

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

SEP -2 2021

JEFFREY P. COLWELL
CLERK

Civil Action No. 20-cv-03495-PAB-MEH

DARUS WILKINS,
Plaintiff,

v.

JOHN PALOMINO,
CHRIS CHAVEZ,
KARA KENNEDY,
NITA HUNT,
BRENT PIERCE,
MR. SMITH,
LUKE HOLLAND, in their individual and official capacities,
VIRGINIA FREED, in her individual capacity,
DR. THIELY,
MS. DILLMAN, and
JANE GILDEN, in their individual and official capacities,

Defendants.

Defendants. (List each named defendant on a separate line. If you cannot fit the names of all defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Section B. Do not include addresses here.

MOTION FOR LEAVE TO FILE AN AMENDED THIRD COMPLAINT

NOTICE

Federal Rule of Civil Procedure 5.2 addresses the privacy and security concerns resulting from public access to electronic court files. Under this rule, papers filed with the court should not contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include only: the last four digits of a social security number; the year of an individual's birth; a minor's initials; and the last four digits of a financial account number.

Plaintiff need not send exhibits, affidavits, grievances, witness statements, or any other materials to the Clerk's Office with this complaint. PLAINTIFF INFORMATION

A. PLAINTIFF INFORMATION

You must notify the court of any changes to your address where case-related papers may be served by filing a notice of change of address. Failure to keep a current address on file with the court may result in dismissal of your case.

Darus Wilkins, CDOC # 118152, P.O. Box 1010 Canon City, Colorado 81215-1010

(Name, prisoner identification number, and complete mailing address)

N/A

(Other names by which you have been known)

Indicate whether you are a prisoner or other confined person as follows: (check one)

- Pretrial detainee
- Civilly committed detainee
- Immigration detainee
- Convicted and sentenced state prisoner
- Convicted and sentenced federal prisoner
- Other: *(Please explain)*

B. DEFENDANT(S) INFORMATION

Defendant 8: Dr. Thiely, CTCF Psychiatrist, P.O. Box 1010 Canon City, CO 81215-1010.
(Name, job title, and complete mailing address)

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? Yes ___ No (*check one*). Briefly explain:

Defendant Dr. Thiely is a CTCF mental health worker with the position of

Psychiatrist, who at all times relevant hereto is assigned to CTCF.

Defendant 8 is being sued in his/her individual and/or official capacity.

Defendant 9: Ms. Dillman, CTCF Nurse Practitioner, P.O. Box 1010 Canon City, CO 81215
-1010.
(Name, job title, and complete mailing address)

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? Yes ___ No (*check one*). Briefly explain:

Defendant Ms. Dillman is a CTCF health care worker with the position of

Nurse Practitioner, who at all times relevant hereto was assigned at CTCF.

Defendant 9 is being sued in his/her individual and/or official capacity.

Defendant 10: Jane Gilden, CTCF Nurse Practitioner, P.O. Box 1010 Canon City, CO 81215-
1010.
(Name, job title, and complete mailing address)

At the time the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? Yes ___ No (*check one*). Briefly explain:

Defendant Jane Gilden is a CTCF health care worker with the position of Nurse

Practitioner, who at all times relevant hereto is assigned at CTCF.

Defendant10 is being sued in his/her x individual and/or x official capacity.

Defendant 11: Mr. Smith, BCCF Correctional Officer, 11560 County Road 75, Las Animas,
 CO, 81054.

(Name, job title, and complete mailing address)

At the time of the claim(s) in this complaint arose, was this defendant acting under color of state or federal law? X Yes No (*check one*). Briefly explain:

Defendant Mr. Smith is a BCCF staff member with the position of
 correctional officer, who at all times hereto is assigned at BCCF

Defendant 11 is being sued in his/her individual and/or x official capacity.

C. JURISDICTION

Indicate the federal legal basis for your claim(s): (check all that apply)

X 42 U.S.C. § 1983 (state, county, and municipal defendants)

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)
(federal defendants)

X Other: (*please identify*) 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 28 U.S.C. § 1391.

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label

the additional pages regarding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM ONE: Tort of Negligence

Supporting facts:

1. The plaintiff shows good cause to go over the page limit of this Third Amended Complaint because of new defendants and a discovery of new information that has caused the plaintiff to go over the page limit this Honorable Court has limited.
2. Since the filing of the complaint the plaintiff has determined that the Administrative Nurse Nita Hunt was the one who admitted defendant Virginia Freed to conduct the D.N.A. test. Defendant Hunt escort Defendant Freed to conduct the paternity test without a validated reason nor any current court order. Defendant Hunt is considered as a defendant because of her actions.
3. Captain Brent Pierce is a Shift Supervisor at Bent County Correctional Facility (BCCF). It has been determined that Defendant Pierce was directly involved in the in the restraint of the plaintiff while defendant Freed got a mouth swab from the plaintiff. Defendant Pierce is considered as a defendant because of his actions
4. Luke Holland is a Unit Manager at BCCF. It has been determined that Defendant Holland was directly involved in the restraint of the plaintiff while defendant Freed got a mouth swab from the plaintiff. Defendant Holland is considered as a defendant because of his actions.
5. Ms. Dillman is a Nurse Practitioner at CTCF. It has been determined that Defendant Dillman was directly involved in the negligence of the plaintiff's injuries sustained at BCCF on July 25, 2019, the negligence of not identifying the cause of those injuries, and the negligence of not seeking a specialist in neurology because of the spinal injuries sustained that was identified in the first MRI scan in November of 2019.
6. Jane Gilden is a Nurse Practitioner at CTCF. It has been determined that Defendant Gilden was directly involved in the cancelation of the plaintiff's approved surgery in March of 2021. Defendant Gilden wanted the plaintiff to do physical therapy after Nurse Practitioner Melissa Rogers identified the cause of the plaintiff's lower back pain and incontinence issues. Ms. Rogers referred the plaintiff to a neurosurgeon for a consultation. Dr. Andrews wrote a message to the plaintiff on July 23, 2021 about the pain the plaintiff was experiencing because the plaintiff's current medications were not helping. Dr. Andrews prescribed a ten (10) day course

