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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

BRAD SKINNER, on his own behalf,)
and on behalf of all other persons)
similarly situated,)

Plaintiffs,)

vs.)

Civil Action No. 02-CV-033B

JUDITH UPHOFF; VANCE EVERETT;)
JAMES HEWITT; DAVID EBELL; all in their)
individual and official capacities, ROBERT)
ORTEGA and SCOTT ABBOTT, in their)
official capacities,)

Defendants.)

DEFENDANTS' SECOND PROPOSED REMEDIAL PLAN

COME NOW the Defendants, by and through their undersigned attorneys, and hereby submit
this *Defendants' 2nd Proposed Remedial Plan* ("Plan") intended to address and correct the violations

outlined by the Court in its summary judgment order of November 27, 2002.

INTRODUCTION

By submission of this Defendants' 2nd Proposed Remedial Plan neither the Defendants nor Plaintiffs waive any attorney-client, work product or other testimonial or evidentiary privilege. This Plan applies only to the inmates of the Wyoming State Penitentiary at Rawlins, Wyoming.

The *Prison Litigation Reform Act*, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) ("PLRA") provides the following with respect to prospective relief ordered by the Court in this case:

(a) REQUIREMENTS FOR RELIEF

(1) PROSPECTIVE RELIEF - (A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless -

(I) Federal law permits such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of a Federal right.

18 USC § 3626(a).

Defendants believe this Plan is workable and satisfies the need for inmate protection from harm at the Wyoming State Penitentiary regarding the issues addressed in the Court's summary judgment order. The Court's Order Granting Plaintiff's Motion for Summary Judgment analyzed the Eighth Amendment violation in three parts:

1. failure to adequately supervise and train subordinates in how to investigate and abate dangerous conditions;
2. failure to develop an effective internal review process for the reporting of policy violations; and
3. failure to discipline malfeasant employees, thereby substantially jeopardizing inmate safety.

I. INVESTIGATIONS

A. New Policies & Procedures

1. Attached to Defendants' Plan, and incorporated herein, is the following Policy and Procedure from the Wyoming Department of Corrections ("WDOC"): State of Wyoming Department of Corrections, Policy and Procedures, 1.012, *Investigation of Inmate Physical Altercations or Assaults to Inmates at WDOC Facilities*, dated April 30, 2003. (Attached hereto as Remedial Plan Exhibit A).

“Purpose - To establish a procedure for the identification and investigation of inmate assaults upon other inmates. The purposes of such investigation will be to determine whether staff error, policy non-compliance or institutional deficiency caused or contributed to such an assault, so that appropriate personnel action, policy revision or other corrective actions may be implemented to minimize the risk of future such incidents.

Policy - It is the policy of the Wyoming Department of Corrections (WDOC) to protect inmates against harm from other inmates by development of appropriate policies and procedures and enforcement of staff compliance with those policies.”

2. This policy, referred to hereafter as the “Investigations Policy,” will govern the WDOC in its conduct of investigations and reporting of incidents involving inmate on inmate physical altercations or assaults.

3. This policy supercedes A.R. #7.017.

4. This policy supplements Director’s Executive Order #02-003 and A.R.#1.004. (Attached as Remedial Plan Exhibits B & C, respectively.)

5. All incidents of inmate physical altercations or assaults are required to be reported to the WDOC Central Office pursuant to A.R.#1.004 and Director’s Executive Order. The Investigations Major, discussed later, conducts an Initial Inquiry of those incidents. Every incident as determined by the Investigations Major which is not a “spontaneous fight” as defined by the Investigations Policy, will be referred by the Investigations Major for Outside Investigation by an investigator who is not a member of WDOC. The victim shall be interviewed as part of each Outside Investigation.

6. All incidents involving inmate on inmate physical altercation or assault will be tracked through a data collection process, including implementation of all corrective actions, including personnel action or procedural revision.

7. The Investigations Policy guides the determination of corrective or disciplinary action against staff based on errors, omissions or policy violations.

