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IN THE

SUPREME COURT OF THE UNITED STATES

Kin Rilbrook - PETITIONER (Your Name)

URITED STRIES RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis

Petitioner has previously been granted leave to proceed in forma pauperis in the following court(s)

United States District Court, relaborated when of Perrominaria United States Court of Repeals Bud alread of Penrominaria

[] Petitioner has not previously been granted leave to proceed in forma pauperis in any other court

Petitioner's affidavit or declaration in support of this motion is attached hereto

King Mulltook
(Signature)

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, The Raid-Cox, am the petitioner in the above-entitled case. In support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress

1 For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

	age monthly an east 12 months	nount during	Amount exp next month	pected
	You	Spouse	You	Spouse
Employment	<u>\$ 0</u>	<u>\$ 0</u>	<u>\$ 0</u>	<u>s O</u>
Self employment	<u>\$</u> D	<u>\$ 0</u>	\$ 0	\$ 0
Income from real property (such as rental income)	<u>, 0</u>	<u>\$ 0</u>	<u>\$ 0</u>	\$ 0
Interest and dividends	50	<u> </u>	\$ 0	\$ 0
Gifts	50	<u>\$ 0</u>	\$ 0	\$ 0
Alimony	\$ 0	<u>\$ 0</u>	\$ 6	\$ 0
Child Support	<u>\$</u>	<u> </u>	50	<u> </u>
Retirement (such as social security pensions annuities insurance)	\$ 0	<u>\$ 0</u>	ş <u> </u>	<u>\$ 0</u>
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Unemployment payments	<u>\$</u> O	<u> </u>	<u>\$</u>	<u>, O</u>
Public assistance	<u>, O</u>	<u>\$</u>	<u>s</u> 0	\$ 0
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Rent or home mortgage particulate lot rented for mob	ayment ple home) uded?			

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	You	Your spouse
Transportation (not including motor vehicle payments)	<u>; 0</u>	; 0
Recreation, entertainment, newspapers, magazines, etc	<u>, o</u>	: 0
Insurance (not deducted from wages or included in mort	gage payments)	
Homeowner's or renter's	<u>; O</u>	; 0
Life	; 0	; 0
Health	, 0	; 0
Motor Vehicle	, 0	; 0
Other CORE	<u>\$ 0</u>	; 0
Taxes (not deducted from wages or included in mortgage	e payments)	
(specify) Cone	<u>\$</u>	<u> </u>
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Alimony, maintenance, and support paid to others	, 0	, 0
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0.004	, 0	, 0
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9	Do you exp	ect any maintains the i	ajor changes to your monthly income or expenses or in your assets or next 12 months?
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10	with this c	ase, includi	ing the completion of this form? \square Yes \square No
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11	a typist) air form?	ny money f	ill you be paying—anyone other than an attorney (such as a paralegal or or services in connection with this case, including the completion of this
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10	Duamda an	other me	formation that will help explain why you cannot pay the costs of this case
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No	AND
	Supreme Court, U.S.
IN THE	MAY 1 0 2012
SUPREME COURT OF THE UNITED STATES	OFFICE OF THE CITY
Kirk Rillorook — PETITIONER	ł
VS	
UNITED STRIES - RESPONDENT	(S)
ON PETITION FOR A WRIT OF CERTIORARI TO	
LIGHTED STRITES CONTOP PRPEAL FOR THE	
PETITION FOR WRIT OF CERTIORARI	
Kite Teillowook #13700-026 (Your Name)	
Po Box 1000 USP Lewisburg (Address)	
Lowisburg, Pa 17837 (City State Zip Code)	
(Phone Number)	

QUESTION(S) PRESENTED

- Whether The U.S. Court of Repeals Erred by affirming summary Judgement in Rayor of the defendants on the intertonal tort Claim only without addressing bearing or ruling on the regligence Union and altregarded it?
- 2) Should have the U.S. Court of Refleats affirmed in Part in Favor of the Defendants as to the intertional Claim, and reversed in Part in Favor of the Plaintiff as to the regligence claim, and thereby ordering the lower district Court and thereby ordering the lower district Court to Proceed on the regligence Claim?
- 3). Whether based on questions one and two (1) and (2), the Plaintiff was Presiduced there-

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page
- All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows

URITED STRTES COURT OF RPPERLS:

1). SLOVITER - CIRCUIT JUDGE

2) FISHER - CIRCUIT JUDGE

3) WEIS - CIRCUIT JUDGE

URITED STRIES DISTICT COURT:
1). WILLIAM J. REPLOR (Residing)

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RPH1/25, 2012 APPENDIX B - URITED STRIES DISTRICT COURT ORDER COSERO.