of Prednisone for the pain in the plaintiff's lower back inflammation, which did not help the plaintiff. Dr. Andrews instructed the plaintiff to back off the exercises as much as needed which were recommended by Defendant Gilden.

7. Dr. Thiely is a psychiatrist at CTCF. It has been determined that Defendant Thiely is directly involved in the mental health treatment of the plaintiff. Defendant Thiely has been negligent in the proper treatment of the plaintiff's PTSD, night terrors, and anxiety issues due to the incident that took place at BCCF on July 25, 2019. Defendant Thiely fails to acknowledge that the use of force that was used on the plaintiff on July 25, 2019 happened.
8. Mr. Smith is a correctional officer at BCCF. It has been determined that Defendant Smith was directly involved in the incident at BCCF on July 25, 2019. Defendant Smith had knowledge of the incident and failed to report the incident because he did not want to lose his job at BCCF. Defendant Smith knew that he was supposed to report the incident by the end of the shift, but failed to do so.
9. Plaintiff reallege and incorporate by reference paragraphs 1-3.
10. In March of 2018, the neglect and delinquency case 18JV279 was initiated by the Adams County Department of Human Services (Brighton, Colorado) against the biological mother Fashaya Williams for subject minor child Jabi Williams.
11. The biological mother Fashaya Williams named the plaintiff Darus Wilkins in the civil complaint as the biological father to the subject minor child.
12. The plaintiff, who was being held at the Jefferson County Detention Facility (Golden, Colorado) for an unrelated criminal case was not present at the hearing of the allegations of neglect and delinquency
13. Because the plaintiff Darus Wilkins was named as the biological father, the issue of the plaintiff's potential parental rights arose. Attorney Camilla Bonzo was assigned to represent Mr. Wilkins in the civil case.
14. In April of 2019, attorney Camilla Bonzo conducted a professional attorney visit with the plaintiff at the Jefferson County Detention Facility; at which time Mr. Wilkins was informed of the matter and was instructed of his potential parental rights in regards to the subject minor child Jabi Williams.
15. The plaintiff did admit to once having a long-term relationship with the biological mother Fashaya Williams, but was not sure whether or not he was the biological father to the subject

minor child.

16. The plaintiff suggested it would be best to know for certain, but the plaintiff expressed concerns and hesitation for the D.N.A. test.
17. Mr. Wilkins went on to explain in great detail to his attorney how very questionable procedures are concerning D.N.A. evidence in the plaintiff's criminal case that led to the plaintiff's conviction and twenty-four (24) year sentence.
18. Attorney Camilla Bonzo was troubled by the details and understood the plaintiff's concerns. Ms. Bonzo and Mr. Wilkins agreed that extra care to secure the handling of the plaintiff's D.N.A. sample to determine paternity was appropriate.
19. On May 2, 2019, attorney Camilla Bonzo submitted to the court an Unopposed Motion along with an attached proposed court order requesting D.N.A. testing to determine paternity for the plaintiff and subject minor child Jabi Williams to be collected before May 22, 2019 at the plaintiff's current facility, the Jefferson County Detention Facility.
20. On May 9, 2019, the proposed order was granted by the court.
21. On May 28, 2019 the plaintiff Darius Wilkins was transferred to the Colorado Department of Corrections (CDOC), and with no fault of the plaintiff, the D.N.A. test was not completed. The plaintiff was available but the order was not carried out as granted by the court in the Unopposed Motion and proposed court order.
22. In July of 2019 the plaintiff was assigned to BCCF to begin serving out his twenty-four (24) year sentence in the CDOC.
23. On July 13, 2019 the plaintiff received a notice addressed to him at BCCF from the plaintiff's attorney Camilla Bonzo informing the plaintiff that the Adams County Attorney's Office reported that Mr. Wilkins' blood draw to determine paternity in case 18JV279 has been received and the results of the D.N.A. test would be made known once the D.N.A. test was completed.
24. However, no blood draw or mouth swab was performed on the plaintiff to determine paternity in case 18JV279 before May 22, 2019 at the Jefferson County Detention Facility.
25. The collection of the court ordered paternity would be completed by the CDOC clinical services or contract workers once the verification of a valid court order.

