No. 03-10455
Cons. w. 03-10505

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RODERICK KEITH JOHNSON,
Plaintiff-Appellee,
v.
GARY JOHNSON, et al.,
Defendants

GARY JOHNSON; ROBERT R TREON, Senior Warden Allred Unit; RICHARD WATHEN; JAMES D MOONEYHAM, Assistant Warden Allred Unit; TOMMY NORWOOD; KENNETH BRIGHT, Major; TRACY KUYAVA, Administrative Technician Unit Classification Committee; TINA VITOLO, Administrative Technician Unit Classification Committee; VICKI WRIGHT, Director, Classification; JOSEPH BOYLE, Captain; JIMMY BOWMAN, Major; KENNETH WILLINGHAM, Sergeant; OSCAR PAUL, Lieutenant; ONESSIMO RANJEL, Lieutenant; DAVID TAYLOR, Lieutenant
Defendants-Appellants

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION - Civil Action No. 7:02-CV-87-R

BRIEF OF PLAINTIFF-APPELLEE

Margaret Winter (Attorney in Charge)
Craig Cowie
Amy Fettig
National Prison Project of the
American Civil Liberties Union Foundation
733 15th Street, NW, Suite 620
Washington, D.C. 20005
Tel: 202.393.4930 Fax: 202.393.4931

Edward Tuddenham
1203 Newning, Austin, TX 78704
Tel: 512.441.9759; Fax: 512.443.4258

Counsel for Plaintiff-Appellee

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Margaret Winter (counsel for plaintiff-appellee);
2. Craig Cowie (counsel for plaintiff-appellee);
3. Amy Fettig (counsel for plaintiff-appellee);
4. National Prison Project of the American Civil Liberties Union Foundation, Inc. (counsel for plaintiff-appellee);
5. Edward Tuddenham (counsel for plaintiff-appellee);
6. Roderick Keith Johnson (named plaintiff-appellee);
7. The Honorable Jerry Buchmeyer, United States District Court for the Northern District of Texas;
8. The Honorable Paul Stickney, United States Magistrate Judge for the Northern District of Texas;
9. Office of the Attorney General of Texas (counsel for defendants-appellants);
10. Celamaine Cunniff (counsel for defendants-appellants);
11. Deven Desai (counsel for defendants-appellants);
12. Steve Bohl (counsel for defendants-appellants);
13. Phillip Marrus (counsel for defendants-appellants);
14. Matthew Tepper (counsel for defendants-appellants);

15. Gary Johnson, Executive Director, Texas Department of Criminal Justice ("TDCJ") (named defendant-appellant);
16. Robert R. Treon, Senior Warden, James V. Allred Unit, TDCJ (named defendant-appellant);
17. Richard E. Wathen, Assistant Warden, James V. Allred Unit, TDCJ (named defendant-appellant);
18. James D. Mooneyham, Assistant Warden, James V. Allred Unit, TDCJ (named defendant-appellant);
19. Major Tommy Norwood, James V. Allred Unit, TDCJ (named defendant-appellant);
20. Major Kenneth Bright, James V. Allred Unit, TDCJ (named defendant-appellant);
21. Tracy Kuyava, Administrative Technician, James V. Allred Unit, TDCJ (named defendant-appellant);
22. Tina Vitolo, Administrative Technician, James V. Allred Unit James V. Allred Unit, TDCJ (named defendant-appellant);
23. Vikki D. Wright, Director, Classification, TDCJ (named defendant-appellant);
24. Captain Joseph Boyle, James V. Allred Unit, TDCJ (named defendant-appellant)
25. Major James Bowman, James V. Allred Unit, TDCJ (named defendant-appellant)
26. Sergeant Kenneth Willingham, James V. Allred Unit, TDCJ (named defendant-appellant)
27. Lieutenant Oscar Paul, James V. Allred Unit, TDCJ (named defendant-appellant)
28. Lieutenant Onessimo Rangel, James V. Allred Unit, TDCJ (named defendant-appellant)
29. Lieutenant David Taylor, James V. Allred Unit, TDCJ (named defendant-appellant)

Margaret Winter
Counsel for Plaintiff-Appellee

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee respectfully suggests that oral argument would be helpful

to the Court because these consolidated appeals involve *de novo* review of the district court's denial of summary judgment in a case with an extensive factual record.

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TABLE OF AUTHORITIES

JURISDICTION

For the reasons set forth in Plaintiff's Motion to Dismiss the appeal in No. 03-10455 and Motion to Dismiss the appeal in No. 03-10455, Plaintiff contends that the Court lacks jurisdiction over these consolidated appeals.

STATEMENT OF THE ISSUES[1]

1. Are Defendants entitled to summary judgment that they did not violate Plaintiff's Eighth Amendment right to protection from rape, where Plaintiff submitted competent evidence that Defendants knew he was highly vulnerable to being raped by violent predators; that they nevertheless arbitrarily denied protection, telling him that he would have to fight off predators if he was unwilling to submit to rape; and that, as a result of their refusal to provide protection, Plaintiff was repeatedly molested by violent sexual predators?

2. Are Defendants entitled to judgment on the pleadings or summary judgment that they did not violate Plaintiff's right to equal protection of the laws,

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[1]Defendants' Eleventh Amendment Immunity arguments, which relate only to Plaintiff's injunctive claims, are about to become moot since Plaintiff transferred to a halfway house on December 19, 2003 and is soon to be released from TDCJ custody. Were that release not to occur, Plaintiff would be entitled to an order requiring Defendants to maintain him in safekeeping and to offer him medical and psychiatric treatment for the injuries they inflicted, for the reasons shown in the District Court. [R5:1243-1250]

where Plaintiff, a Black homosexual, alleged and submitted competent evidence that Defendants, in arbitrarily denying him protection from rape, stated that they do not protect homosexuals, that homosexuals enjoy being raped and that a Black homosexual in particular should be able to fight off predators if he does not want to submit to rape, with the result that Plaintiff was repeatedly molested by violent predators?

STATEMENT OF THE CASE

A. Course of the Proceedings in the Court Below

On April 18, 2002, Plaintiff Roderick Keith Johnson, a prisoner in the custody of the Texas Department of Criminal Justice ("TDCJ"), filed suit for prospective relief and damages under 42 U.S.C. § 1983. The Complaint alleged that Defendants knew that he was at high risk for being victimized by sexual predators yet consciously disregarded the risk, with the result that for a period of eighteen months he was molested and threatened with death if he resisted; and that certain of the Defendants were motivated not merely by deliberate indifference to the risk, in violation of Plaintiff's Eighth Amendment rights, but also by intentional discrimination against homosexuals, and in particular Black homosexuals, in violation of Plaintiff's rights under the Equal Protection Clause. [RE Tab 5]

Defendants' Answer provided no particularized response but only a blanket denial of Plaintiff's highly detailed factual allegations concerning their conduct. [RE Tab 6, ¶1, 11-16] Defendants did not bring a motion to require a reply and the District Court did not order one.

In July 2002, Defendants filed a Partial Motion to Dismiss For Failure to State a Claim Against Them in Their Official Capacity. [R1:86] The motion raised the defenses of standing, mootness, and sovereign immunity, but not qualified immunity. [R1:122-34] Later in July, Defendants Johnson, Treon and Wright each moved for judgment on the pleadings on Plaintiff's Equal Protection claim. [R1: 93, 96, 224-36; R2:350-63] Plaintiff did not oppose the motions of Johnson, Treon and Wright for judgment on th Equal Protection claim [R1:238; R2:365], which the District Court granted. [R4:844-45] In November, all of the remaining Defendants moved for judgment on the pleadings on the Equal Protection claims. [R3:588–622]

On January 24, 2003, while the motion of the remaining Defendants for judgment on the pleadings was pending, all Defendants filed a partial motion for summary judgment. [R4:874] Plaintiff opposed summary judgment with competent evidence supporting each allegation of the Complaint [R5:1187-R6:1251], and with a Declaration pursuant to Federal Rule of Civil Procedure 56(f)

showing that certain relevant information could not be presented in opposition because it was exclusively in Defendants' control and they had refused to disclose it, and Plaintiff's motion to compel disclosure of that information was still pending. [R5:1282-1285]

On April 9, 2003, the District Court denied in its entirety Defendants' motion for summary judgment, holding, "In the instant case, genuine issues of material fact remain with regard to Plaintiff's allegations and with regard to Defendants' qualified immunity defense." [RE Tab 4 at 5] The District Court declined to decide pretrial whether Defendants were entitled to qualified immunity, because "[u]pon review of the current record, the Court has determined that Plaintiff's pleadings and his summary judgment evidence assert facts which, if true, would overcome the defense of qualified immunity." [RE Tab 4 at 4] A week later, the District Court entered an order that "Defendants' motion to dismiss this action on the basis of qualified immunity is DENIED AS MOOT. The Court has already determined that, because of unresolved issues of material fact, Defendants are not entitle[d] to the defense of qualified immunity at this time." [RE Tab 3 at 4]

On May 7, 2003, Defendants filed a notice of appeal from the order denying summary judgment. [R7:1727] The appeal was docketed as No. 03-10455. On May 19, Defendants filed a notice of appeal from the order denying judgment on

the pleadings. [RE Tab 2] That appeal was docketed as No. 03-10505.

Plaintiff filed motions to dismiss both appeals for want of jurisdiction and as frivolous. The Court ordered that these motions be carried with the appeals. On September 2, 2002, the Court consolidated the two appeals.[2]

B. Statement of the Facts

On March 1, 1999, the United States District Court for the Southern District of Texas, by the Honorable Wayne William Justice, entered a decision in *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 939 (S.D.Tex. 1999),[3] a class action by prisoners in TDCJ custody against Gary Johnson, then Director of TDCJ's Institutional Division, and currently TDCJ's Executive Director and a Defendant in Plaintiff Roderick Johnson's case. The *Ruiz* court found that Texas prisoners "live in fear – a fear that is incomprehensible to most of the state's free world citizens. More

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[2]Citations to Defendants-Appellants' Brief in No. 03-10455 are to "Def. Br.2:X;" and citations to Defendants-Appellants' Brief in No. 03-10505 are to "Def. Br.1:X" (X representing the page number). Citations to Defendants Record Excerpts are to "RE." Citations to the record on appeal are in the form RX:YYY, to designate volume and page number. Some pages of the record contain text on both sides of the page, and the reverse sides are not marked with the sequentially numbering of the record on appeal. To designate an unnumbered reverse side of a page, reference is made to the numbered side followed by a capital letter A (*e.g.*, R6:1339-A).

