UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MELVYN A. JOHNSON, Plaintiff, v. ADRIAN M. FENTY, Mayor, UNITED STATES DEPARTMENT, OF JUSTICE, DRUG ENFORCEMENT AGENCY, UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA, DEPARTMENT OF CORRECTIONS, Defendants.	Civil Action No. 07–0935 (RMC) ECF

FEDERAL DEFENDANTS' MOTION
TO DISMISS, OR IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

Federal Defendants United States Department of Justice, Drug Enforcement Agency, and United States Attorney's Office for the District of Columbia, by and through the undersigned counsel, respectfully move this Court pursuant to Rules 12(b)(1), (b)(2), (b)(3), (b)(6), and (b)(7) of the Federal Rules of Civil Procedure, for an order dismissing this action. In the alternative, Defendants move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment to the Defendants on the grounds that no genuine issue of material fact exists and Defendants are entitled to judgment as a matter of law. In support of this

motion, Defendants respectfully refer the Court to the accompanying Statement of Material Facts As To Which There Is No Genuine Dispute, Memorandum of Points and Authorities, and Exhibits 1-6. A proposed order is also attached.

Plaintiff, *pro se*, should take notice that any factual assertions contained in the attachments in support of Defendants' motion will be accepted by the Court as true unless the Plaintiff submits his own affidavit or other documentary evidence contradicting the assertions in Defendants' materials. See Neal v. Kelly, 963 F.2d 453 (D.C. Cir. 1992); see also Local Rule 7(h); Fed. R. Civ. P. 56(e). Rule 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

Dated: August 28, 2007

Respectfully Submitted,

__/s/_____
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF FEDERAL DEFENDANTS'
MOTION TO DISMISS, OR IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

INTRODUCTION

Federal Defendants United States Department of Justice, Drug Enforcement Agency ("DEA"), and United States Attorney's Office for the District of Columbia ("USAO"), by and through the undersigned counsel, respectfully move for dismissal of this matter pursuant to Fed. R. Civ. P. 12(b)(1), (b)(2), (b)(3), (b)(6), and (b)(7), or in the alternative, for summary judgment under Fed. R. Civ. P. 56(c).

Plaintiff, Melvin A. Johnson (a/k/a "Melvyn" A. Johnson), is a Federal prisoner, currently

housed in Petersburg, Virginia. See Exhibit ("Ex.") 1 (Public Information Inmate Data for Plaintiff) at 001.[1] On March 29, 2007, Plaintiff filed a Complaint in the Superior Court for the District of Columbia, which alleged that "an error made on his DEA LAB analysis report," namely the fact that "[a] decimal was missing" from a purity test of drugs found in his possession so that it registered as "29%" rather than 2.9%, "caused him to lose his [criminal] trial," to "receive[] [a sentence of] 30 years [incarceration]," and to " suffer[] much for the past 18 years mentally and physically." See Docket Entry No. 1, Exhibit A (Complaint filed by Plaintiff in Superior Court) ("Compl."). Plaintiff's Superior Court complaint named four defendants: (1) Mayor Adrian Fenty, (2) the D.C. Office of the Attorney General, (3) the U.S. Department of Justice, Drug Enforcement Agency, and (4) the D.C. Department of Corrections Office. See id. (caption). His complaint "demands judgment against Defendants in the sum of $1,500,000.00." Id. On May 21, 2007, Plaintiff's action was removed from the Superior Court for District of Columbia to this Court. See Docket Entry No. 1 (notice of removal). The Notice of Removal inadvertently and erroneously listed the United States Attorney's for the District of Columbia ("USAO") as a Defendant, even though USAO had not been listed as a Defendant in Plaintiff's Superior Court complaint. Compare Docket Entry No. 1, Exhibit A (Complaint filed by Plaintiff in Superior Court, which does not name the USAO as a Defendant) *with* Docket Entry No. 1 (notice of removal), caption, ¶ 1 (which incorrectly asserts that the USAO was among those "named as Defendants" in the Superior Court action).

For the reasons set forth below, this suit should be dismissed for lack of subject matter

[1] Plaintiff's date of birth has been redacted from the as filed version of the Public Information Inmate Data report, in order to protect his privacy.

jurisdiction and failure to state a claim upon which relief can be granted. In the alternative, summary judgment should be granted for Defendants because there are no genuine issues in dispute and Defendants are entitled to judgment as a matter of law.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. Plaintiff's 1989 Arrest, and His Trial, Conviction, and Sentencing in 1990

Plaintiff, Melvin A. Johnson (a/k/a "Melvyn" A. Johnson), is a prisoner currently housed in the Federal Correction Institution ("FCI") in Petersburg, Virginia. See Ex. 1 (Public Information Inmate Data for Plaintiff) at 001. Plaintiff's complaint in this action arises from events which occurred nearly twenty years ago: his 1989 arrest; his conviction, following a non-jury trial, in 1990 for possession with intent to distribute heroin and cocaine, in violation of D.C. Code § 33-541; and his sentencing in that same year.

On August 22, 1989, Metropolitan Police Department Detective Gary O'Neal was on duty in an alley behind 146 "L" Street, Southeast, Washington, D.C., an area which was known to be an "open air distribution center."[2] See, e.g., Ex. 2 (Gov't's Superior Court Brief") at 2; Ex.

[2] The facts in this section are mainly derived from three sources: (1) a brief the government filed in the Superior Court for the District of Columbia concerning Plaintiff's criminal conviction, (2) a brief the government filed on appeal in the District of Columbia Court of Appeals concerning the conviction, and (3) a decision of the District of Columbia Court of Appeals upholding the conviction. See, e.g., Ex. 2 (Government's Opposition to Defendant's Motion to Vacate Sentence, Set Aside in Conviction and Order a New Trial, filed in United States v. Melvyn Johnson, Jr., Crim. No. F-9926-89, filed in the Superior Court for the District of Columbia, Criminal Division-Felony Branch on July 29, 1991) ("Gov't's Sup. Ct. Brf.") at 2-7; Ex. 3 (government's brief filed in the D.C. Court of Appeals in Melvyn A. Johnson v. United States, No. 90-566, 91-1406) ("Gov't's D.C. Ct. of App. Brf.") at 2-8; Johnson v. United States, 636 A. 2d 978, 979 (D.C. App. 1994). Each of these documents provide considerable detail about the circumstances of Plaintiff's arrest, conviction, and sentencing.

3 (Govt's D.C. Ct. of App. Brf.) at 2; Johnson v. United States, 636 A. 2d 978, 979 (D.C. App. 1994). Detective O'Neal observed Plaintiff standing in a walkway and holding several blue zip lock packets of white powder in the palm of his outstretched hand while a female reached within one inch of Plaintiff's hand. See Ex. 2 at 2-3; Ex. 3 at 2-3; Johnson, 636 A. 2d at 979. Suspecting a drug transaction, Detective O'Neal identified himself and demanded that Plaintiff and the female came out of the walkway. Id. The female fled and Plaintiff dropped his hand. Id. After struggling with the Plaintiff, Detective O'Neal recovered nine packets of powder from Plaintiff's hand which field tested positive for heroin. Id. Another officer searched the Plaintiff and found one packet of a white substance that tested positive for crack cocaine and $74.00 in cash in a pouch strapped around his waist. Id.