S'11-CY-131 February 16, 2012.

APPENDIX C

APPENDIX D

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APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Davisy unitedistrates, 47	14 supp 2d 127 2007 U.S. Day Law's 1117, 8 16 F 3d 217,200 (3d/31) 1998) 10
sherdary, united states,	352,1988 US LEXIS 2913, 46 U.S.L.W.
Tamurabia, 892 U.S. 1	(1968)
Urited states Y. Trurix	, 844 U.S. 150 C1963)8

STATUTES AND RULES	11.W
1st Recorded	11.4
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6th Amendment	9.9
18 4.5.034042	- 3
280.3.0.313466)	200
28 U.S.C. 32680CD	3,9,0

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

[] For cases from federal courts	* * * *
The opinion of the United States court of appeals appears at the petition and is	
[] reported at	ed, or,
The opinion of the United States district court appears at A the petition and is	ppendix to
[] reported at	, or, ted, or,
[] For cases from state courts	
The opinion of the highest state court to review the merits Appendix to the petition and is	
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The opinion of the to the petition and is	
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JURISDICTION

For	cases from federal courts
•	The date on which the United States Court of Appeals decided my case was
	No petition for rehearing was timely filed in my case (C)
	[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date, and a copy of the order denying rehearing appears at Appendix
	[] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application NoA
	The jurisdiction of this Court is invoked under 28 U S C § 1254(1)
[] F or	cases from state courts
	The date on which the highest state court decided my case was A copy of that decision appears at Appendix
	[] A timely petition for rehearing was thereafter denied on the following date, and a copy of the order denying rehearing
	appears at Appendix
	[] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application NoA
	The numediction of this Court is invoked under 28 II S C § 1257(2)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 54042 Bureau OF PHOORS DUHIES!

The United states Bureau of Prisons kus a duty to Pronde those in its custody with suit-oble quarters; Provide For their suffected has care, and subsistence; and Provide For their Care, and subsistence; and Provide For their Protection, instruction and discipline. 18 U.S.C. 8 4042

28 U.S.C. \$1346(b). Federal ToH-Claim (FTCR);

Gererally, The united states is immune From sult, But the Federal Toxt Union Act CFTCA) Conves out Pointlewich alternations of which the united states waives its immunity, ore instance in which the united states waives immunity is when a person brings a negligence action against the government based on acts of ommissions of its employees while the employees are acting within the scope of their of these of employment, as u.s.c. & 1846(b).

28 U.S.C.\$ 2680CW Federal ToH-Ualm (FTCR);

The united states is not liable for any claims airsing out of assault for battery committed by Federal entrologies within the scape of their employment unless the employment unless the employment a law enforcement atticer. There is no dispute that a correctional of kicers are law enforcement of there is no played inverse in addressing the elecation intermonal tort exception in the Frank, the court noted that a investigative of exception in the Frank, the court noted that a investigative of exception in the Frank, the court noted that a investigative of exception in the Frank, the court noted that a investigative of exception in the first pairs.

I aw enforcement officer is defined as "any officer is the united states who is empowered by law to exe-The searches, to selve endence, or to make affects for violations of Federal law.

1st Riverdment Provides Ir Pertinent Part:

Corstes skall make ro law respecting ar establishmest of religion, or Prohibiting the Free exercise thereof; or abridging the Freedom of speech, or of the
Press; or the right of the People Peaceablely to
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Redress of Spievances.

En Person shall be relighed answer for a capital, or other wise in Farous atme, unless on a Present meast or ladictment of a Grand Jury, except in access arising in the land or rayal forces, or in the Milita, when in actual service in time of war or Public danger; reason was Person be subject for the same offence to be twice fut in Jeofardy of life or limb; nor shall be compelled in any atministral case to be a witness against himself, nor be deferred of life, liberty, or Property without due Process of law; nor shall private property be taken for Public use, without Just compensation,

Corstitutional and statutory Provision involved cont...