26. No court order was sent to BCCF to get a D.N.A. test from the plaintiff Darus Wilkins.
27. On July 17, 2019, defendant Virginia Freed, a social worker employed by the Bent County Department of Human Services, who was accompanied by defendant Nita Hunt was at BCCF for the purpose of collecting a D.N.A. sample for the Adams County Department of Human Services from the plaintiff as omitted in defendant Freed's incident statement in order to determine paternity in case 18JV279.
28. The court order defendant Freed provided to BCCF was not binding under color of state law.
29. Defendant Virginia Freed provided to defendant Nita Hunt the one and only court order granting the paternity D.N.A. collection to be done on the plaintiff Darus Wilkins before May 22, 2019 at his previous facility, the Jefferson County Detention Facility.
30. Defendant Nita Hunt does not verify a court order but just reads the top as this is the way she was taught, which was stated in her interview with Donnie Britton, a Core Civic investigator. Defendant Hunt was negligent in assuring the validity of the court order before allowing defendant Freed access to the plaintiff Darus Wilkins.
31. The instructions basis and purpose provided in the court order did not give legal force to any competent person to declare the instrument legally valid a reasonable person could do, would do, or should do objected to defendant Virginia Freed's request because it conforms to law, logic, and refers to that which was firmly grounded on facts, evidence, and therefore free from error.
32. On July 17, 2019, the plaintiff Darus Wilkins was ordered to the BCCF clinic; at which time defendants Virginia Freed and Nita Hunt informed the plaintiff that they were there to collect the plaintiff's D.N.A. in order to determine paternity in Adams County civil case 18JV279.
33. The plaintiff refused the request and provided defendants Freed and Hunt a copy of the same court order defendant Freed was in possession of along with the letter from Counsel Camilla Bonzo informing that the D.N.A. test had been reported to have been completed by the Adams County Attorney's Office.
34. Plaintiff Darus Wilkins allowed the defendant Virginia Freed to read the letter from the plaintiff's attorney. Defendant Freed appeared that she was reading the letter but concluded that it was from a separate issue, even though the notice clearly stated the collection had been received from the plaintiff in order to determine paternity for Jabi Williams in case 18JV279.
35. The plaintiff Darus Wilkins again refused to the collection of D.N.A. at which time the

defendants Virginia Freed, in concert with Nita Hunt threatened the plaintiff by telling Mr. Wilkins that he had to provide the D.N.A. sample, and if he did not comply the sample would be taken by force.

36. The plaintiff, who was aware of his constitutional rights believed he had a reasonable expectation of privacy, along with protection of due care legally owed to the plaintiff while under the custody and care of BCCF and continued to refuse the request to provide the D.N.A. sample.
37. As the situation began to get out of control, the plaintiff Darus Wilkins, in an effort to de-escalate the situation suggested he be allowed a telephone call to his attorney Camilla Bonzo in order to resolve the matter.
38. But even with a telephone present in the office, defendant Nita Hunt denied the plaintiff's request with no explanation, rendering the plaintiff confused, scared, and helpless.
39. Defendant Virginia Freed then offered the plaintiff a refusal form to sign, which the plaintiff did. Defendant Nita Hunt failed to provide this critical information to the Core Civic Investigator Donnie Britton.
40. Defendants Freed and Hunt told the plaintiff that they would be returning within a week and would take the D.N.A. sample with force at that time.
41. Defendant Freed suggested that the plaintiff contact his attorney, but failed to mention it in her incident statement that she recovered a signed refusal form from the plaintiff that she somehow later misplaced.
42. The BCCF is not obligated to inform the lab should an offender refuse to be D.N.A. tested, if a court order is not sent to the facility.
43. In this matter, the sample collection was to be conducted by an outside source. Defendant Virginia Freed was responsible for submitting the original signed refusal form to the lab, who would then contact Dori J. Gipson of the Adams County Department of Human Services and inform her of the refusal.
44. It is the plaintiff's position that the defendants had a responsibility to keep Mr. Wilkins from being injured and a duty of care (tort reasons). Plaintiff further asserts the defendants (violated) breached this duty of care by acting negligently and failed to do what a reasonable person would have done under the circumstances. The injury and damage the plaintiff suffered was foreseeable. The defendants could have prevented the harm by first reading the court order in

its entirety and also reading the policy of D.N.A. collection by reading Administrative Regulation 300-24 (Offender D.N.A. Testing) of the CDOC.

45. Defendant Nita Hunt states in the investigation that she has never done an incident like this before. The Colorado Department of Corrections OIG and Legal Services was not resourced as stated in the investigation by Donnie Britton of Core Civic.

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label the additional pages regarding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM TWO: False Arrest

Supporting facts:

46. Plaintiff realleges and incorporates by reference 1-44.
47. On July 25, 2019, Defendant Virginia Freed returned to BCCF with the intention of collecting the plaintiff's D.N.A. with the same defective court order.
48. Because the plaintiff was unsuccessful in contacting his attorney Camilla Bonzo, the plaintiff refused to go to the facility's clinic when ordered at or around 8:45 A.M. on July 25, 2019.
49. In anticipation of having his D.N.A. sample collected with force, the plaintiff remained in his cell in living unit six (6) with his door completely ajar.

