violations of their duties that violate the U.S. Constitution or clearly established Constitutional rules. Id., at 507. The lawsuit was also against the United States and the Department of Agriculture. Id., at 482.

The U.S. Supreme Court recognizes that state officials have a qualified immunity for violation of constitutional violations. *Schuer v. Rhodes* 416 U.S. 232, 239-240 (1973). In the current case, the officials are law enforcement officials and sovereign immunity is waived.

There is no basis to grant federal government greater immunity from liability when sued for constitutional violations than state officials when sued for the same violations. *Butz v. Economu* 438 U.S. at 500.

A prisoner has a right under 42 U.S.C. 1983 to prove a violation of his civil rights by prison officials for denying his rights leading to solitary confinement and suffer physical injuries while in solitary confinement. *Francis v. Haynes* 404 U.S. 519 (1972).

The U.S. Supreme Court held: "We cannot say with assurance that under the allegation of the pro se complaint, . . . it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson* 355 U.S. 41, 55 (1957). In *Haines v. Kerner* 404 U.S. 519, 521: ". . . We conclude that he is entitled to an opportunity to offer

proof." Ibid. See also *Palsy v. U.S.* 349 F.2d 418 at 434 regarding Court allowing prisoner to proceed with claim.

The *Haines* case is directly applicable here. There is no evidence beyond a doubt that Appellants Serra, Santiago and Cordero can prove no facts that would entitle them to relief. Appellants can prove constitutional violations under *Bivens* for due process and under FTCA for deprivation of equitable remuneration for failure to provide education and training. Therefore, Appellants should be allowed the opportunity to offer proof of their claim and to amend the Complaint.

2. The Claims Against The Three Appellees Are Valid In Their Individual Capacity In The Amended Complaint.

All three Appellees are being sued in their official capacity. Appellants request leave to file a Second Amended Complaint to allege that McFadden, Compton and Lappin were all acting in their official and their individual capacities.

The District Court states that Appellants do not allege a valid theory for violation of their Fifth Amendment right under *Board of Regents of State Colleges v. Roth* 408 U.S. 577 (1972) and *McMaster v. Minato* 819 F.Supp. 1429, 1442 (D.Minn 1993). (Excerpt No. CR 30)

In this case, there is a valid Fifth Amendment claim.

First, there was a violation of a constitutionally protected right here. The U.S. Supreme Court and other federal courts recognized that there is a

constitutionally protected right on entitlement to welfare, *Maine v. Thibbold* 448 U.S. 1 (1980); public assistance, *Like v. Carter* 448 F.2d 798 (8th Cir. 1971), cert. denied, 405 U.S. 1095; 42 U.S.C. 1983; food stamps, *Velez v. Color* 767 F.Supp. 253, affd, 978 F.2d 647 (M.D. Fla 1991); housing, *Chavez v. City of Santa Fe Housing Authority* 606 F.2d 282 (10th Cir. 1979); genuine entitlement in leasehold interest, *Thorpe v. Housing Authority of City of Durham* 393 U.S. 268 (1969); tenancy rights, *Walton v. Darry Town Houses* 395 F. Supp. 553 (E.D. Pa 1923).

Prison officials are not entitled to immunity for unconstitutional conditions of confinement. *Alberti v. Sheriff of Harris County, Texas* 406 F. Supp. 649, 669 (So. Texas 1925); *Johnson v. Avery* 393 U.S. 483 (1968).

Thus, in this case the Appellants are entitled to repayment for this work performed under federal regulations. However, the amount of that payment is so low as to amount to deprivation of property without due process of law. This is similar to the *Maine*, *Chavez*, and *Thorpe* cases.

The first prong has been satisfied. There was a violation of the constitutional right.

Second, the right was clearly established. In the case of *Cleavinger v. Saxner* 474 U.S. 193 (1985), the Court said that the prison officials were not entitled to absolute immunity and could be held liable for rules violations.