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to have assistance of counsel for his defence.
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REASONS FOR GRANTING THE PETITION

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OCHORS, BUT WRER ORE GOVENRERT'S CRET SUCES Johnson in enjoyal tart, the court his e Found liquid isot for the inversional total . The Petitioner Stared polsexua, y associated him in the Stoke official simberling whom stoods wor in the Schement Door and all in the violent affact by he stoke of the control of the violent affact by he other office of the other office. The control of the government on the structure of the str 4) The Government Pubo won-und's ar the motion to DOMES SO THE WITHOUT COMMONDER rai of Claim under 28 u.s.C32660cks that re united states is not liable of - For comain information of the 12111 White executing a sourch solzing endence, or making attests for more nons of Federal low Publick, Mam F. 2d in 872, The defendant argued that because the a such assourt dia not after

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CIENTIONAN IN THIS COUNT.
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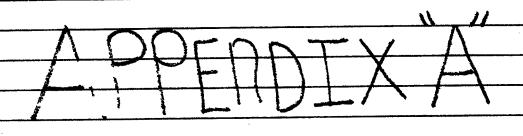
Whorefore, Petitioner respectfully request that the burco-able court teyerse and remained the Affectic court decisions with orders to Proceed on the Regilgence claim.

The petition for a writ of certiorari should be granted

Respectfully submitted,

Wron Mullipake

Date



U.S. Referre Court Browner Referrence no. 12-1531 Datedi Reni 23,2012 RPPerdix "A"

ALD-155

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No 12-1531

KIM MILLBROOK,
Appellant

v

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Middle District of Pennsylvania (D C Civil No 11-cv-00131) District Judge Honorable William J Nealon

Before SLOVITER, FISHER and WEIS, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States

District Court for the Middle District of Pennsylvania and was submitted for
possible dismissal pursuant to 28 U S C § 1915(e)(2)(B) or summary action
pursuant to Third Circuit LAR 27 4 and I O.P 10 6 on April 12, 2012 On
consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 16, 2012 be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court

ATTEST

/s/Marcia M Waldron. Clerk

DATED April 23, 2012

RPPendix"R"

ALD-155

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No 12-1531

KIM MILLBROOK,
Appellant

V

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Middle District of Pennsylvania (D C Civil No 11-cv-00131) District Judge Honorable William J Nealon

Submitted for Possible Dismissal Pursuant to 28 U S C § 1915(e)(2)(B) or Summary Action Pursuant to Third Circuit LAR 27 4 and I O.P 10 6
April 12, 2012
Before SLOVITER, FISHER and WEIS, Circuit Judges
(Opinion filed April 23, 2012)

OPINION

PER CURIAM

Kım Mıllbrook, an ınmate housed at the United States Penitentiary,

Lewisburg Pennsylvania (USP-Lewisburg), appeals from an order of the District

Court granting defendant's motion for summary judgment. For substantially the same reasons provided by the District Court, we will affirm.

I

Millbrook filed a complaint pursuant to the Federal Tort Claims Act (FTCA), 28 U S C §§2671-2680, naming as defendant the United States of America. According to the complaint, Millbrook was subjected to sexual assault while housed in the Special Management Unit (SMU) at USP-Lewisburg on or about March 5, 2010 On that date, Millbrook alleged that he was taken to the basement of the SMU and forced to perform oral sex on Correctional Officer Pealer while Correctional Officer Edinger held his neck and Correctional Officer Gimberling stood watch by the door. He also claimed that he was verbally assaulted during the incident

Defendant filed a motion to dismiss or in the alternative for summary judgment, which the District Court granted According to the defendant, Millbrook was involved in an altercation with his cell mate on the morning of March 4, 2010 As a result, both prisoners were placed in restraints and removed from their cell. They were then transferred to separate holding cells pending injury assessment and photographs. Millbrook claims that he was assaulted the next day

by correctional staff Following an internal investigation, which included a medical assessment, Millbrook's claim was found to be unsubstantiated