50. The plaintiff placed the court order and notice from his attorney in plain view next to him on the floor as he laid there on his chest with his shirt off and hands behind his back to show he had no intention to cause himself or anyone else any harm.
51. Defendant Kara Kennedy and two (2) other officers arrived at the plaintiff's cell at about 9:15 A.M. and told the plaintiff he had to go to health services to provide the D.N.A. sample to determine paternity.
52. While still on the floor, face down with hands behind his back the plaintiff again began to explain in a calm voice that he was refusing and why the plaintiff referred officers to the documents. Noticeably aggravated, Defendant Lt. Kara Kennedy began cursing and stated "Fuck it! Just hold his ass down and take it with force", while defendants Nita Hunt and Virginia Freed stood outside cell 110 in living unit 6.
53. After approximately ten (10) minutes officer Smith who was operating control in living unit 6 on July 25, 2019 at 9:30 A.M. ordered the unit to lock-down and instructed offenders to return to their cells, as omitted by defendant Virginia Freed in her incident statement. Officer Smith logged the incident in the unit logbook but the logbook was lost shortly there after (see Officer Smith's statement in discovery).
54. The unit was locked down and Defendants John Palomino, Chris Chavez, and Virginia Freed arrived at cell 110 in living unit 6.
55. Defendant John Palomino came inside the cell and began trying to talk to the plaintiff Darus Wilkins into providing the D.N.A. sample, but again the plaintiff refused and asked defendant John Palomino to read the court order and notice from attorney Camilla Bonzo. Defendant Palomino admitted in his interview statement that he did not read the entire court order.
56. Defendant Palomino asked the plaintiff what it would take for him to consent the collection, and the plaintiff said, "Only if my attorney approves".
57. The plaintiff was asked to get up off the floor, which the plaintiff did; at which time the plaintiff was handcuffed with his hands behind his back, pat searched and escorted with officers holding his arms and led to defendant Chris Chavez' office where he remained detained (*see Albright v. Oliver*, 510 U.S. 266, 274, 114 S. Ct. 807, 1276 Ed. 2d. 114 (1994)).
58. The plaintiff was handcuffed, arrested, and detained without any probable cause of him committing a crime, a clear act of official oppression under **Colorado Revised Statutes 18-8-**

403(a).

59. The defendants violated the plaintiff's right to be left alone. There was no known or suspected offense, nor was there any facility need for the D.N.A. The court order was provided to defendant Virginia Freed. The defendants did not take the information in the court order into consideration and the arrest did not stand under legal process (orders of the Court). The defendants violated the plaintiff's fourth (4th) amendment rights (*see Albright v. Oliver*, 510 U.S. 266, 274, 114 S. Ct. 807, 1276, Ed. 2d. 114 (1994)).

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label the additional pages regarding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM THREE: Excessive Force

Supporting facts:

60. Upon arriving and still handcuffed in Unit C, defendant Chris Chavez told the plaintiff to sit in a chair provided in defendant Chavez' office by defendant John Palomino, at which time defendant Palomino made three (3) attempts to call the plaintiff's attorney Camilla Bonzo. A message was left on her voice mail requesting that she return the phone call as it pertains to the plaintiff's D.N.A. collection.

61. All Defendant's admitted that they were not familiar with the offender's D.N.A. collection policy, nor were they familiar in the use of force policies that are stated in the Colorado Department of Correction's Administrative Regulation on Offender D.N.A. Collection (*see* **CDOC Administrative Regulation 300-24, Offender DNA Testing**).

62. The Colorado Department of Corrections Investigation Panel concluded that there were "many deficiencies identified in the incident, it is the conclusion of the panel that the staff members who utilized force, that there actions are not within accordance with CDOC Policy. With that being said, there were numerous issues and concerns identified from this incident which could have been mitigated through the use of industry acceptable control tools and sound correctional judgment", this also included the following:
 - a) Lack of knowledge of policy/protocol.

 - b) Training issues contributed to deficiencies.

 - c) Roll call training be conducted to refresh staff on CDOC policies 300-16 RD Use of Force and 300-24 Offender DNA Testing.

 - d) Defendant John Palomino should have maintained an operational/command presence in order to prepare, organize, plan, and direct staff to resolve this incident in an effective and efficient manner.

63. Although staff defended their actions, and believed they were appropriate and justified and in accordance with DOC policy and procedure, they expressed they did not believe they could question defendant and Chief of Security John Palomino.

63. When it appeared that the plaintiff's attorney would not be returning the phone call, defendant John Palomino instructed the plaintiff to stand up, which the plaintiff did.

64. The plaintiff, while still handcuffed with his hands behind his back was forced to the floor on his chest in the prone position.

65. The plaintiff, Darus Wilkins believes that defendant Kara Kennedy was pressing the plaintiff's head into the floor while defendant Palomino had his knee in the plaintiff's lower back. Defendants Chris Chavez, Luke Holland, and Brent Pierce were on top of the plaintiff's upper and lower back, and holding Mr. Wilkins' shoulders to the floor, making it difficult for the plaintiff to breathe.