B. Modifying Policies & Procedures

1. From time to time, during the period of this Court's final decree, it may be necessary to adjust the Investigations Policy. The WDOC agrees not to modify, amend or delete the Investigations Policy until forty-five (45) days notice in writing has been given to the Plaintiffs' legal counsel and the Joint Expert. If the Plaintiffs object to a proposed amendment, modification or deletion of the Investigations Policy, the Plaintiffs and the WDOC shall make a good faith effort to confer with each other and reach an agreement concerning the proposed change. If the parties are unable to reach an agreement, the Plaintiffs may apply to the Court, at any time during the forty-five days, for an order to prevent the modification, amendment or deletion of the Investigations Policy by the Defendants, on the grounds that the policy, as modified, amended or deleted poses a substantial risk of exposing the Plaintiffs to increased risk of harm from inmate on inmate assault. If the Plaintiffs have filed their objection with the Court, the amendment, modification or deletion may not be implemented by the Defendants until the Court has ruled upon the merits of Plaintiffs' objection.

2. Nothing contained in this Plan is intended to imply or confer any authority or jurisdiction on the Court, the Joint Expert or the Plaintiffs over any facility of the State of Wyoming, Department of Corrections other than the Wyoming State Penitentiary at Rawlins, Wyoming.

3. Nothing contained in this Plan is intended to create any contractual rights or state law liberty interest in any person, party or organization. The terms of this Plan are intended to assure

the enforcement of federal constitutional rights for the members of the certified class of Plaintiffs, and only for those rights addressed in the Court's November 27, 2002, summary judgment order.

C. The Investigations Major

1. WDOC will hire an investigator who will work out of the Central Office of WDOC and report directly to the Director. The WDOC investigator position is officially titled the Investigations Major.

2. The following time line applies to hiring the Investigations Major:

a. Advertising for the position has been completed. Applications and resumes have been received from sixty-seven (67) individuals.

b. Preliminary review of all applications has been completed.

c. Interviews of selected candidates have been completed.

c. The position has been offered and accepted.

d. The investigator will commence employment not later than June 1, 2003.

3. The Investigations Major shall perform functions as set forth in the Investigations Policy.

D. Incident Report Forms

1. The WDOC has revised the WSP Staff Report form to include the following language: "By signing this document, the undersigned certifies that the reported information is a complete, true and accurate report of all known pertinent facts, including, but not limited to the reporting officer's observations and role in the incident, action of inmates/offenders and other employees in the course of the incident and how or why the incident occurred and whether a mistake or misconduct by an employee, including the undersigned, or any institutional deficiency, may have caused or contributed

to the incident.” (Attached hereto as Remedial Plan Exhibit D.). The form contains a similar certification for the Shift Commander to indicate his or her review. The form also contains a signature line for the Warden to indicate his or her review.

2. Attached hereto as Remedial Plan Exhibit E is a copy of the General Incident Tracking Log. This form, or something substantially similar, will be used by the Investigations Major and WDOC Director to track inmate-on-inmate assaults. (The log includes a section to record the disposition and closure of each incident. That section describes the conclusions reached, including staff error, staff misconduct, or institutional deficiency, if any, and what corrective action, if any, was taken. The log records the nature of disciplinary action, policy or procedural changes, institutional modifications, and disciplinary action against inmates.)

3. A report from the General Incident Tracking Log process will be provided to the Joint Expert and Plaintiffs’ legal counsel on a monthly basis. The Joint Expert and Plaintiffs’ legal counsel may at any time, during regular business hours, inspect the records supporting the General Incident Tracking Log process. As set forth later in this Plan, certain records relating to inmate on inmate assaults will be provided by the Defendants to the Joint Expert and counsel for the Plaintiffs.

4. All records of the General Incident Tracking Log process will be maintained by the WDOC during the pendency of the Court’s final decree. Following the termination of the Decree, records will be maintained by the WDOC pursuant to the State of Wyoming Records Retention Policy.

E. Staff Discipline

1. Staff compliance with the policies and procedures of the WDOC concerning protection

of inmates from harm will be enforced by supervisors and managers through existing State of Wyoming disciplinary processes. See Policy and Procedure 1.012, *Investigation of Inmate Physical Altercations or Assaults to Inmates at WDOC facilities, and Director's Executive Order #03-003*. (Attached here as Remedial Plan Exhibit F.)