After reviewing Millbrook's response to defendant's motion, the District Court concluded that the defendant was entitled to summary judgment because Millbrook's FTCA claim is precluded by Pooler v United States, 787 F 2d 868, 872 (3d Cir 1986) This appeal followed

П

We have jurisdiction under 28 U S C § 1291 We exercise plenary review over a district court's grant of summary judgment See Kaucher v County of Bucks, 455 F 3d 418, 422 (3d Cir 2006) The District Court's grant of summary judgment will be affirmed if the record demonstrates that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law See Fed R. Civ P 56(c) An issue is material if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" Anderson v. Liberty Lobby. Inc., 477 U S 242, 248 (1986)

We may summarily affirm if Millbrook's appeal presents no substantial question. See 3d Cir L.A.R. 27 4 and 3d Cir I O.P 10 6

Millbrook contends that the defendant is liable under the FTCA for the alleged assault on March 5, 2010. Under 28 U.S.C. § 2680(h), the United States is generally not liable for intentional torts of its employees except for certain intentional torts committed by investigative or law enforcement officers. See 28 U.S.C. § 2680. We have limited claims that arise under § 2680(h) to cases in which an intentional tort is committed by a law enforcement or investigative officer while executing a search, seizing evidence, or making arrests for violations of federal law. Pooler, 787 F 2d at 872. Defendant argued that because the alleged assault did not arise out of conduct during an arrest, search, or seizure, Millbrook's tort claim is not cognizable.

enforcement officers for purposes of the FTCA. Assuming arguendo that they are, to the extent that Millbrook alleges that handcuffing and taking him to the basement of the SMU amounts to an unconstitutional seizure, we agree with the District Court that Pooler limits the term "seizure" to the seizure of evidence Id. Further, Millbrook did not allege that the alleged conduct occurred in the course of an arrest for a violation of federal law, or during the course of a search. See 28 U.S.C. § 2680(h). Thus, we agree with the District Court that while the alleged

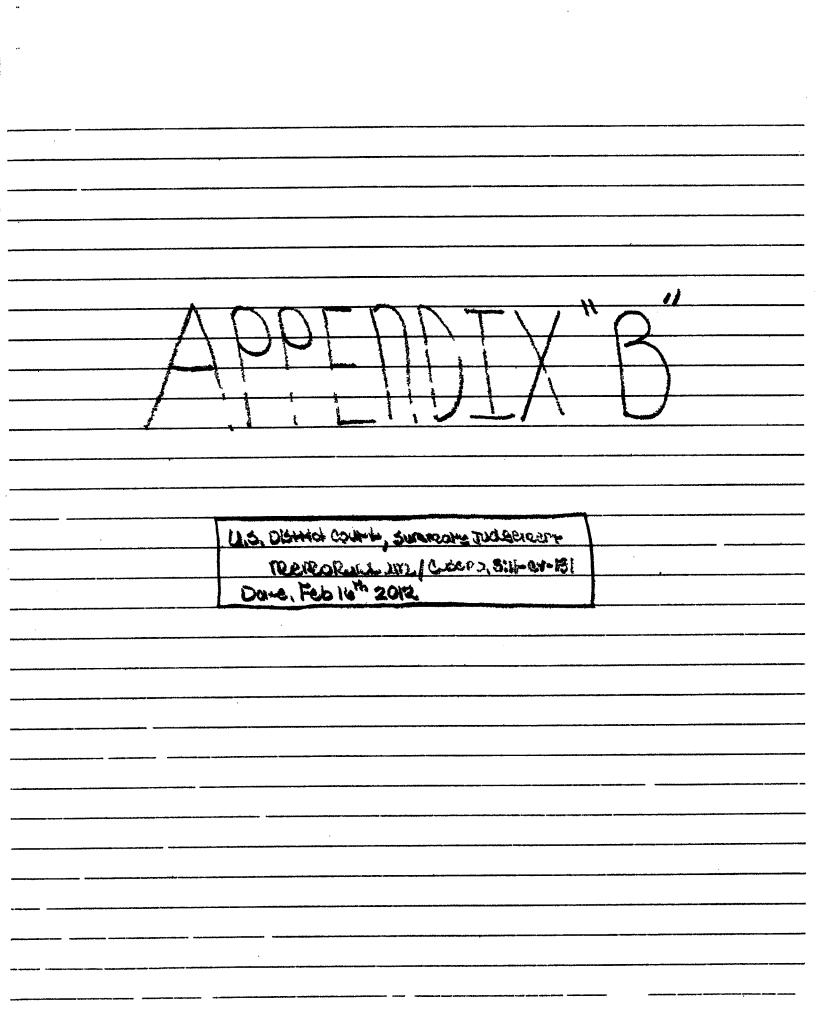
conduct is troubling, Millbrook has not shown that he is entitled to relief under the FTCA $^{\rm 1}$