[3]This Court reversed and remanded for additional findings in *Ruiz v. United States*, 243 F.3d 941, 952, 953 (5th Cir. 2001), on the ground that the district court had failed make the provision-by-provision analysis required by the Prison Litigation Reform Act on the continued necessity for each provision of the 1992 judgment in the case. On October 10, 2001, after having made the required findings, the district court entered an Order requiring Director Johnson to enforce TDCJ's written policies governing the protection of prisoners from predators. *See Ruiz*

vulnerable inmates are raped, beaten, owned, and sold by more powerful ones. Despite their pleas to prison officials, they are often refused protection. Instead, they pay for protection, in money, services, or sex." *Id.* at 940. It found that inmate-on-inmate sexual victimization was routine throughout the TDCJ system, and that officers were aware of it because it was obvious but failed to respond. *Id.* at 929. The evidence at trial:

> revealed a prison underworld in which rapes, beatings, and servitude are the currency of power. Inmates who refuse to join race-based gangs may be physically or sexually assaulted. To preserve their physical safety, some vulnerable inmates simply subject to being bought and sold among groups of prison predators, providing their oppressors with commissary goods, domestic services, or sexual favors. The lucky are those who are allowed to pay money for their protection. Other abused inmates find that violating prison rules, so that they may be locked away in single cells in administrative segregation, is a rational means of self-protection, despite the loss of good time that comes with their "punishment."

Id. at 915-916. The court found that an "institutional resistance to resolving

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v. Johnson, Civ. Action No. H-78-987 (S.D. Tex. Oct. 12, 2001). [R5:1294-1307]

serious safety problems pervades the system," *id.* at 915; that there appeared to be "a strong presumption on the part of prison officials that, in the absence of outward physical harm to assaulted inmates, such as cuts, abrasions, and bruises, no sexual assault has occurred," *id.* at 918; that high barriers kept prisoners out of safekeeping and protective custody, and that prisoners were forced to subject themselves deliberately to disciplinary sanctions in order to separate themselves from predators, *id.* at 923; and that TDCJ had an unwritten systemic policy essentially denying protection to prisoners who failed to fight and be injured protecting themselves. *Id.* The court further found:

> Prison officials deliberately resist providing reasonable safety to inmates. The result is that individual prisoners who seek protection from their attackers are either not believed, disregarded, or told that there is a lack of evidence to support action by the prison system. Inmates who find no other way to protect themselves than to rebel against the prison officials themselves find themselves in a free fall of disciplinary measures that strips them of their privileges and rights. Prison officials at all levels play a game of willing disbelief, one that appears adequate on paper and fails dismally in practice.

Id. The court specifically found that Director Johnson condoned the attitude of

TDCJ prison staff in refusing to acknowledge a threat of harm to prisoners who do not fight back against their attackers. *Id.* at 926.

Defendants were well aware of the 1999 *Ruiz* decision by the time Plaintiff Roderick Keith Johnson arrived at the Allred Unit on September 6, 2000.[4]

At Plaintiff's initial classification hearing at Allred, the three-person Unit Classification Committee ("UCC") was chaired by Major Bright and included Case Manager Kuyava. [R4:1068] Bright's basic duties as a Major of Correctional Officers included responsibility for ensuring prisoners' safety. [R6:1349-51] Kuyava's basic duties included helping prisoners get access to services and guidance, ensuring the accuracy and completeness of the classification information supplied to the UCC, and participating in UCC hearings as a voting member. [R6:1353-54]

At UCC hearings, committee members have before them the entire classification history and records of the prisoner under consideration. [R6:1353-54, 1462] Plaintiff's classification records at this initial hearing contained information

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[4] *See* R5:1338 (TDCJ provided State Classification Chief with copy of *Ruiz* decision since the decision affected classification employees' responsibilities); R6:1341 (8/8/01 Memo from Classification reminding Defendant Wright that Allred staff must collect data on sexual assault to address the ruling in *Ruiz*). Invoking qualified immunity, Director Johnson refused to disclose in discovery whether he had disseminated the *Ruiz* decision to Defendants and this refusal is the subject of a pending motion to compel. [R5:1284-85]

showing that he was presumptively eligible for safekeeping under TDCJ policy AD-04.69, *Security Requirements for at-Risk or Vulnerable Offenders.* [R6:1357-68] The policy defines safekeeping as "a status that permits the unit/facility to house vulnerable individuals and other potential victims together, separate from more aggressive offenders." The policy states:

> Safekeeping status is reserved for those offenders who require separate housing in the general population because of threats to their safety due to a potential for victimization, enemies in the offender population, a history of homosexual behavior, or other similar reasons.

[R6:1359]TDCJ recognizes that additional indicators of "potential for victimization" include effeminacy, vulnerable character, and alleged threats [R6:1361]; lack of criminal sophistication; any previous history of safekeeping; the absence of any history of predation against other prisoners; and an appearance of vulnerability, such as a demeanor that fails to convey to sexual predators that the prisoner cannot be victimized. [R6:1339-39A (Guyten Depo at 30-32); R6:1361] According to TDCJ policy, prisoners are not required to present any objective evidence of victimization, since the goal "is to identify inmates that are prone to vulnerability and predation by the other inmates before it happens. If we reserve safekeeping status for objective evidence only, we would be forced to wait around until they're actually hurt." [R5:1338A -R6:1339 (Guyton Depo at 29-30)] Thus,

the vast majority of prisoners approved for safekeeping "have no objective evidence whatever that they have been victimized." [*Id.*]

Defendants knew at this initial hearing that multiple risk factors made Johnson particularly vulnerable to sexual assault. His classification records showed that he was a homosexual, had been known by the effeminate nickname "Coco," had very limited prison experience[5] and no history of predation against other prisoners, and had been housed in safekeeping just before he was transferred to Allred Unit.[6] [R5:1321-22, R6:1345, 1370-75] Indeed, TDCJ's Executive Director Johnson eventually conceded that Roderick Johnson's "demeanor and orientation " were, without more, sufficient reason for granting him safekeeping. [R6:1376]

Nevertheless, when Plaintiff told Major Bright that he had been placed in safekeeping before coming to Allred, Bright replied, "We don't protect punks on this farm." [R5:1321-22] "Punks" in prison parlance meant homosexuals. [R6:1385-86] Rather than assigning Plaintiff Johnson to safekeeping, Bright

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[5]Plaintiff had been sentenced to state jail for a cocaine possession charge. A sentence of probation he had received ten years earlier, for the unarmed burglary of an uninhabited residence, was revoked and he was transferred to TDCJ to serve out the sentence in prison. [R6:1342-44]

[6]*See* R6:1345, job assignment entry for 8/24/00-9/05/00 (unassigned transient safeke[eping]).

assigned him to general population in Building 8, where prison gang members asserted ownership over Johnson and raped him almost immediately. [R5:1321-22] Of all the prisons in Texas, Allred Unit has one of the highest incidents of reported cases of sexual assault. [R6:1491] Defendants concede that gang members live in the general prison population among the other prisoners and that TDCJ has not been able to identify all of the gang members. [R6:1388 (Norwood Depo at 23-24); R6:1463 (Wathen Depo. at 52); R6:1491 (Treon Depo. at 55)]

In October 2000, a member of the Gangster Disciple gang, Andrew Hernandez, forced Johnson into his cell and raped him. [R5:1323] Johnson asked Assistant Warden Mooneyham and Sergeant Willingham for assistance and medical attention. [*Id.*] As Assistant Warden, Mooneyham had administrative responsibility for the control, security, and administration of employees and inmates. [R6:1395-97] Sgt. Willingham's basic duties included the care and custody of offenders assigned to his work area, reviewing and properly applying information found in offender records relating to offender health and safety, and providing appropriate information to other staff. [R6:1391-91A] Neither Mooneyham nor Willingham offered Johnson help or medical attention. They told him that immediate medical care was available "only in cases of emergency," and

that he would have to file a written I-60 request. [R6:1323][7] Andrew Hernandez continued to rape and abuse Roderick Johnson on a regular basis, and used him as a domestic servant as well, requiring him to clean Hernandez' cell, make his bed, and prepare his food. [R5:1323] In November, Hernandez began to share Johnson with other prisoners, forcing Johnson to perform sex acts with them as well. Hernandez made it clear to Johnson that he would be severely beaten or killed if he refused. [*Id.*] On November 30, after Hernandez stole all of Johnson's possessions, Johnson complained to Sgt. Willingham, who did nothing; when Johnson returned to his housing area, Hernandez assaulted Johnson. [*Id.*] The medical department documented Johnson's injuries from the assault. [R6:1403, 1408] Defendants sent Johnson and Hernandez to segregation in Building 11 and housed them in adjacent cells. [R5:1323]

On December 8, 2000, Johnson was released from segregation and returned to Building 8. On December 9, he submitted in writing a "Life Endangerment" claim, explaining that he was being sexually assaulted; he included the names and cell numbers of the attackers he knew. [R5:1324] He requested safekeeping, transfer to another facility, or protective custody. [*Id.*] Protective custody is an

[7]Allred's policy on access to medical care in fact explicitly provided that "[o]ffender oral requests to officials will be treated as a written sick call request," and "[s]ecurity officers may

extremely restrictive status involving the loss of many privileges.[8] [R6:1359-59A] When Sgt. Willingham interviewed him, he described the assault that had occurred a few days earlier, and explained that gang members knew he was a homosexual, approached him in chow hall and the day room and told him that he must "ride" with the gang (submit to its control) and perform sex acts or he would get hurt; he positively identified Hernandez and his cell-mate Garcia as two of the inmates involved; he identified by nickname and cell number other prisoners whose full names he did not know. [R6:1409-12]

Sgt. Willingham submitted an investigation report stating that Johnson had not suffered any medically verified injuries and concluding that Johnson's complaint was "not corroborated." [R6:1409] Although TDCJ policy mandated investigations into requests for protection, including inmate interviews "if appropriate and necessary, to identify additional factors or validate any information" [R6:1361-61A], Willingham did not interview the alleged perpetrators or any other inmates, "to protect [the] integrity of [the] investigation." [R6:1411]

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call to medical to have an offender seen immediately." [R6:1400]

[8] "In protective custody, inmates are confined alone in cells designated specifically for them. A security escort accompanies them whenever they leave their respective cells. These inmates do not participate in work or educational programs, and they do not shower, recreate, or

Johnson appeared before the UCC on December 13, 2000 requesting safekeeping, protective custody, or a unit transfer. [R4:1014] The Committee included Warden Mooneyham and Case Manager Tina Vitolo. [R4:1069] Vitolo was responsible for helping prisoners get access to services and guidance, ensuring the accuracy and completeness of information supplied to the UCC, and participating in UCC hearings as a voting member. [R6:1353-54]