2. The State of Wyoming Personnel Rules provide for a one year probationary period for new hires. WDOC will use the probationary period to evaluate whether new employees have acquired the skills and abilities of the positions they hold. WDOC may terminate probationary employees who fail to acquire or demonstrate their ability to perform their jobs, including enforcement of WDOC policies concerning incident reporting and protection of inmates from harm.

3. WDOC will use the progressive disciplinary process established in the State of Wyoming Personnel Rules to enforce the WDOC policies concerning incident reporting and protection of inmates from harm among permanent employees. Managers and supervisors must aggressively pursue the discipline of employees who fail to report staff errors, misconduct or institutional deficiencies.

4. Flagrant misconduct does not require the use of progressive discipline pursuant to the State of Wyoming Personnel Rules.

5. Nothing herein is intended to create a protected property right in any employee of the WDOC; nothing herein is intended to create in any person or entity the status of third party beneficiary. The rights, duties and obligations herein shall operate only between the parties to this litigation. The parties to this litigation include the class of all present and future inmates of WSP.

6. Individual personnel files are confidential pursuant to state law. On a monthly basis a

report from the General Incident Tracking Log process will be provided to the Joint Expert and Plaintiffs' legal counsel, including information concerning staff discipline related to incidents of inmate harm. The Joint Expert may at any time, during regular business hours, inspect the records supporting the General Incident Tracking Log process. Personnel files are subject to disclosure to the Plaintiffs' legal counsel as may be necessary to enforce the provisions of this Defendants' Plan, but shall be subject to the terms of the Court's Protective Order.

7. All records of the General Incident Tracking Log process will be maintained by the WDOC during the pendency of the Court's final decree. Following the termination of the Decree, records will be maintained by the WDOC pursuant to the State of Wyoming Records Retention Policy.

8. Whenever any person having authority to recommend disciplinary action, recommends that a staff member be disciplined for a violation of policies pertinent to this Defendants' Plan and the protection of inmates from harm, the Warden must within fourteen (14) days of receiving such recommendation, initiate a personnel action as he or she deems appropriate or provide a written explanation of the reasons why the recommendation of personnel action was not taken. The Warden's written explanation shall be provided to the Investigations Major, recorded in the Central Office General Incident Tracking Log.

II. INSTITUTIONAL CULTURE

A. Assessment of the Culture

1. In April 2002, the National Institute of Corrections, Prison Division ("NIC") announced

the availability of assistance to state departments of corrections to assess cultural issues affecting prison administration. In May 2002, WDOC applied for assistance at the Wyoming State Penitentiary for an assessment. NIC selected WSP for study in July 2002. In August 2002, the NIC initiated a cultural assessment of WSP through a contract with Criminal Justice Institute, Inc. (“CJI”), Middletown, Connecticut. CJI issued its assessment report to the WDOC on January 7, 2003.

2. The WDOC agrees to pursue this process to completion. The process is for Criminal Justice Institute, Inc., working with staff of WSP and WDOC to develop and implement a plan to improve the culture at WSP. The WDOC shall provide a written explanation to the Joint Expert and Plaintiffs’ legal counsel of the rejection of any significant recommendation by CJI in the Cultural Change Process.

3. “Culture” means the system of information made up of the ideas, assumptions, values, beliefs and norms connecting members of a group, organization or institution. The formal culture is the body of mission statements, written policies and rules of the organization.

4. Organizations frequently develop informal cultures made up of unwritten notions, norms, expectations, and values which are unofficially, and perhaps unconsciously communicated from member to member.