A damage action under 42 U.S.C. 1983 is available against prison officials who deprive inmates of good – time credits in violation of their due process right by holding hearings without notice of the changes and written statements with reasons for any discipline imposed. *Wolff v. McDonnell* 418 U.S. 539, 556 (1968).

Also, in *Wilwording v. Swenson* 404 U.S. 249 (1971), the U.S. Supreme Court held that a prison inmate could recover on a Civil Rights Act claim when he alleges that living conditions and disciplinary conditions at the State Penitentiary violated his civil rights and due process rights.

Also, the Supreme Court in *Haines v. Kerner* 404 U.S. 519 (1972) allowed a state prisoner to proceed on a claim under the Civil Rights Act of 1871 for damages for deprivation of civil rights including denial of due process for being sent to solitary confinement and suffered physical injuries while in solitary confinement.

Although these cases are not identical to the current case, they stand for the proposition that where constitutional violations are obvious there can be an absence of factually similar cases. *Smith v. Mattox* 127 F.3d 1416, 1419 (11th Cir. 1997). "But general statements of the law are not inherently incapable of giving fair and clear warning and in other instances, a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific

conduct in questions, even though, "The very action is questions has [not] previously been held unlawful." *United States v. Lanier* 520 U.S. 259, 271 (1997).

In this case, a valid claim exists and is available even if there is not a closely analogous case where the constitutional violation is obvious. *Gray v. Bostic* 458 F.3d 1295, 1306 (11th Cir. 2006); *United States v. Lahier, supra.* Appellants do have a right to education and training, a right to damages under 28 U.S.C. 2640 and a right to equitable compensation under *Bivens*.

The government official is protected by the doctrine of qualified immunity against personal liability only if the legally objective reasonableness of their conduct as asserted in the light of legal authority was clearly established at the time of the action under suit. *Wilson v. Laynes* 526 U.S. 603 (1979).

In the current case, there is individual liability on the part of the three Appellees for their violation of *Bivens*.

C. The Claim for Injunctive Relief Is Valid.

The District Court failed to discuss the issue that this is also an action for injunctive relief by Appellants against the federal prison system to enjoin their unlawful actions. (Excerpt No. CR 027)

Appellant Santiago is still a prisoner at the Federal Prison Camp in Dublin, California and is seeking an injunction and declaratory relief against Appellees

for their illegal activities. This is not barred by the doctrine of sovereign immunity against monetary damages.

The Appellants' first cause of action is for a violation of the Fifth Amendment under *Bivens*.

Appellees violated the constitutionally protected right here. The U.S. Supreme Court and other federal courts recognized that there is a constitutionally protected right to public assistance, *Like v. Carter* (8th Cir. 1971) 448 F.2d 798, cert. denied, 405 U.S. 1095; 42 U.S.C. 1983; housing, *Chavez v. City of Santas Housing Authority* (10th Cir. 1979) 606 F.2d 282; genuine entitlement in leasehold interest, *Thorpe v. Housing Authority of City of Durham* 393 U.S. 268 (1969); tenancy rights, *Walton v. Darry Town Houses* 395 F. Supp. 553 (E.D. Pa 1923).

Prison officials can be prohibited from violating the constitutional rights of prisoners. *Johnson v. Avery* 393 U.S. 483, 490 (1968). Federal injunction is available to protect the Fifth Amendment right of citizens in Federal Court. *Haney v. Goodman* 432 F.2d 333, 343 (6th Cir. 1970).

Thus, in this case Appellants are entitled to an injunction to stop non-payment for this work performed under federal regulations and for failure to give training and education to prisoners. The amount of that repayment is so low as to

amount to deprivation of property without due process of law. This is similar to the *Chavez*, and *Thorpe* cases.

The U.S. Supreme Court has repeatedly held that the Due Process Clause protects prisoners. In *Cleavinger v. Saxner* 474 U.S. 193 (1985), the Court said that the prison officials could be liable for rules violations and can be enjoined for constitutional violation.