The suspected heroin and the suspected cocaine were seized and sent to the DEA's Mid-Atlantic Laboratory for testing. See Ex. 4 at 3 (Report of Chain of Custody and Certificate of Compliance), 5-6 (Laboratory Analysis Comparison Report section near bottom of Report of Drug Property Collected Purchased or Seized), 12 (Forensic Chemist Worksheet, notes, and test results). On December 18, 1989, Forensic Chemist Lois Lamb analyzed the suspected heroin and the suspected cocaine. See Ex. 4 at 5-12. When analyzed, the suspected heroin was confirmed to be heroin with strength of 29%. See Ex 4 at 5-8. The suspected cocaine was confirmed to be cocaine base with strength of 90%. See Ex. 4 at 5-8.. On December 20, 1989, Chemist Lamb completed the report of chain of custody and certificate of compliance pursuant to 33 D.C. Code § 556. See Ex. 3 at 3 (Report of Chain of Custody and Certificate of Compliance). Prior to Plaintiff's trial, Assistant United States Attorney ("AUSA") Andrew Klingenstein subsequently filed a notice of compliance with the Court and provided the report of custody, the analysis of the

controlled substance, and the certificate of legal custody. See Ex. 4 at 1-2; Ex. 4 *generally*. AUSA Klingenstein served Plaintiff's counsel with a copy of these documents. Id.

At trial, the government called Metropolitan Police Department Officer David Stroud as an expert in street trafficking and packaging of illicit drugs. See Ex. 2 (Gov't's Superior Court Brief) at 3-5; Ex. 3 (Govt's D.C. Ct. of App. Brf.) at 4-5; Johnson, 636 A. 2d at 979-80. He testified that the nine packets of heroin had a street value of $180.00 as packaged, but the same quantity of heroin could be purchased in bulk for $60.00. Id.. He also testified that the quantity, variety, and value of the drugs were more consistent with distribution than personal use and that the maximum amount that a heroin addict would use in a day would be six packets, and that a heroin addict would buy no more than two bags of heroin at one time. Id.

Plaintiff, the sole defense witness, testified that he was a heroin addict, had purchased the drugs in exchange for his girlfriend's camcorder, and that he intended to use all of the nine packets of heroin within the next twenty-four hours. See Ex. 2 at 5-7; Ex. 3 at 5-7; Johnson, 636 A. 2d at 980. He also testified that he had two prior convictions for distribution of drugs, had been sentenced under the addict exception under D.C. Code § 33-541(c)(2), had previously participated in drug programs, and had been hospitalized because of his long drug addiction. Id.

Plaintiff was convicted during a non-jury trial for possession with intent to distribute heroin in violation of D.C. Code § 33-541(a)(1). See Ex. 1 (Public Information Inmate Data for Inmate) at 003, 005, 007; Ex. 2 at 7; Ex. 3 at 7-8; Johnson, 636 A. 2d at 980. The Court, crediting Detective O'Neal's testimony, found that the Plaintiff was interrupted during a drug transaction in which he was the seller. See Ex. 2 at 7; Ex. 3 at 7-8; Johnson, 636 A. 2d at 980. Applying "common sense" and recognizing his "powerful motivation to lie" to avoid mandatory

minimum sentencing[3], the Court disbelieved Plaintiff's testimony that he had purchased the heroin for a trade-in with the camcorder. Id. The trial court found Plaintiff guilty of both counts (the heroin and cocaine possession with distribute charges). See Ex. 2 at 2, 7; Ex. 3 at 1; Johnson, 636 A. 2d at 980. It sentenced Plaintiff to a 10-30 year term of incarceration for the possession with intent to distribute heroin count, followed by 1 year's incarceration for cocaine possession. See Ex. 1 at 003-007; Ex. 2 at 2; Ex. 3 at 1-2. Plaintiff filed a motion to vacate the sentence, set aside the conviction, and order a new trial. See Ex. 2 at 1-2. After a hearing, on October 31, 1991, the presiding Judge determined that Plaintiff's motion for a new trial should be denied. See Ex. 3 at 2. Plaintiff then filed an appeal to the D.C. Court of Appeals, in which he challenged his conviction and the denial of his request for a new trial. See Johnson, 636 A. 2d at 980. On February 3, 1994, the D.C. Court of Appeals affirmed the conviction and sentence. Id. *generally*.

Plaintiff was represented by counsel during the pendency of the Superior Court trial, his post trial motions, and his appeal. See, e.g., Ex. 2 (Gov't's Superior Court Brief) at 7-23 (addressing the issue of whether his counsel effectively represented him during the trial); id. at 30 (certificate of service, referring to Plaintiff's attorney of record); Ex. 3 (Govt's D.C. Ct. of App.

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[3] Plaintiff had been previously convicted of distributing heroin (1985), distributing PCP (1985), forgery (1984), carrying a pistol without a license (1983), and burglary II (1982). See Ex. 2 at 7, n. 12; Ex. 3 at 7, n. 6; Ex. 1 (Public Information Inmate Data for Plaintiff) at []. D.C. Code § 33-541(c) established mandatory minimum sentences for certain drug offenses, including distribution, and subparagraph A-1 of that provision, applicable to cases involving heroin, prescribed minimum sentences of four years for the first offense, seven years for the second, and ten years for the third or subsequent offense. See, e.g., Gilmore v. U.S., 699 A.2d 1130, 1131, n. 1 (D.C. App. 1997) (explaining the operation of the provision). Because of Plaintiff's prior convictions and the escalating penalties for repeat offenders, he had an incentive to lie at trial.

Brf.) at 25-40 (addressing the adequacy of Plaintiff's counsel at trial); id. at 43 (certificate of service, referring to "counsel for appellant Melvyn A. Johnson"); Johnson, 636 A. 2d at 979 (referencing appellant's counsel). It appears that neither Plaintiff nor his attorneys ever argued that the DEA had miscalculated the purity of the heroin which had been found in Plaintiff's possession during Plaintiff's trial, in connection with his post-trial motions to vacate the sentence, set aside the conviction, and order a new trial, or in connection with his appeal to the D.C. Court of Appeals. See Ex. 2 (Gov't's Sup. Ct. Brf.) *generally* (responding to a myriad of arguments by Plaintiff, but is devoid of any suggestion that Plaintiff argued that the DEA miscalculated the purity of the heroin at that stage); Ex. 3 (Gov't's D.C. Ct. of App. Brf.) *generally* (same); Johnson, 636 A. 2d 978 (D.C. App. 1994) (makes no mention of the purity issue and does not suggest that Plaintiff raised it.)

II. Plaintiff's February 4, 1992 Letter to Paul De Zan of the DEA's Field Laboratory

On or about February 24, 1992, Plaintiff mailed a letter to Paul De Zan, the then Laboratory Director of the DEA's Mid-Atlantic Field Laboratory. See Ex. 5. In his letter, Plaintiff explained that he was "currently incarcerated at the Lorton Correctional Facility at Lorton, Virginia, serving a sentence of thirty (30) years for possession of a controlled substance." Id. He claimed that "[t]he severity of his sentence is a direct result of the potent quality of heroin which I allegedly possessed." Id. By way of explanation, he noted that "[t]hroughout my trial, it was my contention that the drugs found on my person was for my personal use," but asserted that "because of the quality reported by a certified chemist in your laboratory, I was subsequently convicted," that "[t]he quality of twenty-nine (29%) transforms my image from urban city drug addict to a supplier from Amsterdam," and that "I . . . find the test results to be somewhat at

variance with qualities consistent with street level substance abuse." Id. Thus, Plaintiff requested that his laboratory report be reassessed. Id. Notably, the letter did not provide any evidence that the purity of the heroin found in Plaintiff's possession played any role in his conviction or sentencing. Id. Nor did it set forth a "sum certain" of damages allegedly suffered by Plaintiff as a result of the DEA's purported error. Id.