B. Training.

1. The Defendants will complete in-service training for all security staff by December 2003. The training will educate staff as to the rights of inmates to protection against harm, staff’s responsibilities to carry out procedures designed to minimize the risk of harm to inmates, and staff’s

responsibilities to properly report and investigate incidents of harm. The training will also focus on the duty to identify and report staff error or misconduct contributing to inmate harm from other inmates, and to follow through with disciplinary action or remedial training when indicated. Finally, specialized lesson plans will be developed and utilized in training of supervisory personnel to ensure proper supervision of subordinates who carry out duties related to protection of inmates from harm. The following specific topics will be included in the training curriculum:

- a. Constitutional law governing inmates' rights to be protected from assaults by other inmates, including an analysis of the Summary Judgment Order in this case.
- b. Wyoming Department of Corrections and State Codes of Ethics, particularly as they relate to requirements of honesty and cooperation in investigations.
- c. Wyoming Department of Corrections' Policy and Procedure #3.305 "Temporary Restriction Order" – provides that "an inmate shall be immediately placed on temporary restriction order (T.R.O.) status anytime staff is advised of or becomes aware of a potential threat of harm from another inmate(s)". T.R.O. housing segregates the inmate from other inmates who might harm him. (Attached hereto as Remedial Plan Exhibit G.)
- d. Wyoming Department of Corrections' Policy and Procedure #3.304 "Protective Custody" – requires any staff who becomes aware of a threat to an inmate's safety to place the threatened inmate on T.R.O. status, segregating him from other inmates and thereby eliminating the immediate danger. It then requires an investigation and analysis of the threat and decisions providing long term solutions to alleviate the danger. (Attached hereto as Remedial Plan Exhibit H.)

e. Wyoming Department of Corrections' Policy and Procedure #1.012, *Investigation of Inmate Physical Altercations or Assaults to Inmates at WDOC facilities* – requires reporting and logging at both the facility and WDOC Central Office of all inmate on inmate assaults. The policy requires all staff to report any observations of staff misconduct or policy non-compliance associated with such incidents.

f. Policy and Procedure #1.012, *Investigation of Inmate Physical Altercations or Assaults to Inmates at WDOC facilities* – mandates “Initial Inquiries” by the Investigations Major in all cases of inmate on inmate physical altercations or assaults in compliance with Director’s Executive Order 02-003, paragraph 3 D (Remedial Plan Exhibit B). The policy requires Outside Investigation in those cases involving a non-spontaneous assault. Each investigation is required to include analysis of potential staff error, misconduct or policy non-compliance in relation to the incident, and to make recommendations for remedial training, staff discipline or other corrective measures.

g. The policy requires logging, filing and tracking of initial inquiry reports and any corrective actions.

2. Training will include, where appropriate, interview techniques and record keeping when dealing with inmate threats and inmate-on-inmate assaults.

3. Defendants will maintain a record of training provided. Training records will include completion by employee, course, date, and lesson plan. The WSP Warden will report monthly to the Chief of Operations and Director of the WDOC on training presented and who received training.

4. The Director of WDOC will copy the Joint Expert and Plaintiffs’ legal counsel with the

Monthly Training Report. The Joint Expert and Plaintiffs' legal counsel may at any time, during regular business hours, inspect the records supporting the Monthly Training Report.

5. All records of training will be maintained by the WDOC during the pendency of the Court's final decree. (Training records will be maintained on a permanent basis for current employees and maintained for others as required by the State of Wyoming Records Retention Policy.)

6. Inmates of the Wyoming State Penitentiary will be provided general information by the Defendants concerning the rights of inmates to be reasonably safe from harm by other inmates. This information will be in the form of the language of the Court from pages 10-13 of the Summary Judgment Order entered in this case. Inmates will be provided general information about the policies of the WDOC which concern reporting and investigation of incidents of inmate on inmate assault, the policies on Temporary Restrictive Order, Temporary Protective Custody and Protective Custody. The information referred to in this paragraph will be made available in the form of a pamphlet to be distributed to inmates, or any other means designed by the WDOC reasonably calculated to inform inmates of the WSP. The pamphlet or other process referred to herein for informing inmates shall include the name and address for Stephen L. Pevar, and state that inmates with questions or concerns about inmate protection from harm may contact Mr. Pevar. Nothing in this Plan shall excuse or waive any requirement that inmates exhaust administrative remedies, including the grievance process.

III. COMPLIANCE

A. Joint Expert

1. Compliance with the Plan and the Court's final decree will be necessary. A Joint Expert can assist with tracking and achieving compliance. The parties jointly recommend the Court appoint a Joint Expert.