66. At no time was the plaintiff a threat to himself or staff. This fact was omitted by the defendants in their written statements.
67. The defendants' actions were not objectively reasonable in light of the facts and circumstances confronting them. The court order was clear on when and where the D.N.A. sample was to be collected and the evidence provided clearly shows negligence on part of the defendants (see CDOC Administrative Regulation 1450-01, Section IV, part B Section III).
68. The act of using the excessive force in this matter by the defendants placing their knees in the lower back of the plaintiff while he was handcuffed in the prone position caused serious bodily injury to the plaintiff Darus Wilkins.
69. The plaintiff has suffered substantial injury resulting in permanent impairment and incontinence that requires the plaintiff to wear adult diapers currently along with mild ligamentum flavium hypertrophy to the plaintiff's L-3 S-1. This force was wanton and malicious since there was no perceived need for it.
70. Defendant Mr. Smith was assigned to the control center of Cell House #6 at BCCF during the incident that happened on July 25, 2019. DOC Employee Actions are as follows:
 - a. Assistant Shift Supervisor and defendant Kara Kennedy called for "extra bodies", more staff to the location (Cell House #6-L-110).
 - b. BCCF Correctional Officer Esquibel responded and locked down the pod.
 - c. Medical Records staff member and defendant Nita Hunt and defendant Ms. Freed were in the Unit with a wheel chair.
 - d. BCCF correctional Officer and defendant Mr. Smith did talk with the plaintiff via cell intercom and did have the intercom on hearing the plaintiff did not want to comply with the DNA collection.
 - e. Defendant Smith did watch the escort of the plaintiff out of the Pod/Cell House. The plaintiff was handcuffed.

- f. Defendant smith seemed unsure if the plaintiff had gone to medical and came back to the Cell House.
- g. Defendant Smith's understanding was Shift Supervisor and defendant Brent Pierce sent defendant Kennedy to get the DNA collection done.
- h. The plaintiff did ask defendant Smith to sign a 5-1-C Report that the plaintiff had wrote.
- i. Defendant Smith refused to sign the plaintiff's 5-1-C Report stating he (Smith) needed his job.
- j. Defendant Smith also stated he (Smith) was not trying to get involved.
- k. Defendant Smith stated that the plaintiff did report to Smith that force had been used on the plaintiff.
- l. Defendant Smith did not report this alleged use of force (UOF) to a supervisor.
- m. Defendant Smith stated he (Smith) knows he is obligated to report a UOF.
- n. Defendant Smith stated he did not witness anything in the cell or office.

71. Plaintiff is currently awaiting approval for surgery on the plaintiff's lower back.

STATEMENT OF CLAIM(S)

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CLAIM FOUR: Sexual Assault

Supporting facts:

72. Plaintiff realleges and incorporates by reference paragraphs 59-71.

73. Once the plaintiff was completely prone and handcuffed with his hands behind his back, with officers on top of the plaintiff with a knee in his lower back, a second pat search was given.

74. During this second pat search the plaintiff felt inappropriate touching to Mr. Wilkins' genital area. Plaintiff jerked and asked "what are you doing!?" Since the plaintiff was face down and handcuffed, with his head being pressed into the floor while defendants were on top of him with a knee in his lower back. The plaintiff was unable to determine who was conducting this second pat search. The second pat search was completely unnecessary and inappropriate because the plaintiff Darus Wilkins was already pat searched in his cell (see Part J of CDOC Administrative Regulation 1450-01, and see also Jean-Laurent v. Wilkerson, 540 F. Supp. 2d 501 (S.D.N.Y. 2008)).

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CLAIM FIVE: Unlawful Search and Seizure

Supporting facts:

75. Plaintiff realleges and incorporates by reference paragraphs 72-74.

76. After Miranda Rights were given and the second pat search was completed on the plaintiff, one of the defendants told defendants Virginia Freed and Nita Hunt to come inside the defendant Chris Chavez' office to do a mouth swab of the plaintiff. This was done while the plaintiff was restrained on the floor by the defendants.

77. Defendant Virginia Freed nervously got down on her hands and knees and asked the plaintiff some questions as she prepared to take the D.N.A. sample without a valid court order and without the plaintiff's consent.

78. Defendant Freed put a swab in the plaintiff's left side of his mouth and collected his D.N.A. sample while someone held the plaintiff's head in place on the floor.

79. After retrieving the plaintiff's D.N.A. sample, defendant Freed told an unknown defendant to turn the plaintiff's head so that defendant Freed obtained the second mouth swab from the plaintiff's right side of his mouth; which they did.

80. The plaintiff states that there was no valid court order to obtain the D.N.A. collection. Later in the investigation done by Core Civic and CDOC, the defendant Virginia Freed admitted that the court order was expired (see CDOC Administrative Regulation 300-24, which will support CDOC Administrative Regulation 1450-01).

81. CDOC investigation panel concluded that there were “no checks and balances were in place to ensure a court order for a D.N.A. test was valid, nor was the Office of Inspector General and CDOC Legal Services used as resources”.
82. This was blatant violation of the Fourth Amendment to The Constitution of the United States.
83. At the conclusion of the D.N.A. collection, the plaintiff was visibly shaken and was told by defendant John Palomino that he could go; which the plaintiff did and returned to his cell.

D. STATEMENT OF CLAIM(S)

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CLAIM SIX: Deprivation of Property

Supporting facts:

84. Plaintiff realleges and incorporates by reference paragraphs 78-83.
85. Defendant Virginia Freed took the plaintiff’s D.N.A. sample without the plaintiff’s consent or a valid court order. Taking the plaintiff’s D.N.A. is a serious deprivation of a constitutional magnitude and gives rise to tort claim for deprivation of property (*see Federal Tort Claims Act 28 U.S.C. §§ 2671, et seq.*).