Mooneyham and Vitolo knew from Johnson's classification records that he was a homosexual with an effeminate nickname, that he had been assigned to safekeeping before he got to Allred Unit, that there had been previous similar incidents of reported assaults, that he had identified several of his assailants, and that he had medically documented injuries from a recent altercation with one of them. *See supra* at 9-12. TDCJ policy recognizes each of these factors as indicators of vulnerability to sexual assault; it treats "medically verifiable injuries" as objective evidence of victimization supporting not only placement in safekeeping or protective custody but also transfer to another Unit. [R6:1359, 1361-61A; R5:1338A-R6:1339A]

Mooneyham and Vitolo were well aware that Johnson was at high risk: Vitolo, commenting on the recent attack, pointed out that, given Johnson's

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join other inmates in any other status. " *Ruiz v. Johnson*, 37 F. Supp. 2d at 923.

characteristics, he should have been placed in safekeeping when he arrived at Allred. [R5:1324] Mooneyham replied that initial classification mistakes were not the concern of the present UCC. [*Id.*] They voted to deny Johnson safekeeping and to send him back to general population in Building 8. [R5:1324, 1416] Mooneyham handed Johnson a folded document and told him to sign it. [R5:1324, 1416] When Johnson asked what the document was, Mooneyham replied, "It's a waiver saying that we're moving you to another pod and this will solve the problem;" Johnson did not understand what he was signing, and not knowing that he could refuse, he did as he was told. [*Id.*] After Mooneyham and Vitolo returned Johnson to Building 8, Marty Smith, a member of the Bloods gang, raped Johnson. Soon afterwards Smith began pimping Johnson to other prisoners, and members of the Bloods, Crips and Mexican Mafia sexual abused him. [R5:1325]

In January 2001, Johnson began writing letters to Allred Unit's Classification Chief Vikki Wright, explaining his plight and requesting protection. [R5:1325] As classification chief, Wright was responsible for processing all requests for safekeeping; tracking all investigations, recommendations, and final dispositions of safekeeping requests; reviewing housing assignments and security needs; coordinating all safekeeping requests with Unit administration and the State and Unit classification committees; and supervising and training the case managers

on every essential function of their work, including investigations of inmate sexual assault. [R6:1360; R6:1422, 1429-31] Wright did not respond to Johnson's letters. [R5:1325] Her position was that safekeeping should be restricted to those offenders who are "very old, very feeble, heavily medicated psych patients, handicapped offenders, offenders that are very, very young in appearance," [R6:1431-A (Wright Depo. at 22-23)]. That view clashed with official TDCJ policy. [R5:1338A--R6:1339A (Guyten Depo. at 23-25, 28-31; R6:1359, 1361-61A)].

Around mid-January 2001, members of the Crips gang assaulted Johnson in a stairwell in Building 8. Johnson reported the attack to a sergeant, who refused assistance. [R5:1325] Johnson wrote to Classification Chief Wright again on February 4, while the Unit was on lock-down status. [R6:1432] When the area was on lockdown it was easier to communicate with staff unobserved by other prisoners, who would punish him as a snitch if they saw him communicating with staff. [R5:1326] He complained to Wright that he had sent her numerous I-60s, had been assaulted many times, was the target of violence because he did not want to "ride" with the gangs, and had been placed in segregation as a result of previous assaults; that the Warden had moved some of those involved but this had done no good, all his belongings had been stolen, and gang members had sent him

"stern word that they will try and hurt me when we are no longer lock[ed] down." He stated,"I am a homosexual and cannot defend myself against these men so please help me and let me speak with you." [R6:1432]

On February 8, 2001, Sgt. Willingham notified Wright that Johnson claimed he was being threatened for commissary and sexual favors; that Johnson had been in a fight a few weeks earlier with Hernandez, who was currently housed in Building 8 L Pod, as was Johnson; and that Johnson had named Thomas Bail, also housed there, as one of the aggressors. [R6:1436] Willingham justified his decision not to investigate on the grounds that "there are no witnesses to these allegations" and "there is no proof of any aggression against Offender Johnson." [R6:1436, 1438] This Life Endangerment claim was heard on February 14, 2001 by a UCC consisting of Major Bowman, Captain Boyle, and Case Manager Tracy Kuyava. As a Major, Bowman had the responsibility of ensuring that a complete investigation was made into inmates' requests for protection. [R6:1360] Bowman and Boyle both had responsibility for reviewing and properly applying information in offenders' records and ensuring offenders' safety. [R6:1349-50; 1445-47] Bowman, Boyle and Kuyava knew from Johnson's file that he was an effeminate homosexual, that he had been housed in safekeeping just before his transfer to Allred, that he had identified prisoners who were allegedly threatening and

coercing him (Bail, Garcia, and Hernandez) and that he had been injured in a fight with Hernandez. Bowman, Kuyava and Boyle were aware that not one of these prisoners had been interviewed, and that Willingham's only explanation for this omission was that interviews might "create a hostile environment."[9] [R6:1433-A(App.179)]. Nevertheless, they denied Johnson's request for safekeeping, "due to insufficient evidence to warrant transfer," [R6:1434] and they returned him to Building 8, merely moving him from L Pod to J Pod [R5:1325] Johnson begged them to reconsider because this would provide no protection at all from the gangs. [*Id.*] Major Bowman told Johnson that they would tie him up and drag him back to his cell if he refused to return. [*Id.*] They made it explicit that if he could not fight off sexual predators, his only option was to submit to sexual servitude: Kuyava told Johnson, "You need to get down there and fight or get you a man." [*Id.*]

On February 14, 2001, while Building 8 was still on lockdown, Johnson once again wrote to Classification Chief Wright. [R5: 1326] He begged her to "lock [him] up" and told her that it did no good to keep moving him all around Building 8. [R4:996-97] He stated:

You do not seem to understand how severe things have become for me on

[9]Sergeant Quintero co-signed the Offender Protection Investigation Form on the incident, evidently because Willingham's shift ended before he could do so. [R6:1440, 1443A-44]

> this Building. I am [unable] to survive over here. I am a homosexual and I am constantly forced to perform various sex acts and I do not choose to live in the constant turmoil these men put me through. . . . . I cannot afford to pay anymore or to have sex with just anyone. Please help me, I am so scared. I have been warned when we do come up [....] I have been moved all around this building and they continue to harass me no matter where I seem to go. Please lock me up. Please remove me from this madness.... You insist changing pods will make it all right. But things have not changed at all! Do I have to end up dead or hurt to get you to see that I am in danger and constant fear. They will hurt me if I'm not going to have sex.

Sgt. Willingham was once again assigned to "investigate." [R6:1448-49] Johnson turned over to Willingham a number of the stalker-style letters he was receiving from prisoners who were sexually harassing and threatening him while he was still in lockdown. [R6:1450-57] One of these, signed "Freddy," stated:

> Say look out Coco what are you doing up there talking to the rank, my homeboy told me he saw you so you cannot lie your way out of this one b---. Don't go trying some slick s--- because we have people on 7 and 3 building when we come you have better have your mind made up who you want to be with or we are going to smash you for real.

[R6:1450(App. 197)]. Another letter, a sexually explicit proposition signed George Hall, stated "I will do a lot for you if you just act right but you don't want

to act right, ... you turn me on like a m-----f----- and if I ever get a chance I am going to show you how much I cut [sic] for you." [R6:1454]

Willingham concluded that Johnson's complaint was "not corroborated," because there was "no evidence" that the letters were "legitimate." [R4:995, R6:1441, 1448-49] Of course, there was no evidence that the letters were "illegitimate," and Willingham deliberately refrained from conducting any interviews to determine their authenticity, in order to "preserve the integrity of the investigation." [R6:1448-A (App. 193)]

On February 21, 2001, another UCC was convened to hear Johnson's fourth Life Endangerment claim. It was chaired by Assistant Warden Wathen and included Case Manager Vitolo. [R4:1072] Wathen's basic duties included directing operations regarding the security of offenders, monitoring staff to ensure compliance with policies, procedures and regulation, and directing procedures and policies relating to offender security. [R6:1395, R6:1459-1460] Wathen told Johnson, "You need to start fighting." Johnson asked if he was required to fight to save himself. Wathen replied, "There's no reason why Black punks can't fight and survive in general population if they don't want to f---." [R5:1326-27] Wathen and Vitolo tabled the matter, referring it to Security Threat Group Office ("STG").

[R4:948] [10]

On February 25, 2001, Johnson filed a Step 1 grievance requesting protection. [R6:1464-65] He stated that he had tried to resolve his problem with the UCC and Warden Wathen, that he had received threats to his life and had been made "to perform certain sex acts just to stay safe," and concluded, "I cannot face these men another day. ... Please move me to safekeeping status or have me moved away from this farm." [*Id.*]

On March 16, 2001, the UCC was reconvened. [R5:1327] Warden Wathen, the chairperson, told Johnson that he needed to fight his attackers; Kuyava told Johnson, "Bring bruises or stay out of my face." [*Id.*] Although they knew that he had been injured and was receiving highly threatening, sexually-charged letters, and that not one of the alleged perpetrators had ever been interviewed, they voted to deny Johnson transfer, safekeeping or protective custody on the ground that there was "no evidence to substantiate claims." [R6:1449, 1381]

Later in March, Johnson had a classification review hearing. The UCC gave him minimum custody status and moved him to general population in Building 7,

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[10]The STG "investigation" appears to have consisted only in STG opining that a letter to TDCJ ostensibly from Johnson's grandmother appeared to be in Johnson's handwriting. [R6:1381] Johnson had in fact written this letter, hoping that TDCJ would not ignore a letter from his family even though it ignored his own pleas for help. [R5:1326]

where gang activity was rampant. [R5:1327] Shortly after his arrival, Marty Smith reasserted "ownership" over Johnson and forcibly prostituted Johnson to other gang members. [*Id.*]

On March 18, 2001, Johnson filed another Step 1 grievance. [R5:1327, 1103-04] He explained that he was a homosexual who was being sexually assaulted, that he had raised this issue with unit administration but was told to fight by the warden, that he would be hurt if he used any kind of violence and would incur a major disciplinary charge and lose his parole date. [R5:1103] On April 9 he received a reply, stating that the UCC had reviewed his case on March 16 and denied his request for a transfer, safekeeping, or protective custody due to insufficient evidence. [R4:1004] On April 17, Johnson filed a Step 2 grievance detailing the efforts he had made to seek protection from sexual assault, including four I-60's to Wright. [R5:1101] On May 4, Johnson received a reply, stating in the same stock language that his case had been investigated, there was no evidence to support his claim, and if he felt his life was in danger he should "immediately notify security staff and provide the substantiating evidence." [R5:1102]

On June 18, 2001, the district court issued another decision in the *Ruiz* class action, finding that TDCJ's failure to provide Texas prisoners with reasonable

safety from sexual abuse remained an ongoing systemic problem requiring additional class-wide relief. *Ruiz v. Johnson*, 154 F. Supp. 2d 975, 986, 1001 (S.D. Tex. 2001).

