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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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10 DAMIEN GIBSON,

11 Plaintiff,

Case No. 2:14-cv-01812-KJD-PAL

12 v.

**ORDER**

13 SOUTHERN DESERT  
14 CORRECTIONAL  
15 CENTER, et al.,

16 Defendants.

17 Presently before the Court is Defendants' Motion for Summary Judgement (#21). Plaintiff  
18 Damien Gibson filed a response in opposition (#25) to which Defendants replied (#26). Also before  
19 the Court is Defendants' Motion to Strike (#29). Though the time for doing so has passed, Plaintiff  
20 has failed to file a response in opposition. Therefore, in accordance with Local Rule 7-2(d), and  
21 good cause being found, the motion to strike is granted.

22 **I. Background**

23 On December 12, 2012, Gibson stepped on a rock in the yard at SDCC and thereafter had  
24 pain in his left foot. On January 11, 2013 he requested a medical appointment. On January 18, 2013,  
25 while in medical for a regularly scheduled appointment, Gibson told Defendant Gutierrez, a nurse,  
26 about his foot pain. Gutierrez said he would relay the message to the doctor. Gibson saw the doctor,

1 Defendant Sanchez, on January 28, 2013, who diagnosed Gibson with plantar fasciitis. Dr. Sanchez  
2 recommended a conservative treatment plan of rest, ibuprofen for pain management, and a topical  
3 pain reliever. After continued pain, Gibson's foot was x-rayed on March 20, 2013. The medical staff  
4 agreed that there was a medical problem with Gibson's foot, but the x-rays showed no apparent  
5 damage, injury, or abnormalities to Gibson's foot. Follow up visits continued to recommend the  
6 same conservative treatment of ibuprofen and topical pain reliever, with the additional guideline to  
7 rest and avoid prolonged standing or walking.

8 On April 16, 2013, Sanchez told Gibson that special shoes with better arch support might  
9 alleviate his pain and suggested he contact the warden to request a "shoe chronicle." On April 22,  
10 2013, Warden Williams responded to Gibson's inquiry that "if medical has determined that you need  
11 a special shoe, it is their responsibility to provide a medical shoe." (#3 at 85). Gibson went to  
12 medical appointments on May 19 and 30, which he thought would lead to ordering his shoes.  
13 Medical was unable to directly obtain the "New Balance" shoes that Gibson required.

14 Sanchez gave Gibson permission to order a pair of New Balance shoes, and sent a letter to the  
15 property room to that effect. (#3 at 91). An upheld grievance report dated May 31, 2013, confirmed  
16 that Gibson was authorized to order New Balance shoes for his medical need.

17 In July, Gibson was seen by an outside orthopedist, Dr. Wolf, who confirmed Dr. Sanchez's  
18 diagnosis of plantar fasciitis. Dr. Wolf recommended ibuprofen, a splint to be worn at night, and  
19 stretching exercises, a treatment regime in line with the guidance he had received from SDCC  
20 medical staff. At medical appointments in July and September, Gibson's pain medications were  
21 refilled. At the September medical appointment, Gibson's foot showed improvement, both in  
22 reported pain and in observed ambulation.

23 In December 2013, Gibson's mother ordered him a pair of shoes which were delivered to  
24 SDCC. These shoes were returned to the sender on December 19, 2013, without any notification to  
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1 Gibson that they had arrived and been rejected. On January 23, 2014, Gibson went to the property  
2 room to inquire about his shoes. Navarette told him they had previously arrived but been sent back.

3 Plaintiff then filed the present complaint. An initial screening order reviewed Gibson's  
4 complaint and allowed two claims to proceed: (1) a deliberate indifference to serious medical needs  
5 claim against Sanchez, Gutierrez, Williams, Adams, Sisco, and Navarette; and (2) a due process  
6 claim against Williams, Adams, Navarette, and Sisco. (#2 at 8).