An injunctive action under 42 U.S.C. 1983 is available against prison officials who deprive inmates of good – time credits in violation of their due process right by holding hearings without notice of the changes and written statements with reasons for any discipline imposed. *Wolff v. McDonnell* 418 U.S. 539, 556 (1968).

Also, in *Wilwording v. Swenson* 404 U.S. 249 (1971), the U.S. Supreme Court held that a prison inmate could seek equitable relief on a Civil Rights Act violation when he alleged that living conditions and disciplinary conditions at the State Penitentiary violated his civil rights and due process rights.

In this case, Appellants all suffered violations of their Fifth Amendment rights to due process. It is clear that they were deprived of the entitlement to wages that were compensation for the work that was performed.

Appellants are all being deprived of the right to rehabilitation education and vocational training as required by 18 U.S.C. 3583 and federal case law

previously cited. By forcing them to work for low wages, Appellants are being deprived of their due process rights. This is a valid claim for injunctive relief.

D. The Federal Court Failed to Recognize A Valid Claim under International Law.

The Court dismissed the second cause of action for relief under ICCPR and the UN Covenant on Prisoner Rights claiming the international claims are not enforceable. (Excerpt No. CR 031)

The second cause of action is for violation of the ICCPR and the United Nations Covenant on Prisoner Rights.

Article 7 of ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment. . . "

Article 8 of ICCPR states: "No one shall be required to perform forced or compulsory labor," (exception for lawful order of court.)

Article 9 of ICCPR states: "Everyone has the right to liberty and security of person."

The UN Covenant on Prisoner Rights, paragraph 76 states: "There shall be a system of equitable remuneration of the work of persons." http://www.unchr.ch/html/memo3/b/n/ comp.34.html.

These Covenants apply to Appellants by reason of the fact that the United States has ratified these treaties. *Breard v. Greene* 523 U.S. 371, 376 (1998); *United States v. Baldwin* 120 U.S. 678 (1887).

The District Court cites the case of *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004) for the proposition that the substantive provisions of the ICCPR are not self-executing. (Excerpt No. CR 032) However, that statement in *Sosa* is not the law. It is dicta.

The issue decided in *Sosa* was whether the doctrine of limited immunity applied to an illegal abduction by federal officials. The issues were whether the facts show a valid constitutional claim and whether the precedent for the claim is clear or the constitutional injury is obvious.

Any reference to ICCPR was only dictum.

The U.S. Supreme Court in *Central Virginia Community College v. Katy* 546 U.S. 356, 363 (2006) said that dicta was not binding on the Court.

> It is a maxim not to be disregarded, that general expositions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. *Central Virginia Community College, supra* at 363.

The case of *Sosa* is not controlling.

Appellants state a valid claim under ICCPR.

ICCPR became the law of the United State on September 8, 1992. See ICCPR, December 19, 1996, 999 U.N.T.S. 171. It applies to all people in the United States. ICCRP, Article 2. The ICCPR is an international obligation of the United Sates and constitutes the law of the land.

Article 7 of the ICCPR provides that "no one shall be subjected to. . . cruel, inhuman or degrading treatment. . ." See also Article 3 of European Convention on the Protection of Human Rights and Fundamental Freedoms which is nearly identical to Article 7 of ICCPR. *Xuncax v. Gramajo* 886 F.Supp. 162, 188 (D. Mass. 1995).

Customary International Law is comprised of the customs and usages of the nation of the world and is part of the law of the United States. *Paquete Habana* 175 U.S. 677, 700 (1900). The United Sates does apply the international customary law of human rights. *Filartiga v. Pena Irala* 630 F.2d 876, 887 (2nd Cir. 1980).