2. The parties jointly recommend William C. Collins, Attorney at Law, as the Joint Expert. Mr. Collins' contact information is as follows: P.O. Box 2316, Olympia, Washington 98507, (360) 754-9205, FAX (360) 754-0806.

3. The Joint Expert will have only such access to the reports and records of the Department of Corrections as are necessary to assess the Defendants' compliance with this Plan and the Court's final decree in this matter.

4. The Joint Expert will not conduct *ex parte* communications with any person, party or legal representative in this litigation, except as expressly provided in this Plan. Any written correspondence directed to the Joint Expert by any person other than the Court or the legal counsel for the parties will be returned to the sender unopened and unread.

5. The Joint Expert will oversee the Defendants' compliance with the Court's final decree ordering a Remedial Plan.

6. Following the Court's entry of the final decree incorporating this Defendants' Proposed Remedial Plan, and as soon as can be conveniently arranged, the Joint Expert shall visit the Wyoming State Penitentiary. During this visit the Joint Expert may tour the facility, meet the top administrators for the WDOC and WSP and confer with the legal counsel for the Plaintiffs and

Defendants.

7. The Joint Expert shall conduct at least four (4) on site inspections of the WSP records and facilities as relate to issues of protection of inmates from harm at WSP. The Joint Expert shall conduct an on site inspection approximately every six months following the entry of the Court's decree.

8. During each on site inspection the Joint Expert may, in his discretion, meet in private with any inmate. The Joint Expert shall explain to the inmate that their conversations will not be held in confidence and that he may be required to disclose the content of their discussion with the legal representatives of the parties, or to disclose the information in a written report. The Joint Expert may meet with any member of the WDOC or WSP staff, but may need to do so outside the regular work shift of the staff member. Any staff member meeting with the Joint Expert shall be given the same advisement as inmates, that their discussions with the Joint Expert are not confidential and may be disclosed to the legal representatives of the parties. If requested by the legal representatives of the parties the Joint Expert shall disclose orally or in writing the substance of any private discussions conducted with any inmate or staff member.

9. Within thirty (30) days of each of the first three inspections, the Joint Expert shall issue a written report to the legal representatives of the Plaintiffs and Defendants concerning the Defendants' compliance with the Remedial Plan and the Court's decree.

10. Not less than thirty (30) days before the second (2nd) anniversary of the Court's decree, the Joint Expert shall file a written report with the Court and serve copies upon the legal representatives of the Plaintiffs and Defendants. The report shall include findings of fact concerning

the Defendants' substantial compliance with the decree.

11. The Joint Expert's reports are not binding on the parties or the Court, and either party may make any objections to the reports, or any portion of the reports, including proposed findings, conclusions or recommendations, in any subsequent proceedings before the Court.

12. The Defendants shall bear the costs and expenses of the Joint Expert. The Joint Expert agrees to serve for an hourly fee of \$125.00 for hours actually worked. The Joint Expert shall be compensated at the rate of \$62.50 for time in transit during which work is not conducted. Travel days shall be presumed to be an eight (8) hour day unless actual work is performed beyond the eight hours. The Joint Expert shall not be reimbursed for ordinary expenses of overhead, including copying, communications and office expenses. The Joint Expert may be reimbursed for extraordinary expenses of overhead, including computer assisted legal research. The Joint Expert shall be reimbursed actual expenses for necessary travel. Airfare shall be reimbursed at the available coach rate for travel. Defendants shall pay those costs and expenses to the Joint Expert upon submission of state vouchers, unless objected to by Defendants and disapproved by the Court. Payments shall be made pursuant to usual state accounting procedures.

B. Reporting & Confidentiality

1. The Joint Expert and Plaintiffs' legal counsel will receive monthly copies from the WDOC of the General Incident Tracking Log. The Log will identify and track incidents of inmate on inmate physical altercations or assaults, the timing and nature of reporting and investigation, levels of review and the disposition made, including staff discipline (see General Incident Tracking Log, Remedial Plan Exhibit E). The Joint Expert or Plaintiffs' legal counsel may at any time, during

regular business hours, inspect the records supporting the Log entries.