During this period, Johnson was routinely forced to endure sexual assault and rape by many gang members. [R5:1328] Marty Smith, taking advantage of lax security, came to Building 7 to harass, threaten, and sexually assault Johnson. [*Id.*] On August 24, 2001, Johnson wrote a letter to Case Manager Vitolo, stating:

> I am having a lot of problems with these guys in population not only on 7 Building but in the chow hall also. This guy in the kitchen is trying to force me to be with him and these guys in 7 Building are trying to make me pay with money and sex.

[R6:1469] He identified "the guy in the kitchen" as Marty Smith, Building 3 and stated that he needed to "get away from population or off this Unit." [*Id.*] On August 27, Johnson reported Marty Smith's threats and assaults to an officer who filed a Life Endangerment claim on his behalf. [R5:1328, R6:1466-69] Johnson told the investigator that he was being constantly harassed by members of the Crips and Bloods gangs, that Marty Smith "owned" him and was extorting money from him and "lining up tricks" for him, and threatened that if Johnson did not cooperate Smith would "kick his ass before staff could intervene." [R6:1468-68A]

The investigator declined to interview Smith, purportedly for "fear of retaliation against Offender Johnson." [R6:1467]

On September 5, 2001, Johnson appeared before a UCC chaired by Warden Wathen. [R6:1467] Wathen was aware from previous hearings and the classification records that Johnson was a homosexual who had identified several of his alleged assailants, suffered injuries in a fight with one of them, had received and turned over threatening letters, and that TDCJ had never interviewed any of the assailants Johnson identified. *See supra* at 9-18. Wathen nevertheless denied safekeeping. [R6:1328] Wathen again obtained a waiver of investigation from Johnson. [R6:1467]

Johnson was transferred to Building 18, where the Tangos gang targeted him. [R5:1328] A gang member named Eric Charboneau began threatening him with violence unless he submitted to sex. [R5:1328-29] The Crips and the Mandingo Warriors also began demanding sex from him; members of the Tangos raped and prostituted him. [R5:1329]

On October 12, 2001, the district court in *Ruiz v. Johnson* issued an order based upon the court's earlier findings and further submissions by the parties. [R5:1294-1307] The court reiterated that prisoners in the TDCJ system "are routinely subjected to violence, extortion and rape, that officers are aware of the

victimization and fail to respond, and that an institutional resistance to resolving serious safety problems pervades the system, which involves a deliberate lack of control by prison officials." [R5:1300 (internal quotation marks omitted)] The court reiterated that TDCJ had an "unwritten systemic policy essentially denying protection to prisoners who failed to fight and be injured protecting themselves," reflecting "an acceptance of routine violence and victimization." [*Id.*] The court ordered the defendants to "effectively inform unit wardens that they are responsible for maintaining control of their units so that violence and paying protection are not commonplace in any area," and of their "role in preventing, detecting and reporting violence and victimization." The court also ordered them to "monitor data concerning violence, extortion and requests for protection" at the Unit level, and to enforce written policies to protect vulnerable prisoners by housing them in transient housing, safekeeping, protective custody, single cell status, or safer prison units. [R5:1300-02] The court further ordered defendants to:

> take reasonable steps to ensure that the characteristics and factors that they know to be associated with vulnerability or susceptibility [...], when observed or verified, are credited as "objective evidence" substantiating prisoners' subjective feelings of danger, and that vulnerable and targeted prisoners are not required to fight or suffer injuries before they are transferred or housed in safekeeping or protective custody. Prisoners with characteristics and factors associated with vulnerability or susceptibility . . . . shall not be transferred from one unit where the risk of harm is similar even if not

> yet proven by threats or attacks at the second unit. Again, this order does no more than require Defendants to act in accord with their own written policies and procedures. [R5:1302]

On December 1, 2001, Tangos gang members ordered Plaintiff to perform oral sex on an inmate in Dormitory 18R. [R5:1329] Obeying orders, Johnson was discovered "out of place" by a correctional officer who issued him a disciplinary charge. [R6:1470-1471] Johnson wrote a letter to Warden Treon for protection. Treon did not respond. [R5:1329]

On December 5, 2001, Johnson filed another Step 1 grievance requesting protection from sexual abuse. [R4:987-88] He explained that he had tried unsuccessfully to resolve the problem with the UCC and stated:

> At first I had no problems [in Dormitory 18] but then some inmates started masturbating on me while I was in the shower and before long they started having me do sexual favors. I've been afraid to say anything about it because every time I am talking to an officer I am accused on being a snitch. They also know that I have filed Life In Dangers and Grievances and if I'm caught doing it again I'll be in real trouble.

[*Id.*] Johnson explained that he had experienced similar problems in various general population housing areas and that he had incurred the disciplinary charge as a result. He requested, "To be able to do my time without being sexually molested any longer." [R4:988] At his disciplinary hearing on December 12, Johnson was convicted and punished with loss of recreation and commissary for

45 days. [R6:1470] Despite Warden Wathen's actual knowledge of the particular risks to Johnson, and the *Ruiz* court's trenchant findings and order only two months earlier, Wathen signed off on the conviction and punishment. [R6:1470]

On December 13, Plaintiff went before the UCC on his sixth life endangerment claim, requesting safekeeping or a unit transfer. [R6:1473-74A]. Major Bowman chaired the UCC; the other members were Kuyava and Lieutenant Ranjel. Lt. Ranjel's basic duties included ensuring prisoners' safety. [R6:1475-76]

Major Bowman told Johnson, "Get a man"(that is, submit to sex with a prisoner powerful enough to fight off other sexual predators). [R5:1329-30] Lt. Ranjel remarked, "Preferably a Black one, since it's the Bloods you're having problems with." [*Id.*] Kuyava told him, "You ain't nothing but a dirty tramp," and "Learn to fight or accept the f---ing." [R5:1330] The UCC denied the request for safekeeping "due to lack of credible evidence." [R6:1379] Kuyava stated, "Ms. Pretty is going to a good place now." [R5:1330] She was referring to Building 7, which was notorious as the most heavily gang-infested building at Allred. [*Id.*]

During his first week in Building 7, a member of the Crips forced Plaintiff to perform oral sex on him. Members of the Mexican Mafia told him that he must "ride or die," that is, submit to complete domination by the gang or be killed. [R5:1330]

On December 30, 2001, Johnson filed another grievance requesting safekeeping. [R5:1107-08] He stated that he had been "numerous times to UCC and told them that I am a homosexual and that my life is constantly threatened." [R5:1107] He explained that he was being bought and sold by gang members, masturbated on in the showers, and made to perform sex acts, and that he was being called a snitch for complaining to the administration. He stated that he would deliberately incur a disciplinary in order to get into Building 11 (a segregation unit) because "I cannot take this anymore ... I don't care about anything but my life and safety." [*Id.*]

On December 31, 2001, Johnson deliberately incurred a major disciplinary charge. [R5:1331, R6:1486] On January 1, 2002, Johnson wrote again to Warden Treon as follows:

> Please note sir that I am a homosexual. The inmates living on this unit have repeatedly violated me by masturbating on me in the shower and have been forcing me to ride and perform sex acts .... am constantly forced to do these sexual things. These inmates see me as feminine .... Here and on my old section on 7 Bldg and other sections threatened to do me bodily harm. I have told numerous staff officials and been before UCC .... I have had to cause a disruption 12-30-01 to get myself locked up .... .

[R6:1487] Despite the *Ruiz* court's order two months earlier that wardens must credit "characteristics and factors that they know to be associated with vulnerability as objective evidence substantiating prisoners' subjective feelings of danger," Treon did not respond to this letter. [R51329] Treon took the position that an effeminate prisoner who claimed he was being sexually victimized was not entitled to safekeeping unless he could provide positive proof. [R6:1490]

On or about January 9, Johnson had a hearing on his disciplinary report. Johnson stated at the hearing that he was being sexually enslaved and that he had committed the rule violation in order to get into segregation. [R6:1486-87] He was punished with 45 days loss of recreation, commissary, and property and with 45 days special cell restraint. [R6:1486] He was also demoted to medium custody, a classification change that placed him among much more dangerous prisoners. [R5:1331] Warden Wathen once again signed off on the disciplinary report and punishment. [R6:1486]

On January 17, 2002, Johnson appeared before the UCC on his seventh life endangerment claim. The Committee was chaired by Captain Norwood and included Case Manager Vitolo and Officer Taylor. After listing the names of two of the alleged assailants, the report stated that Plaintiff's claim could not be corroborated because he did not supply the names of the "other offenders."

[R6:1492] It further stated that neither staff nor any prisoner had been interviewed, in order "to protect the integrity of the investigation." [*Id.*] And despite Defendants' admission that they do not know the identities of all the gang members in general population, the report concluded that Plaintiff could not corroborate his claim because the alleged assailant was not listed on Defendants' "gang intelligence list" as a member of the Mexican Mafia. [*Id.*] The report specifically noted that Johnson previously had been assigned to Safekeeping. [R6:1493-A] It stated:

> Offender states that he is a homosexual and that because he is viewed as being weak other offenders harass him. He states that while he's in the shower that offenders masturbate on him, that they push him around, that they take his commissary and they force him to participate in homosexual activity. . . . He claims that most of the harassment that he is currently receiving is from offender Reyes, Santos #1065738, out of 7G-23T. He states that Offender Reyes told him that he bought him from his ex-lover Charboneau, Eric, #82692 out of 18R-34. .... Offender Johnson states that he was told by Offender Reyes that he will do as he is told or that he needs to catch out [*i.e.,* "catch" a disciplinary charge by being found out of place by

> prison officials]. He states that he caught out in order to protect himself, and if placed back in general population that his condition will only get worse. He is requesting to be transferred to another unit or be placed in safekeeping for the remainder of his 8 month sentence. [R6:1492]

After Johnson pleaded his case to the UCC, Captain Norwood told him, "I personally believe you like dick," and that he had probably consented to the sex acts. Vitolo and Taylor laughed at this comment. [R5:1331] Norwood said that Johnson should be placed on high security where he would "get f---ed all the time." [R5:1331-32] Taylor said that Johnson should just "learn to f--- or fight." [*Id.*] Johnson began sobbing, screaming, and pleading with Norwood, Vitolo and Taylor; they laughed, and had Johnson dragged out of the room screaming for help. [R5:1332] They filed a report stating that they had denied safekeeping and transfer due to "insufficient evidence" and "speculation of manipulation." [R6:1494] When cross-examined, however, not one of them could explain the basis for this "speculation," and they were utterly at a loss to explain what motive Johnson could possibly have had – other than genuine, desperate fear for his safety – for repeatedly seeking not only safekeeping *but also protective custody*, an extremely restrictive status involving significant loss of freedom and privileges.

