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

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U.S. COURT OF APPEALS

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

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

APPELLANTS' REPLY BRIEF

INTRODUCTION

Plaintiffs-Appellants submit this Reply Brief in opposition to the Brief for Appellees served on September 16, 2008.

Defendants-Appellees raise two issues in their Brief. First, they argue that Appellants have no legal claim under the U.S. Constitution for payment of their labor-value because there is no property interest in their pay level. *Brief for Appellees* (BA 12).

Second, they argue that international law claims are not recognizable. *Brief for Appellees* (BA 12).

The prison officials fail to respond to Appellants' argument that the UNICOR and the Appellees are "engaged in unlawful conduct of theft, conversion, conspiracy to steal funds and are endangering the lives of prisoners and staff, and they have unclean hands and their relief should be denied." *Brief of Appellants* (ABF 10).

In essence, Appellees do not dispute these facts and claims about their unlawful activities. Their defenses should be denied. *Vance v. Barrett* 395 F.3d 1083, 1091 (9th Cir. 2003).

Appellants respond to Appellees' two arguments as follows:

First, Appellants do have a valid property interest in receiving a living wage under the following:

a. Entitlement to federal programs

b. 18 U.S.C. 4126

c. 28 C.F.R. 345.10

d. *Piatt v. MacDoughall* 773 F.2d 1032 (9th Cir. 1985), <u>affd.</u> 936 F.2d 579 (9th Cir. 1991)

e. International law

Appellants have a valid claim against the United States and against the three Appellees individually.

Second, Appellants also have a valid claim under international law because the United Nations Charter and the Law of Nations provide that a prisoner is entitled to equitable remuneration. A treaty is the supreme law of the land. U.S. Constitution, Article VI.

Finally, Appellants should be allowed to amend their Complaint to allege that the suit is brought against the Appellees in their individual and official roles and that a claim under the FTCA (28 U.S.C. 2671, Federal Tort Claims Act) should be allowed. *Palsy v. United States* 349 F.3d 418, 425 (7th Cir. 2003).

I.

APPELLANTS CLAIM DEPRIVATION OF A PROPERTY INTEREST AND ARE ENTITLED TO A TRIAL.

A prison director may not deprive a prisoner of his wages for work at the prisoner's workshop when the prisoner had a property right to those wages.

Deprivation of that property interest amounts to a violation of a constitutional obligation. *Piatt, supra, 1032, 1036.*

In *Piatt, supra*, the state official failed to pay Piatt the wages required by the Arizona Statute. Denial of the wages due after the work at a prison workshop without a hearing deprived Piatt of his constitution right.

Also, prison officials may not take accrued interest from wages for labor performed by a prisoner at the workplace. *Vance, supra.* It is a violation of due process under the circumstances of this claim.

Under the facts of this case, Appellants have a valid claim under federal law. First, there is a constitutionally protected right to welfare, *Maine v. Thibbold* 448 U.S. 1 (1980); to food stamps, *Velez v. Color* 767 F.Supp. 253, affd. 978 F.2d 647 (M.D. Fla 1991); and to housing *Chavez v. City of Santa Fe Housing Authority* 606 F.2d 282 (10th Cir. 1979).

Appellees argue that the *Maine* case only covers social security law and not due process rights. However, Justice Brenner held that under Section 1983, state officials may be made to respond to damages caused by violation of rights conferred by federal equal rights laws and for violation of other federal constitution rights. 448 U.S. . at 5. The issue there was whether children of a former marriage are covered by AFDC.

In this case, there are both statutory and regulatory due process claims that provide the necessary property rights.

Federal statute provides such a property interest. 18 U.S.C. 4126(b) provides that all valid claims and obligations payable out of said funds shall be assured by the corporation (Prison Industries Fund) and 18 U.S.C. 4126(c) authorizes the corporation to use funds in the vocational training of inmates without regard to their industrial or other assignments.

Thus, under 18 U.S.C. 4126(b) and (c), prison officials must pay prisoners doing work wages for that work. *Piatt, supra.*

Appellants are entitled to payment for their labor both under the statute and under federal regulations. 28 C.F.R. 345.10.

Although the regulations state that there is no statutory requirement that prisoners be paid for work in an industrial assignment, the sentence is contrary to 18 U.S.C. 4126 which requires the corporation to use funds it has to pay wages for vocational training of inmates.

Furthermore, 28 C.F.R. 345.10 does require that "under this authority, inmates of the same grade, regardless of the basis of pay. . . . shall receive approximately the same compensation." This provides a property right to receive payment for work in an amount that is not a deprivation of due process because the wages are too low.

Appellees rely on *McMaster v. Min* n 819 F.Supp. 1442 (D. Minn 1993), affd. 30 F.3d 976 (8th Cir. 1994), cert. denied 513 U.S. 1152 for the proposition that there is no property interest in wages paid to prisoners. However, *McMaster* was based on a claim under the Fair Labor Standards Act (FLSA). The Court there held that the FLSA is not applicable to prisoners because they are not employees. Appellants do not raise claims under FLSA. Therefore, this case is not applicable here.