Upon receipt of Plaintiff's letter dated February 24, 1992, a chemist at the laboratory (believed to be Director De Zan) confirmed that the analysis of Chemist Lamb was correct. Plaintiff's letter was forwarded to DEA's Office of Chief Counsel for response. Due to the passage of time, we are unable to locate DEA's response to Plaintiff's 1992 letter. Upon receipt of the present complaint, Laboratory Director James V. Malone re-verified the calculation and confirmed that the report value of 29% was correct.[4]

ARGUMENT

Plaintiff's Superior Court complaint alleges that an error was made by a federal employee within the Drug Enforcement Agency, and names as Defendants: (1) Mayor Adrian Fenty, (2) the D.C. Office of the Attorney General, (3) the DEA, and (4) the D.C. Department of Corrections Office. See Docket Entry No. 1, Ex. A. Inasmuch as Plaintiff alleges negligence on the part of a federal agency or employee acting within the scope of her official duty and seeks damages, his claims are only cognizable under the Federal Tort Claims Act ("FTCA"), the United States is the only proper Defendant, and he is bound by requirements of that Act, including its exhaustion and statute of limitations requirements. To the extent that this action is

[4] The Federal Defendants are prepared to submit evidence, including in the form of a declaration, to establish these matters should the Court deem this step necessary and appropriate.

properly understood as an FTCA action, it should be dismissed because: (1) Plaintiff has named Defendants other than the United States; (2) he has failed to exhaust his administrative remedies under the FTCA; (3) he has run afoul of the applicable statute of limitations; and (4) Plaintiff's claims fail to state a claim for damages under the FTCA because Plaintiff has not demonstrated that his sentence has been formally overturned or declared invalid.

To the extent that Plaintiff seeks to challenge the fact or duration of his incarceration and his success in this action could result in earlier release, he may only proceed through a writ of habeas corpus against his warden brought in a court with jurisdiction over the warden. However, he cannot bring a habeas corpus action in this District because he is housed in a Virginia prison.

Finally, in any event, Plaintiff's claims are barred by the doctrines of *res judicata* and *collateral estoppel* because they arise from the same nucleus of facts as his Superior Court trial and sentencing as well as his subsequent appeal to the D.C. Court of Appeals, and could have been raised during those proceedings. In the alternative, summary judgment should be granted for Defendants because there are no genuine issues in dispute and Defendants are entitled to judgment as a matter of law.

I. STANDARD OF REVIEW

A. Motion to Dismiss (Fed. R. Civ. P. 12(b)(1) and 12(b)(6))

Defendants move for dismissal under Rule 12(b)(1), as the Court lacks jurisdiction over several of Plaintiff's claims, and Rule 12(b)(6), as Plaintiff fails to state any claim upon which relief can be granted. Plaintiff bears the burden of establishing subject matter jurisdiction. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); Oppermann v. U.S., 2007 W.L.

1748920, *2 (D.D.C. 2007); A.N.S.W.E.R. Coal. v. Kempthorne, 2007 W.L. 1703431, *4 (D.D.C. 2007); Brady Campaign to Prevent Gun Violence v. Ashcroft, 339 F.Supp.2d 68, 72 (D.D.C. 2004); Rann v. Chao, 154 F. Supp.2d 61, 64 (D.D.C. 2001), aff'd, 346 F.3d 192 (D.C. Cir. 2003); Thompson v. Capitol Police Bd., 120 F. Supp.2d 78, 81 (D.D.C. 2000) (observing that "[on] a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of persuasion to establish subject-matter jurisdiction by a preponderance of the evidence.")

A court may resolve a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) in either of two ways. First, the court may determine the motion based solely on the complaint. See, e.g., Herbert v. Nat'l Acad. of Sci., 974 F.2d 192, 197 (D.C. Cir. 1992). Alternatively, to determine the existence of jurisdiction, it may look beyond the allegations of the complaint, consider affidavits and other extrinsic information, and ultimately weigh the conflicting evidence. Id.; Rann, 154 F. Supp.2d at 64 ("[t]he court is not required . . . to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations.")

Furthermore, a motion to dismiss brought pursuant to Rule 12(b)(6) should be granted if it is beyond doubt that a plaintiff can demonstrate no set of facts that supports his claim entitling him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1117 (D.C. Cir. 2000). Although the plaintiff is given the benefit of all inferences that reasonably can be derived from the facts alleged in the complaint, the court need not accept inferences that are not supported by such facts, nor must the court accept plaintiff's legal conclusions cast in the form of factual allegations. See , e.g., Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996); Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994); Holman v. Williams, 436 F.Supp. 2d 68, 73 (D.D.C. 2006).

It is well established that at the motion to dismiss stage the Plaintiff need only allege facts rather than establish them, since this Court will assume the alleged facts to be true. See, e.g., Mobil Exploration v. Babbit, 913 F. Supp. 5, 9 (D.D.C. 1995). However, without an allegation of facts that meets all elements of a cause of action, a claim should be dismissed. Cf. Saltz v. Lehman, 672 F.2d 207, 209 (D.C. Cir. 1982) (plaintiff's failure to allege elements of equitable tolling required dismissal of complaint).

B. Motion for Summary Judgment (Fed. R. Civ. P. 56)

If matters outside the pleadings are considered, generally the motion shall be treated as one for summary judgment under Rule 56. Summary judgment is appropriate when the record shows that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986); Tao v. Freeh, 27 F.3d 635, 638 (D.C. Cir. 1994). In determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587. The mere existence of a factual dispute, however, will not defeat summary judgment. The non-moving party must show that the dispute is genuine and material to the case. That is, the factual dispute must be capable of affecting the substantive outcome of the case and supported by sufficiently admissible evidence that a reasonable trier of fact could find for the non-moving party. Anderson, 477 U.S. at 247-48; Laningham v. U.S. Navy, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987). If the evidence favoring the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477

U.S. at 249-50 (citations omitted). "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial[,] [and] [t]he moving party is 'entitled to judgment as a matter of law.'" Celotex, 477 U.S. at 323.

Moreover, Rule 56 does not require the moving party to negate the non-movant's claim or to show the absence of a genuine issue of material fact. Id. at 323. Rather, when the movant files a properly supported summary judgment motion, the burden shifts to the nonmoving party to show "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-movant cannot manufacture genuine issues of material fact with "some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, or with "conclusory allegations," "unsubstantiated assertions," "or by only a 'scintilla' of evidence." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994). Summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the overall design of the rules of civil procedure, which is to secure the just, speedy, and inexpensive determination of every action. See Celotex, 477 U.S. at 327.