In *Kim Ho Ma v. Ashcroft* 257 F.3d 1095, 1114 (9th Cir. 2001), the Court held that there is a clear international prohibition against prolonged and arbitrary detention. Furthermore, Article 9 of ICCPR, which the United States has ratified (See 188 Cong. Rec. 84781-84 (April 2, 1992), provides that "no one shall be subjected to arbitrary arrest and detention. . ." The detention of a resident alien in excess of the six-month limit was a violation of federal statute as construed in conjunction with International Law. The Court held that there was no reasonable likelihood that INS could be able to remove Kim Ho Ma to Cambodia in the reasonably foreseeable future, and he would have to be released.

Cruel, inhuman and degrading treatment is a violation of International Law under Article 7 of ICCPR.

Universal Declaration, Article 5 is also a separate ground for liability under the Alien Tort Claim Act (hereafter "ACTA") (28 U.S.C. 1350). This conduct also violates the Law of Nations if it contravenes well-established universally recognized norms of international law. *Kadic v. Karadzic* 70 F.3d 232, 246 (2nd Cir. 1995), cert. denied 518 U.S. 105 (1996); *Mehinovic v. Vuckovic* 198 F.Supp.2d 1322, 1348 (N.D. GA 2002). The Court in *Mehinovic* held subjecting a prisoner to degrading acts (shouting anti-Muslim epitets, hittings, and playing horsey) was a violation of international law and the plaintiff had a valid cause of action under ATCA. See *Mehinovic*, *supra* at 198 F.Supp.2d 1348.

The plain language of the statute implies that a tort committed in violation of the Law of Nations would be sufficient to give rise to a cause of action. *Forti v. Suarez-Mason* 672 F.Supp. 1531, 1539 (N.D. Cal 1987), on reconsideration on other grounds 694 F.Supp. 707 (N.D. Cal 1988).

In *United States v. Bakeas* 987 F.Supp. 44 (D. Mass. 1997), the court held that the BOP's policy regarding ineligibility for community confinement based on status as an alien "may. . . violate this nations commitment under the United Nations International Covenant on Civil and Political Rights." *Bakeas*, *supra*, 987 F.Supp. 44, 46, ff. 4.

The Oregon Supreme Court in *Sterling v. Ohio* 290 Or. 611 (1981) held that it was an violation of Oregon law and ICCPR Article 7 and 10.1 to allow a female guard to search a male prisoner.

In this case, Appellants alleged in the First Amended Complaint that their rights were violated under Articles 7, 8 and 9 of ICCPR. Article 7 prohibits degrading treatment of prisoners; Article 8 prohibits compulsory labor; and Article 9 provides the security of the person. The United States has ratified ICCPR. It is a treaty and the law of the land. *Breard v. Greene* 523 U.S. 371 (1998); *Kim Ho Ma v. Ashcroft* 257 F.3d 1095 (9th Cir. 2001), 1114. (Excerpt No. CR 8)

Under these cases, a prisoner of the United States has a valid course of action under the Fifth Amendment of the Constitution and FTCA for protection of his international civil right against arbitrary and degrading imprisonment.

The payment to these three Appellants by Appellees of such low wages of nineteen cents per hour is a violation of ICCPR Article 7, 8 and 9.

The Court should overrule the District Court's decision.

Also, the UN Covenant on Prisoner Rights was adopted by the United Nations Congress on the Punishment of Crime and Treatment of Offenders. (Adopted on August 30, 1955 UNDOC. A.CONF/611 – annex I; E.S.C. res 663c.

University of Minnesota website Human Rights Library.) It requires a system of equitable remuneration of the work of prisoners.

This law of the United States is part of the customary International Law that is comprised of the customs and usages of the Law of Nations. *Paquete Habana* 175 U.S. 677 (1900); *Filartgu v. Pena Irala*, 630 F.2d 876 (2nd Cir. 1980). Under this doctrine, Appellants have a valid course of action for equitable remuneration for their labor in federal prison. The jury in this case should determine what is an equitable remuneration pursuant to customary International Law.