Also, Appellants have a right to education and vocational training under 18 U.S.C. 3553(a)(2)(d); *Federal Sentencing Guidelines*, Third Edition, Vol. 7, page 712; *United States v. Hawk, Wing* 433 F.3d 622, 632 (8th Cir. 2006). The vocational training must be remunerated and paid for as required under statute.

Appellees next argue that they are entitled to qualified immunity from monetary liability under *Forest Guardian v. United States Forest Service* 329 F.2d 1089, 1097 (2003). However, *Forest Guardian* does not stand for that proposition.

The Supreme Court in *Butz v. Economu* 438 U.S. 478, 495 (1971) held: "Our system of juris prudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

> No man in this country is so high that he is above the law. On officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. *United States v. Lee* 106 U.S. 220, 27 L. Ed 171, L.S. Ct. 190 (1882).

In this case, there are clearly established constitutionally protected guidelines, as stated in *Maine v. Thibbold*, *Velez v. Color*, *Piatt v. MacDougall*, *Chavez v. City of Santa Fe Housing Authority* and *Vance v. Barrett*, that there are property rights for a prisoner in prison and that such prisoner is to be paid equitable remuneration for his labor.

Second, that right was violated by Lappin, Compton and McFadden against Plaintiffs-Appellants.

The U.S. Supreme Court, in *Wilwording v. Swenson* 404 U.S. 249 (1971), held that a prison inmate could recover for a Civil Rights Act claim when he alleged in his claim that the living conditions in prison deprived him of due process.

The U.S. Supreme Court, in *Haines v. Kerner* 404 U.S. 519, 520 (1972), held that a prisoner suit for unlawful statutory confinement:

> Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner however in art fully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 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, 45-46 (1957).

In this case, a valid claim does exist and is available. The fact that there is not a closely analogous case does not detract from the validity of the claim. *Gray*

v. Bostic 458 F.3d 1295, 1306 (11th Cir. 2006). *Bivens v. Six Unknown Agents of The Federal Bureau of Narcotics* 403 U.S. 388 (1971).

The issue should go to the jury under *Bivens* and under the Federal Tort Claims Act against the United States. The Court should exercise its discretion to allow the filing of an Amended Complaint because there is a valid ground for a claim with an amendment. Also, with discovery, a private employer could be located. *GaubautvFederal Home Loan Bank* 863 F.2d 57, 69 (D.C. Cir. 1988).

II.

THE DISTRICT COURT ERRONEOUSLY DISMISSED THE CLAIM UNDER INTERNATIONAL LAW.

Appelles next argue that the United Nations Covenant of Civil and Political Rights (ICCPR) does not apply because the treaty was not made self-executory by the U.S. Senate. Appellees cite *Head Money Cases* 112 U.S. 580, 598 (1884) and *Sosa v. Alvarez-Machin* 542 U.S. 692 (2004). However, they fail to state that *Sosa* is only dictum.

The argument of Appellees is sophistry and deprecates the U.S. Constitution. Under the Constitution, treaties are: "The supreme law of the land." U.S. Constitution, Article VI.

The Constitution places no express restrictions upon the treaty power, and it is not limited by the power of any state or the power of Congress to legislate. *Geofroy v. Riggs* 133 U.S. 258 (1889).

The President has power, "by and with the advice and consent of the Senate, to make treaties provided two-thirds of the Senators present concur." U.S. Constitution, Article II, Section 2.

A state statute that interferes with national foreign policy, and with a treaty, is invalid. *Zschernig v. Miller* 389 U.S. 429 (1968). A federal statute is equal in dignity to a treaty. *Reid v. Conert* 354 U.S. 1 (1957).

The ICCPR was adopted by the United Nations in 1966 and was approved by the U.S. Senate in 1992. The United States has ratified this treaty. *Bread v. Greene* 523 U.S. 371, 375 (1998). This treaty provides (1) limits to cruel, inhuman and degrading treatment; (2) liberty and security of person; and (3) a system of equitable remuneration for prisoners.

Appellees argue that the ICCPR is only a compact between independent nations and creates no rights or remedies for citizens. They cite *Head Money Cases* 112 U.S. 580 (1884).

The *Head Money Cases* are inconsistent with the U.S. Constitution, Article VI and, like *Plessy v. Ferguson* 163 U.S. 537 (1896) (separate but equal is constitutional), should be sent to the dust bin of history.

Appellees' argument is a rehatching of *Plessy* because they argue that ICCPR was ratified but does not apply to U.S. citizens or to prisoners. To whom does it apply then? Whose rights are protected by this important declaration of

civil rights? Only the state? The state does not need such protection; only its citizens do.