[R6:1389 (Norwood Depo., 34:6-39:4); R6:1461-1462 (Wathen Depo. at 29:2-30:1); R6: 1421 (Taylor Depo. at 55:5-56:16); R6:1355-1356 (Vitolo Depo. at 32-34)]

On January 18, 2002, prison officials issued a written denial of Johnson's December 30, 2001 Step 1 grievance. The response was, "You need to provide evidence (names, letters, kites, etc.) to unit classification or the shift captain when life endangerments are being investigated." [R5:1108] Johnson had already repeatedly taken these steps, to no avail. On January 23, he submitted a Step 2 appeal of this grievance, pleading again for safekeeping or protective custody. [R5:1105-1106] The reply he received denied relief in the same stock language, that he must "provide the substantiating evidence." [R5:1106]

On January 20, 2002, Defendants returned Johnson to general population in Building 8 – where he had been repeatedly assaulted. *See supra* at 10-15. On about January 23, Plaintiff Johnson wrote a letter to Director Gary Johnson. Plaintiff explained that he was an effeminate homosexual, that he was constantly being sexually harassed and used as a "sex toy" by other inmates, that he was unable to defend himself, that he was being denied protection by the UCC, and that his life was in danger. [R6:1495-96] Director Johnson did nothing – even though the *Ruiz* court had ordered him four months earlier to monitor claims of sexual

victimization and to ensure that prison staff were crediting characteristics associated with vulnerability as objective evidence substantiating prisoners' subjective feelings of danger. [R5:1302] The only response Plaintiff received was a form letter stating, "[w]e rely on the unit administration's professional assessment of your situation and trust they will take appropriate action to ensure your safety," and advising him to "contact the Warden, the Major, the Chief of Classification, or any security staff member on your unit regarding your life endangerment claims." [R6:1497] Of course, as Plaintiff's letter had just explained, he had already taken these steps, to no avail. Although the TDCJ Ombudsman's office faxed a copy of Plaintiff's letter to Warden Treon and inquired whether the correspondence was related to the UCC's January 17, 2002 "life in danger" review [R6:1498], nothing in the record suggests that Warden Treon did anything in response.

Once Defendants released Johnson from solitary confinement and placed him on special cell restraint in Building 8, Black and Hispanic gangs on the unit fought over him, each claiming him as their property. [R5:1332] Gang members sent him letters threatening him with violence. [R6:1500-06] One letter warned him that a certain gang that claimed to own him was planning to sell him for a big price, and "they are going to hurt you unless you do something fast," because they

" know you're going to the people [classification] on them." [R6:1504] The letter's author offered to "buy" Johnson to assure his safety. [*Id.*] Desperate to get help before he was returned from segregation to general population, Johnson began writing to the ACLU and other organizations for assistance. His family also attempted to advocate on his behalf. [R5:1332-33]

On February 11, 2002, Johnson's grandmother wrote to TDCJ's Ombudsman, explaining that Johnson was a homosexual who was being pressured to provide sex and threatened with harm. [R6:1507] The Ombudsman faxed the letter to Warden Treon requesting an investigation. [R6:1509] Copies were also sent to Wright, Kuyava and Vitolo. [R6:1510; 1356] There is no evidence that Treon, Wright, Kuyava, or Vitolo did anything to investigate; instead, Kuyava told the Ombudsman that the UCC had already reviewed these allegations and had "denied Johnson safekeeping, protective custody or transfer due to insufficient evidence." [R6:1510, 1356]. On February 20, the Ombudsman's office notified Johnson's grandmother that the claim had been investigated and no evidence found to support it. [R6:1511] On or about February 22, 2002, Johnson was returned to general population in Building 8. That night, gang members assaulted him and forced him to perform sex. The attacks continued the next day. [R5:1333] Thereafter, the sexual assaults and exploitation escalated dramatically; the gang

sold him to scores of other inmates. [*Id.*]

On or about March 17, Mexican Mafia members forced Johnson into the showers with a mentally ill inmate known as Alazar and demanded that they engage in sex together; when the assault was interrupted by a summons to chow, Alazar ran to Lieutenant Paul, hysterically begging for help. [R5:1333-34] Although Lt. Paul's basic duties includes ensuring the safety of assigned offenders, [R6:1475-83], Paul refused to help Alazar and ordered him to go away. [R5:1334] Johnson then approached Lt. Paul to tell him what had happened, but rather than offer assistance Paul told Johnson that he had better not act like Alazar or he would be "carried off the unit in a body bag." [*Id.*] On March 27, 2002, Major Bowman interrupted an attorney-client telephone call between Plaintiff Johnson and the ACLU and took him to Captain Boyle's office. [R5:1334] Boyle told Johnson that since he had not been stabbed or "gutted," prison officials would not place him in safekeeping. Boyle ordered Johnson to sign a waiver of his life endangerment claims, threatening that unless he did so, "we are really going to f--- you over." [*Id.*]

On March 28, the ACLU sent a fax to Director Johnson describing Roderick Johnson's situation and requesting that he be placed immediately in safekeeping. [R6:1563-64; R5:1309] The next day, Major Bowman summoned Johnson and told him that "the ACLU don't run s---" and that Johnson should "have his a--

kicked." [R5:1334] Warden Treon told Johnson, "the ACLU don't run my damn classification unit," and Johnson had "better not say [he] was coerced into s—," because "with your classification, I can send you to a terrible place." [*Id.*]

On April 1, 2002, Johnson again went before the UCC, chaired by Warden Wathen, who told Johnson, " we're recommending to transfer you, and you're going to see a 'good friend' of ours on another unit." [R5:1335] Warden Treon later testified that he wanted Johnson out of Allred because he feared that Johnson was talking to other prisoners about getting assistance from the ACLU. [R6:1489-89A]

On April 5, 2002, Director Johnson decided to approve Roderick Johnson's placement in safekeeping. [R5:1309-09A]. He notified the ACLU that "in view of offender Johnson's demeanor and orientation," Roderick Johnson would be transferred from Allred and placed in safekeeping at another Unit. [R6:1376] Shortly thereafter, Roderick Johnson was transferred to the Michael Unit, where he was placed in safekeeping. [R5:1335]

THE STANDARD OF REVIEW

This Court reviews *de novo* a district court's ruling on summary judgment, applying the same standard as does the district court, viewing the evidence in the light most favorable to the nonmoving party and resolving all permissible

inferences in his favor, and granting summary judgment only if the Court finds that the facts material to plaintiff's claim are undisputed by the parties and no reasonable juror could find for the nonmovant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

SUMMARY OF THE ARGUMENT

Plaintiff produced ample evidence, both circumstantial and direct, from which a trier of fact could find that Defendants were well aware of the significant risk that Plaintiff would be raped and that they consciously disregarded the risk, arbitrarily denying him protection. The circumstantial evidence includes abundant evidence that the risk was overwhelmingly obvious; the direct evidence includes statements by Defendants announcing that they were denying protection because it was up to Plaintiff to fight off predators if he did not choose to submit to them. *See Point I.A.* Defendants' argument that they are entitled to qualified immunity on the Eighth Amendment claim, because "there is no Fifth Circuit or Supreme Court holding on the specific legal question" of a prisoner's entitlement to be classified to safekeeping status, is without merit. The Supreme Court has rejected the argument that the law is not "clearly established" for purposes of qualified immunity unless there are Circuit or Supreme Court holdings on "the specific legal question" posed. Defendants here had the clearest possible warning that their conduct violated

Plaintiff's Eighth Amendment rights since the Supreme Court announced a decade ago that prison officials violate prisoners' Eighth Amendment rights when, with conscious disregard of a substantial risk that a prisoner will be raped, they fail to take reasonable measures to abate that risk. *See Point I.B.*

Plaintiff alleged and submitted direct evidence to prove that, in denying Plaintiff protection, Defendants stated that homosexuals enjoy being raped and that a gay Black man in particular should have to fight off sexual predators if he did not want to be raped. This direct evidence of discriminatory intent shifted the burden of proof to Defendants to prove at trial by a preponderance of the evidence that they would have taken the same action regardless of the impermissible criteria. *See Point II.A.1.*

Defendants' argument that § 1983 plaintiffs suing state officials in their individual capacities must meet a heightened pleading requirement and that Plaintiff has not met that requirement is specious. When a public official pleads the affirmative defense of qualified immunity in his answer the district court may require the plaintiff to reply to that defense in detail; but Defendants never moved for a reply and the District Court did not order one. Plaintiff's Complaint amply satisfied Federal Rule of Civil Procedure 8(a) as a "short and plain statement of the claim showing that [he] is entitled to relief." Even if Plaintiff were required to meet

a heightened pleading standard, he has met it. *See Point II.A.2.*

> Defendants had fair warning that their conduct violated the Equal Protection Clause. The Supreme Court long ago made clear that racial discrimination is as intolerable within a prison as outside, except as may be essential to prison security and discipline. The law was also clearly established that a state actor violates the Equal Protection Clause when he deliberately seeks to disadvantage homosexuals. Defendants have never suggested that they had a legitimate, let alone essential, reason for denying any prisoner protection on the basis of race or homosexuality. *Point II.B.* **I. A TRIER OF FACT COULD FIND THAT DEFENDANTS WERE DELIBERATELY INDIFFERENT TO PLAINTIFF'S RIGHT TO PROTECTION FROM VIOLENT SEXUAL PREDATORS AND DEFENDANTS HAD FAIR WARNING THAT THEIR CONDUCT VIOLATED THE EIGHTH AMENDMENT**

A. There Was Ample Evidence of Defendants' Deliberate Indifference

Prison officials have an indisputable duty to protect prisoners from violence at the hands of other prisoners. The reasons are plain:

> [H]aving stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. . . . [G]ratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective, any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.

Farmer v. Brennan, 511 U.S. 825, 833-835 (1994) (internal citations, quotation and punctuation marks omitted).

To hold a prison official liable under the Eighth Amendment for failing to protect him from sexual assault, the prisoner must show that he was incarcerated under conditions posing a "substantial risk of serious harm." *Id.* at 834 (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). He must also show that prison officials acted with a "sufficiently culpable state of mind," that is, one of deliberate indifference to the prisoner's safety. *Id.* (citations omitted). A prison official acts or fails to act with deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serous harm exists, and he must also draw the inference." *Id.* at 837. Prison officials consciously disregard a substantial risk when they fail to take reasonable measures to abate it. *Id.* at 847.