7 II. Summary judgment standard

8 The Court properly grants summary judgment when the record demonstrates that there is no  
9 genuine issue as to any material fact. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317,  
10 330 (1986). “[T]he substantive law will identify which facts are material. Only disputes over facts  
11 that might affect the outcome of the suit under the governing law will properly preclude the entry of  
12 summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”

13 Anderson v. Liberty Lobby, 477 U.S. 242, 248–49 (1986).

14 A dispute is “genuine” only where a sufficient evidentiary basis would allow a reasonable  
15 jury to find for the nonmoving party. Id. “The amount of evidence necessary to raise a genuine issue  
16 of material fact is enough ‘to require a jury or judge to resolve the parties’ differing versions of the  
17 truth at trial.’” Aydin Corp. v. Loral Corp., 718 F.2d 897, 902 (9th Cir. 1983) (quoting First Nat'l  
18 Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288–89 (1968)). The plaintiff bears the burden to  
19 produce evidence to defeat a properly supported motion for summary judgment by showing there are  
20 genuine issues of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256–57 (1986). Even  
21 when such evidence would be in the possession of the defense, the plaintiff must use discovery to  
22 produce evidence, or summary judgment may be granted. Id.

23 Evidence must be viewed in a light most favorable to the opponent of the motion, and all  
24 reasonable inferences must be drawn in his favor. U.S. ex rel. Anderson v. N. Telecom, Inc., 52 F.3d  
25 810, 815 (9th Cir. 1995), as amended (May 26, 1995) (citing T.W. Elec. Svc., Inc. v. Pacific Elec.

1 Contractors Ass'n, 809 F.2d 626 630-31 (9th Cir. 1987)). However, inferences are limited to those  
2 upon which a reasonable jury might return a verdict. Id.

3 III. Discussion

4 Defendants have now moved for summary judgment on all claims. They argue: (1) that they  
5 are not liable in their official capacity; and (2) that they are entitled to qualified immunity.  
6 Defendants also deny: (3) that they were deliberately indifferent to Gibson's serious medical need;  
7 and (4) that they denied Gibson due process rights.

8 A. Official capacity claims

9 Liability under 42 U.S.C. §1983 arises only upon personal participation by the defendant.  
10 Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979). "A person deprives another 'of a constitutional  
11 right, within the meaning of Section 1983, if he does an affirmative act, participates in another's  
12 affirmative acts, or omits to perform an act which he is legally required to do that causes the  
13 deprivation of which [the plaintiff complains].'" Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988)  
14 (alteration in original) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). The inquiry  
15 into causation must be individualized and focus on the duties and responsibilities of each individual  
16 defendant whose acts or omissions are alleged to have caused a constitutional deprivation. Id.

17 States are not "persons" within the meaning of 42 U.S.C. §1983. Will v. Michigan  
18 Department of State Police, 491 U.S. 58, 64-70 (1989). A plaintiff cannot maintain a § 1983 action  
19 against a state. Id. When a state official is sued in their official capacity, the suit is not truly brought  
20 against the official, but against the official's office. Id. at 71. Such an action, therefore, is effectively  
21 a suit against the state itself. Id. Therefore, a Section 1983 action cannot be properly brought against  
22 the state or a state official acting in his or her official capacity, regardless of whether the complaint is  
23 filed in state or federal court. Id. at 64-71.

1       In his initial complaint, Gibson sued all defendants in both their individual and official  
2 capacities. Since section 1983 actions cannot be maintained against persons in their official  
3 capacities, all claims against Defendants in their official capacities are dismissed with prejudice.

4       B. Qualified Immunity

5       Qualified immunity protects Section 1983 defendants from civil liability when performing  
6 discretionary functions, unless such conduct violates clearly established rights of which they should  
7 reasonably be aware. Jackson v. City of Bremerton, 268 F.3d 646, 650 (9th Cir. 2001). If a  
8 constitutional violation in fact occurred, a secondary inquiry must evaluate if the defendant could  
9 have “reasonably but mistakenly believed that his or her conduct did not violate a clearly established  
10 constitutional right.” Id. at 651.