II. To the Extent that Plaintiff Alleges Negligence by a Federal Employee and Seeks Damages on this Basis, His Action is Only Cognizable Under the Federal Torts Claims Act, and the Sole Proper Defendant to an FTCA Claim is the United States

Plaintiff has named Mayor Fenty[5], the United States Department of Justice, DEA, the D.C. Office of the Attorney General, and the Department of Corrections as Defendants in his Complaint. See Docket Entry No. 1, Ex. A. However, for the reasons set forth below, none of the named Defendants are proper Defendants in this FTCA action.

As mentioned, the Plaintiff bears the burden of proving subject-matter jurisdiction of this

[5] The undersigned do not represent Mayor Fenty or the D.C. Department of Corrections.

Court. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182 (1936); Dist. Of Columbia Ret. Bd. v. United States, 657 F. Supp. 428 431 (D.D.C. 1987). Absent an explicit waiver, the doctrine of sovereign immunity shields the federal government from suit. See, e.g., FDIC v. Meyer, 510 U.S. 471, 475 (1994); Ardestani v. INS, 502 U.S. 129, 137 (1991); Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); United States v. Nordic Village, Inc., 503 U.S. 30, 32-34 (1990) ("[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'") (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392, 399 (1976); Tri-State Hospital Supply Corp. v. U.S., 341 F.3d 571, 575 (D.C. Cir. 2003). Because sovereign immunity is jurisdictional in nature, see Meyer, 510 U.S. at 475, "the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." See, e.g., United States v. Mitchell, 445 U.S. 535, 538 (1980). As the Supreme Court has often observed, waiver of sovereign immunity must be "unequivocally expressed in the statutory text" and "strictly construed, in terms of its scope, in favor of the sovereign." See, e.g., Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (internal quotations omitted). A party bringing suit against the United States bears the burden of proving that the government has unequivocally waived its immunity. See, e.g., Tri-State Hospital Supply Corp., 341 F.3d at 575.

In the context of tort claims against the United States, the FTCA represents a limited waiver of sovereign immunity. 28 U.S.C. §§ 1346(b) and 2671-80. For a plaintiff suing a federal agency or employee acting within the scope of his official duty, the sole available remedy is to pursue an action against the United States under the FTCA. See, e.g., Bancoult v. McNamara, 370 F. Supp. 2d 1, 10 (D.D.C. 2004). Specifically, the FTCA represents a limited

waiver of the government's sovereign immunity "'grant[ing] the federal district courts jurisdiction over a certain category of claims for which the United States has ... 'render[ed]' itself liable.'" See Tri-State Hospital Supply Corp., 341 F.3d at 575 (citing United States v. Orleans, 425 U.S. 807, 813 (1976) and Meyer, 510 U.S. at 477). Specifically, section 1346(b)(1) of the FTCA confers exclusive jurisdiction to the district courts over

> civil actions on claims against the United States, ... for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

See 28 U.S.C. § 1346(b)(1).

Under the FTCA, only the United States is the proper Defendant. See, e.g., 28 U.S.C. § 2679(a); Hall v. Administrative Office of the United States Courts, 2007 W.L. 2219319, *2 (D.D.C. 2007) ("[o]nly the United States can be a defendant to a claim under the FTCA"); Cox v. Sec'y of Labor, 739 F. Supp. 28, 29 (D.D.C. 1990) (dismissing an FTCA suit against the Secretary of Labor for lack of subject-matter jurisdiction because only the United States is a proper defendant to such suits); Hagmeyer v. Dep't of Treasury, 647 F. Supp. 1300, 1304-05 (D.D.C. 1986) (reaching the same conclusion, in the case of an FTCA claim against the Department of Treasury). Thus, the Department of Justice and DEA should be dismissed from this action. See Fed. R. Civ. P. 12(b)(1), (b)(6).[6]

[6] Moreover, the Defendant USAO should be dismissed because it was not a part of the original Superior Court action which was removed to this action. The Notice of Removal inadvertently and erroneously listed the United States Attorney's for the District of Columbia ("USAO") as a Defendant, even though USAO had not been listed as a Defendant in Plaintiff's

III. Plaintiff Failed to Exhaust His Administrative Remedies Under the FTCA by Presenting a Claim for Money Damages to the Agency Before Filing Suit

To the extent Plaintiff raises any tort claims for which the government has waived sovereign immunity under the FTCA, Plaintiff has failed to exhaust his administrative remedies, and the Court lacks jurisdiction to entertain Plaintiff's suit.

It is well established that exhaustion is a mandatory jurisdictional prerequisite to an FTCA action; that the FTCA prohibits a plaintiff from filing suit in federal court until he or she has exhausted administrative remedies.[7] Specifically, the FTCA provides that

> [a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified

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Superior Court complaint. Compare Docket Entry No. 1, Exhibit A (Complaint filed by Plaintiff in Superior Court, which does not name the USAO as a Defendant) *with* Docket Entry No. 1 (notice of removal), caption, ¶ 1 (which incorrectly asserts that the USAO was among those "named as Defendants" in the Superior Court action).

[7] See, e.g., McNeil v. United States, 508 U.S. 106, 112 (1993) (finding that "[t]he most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of judicial process"); id. at 113 (concluding that "[t]he FTCA bars claimants from bringing suit in federal court unless they have exhausted their administrative remedies" and that "[b]ecause petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit"); Carter v. McKain, 2004 W.L. 830949, **1 (D.C. Cir. 2004); Grant v. Secretary, U.S. Dep't of Veterans Affairs, 2004 W.L. 287125, *1 (D.C. Cir. 2004); Borowy v. United States Marshals Service, 1998 W.L. 545426 (D.C. Cir. 1998); Mittleman v. United States, 104 F.3d 410, 413 (D.C. Cir. 1997) (noting that "[a] claim not so presented and filed is forever barred"); Bowden v. United States, 106 F.3d 433, 441 (D.C. Cir. 1997); Alston v. Hawk, 1994 W.L. 71568 (D.C. Cir. 1994); Jackson v. United States, 730 F. 2d 808, 809 (D.C. Cir. 1984); Hall v. Administrative Office of the United States Courts, 2007 W.L. 2219319, *2 (D.D.C. 2007); Satti v. United States Dep't of Defense, 2007 W.L. 1794102, *1 (D.D.C. 2007); Bancoult v. McNamara, 370 F. Supp.2d 1, 10 (D.D.C. 2004).

or registered mail.

See 28 U.S.C. § 2675(a) (emphasis added). To satisfy the FTCA's exhaustion requirement, a plaintiff must have filed within two years after the claim accrued "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum-certain damages claim." See, e.g., 28 U.S.C. §§ 2401(b) (setting forth the two year requirement), 2675(a); Bowden v. United States, 106 F.3d 433, 441 (D.C. Cir. 1997) (internal quotations omitted); G.A.F. Corp. v. United States, 818 F.2d 901, 919-20 (D.C. Cir. 1987) (same); Murphy v. United States, 121 F. Supp.2d 21, 27 (D.D.C. 2000) (same); Satti v. United States Dep't of Defense, 2007 W.L. 1794102, *1 (D.D.C. 2007) (same); Williams v. United States, 2007 W.L. 1549182, * 2 (D.D.C. 2007) (same); see also Grant v.Secretary, U.S. Dep't of Veterans Affairs, 2004 W.L. 287125, * 1 (D.C. Cir. 2004) (noting that "[t]o satisfy the FTCA's exhaustion requirement, an administrative claim must describe the alleged injury with sufficient particularity to allow the agency to investigate and assess the strength of the claim" and that "[t]he claim must also set forth a 'sum certain' of damages so that the agency may make an informed decision whether to attempt settlement negotiations").