"Whether an official had the requisite knowledge of risk to be liable for failure to prevent it is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact finder may conclude that the official knew of a substantial risk from the very fact that it was obvious." *Id*. at 842. "Thus, if a prisoner presents evidence that a substantial risk of inmate attacks

was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the officials being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant official had actual knowledge of the risk." *Id.* at 842-43.

There was ample evidence in the summary judgment record from which a trier of fact could conclude that each of the Defendants was deliberately indifferent to the significant risk to Plaintiff's safety when they denied his requests for protection.

1. The "UCC Defendants"

The Defendants who voted in the UCC hearings that entertained Plaintiff's requests for protection – Bowman, Bright, Boyle, Kuyava, Mooneyham, Norwood, Ranjel, Taylor, Vitolo and Wathen – make several arguments relating specifically to their role in these hearings. Plaintiff addresses first the arguments that the UCC Defendants make in common (Point I.A.1.a, *infra*), and then their remaining arguments relating to particular UCC hearings (Point I.A.1.b, *infra*)

a. UCC Defendants' Arguments in Common

All of the UCC Defendants argue that to support a claim for deliberate indifference, a prisoner "must provide information [to prison officials] specifying a specific threat," and that Plaintiff failed to provide them with such information. *See*

Def. Br.2:25. The Supreme Court, however, has firmly rejected this argument: "[It]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Farmer*, 511 U.S. at 843. Thus, for example, "a prisoner can establish exposure to a sufficiently serious risk of harm 'by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates.'" *Id.* (citation omitted). In such cases "it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom. *Id.* at 844.

Furthermore, on the many occasions when Johnson *did* positively identify the prisoners who were threatening and molesting him, Defendants always declined to interview them, purportedly in order "to protect the integrity of the investigation"or to protect Plaintiff. *See supra* at 12, 16, 18, 21, 27. Although a prison official "may show that the obvious escaped him," he will not escape liability "if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to

exist." *Farmer*, *id.* at 843 n.8.[11]

The UCC Defendants also insist that they were unaware of any threat to Johnson's safety because he was 32 years old, 5'11" in height, weighed 170-185 pounds , and had "prior military training." Def. Br. 2:25; *see also* Def. Br. 2:27, 2:32. The unspoken inference Defendants apparently want the Court to draw is that they reasonably assumed Plaintiff was equipped to fight off the organized gangs of sexual predators who controlled him. Since inferences are to be drawn in *Plaintiff's* favor rather than Defendants,' the only permissible inference is that Roderick Johnson obviously was not physically powerful enough to fight off gangs of violent predators who threatened to kill him if he did not submit to their sexual demands. Defendants' claim that they relied on Plaintiff's "military training" in denying him protection is patently pretextual: Defendants have never before raised this defense, and there is no evidence in the record that Plaintiff had "military training."[12]

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[11]Defendants rely on *Neals v. Norwood*, 59 F.3d 530 (5th Cir. 1995), for the proposition that officials cannot be deliberately indifferent unless the prisoner provided "information specifying a specific threat." Def. Br. 2:25. If *Neals* held what Defendants claim, it would be in direct conflict with *Farmer*. However, the plaintiff in *Neals* alleged that he had been *negligently* left in general population and this Court held only that allegations of negligence do not meet the deliberate indifference standard. *Id.* at 532.

[12]As a youth Plaintiff served in the Navy. From this fact, Defendants evidently want the Court to draw an inference that his "military training" consisted in combat techniques and martial arts rather than in clerical duties. Had Defendants raised this issue below, Plaintiff would have rebutted it.

In any event, whatever Plaintiff's height and weight, Defendants' assumption that he was responsible for fighting off the gangs is most certainly *not* reasonable: the federal court in the *Ruiz* class action had repeatedly found unconstitutional TDCJ's unwritten policy of denying protection from rape to prisoners who fail to fight their predators. *See supra* at 5-7, 20-21, 22-23. TDCJ's own policies acknowledged that openly homosexual or effeminate prisoners were especially vulnerable to assault; even Director Johnson eventually conceded that Plaintiff's "demeanor and orientation" were sufficient reasons, without more, for granting him safekeeping. *See supra* at 33.

Defendants provide no citation to the record supporting their remarkable claim that "[t]he undisputed summary judgment evidence" proves that none of them "*actually drew the inference* that Johnson was subject to a serious risk of attack." Def. Br.2: 25(emphasis added). Defendants' subjective state of mind is a quintessential fact question, turning on credibility, and only through live cross-examination can the fact-finder observe the demeanor of a witness and assess his credibility; for that reason, summary judgment is seldom appropriate when state of mind is an essential element of the nonmoving party's claim. *Int'l Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991). The jury will decide whether or not Defendants were actually aware of the risk after weighing the circumstantial

evidence (*e.g.*, the extreme obviousness of the risk); the direct evidence (*e.g.*, Defendants' statements that they "don't protect punks"); and Defendants' demeanor and general credibility on the witness stand when they deny that they were aware that Plaintiff was at risk.

Defendants' contention that their refusal to grant safekeeping was merely an "exercise of their professional judgment, even if was poor judgment," Def. Br. 2:26. is refuted by their own words. They were not exercising "professional judgment" when they advised Plaintiff to "get a man" (that is, submit to sex) if he did not want to fight, because they did not protect "punks" and so he must "fight or f—." *See supra* at 9, 18-19, 25.

Defendants argue further that what "conclusively proves" that they were not deliberately indifferent is "[t]he fact that each Appellant interviewed Johnson, thoroughly reviewed his file, and allowed Johnson to present additional information during the respective hearings." Def. Br. 2:26. Defendants do not provide record citations for these "facts," but even if accepted as true the inference to be drawn from them is not that Defendants were reasonable but that they callously disregarded the obvious risks to Plaintiff's safety, since his classification records revealed that he had multiple characteristics which official TDCJ policy deemed to be high-risk factors. *See supra* at 8-9, 13.

Finally, each of the ten UCC Defendants insists that his or her conduct in voting to deny Plaintiff protection was *ipso facto* "objectively reasonable" – because at each UCC, the three UCC members "voted unanimously" to deny safekeeping *See* Def. Br 2:27-28, 29, 30, 31, 32-33, 34, 35, 37, 38, 39, 41, 42, 44, 45, 46, 47. The assertion that their unanimity somehow establishes their reasonableness is patently absurd, and Defendants do not even present an argument in its support.

b. UCC Defendants' Hearing-Specific Arguments

The September 6, 2000 UCC

Major Bright and Case Manager Kuyava, who denied safekeeping at Johnson's initial classification hearing, argue that they were not deliberately indifferent because Johnson did not have a life endangerment request pending at the time of the hearing, did not have known enemies at the time of his arrival, had not previously been classified to safekeeping, was 32 years old, 5'11", 185 pounds, and "had military training." Def. Br. 2:27, 2:32. In fact, the records before Bright and Kuyava on September 6, 2000 showed that Johnson was an effeminate homosexual, and thus was deemed by official TDCJ policy to belong to an identifiable group of prisoners frequently singled out for violent attack by other inmates. *See supra* at 8-9. Bright and Kuyava also knew that Johnson had been housed in safekeeping just

prior to his arrival at Allred Unit, another indicator of vulnerability. *Id.* Bright, the chairman of the UCC, openly expressed the UCC's callous indifference to the risk, stating, "we don't protect punks [homosexuals] on this farm." *Id.*

The December 13, 2000 UCC

Captain Mooneyham and Case Manager Vitolo, who voted to deny safekeeping at the December 13, 2000 UCC, justify their decision on the ground that Johnson "signed a waiver of his Life Endangerment request." Def. Br. 2:35-36, 40. This justification is a pretext, since they obtained Johnson's signature on the waiver *after* they denied safekeeping; they misled Johnson into believing that the waver was routine paperwork that he was obliged to sign. [R5:1324]

Mooneyham and Vitolo also claim that the names Plaintiff provided of the prisoners who were threatening him did not "check out to any known offenders on the unit." Def. Br. 2:36. The record includes copious evidence to the contrary. Plaintiff first sought Mooneyham's protection from Andrew Hernandez in October; in November, Hernandez inflicted injuries on Plaintiff, which were documented by the medical department; in December, Plaintiff reported that Hernandez had stolen all his belongings and assaulted him. *See supra* at 10-12. Plaintiff provided the cell numbers of other assailants whom he knew only by nickname. [R6:1410] Defendants deliberately declined to interview Hernandez or any of the other

assailants – purportedly, "to protect the integrity of the investigation." [R6:1411]

Mooneyham and Vitolo contend that nevertheless the risk was not obvious because at the time Johnson requested protection he "had been separated from Garcia and K-Pod for nine days and assigned to 8 Building L Section for twelve hours." This is unpersuasive, since the UCC had been told that the threats resumed after Johnson was returned to Building 8 from segregation. *See supra* at 11-12.

Mooneyham and Vitolo argue further that they responded "reasonably" to any risk by noting that Johnson was not to be housed together with Garcia. Def. Br. 2: 36, 40. This response was patently *un*reasonable, since Johnson reported that he was being threatened not only by Garcia but also by Hernandez and other gang members in K, L and J Pods, and that the abuse was occurring not only in the housing area but in the chow hall where prisoners from various pods mingled at meal times. [R6:1410; R6:1417-18 (Johnson Depo. at 185-188); R6:1420 (Taylor Depo. at 27-29)

The February 14, 2001 UCC

Major Bowman, Case Manager Kuyava and Captain Boyle contend that they behaved reasonably in voting to deny safekeeping at the February 14 UCC because Johnson was unable to produce threatening notes or provide the full names of the prisoners who threatened him. Def. Br. 2:28, 30, 33. This excuse is pretext, since official TDCJ policy requires no such evidence, and in the vast majority of

cases where TDCJ approves safekeeping the prisoners present no "objective" evidence whatever of victimization. *See supra* at 8-9. Furthermore, Bowman, Boyle and Kuyava not only condoned Sgt. Willingham's failure to seek corroboration by interviewing the alleged perpetrator, Thomas Bail; they also ratified Willingham's Catch-22 conclusion that safekeeping should be denied because "there are no witnesses to these allegations" and "no proof of any aggression against Offender Johnson." [R6:1436]

Defendants' justification for ignoring the threat posed by Thomas Bail – that he was not "a known gang member" – is particularly specious. Defendants were well aware that they could not identify all gang members at Allred Unit. *See supra* at 10. The issue was not whether Thomas Bail was truly a gang member, but rather whether he was preying on Johnson.