As Millbrook's appeal presents no substantial question, we will summarily affirm the District Court judgment See 3d Cir L.A.R. 27 4 and 3d Cir I O.P

10 6 Millbrook's motions for appointment of counsel are denied

5

We also agree with the District Court that although Millbrook raises assertions of negligent behavior on the part of the correctional officers, it is clear that the alleged actions were intentional Indeed, Millbrook stated in his complaint that he was "sexually assaulted and battered maliciously with evil intent by officers Pealer, Edinger and Gimberling." See Complaint at 5 Therefore, we agree that he did not state a negligence claim upon which relief could be granted See Fed R. Civ P 12(b)(6)



RPPERDIX"B"

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KIM MILLBROOK.

CIVIL ACTION NO 3 11-cv-131

Plaintiff

v

UNITED STATES OF AMERICA,

Defendant

MEMORANDUM

Reckground

This action pursuant to the Federal Tort Claims Act (FTCA) was initiated by Kim Millbrook, an inmate presently confined at the United States Penitentiary, Lewisburg, Pennsylvania (USP-Lewisburg) Named as sole Defendant is the United States of America. Service of the Complaint was previously ordered

According to the Complaint, Plaintiff was housed in the USP-Lewisburg Special Management Unit (SMU) on or about March 5, 2010. On said date, Plaintiff alleges that he was taken to the basement of the SMU housing unit and "forced to perform oral sex on a Correctional Officer Pealer while Correctional Officer Edinger held me around my neck in a choke hold., another Correctional Officer Gimberling stood watch by the door." (Doc. 1, ¶IV) Plaintiff adds that those officers also verbally threatened him with further injury in an effort to dissuade him from reporting the incident. Millbrook seeks relief under the FTCA on the basis that Officers Pealer, Edinger and Gimberling, while acting within the scope of their employment, subjected him to sexual assault and battery.

¹ A declaration by Plaintiff which accompanies his Complaint indicates that following the (continued.)

Defendant has responded to the Complaint by filing a motion to dismiss or, in the alternative, for summary judgment See (Doc 9) According to the Defendant, Inmate Milibrook was involved in an altercation with his cell mate on the morning of March 4, 2010 As a result, both prisoners were placed in restraints and removed from their cell. The combatants were transferred to separate holding pending injury assessment and photographs. The next day Milibrook asserted that he had been sexually assaulted by correctional staff. Following an internal investigation, which included a medical assessment, Plaintiff's claim was found to be unsubstantiated. See (Doc 18, p. 4)

In addition to submitting a brief in opposition to said motion, Plaintiff has also filed a cross motion for summary judgment. See (Doc 24) The cross motions for summary judgment are ripe for disposition.

Discussion

Metion to Dismiss

Defendant's pending dispositive motion is supported by evidentiary materials outside the pleadings. Federal Rule of Civil Procedure 12(d) provides in part as follows

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56 All parties must be given reasonable opportunity to present all the material that is pertinent to the motion.

¹(continued)
alleged incident of March 5,2010, he was subjected to additional sexual assaults by both correctional

alleged incident of March 5,2010, he was subjected to additional sexual assaults by both correctional staff and another prisoner

Millbrook also states that he was sexually assaulted by prison staff while previously confined at USP-Terre Haute—Since the only tortious conduct asserted in the Complaint relates to the March 5, 2010 USP-Lewisburg incident those additional allegations will not be considered

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial "Celotex, 477 US at 322-23 "Such affirmative evidence—regardless of whether it is direct or circumstantial—must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance "Saldana, 260 F 3d at 232 (quoting Williams v. Borough of West Chester, 891 F.2d 458, 460-61 (3d Cir 1989))

Plaintiff's Summary Judgment Metion

Middle District of Pennsylvania Local Rule 7 5 requires that a party who files a pretrial motion must submit a brief in support of said motion within fourteen (14) days of its being filed with the court. If a supporting brief is not timely filed, "such motion shall be deemed to be withdrawn."