11       The plaintiff bears the burden of proving that a right allegedly violated was clearly  
12 established at the time of the alleged misconduct. Baker v. Racanscy, 887 F.2d 183, 186 (9th Cir.  
13 1989) (citing Davis v. Scherer, 468 U.S. 183, 197 (1984)). If the plaintiff carries this burden, then the  
14 defendants must prove that their conduct was reasonable even though it might have violated  
15 constitutional standards. Romero v. Kitsap Cty., 931 F.2d 624, 627 (9th Cir. 1991).

16       Determining whether a state officer could have reasonably believed their conduct was lawful  
17 is a fact-specific objective test. Thorsted v. Kelly, 858 F.2d 571, 573 (9th Cir. 1988). Qualified  
18 immunity protects government officials from liability for good faith misjudgments and mistakes. See  
19 Butz v. Economou, 438 U.S. 478, 507 (1978). Once a court determines the law is clearly  
20 established, it may then “determine if there are genuine issues of material fact surrounding the  
21 reasonableness of the [official’s] conduct.” Romero v. Kitsap Cty., 931 F.2d 624, 628 (9th Cir.  
22 1991).

23       Qualified immunity does not apply if clear rules were violated and the official’s actions are  
24 clearly unreasonable. Gibson has cited administrative regulations that require he be notified of  
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1 unauthorized packages and be given an opportunity to dispute their unauthorized status.<sup>1</sup> Once a rule  
2 is established, reasonableness must be evaluated, subject to uncertainty about material facts. Id.  
3 Gibson attempts to create issues of material fact, including: whether the package came from an  
4 authorized vendor, the reasons the mail room did not notify Gibson of the package's arrival, and the  
5 reasons why the wardens, Williams and Adams, told the property room not to accept shoes from  
6 outside vendors.

7 However, any factual uncertainty arises because Gibson has not met his burden in opposing  
8 the motion for summary judgment with admissible evidence supporting his version of events. Neither  
9 side disputes that packages must come from an authorized vendor distribution center. AR 711(6)(D).  
10 However, Gibson provided no evidence that his package came from an authorized vendor. Without  
11 proof that the SDCC staff improperly rejected the package arriving for Gibson, there is no evidence  
12 that the SDCC staff violated a clearly established right. Errors in administering the mail room, if any,  
13 do not constitute the "clear rules" needed to negate qualified immunity. Administrative errors, by  
14 themselves, do not rise to the level of constitutional violations.

15 Additionally, the medical care Gibson received was appropriate. The medical personnel  
16 treating Gibson did not deny or delay his treatment. There is no evidence Gibson's Eighth  
17 Amendment constitutional rights were violated. In fact, Defendants have adduced clear evidence that  
18 they acted reasonably. Gibson has not raised any genuine issue of material fact that if resolved in his  
19 favor would result in liability under the Eighth Amendment. Evidence that Plaintiff suffered from a  
20 chronic medical condition is not, by itself, evidence of an Eighth Amendment violation. Therefore,  
21 Defendants are entitled to qualified immunity and the motion for summary judgment is granted.

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24 <sup>1</sup>"If any item of mail addressed to an inmate is rejected for any reason the inmate shall receive written notice that  
25 describes the rejected item, states the reason it was rejected, notifies the inmate of his right to appeal through the  
grievance process in accordance with Administrative Regulation 740, and notifies the sender of his right to appeal . . ." AR 750.06(1).

### C. Deliberate indifference to a serious medical need

2 Even if the Court did not find that Defendants were entitled to qualified immunity, Gibson  
3 has not met his burden to show prison officials were deliberately indifferent to his serious medical  
4 needs. To maintain an Eighth Amendment claim based on prison medical treatment, an inmate must  
5 show “deliberate indifference to serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th  
6 Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). Deliberate indifference has a two  
7 part test. McGuckin v. Smith, 974 F.2d 1050 (9th Cir.1991), overruled on other grounds by WMX  
8 Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir.1997) (en banc). First, the plaintiff must show a  
9 “serious medical need” by demonstrating that “failure to treat a prisoner’s condition could result in  
10 further significant injury or the ‘unnecessary and wanton infliction of pain.’” Jett, 439 F.3d at 1096  
11 (quoting Estelle, 429 U.S. at 104). Second, the plaintiff must show the defendant’s response to the  
12 need was deliberately indifferent. Jett, 439 F.3d at 1096.