2. On a monthly basis, the WDOC shall provide the Joint Expert and Plaintiffs' legal counsel, with a copy of all investigation reports generated during the preceding month under Policy and Procedure 1.012, including the reports of the Investigations Major or any outside investigations of non-spontaneous assaults, reports of the Warden, Prisons Administrator or Director, together with copies of the supporting documentation for each new incident which has been investigated and reported on during the period, unless previously provided pursuant to this Plan. For purposes of this requirement, "supporting documentation" includes, among other things, all documents that bear upon the question whether staff knew or reasonably should have known that the inmate was at risk of assault and whether staff took sufficient measures to abate that risk.

3. Information appearing in Staff Reports, Incident Reports and Training Records, and other documents agreed to be provided or made available to the Joint Expert or Plaintiffs' legal counsel may be confidential or privileged under state law, due to considerations of Institutional Security, Personal Privacy and Confidentiality. The parties agree that this information will be made available on condition of and subject to the terms and conditions of a Protective Order of the Court in the form of Remedial Plan Exhibit I attached hereto and incorporated by this reference.

4. It is further understood and agreed that the information and documentation produced or made available to the Joint Expert or Plaintiffs' legal counsel shall not be the basis of or admissible in any proceeding outside the present litigation, unless obtained by the Plaintiffs independent of any production or inspection pursuant to this Plan. Defendants may use the information or documentation in any employment, personnel or other civil litigation.

C. WDOC Policy Enforcement

1. Staff compliance with WDOC Policy and Procedure will be monitored through the Incident and Staff Report process, and the General Incident Tracking Log, by the Warden, Investigations Major, and the Director.

2. The Staff Report form and General Incident Tracking Log track the assessment of staff error, policy compliance or other institutional deficiencies, and the follow up to those conclusions, including staff discipline.

4. Compliance will be monitored through the process of reporting to the Joint Expert and Plaintiffs' legal counsel, with the opportunity to inspect and verify the underlying records.

IV. TERMINATION OF DECREE

Termination of this Defendants' Plan and the Court's decree shall be determined pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626(b) and such other rule or statute as shall be found applicable.

PRAYER

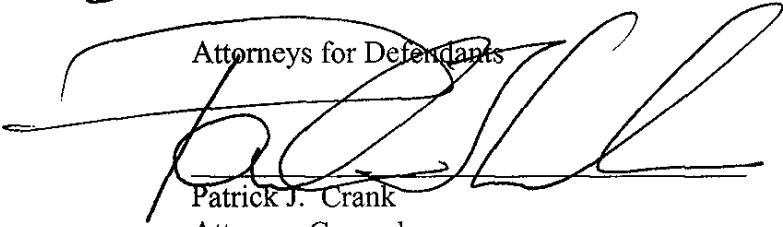
The Defendants respectfully request the Court to:

1. Enter a final decree incorporating this Defendants' Second Proposed Remedial Plan into the Court's final order,

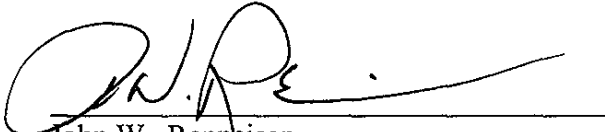
2. Appoint a Joint Expert as provided in this Plan, fix the compensation of the Joint Expert, and

3. Enter a Protective Order as provided with this Plan.

Respectfully submitted this 6TH day of May, 2003.


Attorneys for Defendants

Patrick J. Crank
Attorney General


John W. Renneisen

Deputy Attorney General
Herschler Building, 1st Floor West
Cheyenne, WY 82002
(307) 777-7242

CERTIFICATE OF SERVICE

I do hereby certify that I have caused a true and correct copy of the above **DEFENDANTS' SECOND PROPOSED REMEDIAL PLAN** to be sent by First Class, postage prepaid, United States mail, on this 7th day of May, 2003, addressed to the following individuals:

Stephen L. Pevar
ACLUF
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Hartford, CT 06106

Timothy C. Kingston
Graves, Miller & Kingston
408 West 23rd Street
Cheyenne, WY 82001

Shirley Kingston
418 South 12th Street
Laramie, WY 82070



ATTORNEY GENERAL'S OFFICE

**Attachments/Exhibits
too
voluminous to scan**