Bowman, Boyle, and Kuyava also claim that they perceived no risk because Johnson's housing had been on continuous lockdown since January 20. Def. Br.2:28, 30. This argument is plainly spurious: Johnson had explicitly informed Defendants that "these people have sent me stern word that they will try and hurt me *when we are no longer lock down*." [R6:1432]

Finally, Bowman, Kuyava and Boyle argue that it was reasonable of them to return Johnson to Building 8 because they specified that he not be housed in the

same pod with Andrew Hernandez. Def. Br. 2:28. This conduct was in fact patently *un*reasonable, since Johnson had reported that he was being menaced not only by Andrew Hernandez but by Thomas Bail and many others in Building 8. Furthermore, Kuyava's admissions provide direct evidence that Defendants knew or at least strongly suspected that Johnson would again be victimized by sexual predators when they sent him back to Building 8: She told him, "You need to get down there and fight or get you a man." [R5:1325]

The February 21, 2001 UCC

There was copious evidence before the February 21, 2001 UCC that Plaintiff was at high risk of being sexually assaulted and needed protection, *see supra* at 17-18, including the violently threatening letters Johnson had turned over to Willingham. [R6:1454-57] Warden Wathen and Vitolo argue that they were nevertheless not deliberately indifferent in refusing safekeeping because (1) the alleged perpetrator, George Hall, was housed "in a different section than Johnson;" (2) Building 8 was on lockdown and would remain on lockdown for a period of time; (3) "the investigator could find no offender with the name or nickname 'Freedy'"; and (4) the UCC did not have enough information to make a decision regarding [Johnson's] claim." Def. Br. 2:41, 42.

These excuses are plainly pretextual. First, Defendants knew it made no

difference that George Hall was housed in 8 Building K Pod while Johnson was housed in 8 Building L Pod, because Johnson had told them that he was being menaced *in chow hall* by offenders from K Pod and L Pod, who mingled there. *See supra* at 11-12. Second, Johnson had reported that he gang members were threatening to hurt him "when we are no longer lock[ed] down." *See supra* at 15. Third, it was meaningless that Willingham had been unable to locate a "Freedy" since the menacing letter at issue was signed "Freddy," not "Freedy." *See supra* at 17-18 [R6:1450]. Fourth, it clashed with official policy and the 1999 *Ruiz* decision to deny safekeeping on the ground of "insufficient evidence," particularly when officials themselves had failed even to conduct interviews of the alleged perpetrators. *See supra* at 5-9, 13. Finally, there is *direct* evidence of the real reason for the UCC's denial of safekeeping: the UCC's chair, Warden Wathen, told Plaintiff "[t]here's no reason why Black punks can't fight and survive in general population if they don't want to f---." [R5:1326-27]

Wathen and Vitolo contend that even if they were aware of the risk they behaved reasonably in denying safekeeping because the three members of the UCC "voted unanimously to refer this matter" to the Security Threat Group Office. Def. Br.2:42, 44. Defendants could not discharge their own responsibility as UCC members simply by passing the buck to STG. In any event, arguments based on the

"reasonableness" of their reliance on STG investigations should be rejected since Defendants refused to produce information in discovery regarding STG polices, procedures, and investigations. [R5:1283-84]

The March 16, 2001 UCC

The risk was overwhelming obvious by the time of the March 16, 2001 UCC, for all the reasons stated above. *See supra* at 5-19. **Warden Wathen and Kuyava** contend that even if the risk was obvious, they "responded reasonably" because "the STG Office interviewed Johnson regarding his life endangerment investigation and possible extortion from several offenders" and "found no evidence to support any extortion at that time." Def. Br.2:31. This claim should be rejected for the reasons already stated. *See supra at* 47-48.

The September 5, 2001 UCC

Warden Wathen claims that his conduct was "objectively reasonable" in denying safekeeping at the September 5, 2001 UCC because the STG Office was unable to confirm that Marty Smith was a gang member and because "Johnson could not identify any of the offenders" to whom Marty Smith was prostituting him. Def. Br. 2:445. It is immaterial that Marty Smith was not a "confirmed" gang member, since Defendants could not identify all the gang members in the prison population. *See supra* at 10. The issue was not whether Marty Smith was a

confirmed gang member but whether Marty Smith and others were menacing Roderick Johnson. The risk was patently obvious to Wathen, for all the reasons stated above, *see supra* at 45-48. Further, Wathen had already made his explicit his awareness of, and indifference to, the risk to Johnson's safety when he told Johnson that he must fight. [R5:1326-27]

The December 13, 2001 UCC

Bowman, Kuyava and Ranjel contend that they were not deliberately indifferent in denying safekeeping or a Unit transfer at the December 13, 2001 UCC, because Plaintiff "would not or could not" not furnish the names of the sexual predators who were threatening him, and because the investigator could not corroborate his claims. Def. Br. 2:29-30, 35, 38. But Johnson *had* in fact supplied names, identifying, among others, Andrew Hernandez, S. Garcia, George Hall, Thomas Bail, Marty Smith, and Reyes, and Defendants always declined to interview the alleged assailants – "to protect the integrity of the investigation," or to protect Plaintiff. *See supra* at 12, 16, 18, 21, 27. Defendants also now claim – for the first time – that they were concerned at this December 2001 UCC that Plaintiff was "attempting to manipulate the system for secondary gains." Def. Br. 2:29-30, 35, 38. The record citation they provide lends no support for the claim that this was their motive. Moreover, Bowman, Kyava and Ranjel did not make this argument in

the District Court: then, their only argument was that Plaintiff "failed to provide any names" and thus they were not "aware of specific risk of harm" to him. [R4:920] It further undermines their credibility that they raise this new excuse on appeal.

The January 17, 2002 UCC

Norwood, Vitolo and Taylor contend that they were not deliberately indifferent in denying Johnson protection at the January 17, 2001 UCC because he could not supply the names of his alleged assailants or provide any specifics. Def. Br.2:37, 39, 42. In fact, Johnson supplied the names, identification numbers and housing areas of Santos Reyes and Eric Charboneau and he had reported that offenders masturbated on him in the showers. Defendants declined to interview anyone, ostensibly "to protect the integrity of the investigation," just as they had previously declined to interview Andrew Hernandez, S. Garcia, Marty Smith, Thomas Bail and George Hall.

Defendants also claim that they were not deliberately indifferent because the investigator "found no evidence that Reyes was associated with the Mexican Mafia," Def. Br. 2: 37, 39, 42. Defendants themselves concede that they are unable to identify all the gang members at Allred Unit. *See supra* at 10. Defendants further claim that their conduct was reasonable because Johnson was in solitary confinement at the time he wrote his letter to them. Def. Br. 2: 39. They were,

however, perfectly aware from his classification records and the investigator's report that Johnson was housed in solitary confinement on a temporary basis only and that his request for safekeeping was in contemplation of his return to general population. *See supra* at 28; R6:1492.

Finally, Defendants contend that their conduct was objectively reasonable because they were concerned that Johnson "was attempting to manipulate the classification system for secondary gain." Def. Br. 2:39. When cross-examined, however, not one of them could explain the basis for this "speculation;" indeed, they were utterly at a loss to explain what motive Johnson could possibly have had – other than genuine, desperate fear for his safety – for repeatedly seeking not only safekeeping but also protective custody, which is an extremely restrictive status involving significant loss of freedom and privileges. *See supra* at 29.

Furthermore, there is not only circumstantial but direct evidence that Defendants' "speculation of manipulation" justification was a pretext: In denying protection, Captain Norwood told Johnson that he believed he liked "dick," and thus should be placed on high security where he would have only one cell mate and could "get f---ed all the time;" Vitolo and Taylor laughed at this comment, and Taylor said that Johnson should just "learn to f--- or fight." [*Id.*] *See supra* at 28.

2. The "Non-UCC Defendants"

The "non-UCC Defendants" – Director Johnson, Warden Treon, Classification Chief Wright, Lt .Paul, and Sgt. Willingham – contend that Johnson's deliberate indifference claim must be dismissed because they did not participate in Johnson's classification hearings. Def. Br. 2:22-24. Defendants' premise – that only the classification committee can have any causal connection to Plaintiff's injuries – is incorrect. Director Johnson,[13] Treon, Wright, Paul and Willingham each had clear authority and obligation to take reasonable measures within the scope of his or her own duties to protect prisoners from rape; each was actually aware that Roderick Johnson was at substantial risk of serious injury; yet each either belligerently refused Roderick Johnson's requests for assistance or responded, if at all, only with empty and purely ritualistic gestures. Johnson repeatedly sought help, to no avail, from Willingham in October 2000, November 2000, December 2000, and February 2001; from Wright several times in January and February 2001; from Treon several times in December 2001 and January 2002; from Johnson in January 2002; and from Paul in March 2002. *See supra* at 10-32. Wright and Treon also received and ignored inquiries about Johnson from the Ombudsman's office. *See supra* at 30-31. **Treon,**

[13]Director Johnson had been court-ordered to ensure that all TDCJ wardens understood their responsibilities for protecting prisoners from rape. He ultimately secured Plaintiff's placement in safekeeping, based on nothing more than Plaintiff's "demeanor and orientation" – but only after intervention by the ACLU. *See supra* at 32-33.

Wright and Johnson argue that the Supreme Court's decision in *Sandin v. Conner*, 515 U.S. 472 (1995) "leaves Johnson without a federally protected right to have his grievances, much less his letters of complaint, investigated and resolved." Def. Br. 2:23. This argument is frivolous: *Sandin* concerned procedural due process rights and left completely untouched prisoners' "other protection from arbitrary state action even within the expected conditions of confinement," including "[the] Eighth Amendment[] and the Equal Protection Clause of the Fourteenth Amendment where appropriate[.]" 515 U.S. at 487 n. 11. Plaintiff has never claimed that his right to procedural due process was violated: he claims, rather, that Director Johnson, Wright and Treon were deliberately indifferent to the risk that he would be sexually assaulted, in violation of the Eighth Amendment, and that the letters and grievances they ignored are evidence that they were actually aware of the risk.

Treon, Wright and Johnson argue further that they responded reasonably to his letters and grievances because their offices have a "process" for handling letters and grievances, and that this process was followed and led in some cases to UCC hearings. Def. Br. 2:23-24. Defendants were well aware, however, from those very letters and grievances, that their "processes," although leading to UCC hearings, were providing Plaintiff no protection whatsoever from rape. *See supra* at 14-17, 26, 29-30. "The imposition of extensive policies and the formation of a bureaucracy do

not [] immunize the system from constitutional challenge. The measure of a prison system's constitutionality, as always, is not its production of policies, but its treatment of inmates." *Ruiz*, 37 F. Supp. 2d at 940.