86. This is a clear violation of the plaintiff's Fourth Amendment Rights of the Constitution of the United States.

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CLAIM SEVEN: Intentional Tort

Supporting facts:

87. Plaintiff realleges and incorporates by reference paragraphs 84-86.

88. The actions demonstrated by the defendants to the plaintiff at BCCF on July 17, 2019 and July 25, 2019 was not an accident but on purpose and had no established right to do what the defendants did

89. Defendant Virginia Freed intentionally came to BCCF to collect the plaintiff's D.N.A. sample as omitted in her incident statement.

90. Defendant Freed intentionally returned to BCCF to collect the plaintiff's D.N.A. on July 25, 2019 without a legally binding court order permitting the plaintiff's D.N.A. sample.

91. Defendant Virginia Freed intentionally put a bucal swab in the plaintiff's mouth and collected his D.N.A. without consent while the plaintiff was handcuffed and pinned to the floor.

92. BCCF defendant Nita Hunt intentionally escorted the defendant Ms. Freed to the plaintiff's cell

in Unit 6C on July 25, 2019.

93. BCCF defendants intentionally pat searched and handcuffed the plaintiff on July 25, 2019.
94. BCCF defendants intentionally forced the plaintiff into the prone position while he was already handcuffed.
95. BCCF defendants intentionally put a knee in the plaintiff's lower back and by doing so intentionally caused injury.
96. BCCF defendants intentionally gave the plaintiff a second pat search and touched the plaintiff's genital area. A second pat search was unnecessary because the plaintiff was under constant supervision of the BCCF defendants and staff since the first pat search.
97. BCCF defendants intentionally used excessive force and pinned the plaintiff on the floor, allowing the defendant Virginia Freed to commit a serious deprivation of a constitutional magnitude.
98. Defendants were successful in their intent to do that which the color of state law has declared wrong as construed with negligence.
99. Defendants intentionally failed to exercise the degree of care in doing what is otherwise permissible. BCCF defendants intentionally did not video and sound record the incident for legal purposes and no anatomical was given after the incident on July 25, 2019 as omitted in the defendant statement.
100. Defendants intentionally did all the above without knowing the policies and procedures in the use of force and offender D.N.A. collection.

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each

claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label the additional pages regarding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM EIGHT: Denial of Due Process

101. Plaintiff realleges and incorporates by reference paragraphs 87-100.
102. The plaintiff Darus Wilkins was transported to Colorado Territorial Correctional Facility (CTCF) in retaliation for reporting the incident that occurred on July 25, 2019 with no explanation about the relocation.
103. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the named defendants from depriving "any person of life, liberty, or property without due process of law". This includes administrative transfers to a different prison.
104. The plaintiff has a "liberty interest" because the plaintiff wrote reports to the CDOC Private Prison Monitoring Unit (PPMU) about the incident that occurred on July 25, 2019. The report was about the use of force that was used on the plaintiff without a valid court order.
105. The plaintiff did not receive an anatomical after the use of force that was used against the plaintiff on July 25, 2019.
106. In *Sandin v. Connor*, 515 U.S. 472 (1995), the plaintiff received "atypical and significant hardship in relation to the ordinary incidents of prison life", this means that the plaintiff did not receive proper medical or mental health treatment at BCCF and at CTCF, where the plaintiff is currently incarcerated.
107. The defendants could not transfer the plaintiff to punish him for writing a complaint to the PPMU. The defendants used this transfer to restrict the plaintiff's access to the PPMU for the purpose of the filed complaint against BCCF (*see Allah v. Seiverling*, 229 F.3d 220 (3rd Circuit 2000)).

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label the additional pages regarding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM NINE: Cruel and Unusual Punishment

108. Plaintiff realleges and incorporates by reference paragraphs 14-20.

109. The Eighth Amendment to the United States Constitution protects the plaintiff's rights to medical care. The plaintiff was denied an anatomical at BCCF after the use of force was used against the plaintiff on July 25, 2019. CDOC procedure and policy expresses that an anatomical is to be conducted after the use of force is used against any offender in the custody of the CDOC, this includes private prisons.

110. The plaintiff has a "serious medical need". The clinical staff at CTCF has failed to mitigate the medical and mental health needs of the plaintiff from November of 2019 to the present. This serious medical and mental health need "if left unattended, poses a substantial risk of serious harm" (*see Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Circuit 2000)).