As mentioned, the FTCA's exhaustion requirements are jurisdictional and full compliance with those requirements is mandatory, "including for pro se plaintiffs." See Satti v. United States Dep't of Defense, 2007 W.L. 1794102, *1 (D.D.C. 2007); Williams v. United States, 2007 W.L. 1549182 (D.D.C. 2007) (same); see also Grant v. Sec'y, U.S. Dep't of Veterans Affairs, 2004 W.L. 287125, *1 (D.C. Cir. 2004) (affirming dismissal of pro se litigant's action based on failure to exhaust under the FTCA); Simpkins v. Dist. of Columbia, 108 F.3d

366, 371 (D.C. Cir. 1997) (further stating that "forcing these cases through the administrative process helps sort out not only worthless claims, but also worthy ones, which may be settled at that stage"); G.A.F. Corp. v. United States, 818 F.2d at 904; Hobley v. United States, 2007 W.L. 1821157, *3 (D.D.C. 2007) (finding that pro se Plaintiff failed to exhaust); Asemani v. U.S., 2005 W.L. 975635, *3 (D.D.C. 2005) (finding that "this action was filed prior to the exhaustion of administrative remedies" and noting that "[t]he fact that plaintiff is proceeding pro se does not excuse the failure to satisfy the statutory requirements"); Adeogba v. Migliaccio, 266 F.Supp.2d 142, 146 (D.D.C. 2003) ("a pro se plaintiff must exhaust his administrative remedies prior to filing an action under the FTCA"); see also McNeil v. United States, 508 U.S. 106, 110-13 (1993); supra at 15, n. 7.

In the present matter, Plaintiff failed to present an administrative claim to the appropriate federal agency - the DEA - a written statement describing the alleged accident and setting forth a sum certain, as he was required to do under 28 U.S.C. §§ 2401(b) and 2675(a), and the implementing published agency regulations. See Ex. 6, Declaration of Bettie E. Goldman; 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2(a) (requiring FTCA plaintiffs to first file with the agency a timely Standard Form 95 stating their claim); 28 C.F.R. § 14.2(b)(1) (requiring plaintiffs to submit FTCA claims to the agencies whose actions gave rise to the claim). He had two years to present his claim, but at this point it is well past that deadline. See 28 U.S.C. §§ 2401(b).

It is true that Plaintiff mailed a letter to the DEA on or about February 24, 1992, in which he claimed that "[t]he severity of [the] sentence" he had received was "a direct result of the potent quality of heroin which I allegedly possessed," asserted that "because of the quality reported by a certified chemist in your laboratory, I was . . . convicted," suggested that the

laboratory might have made an error in computing the purity of the heroin found in his possession, and requested that the laboratory report be reassessed. See Ex. 5. Even assuming, arguendo, that this letter constituted "a written statement sufficiently describing the injury to enable the agency to begin its own investigation," it did not set forth a "sum certain" of damages allegedly suffered by Plaintiff as a result of the DEA's purported error. See Ex. 5. Thus, Plaintiff has failed to properly exhaust his FTCA claim, and this court lacks subject matter jurisdiction over that claim. See, e.g., Bowden, 106 F.3d at 441 (noting that "Bowden failed to satisfy the second of these requirements [the sum certain damages claim requirement] because he never informed the INS of the amount of amount of damages he sought from its alleged failure to bear the entire tax liability on his settlement payment"); G.A.F. Corp., 818 F.2d at 919-20; Murphy, 121 F. Supp.2d at 27; Satti, 2007 W.L. 1794102 at *1; Williams, 2007 W.L. 1549182 at * 2; see also Grant, 2004 W.L. 287125 at * 1. For this reason, among others, the Court lacks subject-matter jurisdiction over this action. See Fed. R. Civ. P. 12(b)(1).

IV. Plaintiff's FTCA Claims are Barred because He is Untimely: He Failed to Satisfy the FTCA's 2 Year Presentment Requirement and 6 Month Statute of Limitations

The FTCA sets forth not only a two year presentment requirement (as mentioned), but also a six month statute of limitations. Specifically, the FTCA provides that:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

See 28 U.S.C. § 2401(b) (emphasis added). A claim "accrues" for purposes of this provision

when a plaintiff has knowledge of the purported injury and its cause. See, e.g., United States v. Kubrick, 444 U.S. 111, 122 (1979); Hall v. Administrative Office of the United States Courts, 2007 W.L. 2219319, *2 (D.D.C. 2007) ("[a]n FTCA claim accrues once the injured party knows both the fact of his injury and its cause"); Sexton v. United States, 832 F.2d 629, 633 (D.C. Cir.1987); Stokes v. United States Postal Service, 937 F.Supp. 11 (D.D.C. 1996).

Here, Plaintiff was arguably aware of his alleged injury and its cause at the time of his trial and sentencing in 1990. After all, prior to Plaintiff's trial, an AUSA filed and served upon Plaintiff and his counsel a Notice of Compliance, along with copies of the official reports of custody and the DEA's analysis of the controlled substances found on Plaintiff at the time of his arrest, with the D.C. Superior Court. See Ex. 4. Furthermore, Plaintiff certainly was aware of his alleged injury and its cause by the time of his February 4, 1992 letter as it was the subject of that letter. See Ex. 5. Plaintiff however did not initiate his Superior Court action until March 2007, at least fifteen (15) years after he became aware of his alleged injury and its cause. See Docket Entry No. 1, Ex. A (copy of Superior Court complaint). Thus, the FTCA's two year presentment requirement and six month statute of limitations had both run without Plaintiff having submitted a proper administrative claim to the DEA, or having filed his action in D.C. Superior Court.

As mentioned, the FTCA "is a limited waiver of the United States' sovereign immunity" which defines the terms upon which the United States may be sued, and as such, "absent full compliance with the conditions . . . placed upon its waiver, courts lack jurisdiction to entertain tort claims against it." GAF Corp., 818 F. 2d at 904 (emphasis added). The FTCA's commands are "unambiguous" and courts are "not free to rewrite the statutory text" of the FTCA. See

McNeil, 508 U.S. at 111; United States v. Kubrick, 444 U.S. at 113, 117-18 (discussing presentment requirement of 28 U.S.C. § 2401(b)); Schuler v. United States, 628 F.2d 199, 201 (D.C. Cir. 1980) (finding that section 2401(b) "requires the claimant both to file the claim with the agency within two years after accrual of the claim and then to file a complaint in the District Court within six months after the agency denies the claim," not just one of the two) (emphasis added). Accordingly, Plaintiff must strictly comply with the FTCA's limitations period and that his failure to do so in this case deprives the Court of jurisdiction. See Stokes v. United States Postal Service, 937 F.Supp. 11, 17 (D.D.C. 1996) (citations omitted) (rejecting plaintiff's FTCA claim as time barred where, as here, plaintiff's pleadings demonstrated that plaintiff had knowledge of the alleged tort more than two years before she filed an administrative claim). Thus, Plaintiff's action is subject to dismisal for this reason, among others. See Fed. R. Civ. P. 12(b)(1), 12(b)(6).