13 Indifference may appear when prison officials deny, delay or intentionally interfere with  
14 medical treatment. Id. at 1096. Yet, an “inadvertent [or negligent] failure to provide adequate  
15 medical care” alone does not state a claim under Section 1983. McGuckin, 974 F.2d at 1059 (citing  
16 Estelle, 429 U.S. at 105); Jett, 439 F.3d at 1096. Substantial harm to the inmate is not required. Id.  
17 Poor medical treatment may, at some point, rise to the level of constitutional violation, but mere  
18 malpractice, or even gross negligence, does not suffice. Wood v. Housewright, 900 F.2d 1332, 1334  
19 (9th Cir. 1990).

20 To any extent Defendants argue that Gibson's medical need was not serious, the Court  
21 disagrees. Gibson did experience ongoing foot pain which proper treatment may have alleviated.  
22 Pain inflicted "when relief is readily available" is actionable regardless of lasting impact. Boretti v.  
23 Wiscomb, 930 F.2d 1150, 1155 (6th Cir. 1991). Looking at the facts in a light most favorable to non-  
24 movant, the Court presumes that Gibson's foot pain constitutes a serious medical need.

1 Dr. Sanchez prescribed New Balance shoes which Gibson's mother attempted to order for  
2 him. The Inmate Property Manual states that inmates may only receive packages directly from an  
3 approved vendor. AR 711(6)(D); (#22-11 at 2). Gibson produced no evidence that the shoes came  
4 from an approved vendor. Defendants adduced evidence that the package arrived directly from  
5 Gibson's mother. It is Gibson's burden to produce evidence showing a genuine issue of material fact,  
6 which he has not done. Gibson's lack of evidence leaves no genuine issues of material fact for trial.  
7 Without evidence Gibson's medical shoes were improperly rejected, there is no evidence that such  
8 rejection was deliberate indifference.

9 1. Sanchez

10 Dr. Sanchez examined and treated Gibson repeatedly. Dr. Sanchez's diagnosis of  
11 plantar fasciitis was confirmed by outside specialist Dr. Wolf. Sanchez did not deny, delay, or  
12 interfere with Gibson's treatment. While Gibson may not agree with the treatment he received from  
13 Sanchez, there is no evidence it violated any of Gibson's rights. Even malpractice or gross  
14 negligence is insufficient to find deliberate indifference. Wood, 900 F.2d at 1334. The undisputed  
15 evidence shows that Sanchez's treatment was at a high level that rose well above malpractice or  
16 gross negligence. The Court grants summary judgment on Gibson's claim of deliberate indifference  
17 against Dr. Sanchez.

18 2. Gutierrez

19 Gutierrez's situation is similar to that of Dr. Sanchez. Gutierrez's treatment of Gibson  
20 was reasonable. Gutierrez did not deny, delay, or interfere with Gibson's treatment. While Gutierrez  
21 denied one of Gibson's grievances, that action was not related to the violation of any of Gibson's  
22 constitutional rights. A prison official's "denial of a grievance does not in and of itself rise to the  
23 level of a constitutional violation." Williams v. Wood, 223 F. App'x 670, 672 (9th Cir. 2007).  
24 Gibson has not identified any other action by Gutierrez which violated Gibson's Eighth Amendment  
25 rights. Therefore, Gutierrez is granted summary judgment on Gibson's claim of deliberate  
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1 indifference.