111. In November Of 2019 the plaintiff’s MRI showed “mild ligimentum flavium hypertrophy L3-S1”. This injury was sustained from the July 25, 2019 incident at BCCF. Nurse Practitioner and defendant Ms. Dillman did not recognize the injury on the MRI scan done in November of 2019.
112. In September of 2020, Nurse Practitioner Melissa Rogers identified the mild ligimentum flavium hypertrophy L3-S1 as the potential cause to the plaintiff’s incontinence issues that stemmed from the July 25, 2019 incident at BCCF (see **Condensed Health Services Encounter**). Ms. Rogers requested a neurosurgeon consultant to see the plaintiff. That request was denied because the MRI was a year old by CDOC medical administration. Another MRI scan was done on March 18, 2021.
113. On March 31, 2021 a neurosurgery appointment was approved but not yet scheduled, as informed by Nurse Practitioner and defendant Jane Gilden (see March 28, 2021 Request for Interview Form).
114. On July 14, 2021 defendant Jane Gilden informs the plaintiff that the neurosurgeon consultation was cancelled by the defendant Jane Gilden. The neuro surgery was not necessary based on the current MRI results. The reason was that the MRI showed mild degenerative disc disease, but there was moderate foraminal stenosis L4-L5 – which can be corrected by surgery by a qualified neurosurgeon (see Message from Medical dated July 14, 2021).
115. Defendant Jane Gilden wants to proceed with physical therapy and medical management, but Nurse Practitioner Melissa Rogers wanted to have a consult with a qualified neurosurgeon. This is a conflict of interest in the plaintiff’s medical needs. Physical therapy is not going to correct the incontinence issues that the plaintiff is currently suffering from, only corrective surgery can correct this issue.
116. CTCF defendants Dillman and Gilden violated the plaintiff’s rights under “Cruel and Unusual Punishment” because the defendants Dillman and Gilden failed to attend to the plaintiff’s serious needs. The appropriate inquiry is whether the defendants Dillman and Gilden exhibited deliberate indifference to such needs given that society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to Eighth Amendment violations only when those needs are serious (see *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), (see also *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704(11th Circuit 1985).
117. On July 23, 2021, CTCF health care physician Dr. Lawrence Andrews told the plaintiff in the form of a message that he prescribed a ten (10) day course of Prednisone that did not help the plaintiff’s continuing pain. Mr. Andrews also stated that the plaintiff could back off the

exercises as previously recommended by defendant Jane Gilden as much as needed when the plaintiff's muscles are tight.

118. Defendant Dr. Thiely exhibited deliberate indifference because Dr. Thiely did not believe the plaintiff had night terrors and PTSD issues after the incident at BCCF on July 25, 2019 until after reading the panel conclusion that was done on September 30, 2019 from the said incident that took place on July 25, 2019.

D. STATEMENT OF CLAIM(S)

State clearly and concisely every claim that you are asserting in this action. For each claim, specify the right that allegedly has been violated and state all facts that support your claim, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific legal cases to support your claim(s). If additional space is needed to describe any claim or to assert additional claims, use extra paper to continue that claim or to assert the additional claim(s). Please indicate that additional paper is attached and label the additional pages regarding the statement of claims as "D. STATEMENT OF CLAIMS."

CLAIM TEN: Tort of Outrageous Conduct

119. Plaintiff realleges and incorporates by reference paragraphs 21-31.
120. The plaintiff states that the BCCF defendants (this includes contract workers) "shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation" (see Administrative Regulation 1450-01 {Code of Conduct} , paragraph X).
121. BCCF defendants who "are considered contract workers, who have knowledge of or respond to any use of force, regardless of degree of force must immediately report the use of force incident to their supervisor and complete an incident report before the end of the shift in accordance with Administrative Regulation 100-07 (Reportable Incidents and Incident

Tracking System) and Administrative Regulation 300-16RD (Use of Force Options page six (6) of Administrative Regulation 1450-01, § F).

122. Also in Administrative Regulation 1450-01, page two (2), § IV – Procedures it states that “DOC employees, contract workers, and volunteers **will avoid** situations which give rise to direct, indirect or perceived conflicts of interest [2-CO-1C-24//5-1C-40691].

123. At the beginning of Administrative Regulation 1450-01 (Code of Conduct) it states that “the following rules and standards include but are not limited to, accepted principles expressing in general terms the conduct expected of DOC employees, contract workers, and volunteers, violations of this policy may result in corrective and/or disciplinary action [2-CO-1C-04]. Failure to adhere to these rules and standards may also adversely affect the safety and security of the facility and general public. The Department reserves the right to monitor DOC employees, contract workers, and volunteers activities in order to ensure compliance with this Administrative Regulation violations of these principles may result in an investigation as defined in Administrative Regulation 1150-04 (Professional Standards Investigations)”.

124. Defendant John Palomino falsely stated to the plaintiff’s attorney, Camilla Bonzo that the plaintiff consented to the DNA test.

125. An Incident Review/Information Gathering Committee was requested by the Private Prison Monitoring Unit (PPMU) for a Use of Force that occurred on July 25, 2019 at approximately 8:35 A.M., in the defendant Chris Chavez’ Office of Living Unit 6 at BCCF. The Incident Review was conducted by Warden Scott Dauffenbach, Associate Warden Tracy Coleman, Lieutenant Sandy Zylstra, and BCCF Facility Investigator Donny Britton as a comprehensive review of a Use of Force incident.

126. The conclusion to the Incident Review was as follows:

a. Appears to the panel members, there was a disorganized response, lack of knowledge of policy/protocol and training issues contributed to the deficiencies related to this use of force incident. Roll Call Training be conducted to refresh staff on CDOC Policies 300-16 RD Use of Force and 300-24 DNA Testing.

b. There were many deficiencies identified in this incident, it is the conclusion of the panel that the staff members who utilized force, **that there actions are not within accordance with Departmental Policy.** With that being said, there were numerous issues and concerns identified from this incident which could have been mitigated through the use of industry acceptable control tools and **sound correctional**

judgment.