The time has come to have the U.S. Courts recognize that the ICCPR applies to the citizens and that *Head Money Cases*, *supra* is a violation of the U.S. Constitution, Article VI and interferes with the Supremacy Clause. *Head Money Cases*, *supra* should be sent to the dust bin of history like *Plessy*. It is a violation of the U.S. Constitution and prevents U.S. citizens from achieving the full right to the enlightened objectives of the United Nations, including the universal desire of men and women for peace and for equality of rights and opportunities.

This Court should recognize that ICCPR is a treaty adopted by the U.S. Senate, the Supreme law of the land that protects all persons in the United States including citizens, aliens, men, women and prisoners.

Appellees next argue that the U. N. Covenant on Prisoner Rights is also not applicable because it is not a treaty. This covenant is similar to international compacts because they are promulgated by the United Nations, and the United States is a founding member or the United Nations, a permanent member of the U.N. Security Counsel and also a member of the U.N. General Assembly. The U.N. Counsel approving the covenant was with the participation of the United States which is a member of the U.N. Economic and Social Council. Thus, this

covenant has the same supremacy as a treaty over state laws and federal policy. *United States v. Belmont* 301 U.S. 324 (1937).

This Court should recognized the United Nations Covenant on Prisoner Rights because it is the Supreme law of the land. Otherwise, Appellees' argument is that all of the work of the United Nations is for naught, and the citizens reap no benefits from this noble and sovereign institution.

The Courts should respect the laws and covenants of the United Nations which serves to promote peace, equality and more fundamental rights to housing, education, health care and food than most civilized nations in the world accord to their citizens.

Appellants have the right to equitable remuneration for their work in prison, and they should be paid a living wage and not a slave wage of nineteen cents per hour for their labor-value. Slavery was eliminated in the United States in 1863, in Brazil in 1867, in Haite in 1803 and in Russia in 1917. Let's move forward in history instead of going back to the nineteenth century slave plantations of the south. We must become more advanced rather than promote a system that relegates prisoners to a status of slavery.

The Court in *United States v. Bakeas* 987 F.Supp. 44 (D. Mass. 1997) stated that "The federal policy (discriminatory treatment of aliens) may also violate this nation's commitments under the International Covenant on Civil and Political

Rights (Dec. 16, 1996, 999 U.N.T.S. 171 (ICCPR) in which we have become a party in 1992. . . . Given the centrality of non-discrimination to the ICCPR, it is unlikely that the Committee would allow the U.S. to carve out its own separate definition of its obligation under international law."

Appellees' argument would make the United States an outlaw in the family of nations by ignoring the ICCPR and the United Nations Covenant on Prisoner Rights. As the Supreme Court said in *United States v. Lee*, *supra*, No man in the country is above the law." Appellees are acting with defiance, in violation of the U.S. Constitution, the U.N. Charter and the ICCPR, in their treatment of U.S. prisoners in their institutions. This must end. The Court should reverse the decision of the District Court and allow this claim to proceed to trial.

Appellees' last argument regarding aliens misses the point because it is an argument the law of nations applies to this case.

III.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING LEAVE TO AMEND.

The District Court erred in denying the request to amend the Complaint because the refusal was not based on a valid ground. *Foman v. Davis* 371 U.S. (1962).

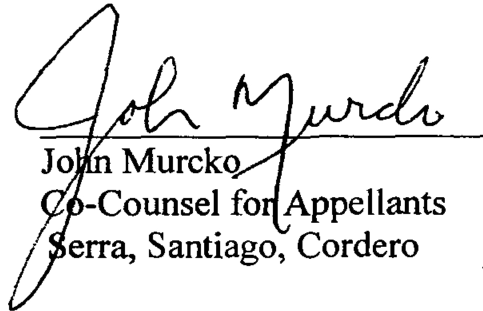
Contrary to Appellees' assertion that it would be futile, an amendment to the Complaint would allow Appellants the opportunity to test the claim on the merits.

Appellants request leave to file an Amended Complaint to allege a violation of the FTCA, based on the claims that Appellees acted in their individual capacities; that they violated 18 U.S.C. 4126; and that they violated the property rights of the prisoners.

CONCLUSION

Appellants request the Court to reverse the District Court's decision to dismiss the Complaint; to allow the filing of an Amended Complaint; and to permit a jury trial.

Date: November 12, 2008



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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 2,227 words.

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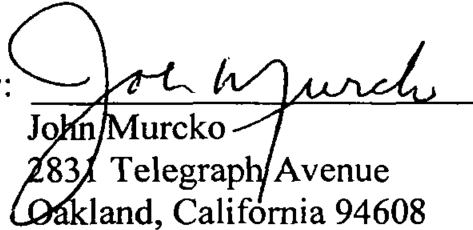
By: 

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1 **PROOF OF SERVICE**

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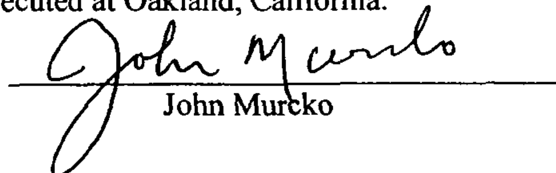

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