V. Plaintiff's Action Fails to State a Claim for Damages under the FTCA, because He has Not Shown that His Sentence Has Been Overturned or Declared Invalid, and He May Only Proceed through a Writ of Habeas Corpus Against his Warden Brought in a Court with Jurisdiction over the Warden (i.e., in Virginia)

To the extent that Plaintiff seeks damages resulting from his allegedly unlawful incarceration, he fails to state a claim upon which relief can be granted. This court has held that "[a]bsent a showing that [a] plaintiff's conviction or sentence has been overturned or declared invalid . . . he cannot recover damages under the FTCA" See, e.g., Hall v. Administrative Office of U.S. Courts, 2007 W.L. 2219319, *4 (D.D.C. 2007); Watkins v. Holt, 2006 WL 2331090, *2 (D.D.C. 2006) (same).

In reaching this conclusion, this Court apparently relied in part on Heck v. Humphrey,

512 U.S. 477 (1994) ("Heck"), a case which admittedly arose in a different context: the context of a section 1983 action, but whose language this Court has concluded has broader application. In Heck, the Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ for habeas corpus, 28 U.S.C. § 2254.

Id. at 486-87.

Although Plaintiff seeks monetary damages in his action, his action appears to be a collateral challenge to his conviction which, in effect, challenges the "fact or duration" of his confinement and in that success in this action might demonstrate the invalidity of his confinement or its duration. Thus, Plaintiff should have proceeded through proper petition for a writ of habeas corpus against his warden brought in a court with jurisdiction over the warden. See, e.g., Watkins v. Holt, 2006 W.L. 2331090, *2 (D.D.C. 2006) (observing that "[n]otwithstanding plaintiff's having chosen the FTCA as the jurisdictional basis of this suit, it is clear that his claims sound in habeas" and explaining that "[i]nsofar as plaintiff demands immediate release from his current custody, his sole remedy is through a petition for a writ of habeas corpus, which names the warden as the respondent, filed in the district where he is incarcerated").[8]

[8] See also Wilkinson v. Dotson, 544 U.S. 74, 82 (2005) (habeas is the exclusive remedy if the success of the action "would necessarily demonstrate the invalidity or confinement or its duration"); Preiser v. Rodriguez, 411 U.S. 475 (1973); Bourke v. Hawk-Sawyer, 269 F.3d 1072, 1074 (D.C. Cir. 2001) (even where a prisoner's claim that he was illegally denied a chance to secure his release would not necessarily result in his being released any earlier, it would raise that

In Guerra v. Meese, 786 F.2d 414 (D.C. Cir. 1986), this Court held that a district court may not entertain a habeas corpus action unless it has personal jurisdiction over the custodian of the prisoner. See also Chatman-Bey, 864 F.2d at 810 (reaffirming that "the appropriate defendant in a habeas action is the custodian of the prisoner," and also holding that the "custodian" of a federal prisoner seeking release on parole is the warden of the prison in which he is confined); Blair-Bey v. Quick, 151 F.3d 1036, 1039 (D.C. Cir. 1998) (same); see Anyanwutaku v. Moore, 151 F.3d 1053, 1055 (D.C. Cir. 1998); see also Rumsfeld v. Padilla, 542 U.S. 426, 447 (2004) (explaining that "[w]henever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement."); Stokes v. U.S. Parole Comm'n, 374 F.3d 1235, 1237-38 (D.C. Cir. 2004) (noting that "[b]ecause '[a] writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in ... custody,' . . . a court may issue the writ only if it has jurisdiction over that person," the warden of the facility in which the inmate is incarcerated) (internal citations omitted); Dominguez, 2006 W.L. at *3.

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possibility and thus have a probabilistic impact on the duration of his custody, requiring that he resort to habeas in the jurisdiction of his incarceration); Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 373 (D.C. Cir. 2000) (concluding that "[f]or a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody"); Chatman-Bey v. Thornburgh, 864 F.2d 804, 809 (D.C. Cir. 1988) (en banc) (holding that [the U.S. Supreme Court case of Preiser v. Rodriguez] . . . makes clear that, as a matter of Congressional intent, prisoners mounting a challenge to the lawfulness of their custody are to proceed by means of habeas); id. at 809 (finding that a federal prisoner seeking to challenge his parole eligibility date was required to proceed in habeas, even though success upon his claims would not necessarily result in his earlier release); see also Dominguez v. BOP, 2006 W.L. 1445041, *3 (D.D.C. 2006); McGlamary v. Lappin, 2006 W.L. 1382185, *1, n.1 (D.D.C. 2006); Boyer v. Conaboy, 983 F. Supp. 4 (D.D.C. 1997) ("[t]he Court will reaffirm a principle that has unwaveringly governed federal-court practice for almost a quarter-century: that a prisoner who attacks the legality or duration of his sentence must proceed by habeas corpus"); Bayless v. United States Parole Commission, 1996 W.L. 525325, *7 (D.D.C. 1996).

In this instance, Plaintiff is held in Virginia, not the District of Columbia. See, e.g., Ex. 1 at 001; see also Docket Entry No. 9 (Notice of Plaintiff's New Address). Thus, venue in this jurisdiction is not proper. Nor has Plaintiff named his Warden as a defendant as would be required for a habeas corpus action. And this Court could not exercise jurisdiction over the Warden even if the Warden was named as a Defendant. For this reason, among others, Plaintiff's action should be dismissed. See Fed. R. Civ. P. 12(b)(1), (b)(2), (b)(3).

Only if the Court has jurisdiction over the Plaintiff's custodian may it afford meaningful relief, and then it would be in the context of habeas relief. Plaintiff's action should be dismissed in part because he failed to join his Warden as the Defendant.[9] When an inmate in a federal prison files a civil action in the District of Columbia challenging the lawfulness of his custody, his case must either be dismissed or transferred to the jurisdiction where the prisoner's immediate custodian is located. See, e.g., Bourke, 269 F.3d 1074; In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988); Guerra v. Meese, 786 F.2d 414 (D.C. Cir. 1986).

VI. In any Event, Plaintiff's Action is Barred by the Doctrines of *Res Judicata* and *Collateral Estoppel* Because He Had an Opportunity to Raise the Claims he Now Makes when He was Before the D.C. Superior Court and D.C. Court of Appeals

The Complaint which Plaintiff filed in the Superior Court for the District of Columbia, alleged that "an error made on his DEA LAB analysis report," namely the fact that "[a] decimal was missing" from a purity test of drugs found in his possession so that it registered as "29%"

[9] Fed. R. Civ. P. 12(b)(7) calls for dismissal for "failure to join a party under Rule 19." That rule, in turn, calls for joinder of persons if, "in the person's absence complete relief cannot be accorded among those already parties". Fed. R. Civ. P. 19(a). Where the person cannot be made a party, but is indispensable, the court shall dismiss the matter. Fed. R. Civ. P. 19(b). As noted above, the prisoner's custodian is a necessary party in an action such as this.

rather than 2.9%, "caused him to lose his [criminal] trial," to "receive[] [a sentence of] 30 years [incarceration]," and to " suffer[] much for the past 18 years mentally and physically." See Docket Entry No. 1, Exhibit A (Complaint filed by Plaintiff in Superior Court). Plaintiff's entire action is barred by the doctrines of *res judicata* and *collateral estoppel* as his claims (1) could have been presented to the D.C. Superior Court or D.C. Court of Appeals during the pendency of Plaintiff's trial and sentencing before the D.C. Superior Court and his appeal to the D.C. Court of Appeals, during a period when he was represented by counsel, and (2) arise out of the same "nucleus" of facts as did his trial, sentencing, and appeal.