E. The District Court Abused Its Discretion By Not Granting Leave To Amend The Complaint.

Leave to amend a Complaint ordinarily should be granted freely to allow a plaintiff "an opportunity to test his claim on the merits." A refusal by a District Court to allow an amendment must be based on valid ground. *Foman v. Davis* 371 U.S. 178 (1962).

The Court of Appeals states: "We recognize that many commentators advocate a policy of liberally permitting repleading in circumstances such as this." *Gaubaut v. Federal Home Loan Board* 863 F.2d 59 (D.C. Cir. 1988).

The District Court should be liberal in allowing a party to amend his/her claim to test the claim on its merits. *National Treasury Employees Union v. Helfer* 53 F.2d 1289, 1290 (D.C. Cir. 1995).

In Plaintiffs Appellants' Opposition to Defendants' Motion to Dismiss, Plaintiff Appellants requested an opportunity to file a Second Amended Complaint to state that:

1. there was a violation of the FTCA;
2. Appellees acted in their individual capacities;
3. Appellees deprived Appellants of educational and training while in prison; and
4. there was a violation of Appellants' property rights for due process. (Excerpt No. CR040)

These were valid grounds for a Second Amended Complaint and would give Appellants an opportunity to test the claims on their merits.

Allowing a claim under FTCA would resolve the issue of sovereign immunity, as the District Court found. It would also allow a claim for individual responsibility.

Next, allowing an amendment that alleged violation of training and education, a clear violation of the law, would allow a further basis for objection.

The Court should reverse the District Court decision and allow a Second Amended Complaint.

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CONCLUSION

For the foregoing reasons, the District Court incorrectly ruled granting Appellees' Motion to Dismiss based on the conclusion that the District Court had subject matter jurisdiction over

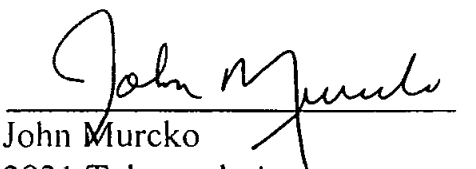
Therefore, Appellants respectfully request that this Court reverse the District Court's decision granting Appellees' Motion to Dismiss for lack of subject matter jurisdiction.

REQUEST FOR ORAL ARGUMENT

Pursuant to FRAP, Appellants respectfully request that oral argument be permitted. Appellants' appeal of the District Court's granting the Motion to Dismiss for lack of subject matter jurisdiction involves novel issues of law under the *Bivens* case, the Fifth Amendment to the U.S. Constitution and International Law regarding "commercial activity."

Oral argument will give the Court an opportunity to further explore these issues.

Dated this 23 day of July, 2008

By: 

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1 FOR DOCKET NO. 08-15969

Pursuant to Fed. R. App. P. 32(a)(7)(C) and the Ninth Circuit Rule 32-1, I certify that Appellants' brief is proportionally spaced, has a typeface of 14 points or more and contains 4,322 words.

Dated this 23 day of July, 2008

By: John Murcko

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PROOF OF SERVICE

Re: Serra, Santiago, Cordero, et al v. Lappin, Compton, McFadden, et al.
United States Court of Appeals for The Ninth Circuit, Case No. 08-15969

I am a citizen of the United States and am employed in the County of Alameda, State of California. I am over the age of 18 and am not a party to the above-entitled action. On the date listed below, I served the following document(s).

- **BRIEF OF APPELLANTS** (Two Copies)
- **APPEALLANTS' EXCERPT OF RECORD**

By transmitting a true copy thereof addressed as follows:

Jeffrey Bucholtz
Robert J. Katenberg
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Washington, D.C. 20530

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Civil Division
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_____ **BY EMAIL:** By sending true copies thereof by email transmission to the parties and/or counsel of record.

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I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct; that I am readily familiar with the business practices for collection and processing of documents for mailing with the U.S. Postal Service and with the UPS services at our office in Oakland, California, and that this declaration is executed at Oakland, California.

DATED: July 25, 2008

John Murcko

John Murcko