A review of the docket establishes that Plaintiff has not filed a brief in support of his motion. Moreover, Millbrook's pending motion does not set forth any argument as to why summary judgment should be entered in his favor. An attached certificate of service indicates only that his motion being submitted in opposition to the Defendant's dispositive motion. Since Plaintiff has failed to submit a supporting brief as required by Local Rule 7.5, and his motion offers no basis whatsoever as to why entry of summary judgment in his favor is appropriate, his motion seeking entry of summary judgment (Doc. 24) will be deemed withdrawn

Defendent's Summery Judement Metion

Defendant's initial argument is that it is entitled to sovereign immunity to the extent that the Complaint is asserting an intentional tort claim because "the incident Millbrook alleges did not occur during the course of an arrest, search, or seizure" (Doc 18, p 6)

The FTCA provides a remedy in damages for tortious conduct by employees of the

\$72 (3d Cir 1986) In <u>Pooler</u>, the Court of Appeals held that § 2680(h) waives the government's sovereign immunity only in those cases in which a law enforcement or investigative officer commits one of the enumerated intentional torts "while executing a search, seizing evidence, or making an arrest" <u>Id</u>. The Court explained that based on the underlying legislative history that the investigative officer exception should only apply to conduct taken by investigative or law enforcement officers during the course of a search, seizure, or an arrest. 3 <u>Id</u>. at \$72

In <u>Matsko</u>, the Third Circuit Court of Appeals recognized that <u>Pooler</u> set forth a narrow reading of § 2680(h), but declined to undertake a determination as to whether <u>Pooler</u> should be broadened to encompass all activities undertaken by investigative officers <u>Matsko</u>, 372 F 3d at 560 <u>Pooler</u> remains binding precedent on this Court

Under <u>Pooler</u>, in order to be actionable under the FTCA, the alleged misconduct had to occur during an arrest, search, or seizure. In the present case, the alleged unconstitutional conduct of March 5, 2010 did not occur during the course of an arrest. Second, the challenged actions were not undertaken during the course of a search. The third enumerated activity set forth in <u>Pooler</u> was seizure

The most common type of seizure is an arrest which results in detention. Plaintiff contends that based upon the principles announced in <u>Terry v. Ohio</u>, 392 U.S. 1 (1968) (holding that an investigative stop that momentarily detains a person is a seizure), and similar cases, the purported sexual assault occurred during a seizure because he was placed in restraints and taken

³ This Court recognizes that other courts not bound by the <u>Pooler</u> holding have adopted a broader view <u>See Oritz v. Pearson.</u> \$\$ F Supp 2d 151, 164-65 (S D N Y 2000)

negligence claim upon which relief can be granted See Hall v. United States. 2008 WL 919605* 5 (M D Pa. April 2, 2008) (Rambo, J)

An appropriate Order will enter

Wiendauen

United States District Judge

DATED FEBRUARY 16, 2012

Ubberopix "R"

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KIN MILLBROOK,

CIVIL ACTION NO 3 11-cv-131

Plaintiff

(Judge Nealon)

V

FILED

UNITED STATES OF AMERICA,

Defendant

FEB 1 6 2012

Per______DEPUTY CLERK

ORDER

NOW, THIS 16th DAY OF FEBRUARY, 2012, in accordance with the Memorandum issued this date, IT IS HEREBY ORDERED THAT:

- Plaintiff's motion (Doc 24) for summary judgment is **DEEMED**WITHDRAWN
- 2 Defendant's dispositive motion is construed as solely seeking entry of summary judgment.
- 3 The Defendant's motion for summary judgment (Doc 9) is GRANTED
- 4 The Clerk of Court is directed to CLOSE the case

United States District Judge