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." See San Remo Hotel, L.P. v. City and County of San Francisco, Cal., 545 U.S. 323, 336, n. 16 (2005) (internal citation omitted and emphasis added).[10] The doctrine of res judicata describes two discrete effects: (1) "claim preclusion," the fact that "a valid final adjudication of a claim precludes a second action on that claim or any part of it" and (2) "issue preclusion, long called 'collateral estoppel,'" that is that "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim." See Baker v. Gen. Motors Corp., 522 U.S. 222, 233, n. 5 (1998) (internal

[10] See also Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 476 (1998); Nevada v. United States, 463 U.S. 110, 129-130 (1983); Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, n. 5 (1979); Montana v. United States, 440 U.S. 147, 153 (1979); Smalls v. United States, 471 F. 3d 186, 192 (D.C. Cir. 2006); Tutt v. Doby, 459 F.2d 1195, 1197 (D.C. Cir. 1972); Burnett v. Sharma, 2007 W.L. 1020782, *2 (D.D.C. 2007) ("Res judicata bars not only claims that actually were litigated, but also claims that could have been litigated in the previous action.")

citation omitted); San Remo, 545 U.S. at 336, n. 16 (explaining that under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."); Parklane, 439 U.S. at 326, n. 5; Montana, 440 U.S. at 153.

The doctrines of *res judicata* and *collateral estoppel* are both designed to "'preclude parties from contesting matters that they have had a full opportunity to litigate.'" See Montana, 440 U.S. at 153-154; Carter v. Rubin, 14 F. Supp.2d 22, 33 (D.D.C. 1998). "These doctrines protect parties from the expense and burdens associated with multiple lawsuits, conserve judicial resources, and reduce the possibility of inconsistent decisions." Id. at 33-34 (citing United States v. Mendoza, 464 U.S. 154, 158-59 (1984)); Hardison v. Alexander, 655 F.2d 1281, 1288 (D.C. Cir. 1981) (noting that the purpose of *res judicata* is to "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and to prevent serial forum-shopping and piecemeal litigation"); Westgate-Sun Harbor Co. v. Watson, 206 F.2d 458, 462 (D.C. Cir. 1953) (noting that "there must some time be an end to litigation, not only in the interest of the adverse party who should not be vexed twice or thrice or even more times for the same cause, but also in the interest of the state in settled law and legal relations and that of courts and litigants in an orderly judicial process which would be seriously jeopardized by unnecessary overcrowding of already crowded dockets").

Res judicata forecloses a cause of action that is based on the same "nucleus of facts," Page v. United States, 729 F.2d 818, 820 (D.C. Cir. 1984), and which comprises "any part of the transaction, or series of connected transactions, out of which [a prior] action arose." Stanton v. Dist. of Columbia Court of Appeals, 127 F.3d 72, 78 (D.C. Cir. 1997). For *res judicata*

purposes, "it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." Page, 729 F.2d at 820. To determine whether or not two suits involve the same cause of action, this Circuit has adopted the "transactional" approach under which a claim, or cause of action, consists of "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." See Stanton, 127 F.3d at 78 (internal citations and quotations omitted). In assessing whether facts constitute a "transaction" or "series of transactions" the court must consider "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Id. at 78.

Plaintiff's action in this Court arises from the same underlying series of transactions or "nucleus of facts" as did his action in the D.C. Superior Court and D.C. Court of Appeals: Plaintiff's 1989 arrest; his conviction, following a non-jury trial, in 1990 for possession with intent to distribute heroin and cocaine, in violation of D.C. Code § 33-541; and his sentencing in that same year. Compare Ex. 2 (Gov't's Superior Court Brief"), Ex. 3 (Govt's D.C. Ct. of App. Brf.), and Johnson v. United States, 636 A. 2d 978, 979 (D.C. App. 1994) (referencing all of these events) with Compl. *generally*.

Plaintiff certainly had a "full opportunity to litigate" the claims he now presses upon this Court. See, e.g., Montana, 440 U.S. at 153-154; Carter v. Rubin, 14 F. Supp.2d 22, 33 (D.D.C. 1998). Plaintiff was represented by counsel during the pendency of the Superior Court trial, his post trial motions, and his appeal. See, e.g., Ex. 2 (Gov't's Superior Court Brief) at 7-23 (addressing the issue of whether his counsel effectively represented him during the trial); id. at 30

(certificate of service, referring to Plaintiff's attorney of record); Ex. 3 (Govt's D.C. Ct. of App. Brf.) at 25-40 (addressing the adequacy of Plaintiff's counsel at trial); id. at 43 (certificate of service, referring to "counsel for appellant Melvyn A. Johnson"); Johnson, 636 A. 2d at 979 (referencing appellant's counsel). During the pendency of his trial and sentencing in the D.C. Superior Court, and his appeal to the D.C. Court of Appeals, Plaintiff could have (but failed to) raise the claim which he now asserts in this Court, that the DEA miscalculated the purity of the heroin found on his possession. Plaintiff certainly was on notice of the DEA's calculations prior to his trial as AUSA Andrew Klingenstein filed and served upon Plaintiff's counsel a notice of compliance with the Court and provided the report of custody, the analysis of the controlled substance, and the certificate of legal custody prior to Plaintiff's trial *prior to Plaintiff's trial*. See Ex. 4 at 1-2; Ex. 4 *generally*. Moreover, Plaintiff could have made the argument during his appeal to the D.C. Court of Appeals as he mentioned it in a February 4, 1992 letter to the DEA, two years before the D.C. Court of Appeals rendered its decision on his appeal. See Ex. 5; Johnson v. United States, 636 A. 2d 978, 979 (D.C. App. 1994).

Moreover, both the Superior Court and the D.C. Court of Appeals found Plaintiff had committed the drug offenses at issue. A Federal court must give decisions by the D.C. Superior and Court of Appeals courts the same preclusive effect as it would give other federal courts.[11]

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[11] See, e.g., Moment v. Dist. of Columbia, 2007 WL 861138, *4 (D.D.C. 2007) (noting that the Plaintiff "does not contest that the Superior Court is a court of competent jurisdiction" for res judicata purposes and that "[t]he defendants have shown that Moment's current claims are the same that were previously asserted and adjudicated in his prior Superior Court litigation" and that "[t]herefore, defendants' motion for judgment on the pleadings will be granted and plaintiff's complaint will be dismissed"); Lee v. Bradford, 2006 WL 2520614, at *2 (D.D.C. Aug. 30, 2006) (noting that a dismissal in Superior Court for failure to state a claim in a complaint alleging deprivation of constitutional rights was a final judgment on the merits by a court of

Thus, Plaintiff's action is barred by the doctrines of *res judicata* and *collateral estoppel* as: (1) he had an opportunity to raise his allegations before the D.C. Superior Court and the D.C. Court of Appeals, and (2) they arise from the same "nucleus" of facts as those prior actions.