- c. Chief Palomino should have maintained an operational/command presence in order to prepare, organize, plan, and direct staff to resolve this incident in an effective and efficient manner.
 - d. Although staff defended their actions, and believed they were appropriate and justified and in accordance with CDOC policy and procedure, they expressed they did not believe they could question Chief Palomino.
127. BCCF defendants did not write a 5-1-C Report. All staff interviewed knew this incident to be unusual/not a daily operational procedure.
128. BCCF staff that were interviewed had no knowledge of policy related to Offender DNA testing. BCCF did not have a Standard Operating Procedure for offenders who refuse DNA Testing.
129. BCCF defendants did not have any “checks or balances” in place to ensure a court order for a DNA test is valid, nor was the Office of Inspector General and CDOC Legal Services were used as a resource.
130. BCCF defendants did not use any video or camera to document this incident.
131. No anatomical was conducted on the plaintiff after the use of force was used on the plaintiff.
132. The plaintiff states for the record that at any time was the collection of the plaintiff’s DNA used for the purpose of any criminal offenses, or for suspicion of child support issues. In the end of the paternity issue, the plaintiff was not the biological father of the child in question that brought on the incident that happened on July 25, 2019.
133. The actions of the BCCF defendants during the incident on July 25, 2019 was outrageous and grossly negligent because the BCCF defendants were not in compliance with CDOC Departmental Policy and Procedures.

F. ADMINISTRATIVE REMEDIES

WARNING: Prisoners must exhaust administrative remedies before filing an action in federal court regarding prison conditions. See 42 U.S.C. § 1997e(a). Your case may be dismissed or judgment entered against you if you have not exhausted administrative remedies.

Is there a formal grievance procedure at the institution in which you are confined?

Yes No (check one)

Did you exhaust administrative remedies?

Yes No (check one)

G. REQUEST FOR RELIEF

State the relief you are requesting or what you want the court to do. If additional space is needed to identify the relief you are requesting, use extra paper to request relief. Please indicate that additional paper is attached and label the additional pages regarding relief as "G. REQUEST FOR RELIEF."

WHEREFORE, plaintiff respectfully prays that this Court enter judgment granting plaintiff:

134. A declaration that the acts and omissions described herein violated plaintiff's rights under the Constitution and laws of the United States.

135. Issue an injunctive ordering defendants John Palomino, Chris Chavez, Kara Kennedy, Nita Hunt, Brent Pierce, Mr. Smith, Luke Holland, Virginia Freed, Ms. Dillman, Jane Gildea and Dr. Thiely to:

- e. Immediately arrange for the plaintiff's need for physical therapy or follow-up medical treatment to be evaluated by a medical practitioner with expertise in the treatment and restoration and function of spinal and nervous system, and:

- a. Carry out without delay the treatment directed by such medical practitioner, and
- b. Be seen and evaluated by a psychological practitioner with expertise in depression and Post-Traumatic Stress Disorder issues and needs, and:
- c. Carry out without delay the treatment directed by such psychological practitioner.

136. Award compensatory damages in the following amounts:

- a. \$100,000.00 jointly and severally against defendants John Palomino, Chris Chavez, Kara Kennedy, Brent Pierce, Nita Hunt, and Luke Holland for injuries sustained as a result of the plaintiff's restraint and the cause of his current psychological needs.
- b. \$10,000.00 jointly and severally against defendant John Palomino from the deprivation of liberty and amenity, and emotional injuries resulting from his denial of due process in connection with the illegal D.N.A. test.
- c. \$50,000.00 jointly and severally against defendant John Palomino, Chris Chavez, Kara Kennedy, Brent Pierce, Nita Hunt, Mr. Smith, and Luke Holland for the physical and emotional injuries resulting from their failure to provide adequate medical and psychological care to the plaintiff.

137. Award punitive damages in the following amounts:


- a. \$15,000,000.00 each against defendants John Palomino, Chris Chavez, Kara Kennedy, Brent Pierce, Nita Hunt, and Luke Holland for their roles in the wanton and malicious physical injuries sustained to the plaintiff during the illegal search and seizure of the plaintiff's D.N.A., and the resulting violations that accompanied as a result of the illegal search and seizure.
- b. \$50,000.00 jointly and severally against defendant Mr. Smith for his negligence in not filing a 5-1-C Report on the use of force used on the plaintiff during the incident that took place on July 25, 2019.
- c. \$1,000,000.00 against defendant Virginia Freed for her role in the illegal seizure of the plaintiff's D.N.A. without a valid court order.

- 138. A jury trial on all issues triable by jury.
- 139. Plaintiff's legal costs in this suit.
- 140. Any additional relief this court deems just, proper, and equitable.

H. PLAINTIFF'S SIGNATURE

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this amended complaint, and that the information in this amended complaint is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Under Federal Rule of Civil Procedure 11, by signing below, I also certify to the best of my knowledge, information, and belief that this amended complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending or modifying existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the amended complaint otherwise complies with the requirements of Rule 11.



(Plaintiff's Signature)

8-30-2021

(Dated)

Colorado Department of Corrections

Name DAVID WILLIAMS

Register Number 118152

Unit 1-32-8118152

Box Number 1210

City, State, Zip Canon City CO 81205-1010

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<u>CTCF</u> FACILITY	<u>8-30-21</u> DATE REC'D	
<u>MABB</u> DOC EMPLOYEE LAST NAME	<u>4106</u> <u>g</u> ID# INT	
<u>118152</u> DOC#	<u>Wilkins</u> OFFENDER LAST NAME	<u>D</u> INT

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