2                   3. Williams

3 Williams was aware of Gibson's medical issue and had responded to his request for  
4 shoes indicating that medical should provide shoes if they were needed. However, even conceding  
5 that Williams spoke to the property room to expressly deny receipt of outside shoes shortly before  
6 Gibson's shoes arrived, there is no evidence that such guidance was contrary to policy or violated  
7 Gibson's rights. Gibson was required to submit admissible evidence showing genuine issues of  
8 material fact for trial. He has not met that burden. There is no evidence the shoes were improperly  
9 rejected, or rejected with a malicious intent. Without evidence of improper rejection there is no  
10 evidence of deliberate indifference. Therefore, the Court grants William's motion for summary  
11 judgment on Gibson's claim that he was deliberately indifferent to Gibson's serious medical needs.

12                   4. Adams

13 Similarly, Gibson adduced evidence that Adams spoke to the property room and  
14 instructed them to deny receipt of outside shoes. However, it is Gibson's burden at summary  
15 judgment to show facts from which at least malice could be inferred. Gibson produced no evidence  
16 that Adams was aware of Gibson's medical issue. Gibson has not identified personal actions by  
17 Adams which denied Gibson any constitutional rights. There is no evidence that his shoes were  
18 improperly rejected. Gibson has not met his burden to show Adams improperly denied, or delayed  
19 Gibson's medical treatment and therefore Adams was not deliberately indifferent. Therefore, the  
20 Court grants Adams's motion for summary judgment on Gibson's claim that he was deliberately  
21 indifferent to Gibson's serious medical needs.

22                   5. Sisco

23 Gibson's only allegation pertaining to Deputy Director Sisco is that Sisco denied one  
24 of his grievances. Responding to a grievance, without more, is not sufficient to find liability under  
25 Section 1983. See Williams, 223 F. App'x at 672. Gibson has not raised genuine issues of material  
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1 fact that any personal actions of Sisco would constitute violations of Gibson's rights. Accordingly,  
2 the Court grants Sisco's motion for summary judgment on Gibson's claim that he was deliberately  
3 indifferent to Gibson's serious medical needs.

4 6. Navarette

5 Navarette was in charge of the property room, and acknowledged that he rejected the  
6 unauthorized package, presumably with Gibson's New Balance shoes. Gibson has produced evidence  
7 that Navarette did not inform Gibson of the package's arrival. However, even looking at the facts in a  
8 light most favorable to Gibson, the failure to follow the administrative procedure (notifying Gibson  
9 that the package had arrived and been rejected) without a link to an unconstitutional motive to deny  
10 or delay Gibson's medical care does not meet the standard of deliberate indifference. See Wood, 900  
11 F.2d at 1334.

12 While Gibson produced evidence that property was informed of his authorization to  
13 receive shoes for medical reasons, Gibson offered no evidence that Navarette knew of that  
14 notification, nor evidence he knew the shoes arriving for Gibson were for medical purposes. In the  
15 absence of evidence the shoes were improperly rejected, or that Navarette knew the shoes were for a  
16 medical need, there is no basis to suggest Navarette's actions were deliberately indifferent. Summary  
17 judgment for Navarette on Gibson's claim of deliberate indifference is granted.

18 D. Due process violation

19 Finally, the Court must consider whether denying Gibson his shoes violated his due process  
20 rights. Neither a negligent, nor intentional, unauthorized deprivation of property by a prison official  
21 is actionable if a meaningful post-deprivation remedy is available for the loss. Hudson v. Palmer, 468  
22 U.S. 517, 533 (1984); Quick v. Jones, 754 F.2d 1521, 1524 (9th Cir. 1985); Piatt v. MacDougall, 773  
23 F.2d 1032, 1036 (9th Cir. 1985); see also Knudson v. City of Ellensburg, 832 F.2d 1142, 1149 (9th  
24 Cir. 1987).

1 Nevada provides tort remedies for the unlawful deprivation of prisoner's personal property.  
2 See NRS 41.031. NRS 41.0322(3) applies to inmate claims for "loss of the person's personal  
3 property, property damage, personal injuries or any other claim arising out of a tort pursuant to NRS  
4 41.031." Berry v. Feil, 357 P.3d 344, 347-48 (Nev. App. 2015). In Hudson, the Court noted that a  
5 state "remedy was entirely adequate to satisfy due process, even though . . . it might not provide  
6 respondent all the relief to which he might have been entitled under § 1983." Hudson v. Palmer, 468  
7 U.S. 517, 531 n.11 (1984). The purpose of tort litigation for prisoners is to compensate them for  
8 their wrongs, including deprivations of constitutional rights. See Carey v. Piphus, 435 U.S. 247,  
9 260-61 (1978).