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competent jurisdiction); Redman v. Graham, 2005 W.L. 3211938, *2-3 (D.D.C. 2005) (deciding that one of the defendants in that case, "Graham will be dismissed based on the doctrine of res judicata" because the plaintiff "has pleaded the same facts and named the same parties here as in her D.C. Superior Court case and her proceeding before the RACD" and that "[s]he did not raise her discrimination and Fair Housing Act claims as defenses in Dr. Pitts' suit for possession, but she could have."); Flynn v. 3900 Watson Place, Inc., 63 F.Supp.2d 18, *19 (D.D.C.,1999) ("The court concludes that District of Columbia law precludes relitigation of plaintiffs' Fair Housing Act claim in federal court because that claim arises from the same nucleus of facts as those adjudicated in the landlord-tenant court [i.e., the Landlord and Tenant Branch of D.C. Superior Court], and the plaintiffs had an opportunity to raise their Fair Housing Act claim as a defense in that proceeding.")

Dated: August 28, 2007

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MELVYN A. JOHNSON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 07–0935 (RMC)
	)	ECF
ADRIAN M. FENTY, Mayor,	)	
UNITED STATES DEPARTMENT, OF JUSTICE, DRUG ENFORCEMENT AGENCY,	)	
UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA,	)	
DEPARTMENT OF CORRECTIONS,	)	
Defendants.	)	

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 7(h), Defendants submit this statement of material facts as to which there is no genuine issue:

1. Plaintiff, Melvin A. Johnson (a/k/a "Melvyn" A. Johnson), is a prisoner currently housed in the Federal Correction Institution ("FCI") in Petersburg, Virginia. See Exhibit ("Ex.") 1 (Public Information Inmate Data for Plaintiff) at 001; see also Docket Entry No. 9 (Notice of Plaintiff's New Address).

2. Prior to Plaintiff's criminal trial, Assistant United States Attorney ("AUSA") Andrew Klingenstein filed and served upon Plaintiff the following documents: a notice of compliance with the D.C. Superior Court and provided a report of custody, an analysis of the controlled substances found in Plaintiff's possession, and a certificate of legal custody. See Ex. 4 at 1-2; Ex. 4 *generally*. AUSA Klingenstein served Plaintiff's counsel with a copy of these documents. Id.

3. Plaintiff was convicted during a non-jury trial for possession with intent to distribute heroin in violation of D.C. Code § 33-541(a)(1). See Ex. 1 (Public Information Inmate Data for Inmate) at 003, 005, 007; Ex. 2 at 7; Ex. 3 at 7-8; Johnson v. United States, 636 A. 2d 978, 979-80 (D.C. App. 1994)

4. The D.C. Superior court found Plaintiff guilty of two counts (possession with intent to distribute heroin and cocaine). See Ex. 2 at 2, 7; Ex. 3 at 1; Johnson, 636 A. 2d at 980. It sentenced Plaintiff to a 10-30 year term of incarceration for the possession with intent to distribute heroin count, followed by 1 year's incarceration for cocaine possession. See Ex. 1 at 003-007; Ex. 2 at 2; Ex. 3 at 1-2.

5. Plaintiff filed a motion to vacate the sentence, set aside the conviction, and order a new trial. See Ex. 2 at 1-2. After a hearing, on October 31, 1991, the presiding Judge determined that Plaintiff's motion for a new trial should be denied. See Ex. 3 at 2.

6. Plaintiff then filed an appeal to the D.C. Court of Appeals, in which he challenged his conviction and the denial of his request for a new trial. See Johnson, 636 A. 2d at 980. On February 3, 1994, the D.C. Court of Appeals upheld affirmed the conviction and sentence. Id.

generally.

7. Plaintiff was represented by counsel during the pendency of the Superior Court trial, his post trial motions, and his appeal. See, e.g., Ex. 2 (Gov't's Superior Court Brief) at 7-23 (addressing the issue of whether his counsel effectively represented him during the trial); id. at 30 (certificate of service, referring to Plaintiff's attorney of record); Ex. 3 (Govt's D.C. Ct. of App. Brf.) at 25-40 (addressing the adequacy of Plaintiff's counsel at trial); id. at 43 (certificate of service, referring to "counsel for appellant Melvyn A. Johnson"); Johnson, 636 A. 2d at 979 (referencing appellant's counsel).

8. It appears that neither Plaintiff nor his attorneys ever argued that the DEA had miscalculated the purity of the heroin which had been found in Plaintiff's possession during Plaintiff's trial, in connection with his post-trial motions to vacate the sentence, set aside the conviction, and order a new trial, or in connection with his appeal to the D.C. Court of Appeals. See Ex. 2 (Gov't's Sup. Ct. Brf.) *generally* (responding to a myriad of arguments by Plaintiff, but is devoid of any suggestion that Plaintiff argued that the DEA miscalculated the purity of the heroin at that stage); Ex. 3 (Gov't's D.C. Ct. of App. Brf.) *generally* (same); Johnson, 636 A. 2d 978 (D.C. App. 1994) (makes no mention of the purity issue and does not suggest that Plaintiff raised it.)

II. Plaintiff's February 4, 1992 Letter to Paul De Zan of the DEA's Field Laboratory

9. On or about February 24, 1992, Plaintiff mailed a letter to Paul De Zan, the then Laboratory Director of the DEA's Mid-Atlantic Field Laboratory. See Ex. 5. In his letter, Plaintiff explained that he was "currently incarcerated at the Lorton Correctional Facility at

Lorton, Virginia, serving a sentence of thirty (30) years for possession of a controlled substance." Id. He claimed that "[t]he severity of his sentence is a direct result of the potent quality of heroin which I allegedly possessed." Id. By way of explanation, he noted that "[t]hroughout my trial, it was my contention that the drugs found on my person was for my personal use," but asserted that "because of the quality reported by a certified chemist in your laboratory, I was subsequently convicted," that "[t]he quality of twenty-nine (29%) transforms my image from urban city drug addict to a supplier from Amsterdam," and that "I . . . find the test results to be somewhat at variance with qualities consistent with street level substance abuse." Id. Thus, Plaintiff requested that his laboratory report be reassessed. Id. Notably, the letter did not provide any evidence that the purity of the heroin found in Plaintiff's possession played any role in his conviction or sentencing. Id. Nor did it set forth a "sum certain" of damages allegedly suffered by Plaintiff as a result of the DEA's purported error. Id.

10. Plaintiff has never presented a proper administrative claim to the appropriate federal agency - the DEA - a written statement describing the alleged accident and setting forth a sum certain, as he was required to do under 28 U.S.C. §§ 2401(b) and 2675(a), and the implementing published agency regulations. See Ex. 6, Declaration of Bettie E. Goldman.

Respectfully submitted,

__/s/_____
JEFFREY A. TAYLOR, D.C. BAR # 498610
United States Attorney

__/s/_____
RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

__/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 28th day of August, 2007, the foregoing Federal Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, Memorandum of Points and Authorities in Support of Federal Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment, and Federal Defendants' Statement of Material Facts Not in Dispute, and the accompanying Exhibits, were served via the Electronic Case Filing System upon the non-Federal Defendants, and were served upon the *pro se* Plaintiff by first class mail, postage prepaid mail addressed as follows:

Melvyn A. Johnson
R 07904-007
Federal Correctional Complex
Petersburg-Medium
P.O. Box 90043
Petersburg, VA 23804

__/s/_____
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