10 The Court considers Gibson's due process rights in relation to two claims: (1) his property  
11 right in receiving his shoes; and (2) his serious medical needs.

12 Gibson has not met his burden to raise genuine issues of material fact showing that his  
13 property right in the shoes was harmed. The package sent to Gibson was returned to the sender,  
14 which Gibson does not dispute. There is a non-material disagreement between the parties about  
15 whether that sender was a vendor or Gibson's mother. Regardless of the sender, there is no evidence  
16 that the shoes were lost. Even if the shoes had been lost, and it was the fault of SDCC, there are  
17 existing remedies in Nevada law for Gibson's compensation. Berry, 357 P.3d at 347-48. Gibson's  
18 action for due process violations based on his property rights in the shoe package he did not receive  
19 is dismissed.<sup>2</sup>

20 For Gibson's medical need, denial of due process would only arise as part of deliberate  
21 indifference to Gibson's medical need. Gibson argues that the deprivation of his due process rights  
22 demonstrates the Defendant's deliberate indifference. However, there is no evidence that Gibson's

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24 <sup>2</sup>It is not clear from the evidence and facts before the court if Gibson even has a property right in the shoes. His  
25 mother purchased them and arranged to send them to Gibson, but he never received them. Actual or constructive delivery  
of the gift to the donee is required to transfer ownership. In re Irrevocable Trust Agreement of 1979, 331 P.3d 881, 885  
(2014). Thus, any property right in the shoes reasonably belonged to Gibson's mother and not to Gibson.

1 shoes were unreasonably rejected. Gibson has not met his burden to adduce facts showing the shoes  
2 came from an authorized vendor. Without evidence that SDCC officials acted unreasonably, or  
3 contrary to policy, Gibson's claim fails. Any failure to follow Administrative Regulations regarding  
4 the logistical handling of Gibson's package, even if true, would not rise to the level of deliberate  
5 indifference, nor raise a constitutional due process claim.

6 1. Williams, Adams, and Navarette

7 While Wardens Williams and Adams, and property manager Navarette, were each  
8 involved in deciding how to handle Gibson's unauthorized package, Gibson has not presented  
9 evidence that they improperly rejected his package, or that they were deliberately indifferent. While  
10 the property room had been notified of Gibson's authorization to receive shoes from an authorized  
11 vendor, there is no evidence that Navarette knew of that authorization, or that the package was  
12 related to Gibson's serious medical need. Without evidence that anyone violated materially  
13 significant rules, Gibson has produced no evidence of violation of his constitutional due process  
14 rights. Summary judgment for Williams, Adams, and Navarette on Gibson's due process claim is  
15 granted.

16 2. Cisco

17 Gibson's only allegation pertaining to Deputy Director Cisco is that Cisco denied one  
18 of his grievances. Responding to a grievance is an essential part of meeting a prisoner's due process  
19 rights. Gibson has not identified, with admissible evidence, any actions personally taken by Cisco  
20 affecting the receipt of Gibson's shoes. Accordingly, Cisco is granted summary judgment on  
21 Gibson's due process claim.

22 IV. Conclusion

23 Accordingly, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment  
24 (#21) is **GRANTED**;

25 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike (#29) is **GRANTED**;

**IT IS FURTHER ORDERED** that the Clerk of the Court **STRIKE** Plaintiff's Sur-reply (#28);

**IT IS FURTHER ORDERED** that the Clerk of the Court enter **JUDGMENT** for Defendants and against Plaintiff.

DATED this 14<sup>th</sup> day of September 2017.



Kent J. Dawson  
United States District Judge