Director Johnson also argues that "[t]here is no clearly established law that requires the Executive Director of the Texas Department of Criminal Justice to write back to Plaintiff, nor is there any clearly established law that requires Defendant Johnson to place Plaintiff in safekeeping based on the alleged letter." Def. Br.1:31. The issue is not whether Director Johnson was required to "write back to Plaintiff" or to respond to Plaintiff's letter by placing him in safekeeping, but rather whether Director Johnson knew of a substantial risk to Plaintiff and failed to take reasonable measures to abate the risk. The reasonableness of Director Johnson's inaction must be judged in light of the federal court findings and orders in *Ruiz* which had instructed him in the gravity of the problem, the severity of the risk, and the nature of his responsibilities in responding to that risk.[14]

Lt. Paul argues that the Complaint does not state a claim of failure-to-protect

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[14]At Defendant Johnson's deposition, TDCJ counsel instructed him on grounds of qualified immunity not to answer various questions designed to elicit information as to his personal knowledge of the risk to Plaintiff and whether he had taken reasonable measures to abate the risk. For example, he was instructed not to answer what steps he took to implement, the 1999 and 2001 Orders in *Ruiz*. [R5:1312, 1314, 1317, 1318] He obtained a protective order which is still in effect pending resolution of his qualified immunity claim. [R5:1284-85]

against him because Plaintiff "does not allege that he ever told Paul that he was being sexually abused or that Paul was ever aware of the risk of harm to Plaintiff." Def. Br. 1:30. This is inaccurate. The Complaint alleges, and Plaintiff submitted competent evidence to show, that gang members sexually abused Plaintiff and a mentally ill prisoner; when they informed Paul about the assault immediately afterwards he offered no assistance but instead threatened them. [RE Tab 5, ¶¶ 102-104; R5:1333-34].

B. Defendants Had Fair Warning That Their Conduct in Arbitrarily Refusing Plaintiff Protection from Sexual Assault Violated the Eighth Amendment

It was clearly established at the time of Defendants' actions that their conduct violated his constitutional rights. Indeed, Defendants had been repeatedly warned by the *Ruiz* court – in March 1999, June 2001, and October 2001 – that their conduct in creating high barriers to safekeeping and protective custody, their "game of willing disbelief" in the face of obvious risks, their placing on vulnerable prisoners the burden of *proving* their need for protection by fighting sexual predators, presenting bruises, and the like, violated the Eighth Amendment. *See supra* at 5-7, 20-21, 22-23.

Defendants complain that they nevertheless could not have known that their conduct violated the law because "[t]here is no Fifth Circuit or Supreme Court

holding on [the] specific legal question" of a prisoner's entitlement to safekeeping. Def. Br. 2:25-26. The Supreme Court, however, has firmly rejected prison officials' argument that the law is not clearly established unless there are Circuit or Supreme Court holdings on "the specific legal question" posed. Officials can "be on notice that their conduct violates established law even in novel factual circumstances," and "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Hope v. Pelzer*, 536 U.S. 730 (2002) (citing *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)).

In *Hope*, Alabama prison officials argued that, at the time they shackled the plaintiff to a hitching post, allegedly for security reasons, it had not been clearly established that use of the hitching post violated the Eighth Amendment. The Supreme Court rejected the argument, elucidating that for qualified immunity purposes the salient question is *not* whether the right has been established in a case with materially similar facts, but whether the state of the law at that time gave defendants "fair warning" that the alleged treatment was unconstitutional. *Id.* at 741. The Court decided that some notice was provided by Circuit precedent finding other forms of corporal punishment impermissible. *Id.* at 742. The Court further reasoned that "the obvious cruelty inherent in the practice should have provided respondents

with some notice that their conduct was unconstitutional," *id.* at 745, since "Hope was treated in a way antithetical to human dignity--he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous." *Id.* In addition, the Court found, an Alabama Department of Corrections regulation requiring that prisoners be given regular bathroom and water breaks provided fair warning to prison officials that their use of the hitching post *without* providing the requisite water and bathroom breaks would violate the prisoner's Eighth Amendment rights. *Id.* at 743-744. Moreover, warning had been provided by a U.S. Department of Justice Report criticizing Alabama's use of the hitching post as inhumane. *Id.* at 744-745. The Court decided that district court findings in a class action case against the Alabama DOC of multiple instances of degrading and inhumane use of the hitching post were also relevant: the awareness of risk attributable to any individual prison official could be evaluated in part by considering the pattern of treatment that inmates generally received. *Id.* at 738 n.8.

Defendants here had far clearer and more explicit warning than the prison officials in *Hope* that their conduct violated Plaintiff's Eighth Amendment rights. The Supreme Court announced nearly a decade ago that prison officials violate prisoners' Eighth Amendment right not to be sexually assaulted when, with

conscious disregard of a substantial risk that a prisoner will be raped, they fail to take reasonable measures to abate that risk. *Farmer*, 511 U.S. at 839-847. At the same time, the Supreme Court made clear that prisoners may not be required to specifically identify their potential assailants in order to be entitled to protection. *Id.* at 843-844.

> The Fifth Circuit has likewise made it abundantly clear that "[p]rison authorities must protect not only against current threats, but also must guard against sufficiently imminent dangers that are likely to cause harm in the next week or month or year." *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995) (quotation marks and citations omitted) (holding that a risk of serious harm could be found to be obvious where Texas prisoner alleged that he had filed three grievances about a predatory inmate, made at least one oral complaint to a guard, and wrote his correctional officer about the problem). What is more, the multiple decisions and orders in the *Ruiz* class action provided Defendants with the most precise warning imaginable that their conduct violated the Eighth Amendment. **II. A TRIER OF FACT COULD FIND THAT BOWMAN, BRIGHT, KUYAVA, NORWOOD, RANJEL, TAYLOR, VITOLO AND WATHEN ARBITRARILY DISCRIMINATED AGAINST PLAINTIFF BASED ON HIS RACE AND HOMOSEXUALITY AND THEY HAD FAIR WARNING THAT THEIR CONDUCT DENIED EQUAL PROTECTION**

A. Plaintiff Adequately Alleged Equal Protection Claims and Presented Competent Evidence Supporting Those Allegations

1. Plaintiff's Allegations Were Sufficiently Specific

Defendants[15] contend that the allegations of the Complaint do not state an

[15] Defendants continue to argue the Equal Protection claim as to Mooneyham, Willingham

Equal Protection claim because they are not "specific enough for each defendant to identify the group of similarly situated prisoners and to identify the manner in which the plaintiff was treated differently." Def. Br. 1:19. In fact, the Complaint alleged that Defendants refused Plaintiff's repeated pleas to be housed in safekeeping, insisting that, "because he is Black, he should either be able to fight off his attackers or else accept his sexual victimization"; they repeatedly "expressed contempt for non-aggressive gay men, and made it explicit that it was their practice to refuse to protect such inmates from sexual assault, at least until such inmates were savagely beaten." [RE Tab 5 at 1-2] The Complaint alleged that in arbitrarily refusing Plaintiff protection from sexual assault, certain of the Defendants made remarks revealing that the refusal was motivated not merely by deliberate indifference but also by antipathy and contempt for homosexuals, and in particular for gay Black men. [*Id.*] The gist of their remarks was that homosexuals enjoy being raped, and that a gay Black man in particular should have to fight off sexual predators if he did not want to be raped. In voting to deny safekeeping, Major Bright told Johnson, "We don't protect punks [homosexuals] on this farm;" Warden Wathen told him, "There's no reason why Black punks can't fight and survive in general population if they don't want to f—;" Bowman told him, "If you want to be a ho, you'll be

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and Paul, even though Plaintiff expressly relinquished his equal protection claim against those

treated like a ho," and "Get a man;" Ranjel added, "preferably a Black one;" and Kuyava, after a decision to deny safekeeping and send Plaintiff to a housing area heavily populated by gang members, stated, "Ms. Pretty is going to a good place now," "You ain't nothing but a dirty tramp," and "Learn to fight or accept the f---ing." [*Id.* at ¶¶ 33, 52, 55, 76. 77] The Complaint alleged that Captain Norwood told Plaintiff that he had probably consented to the sex because he "like[d] d---" and that he should be placed on high security where he would have only one cell mate and could "get f---ed all the time;" Vitolo and Taylor laughed at Norwood's remarks, and Taylor told Johnson that he should "learn to f--- or fight." [*Id.* at 86] Plaintiff submitted competent evidence supporting those claims. *See supra* at 9, 17, 18-19, 25, 28.

2. Plaintiff Provided Direct Evidence of Discrimination

Defendants argue that the Defendants' statements are insufficient to show intentional discrimination in violation of § 1983 because Plaintiff has not identified a similarly-situated, non-gay, non-Black individual to whom Defendants granted safekeeping. Def. Br. 1:19. This argument should be rejected for two reasons.

First, Plaintiff requested such evidence in discovery but Defendants refused to produce it, and Plaintiffs opposed summary judgment on this ground with a Rule

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three Defendants at the close of discovery. *See* R5:1223-24.

56(f) affidavit [R5:1283-1284]. *See Int'l Shortstop, Inc. v.Rally's, Inc.* , 939 F2d. 1257 (5th Cir. 1991) (holding that where the evidence which the nonmoving party could offer to create a factual dispute is in the exclusive possession of the moving party, and informs the court that its diligent efforts to obtain the evidence have been unsuccessful, a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course.)

Second, Plaintiff did not need to identify a similarly-situated, non-gay, non-Black individual to whom Defendants granted safekeeping in order to make out a prima facie case that Defendants denied him equal protection. "The precise requirements of a prima facie case of discrimination can vary depending on the context and were never intended to be rigid, mechanized, or ritualistic." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) (interior quotation marks and citations omitted).[16] Furthermore, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. *Id.* at 511.

Because direct evidence of discriminatory intent is rarely available, plaintiffs usually must rely on circumstantial evidence, which is less advantageous since it

[16]The inquiry into intentional discrimination is essentially the same for individual actions brought under sections 1981 and 1983 and Title VII. *See Wallace v. Texas Tech University,* 80

subjects them to the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Within that framework, the plaintiff carries the initial burden of establishing a prima facie case of intentional discrimination.[17] The defendant can rebut that prima facie case by producing evidence of a legitimate reason for the adverse action. Then the burden shifts to the plaintiff to prove that the discriminatory motive was a "but for" cause of the adverse action. If the plaintiff presents evidence that the legitimate reason given by the defendant was a pretext, a jury may infer the existence of this "but for" causation. *See Texas Dep't of Com'ty. Affairs v.Burdine,* 450 U.S. 248, 252-253 (1981) (citing *McDonnell Douglas*).

On the other hand, if the plaintiff can present direct evidence that the employer's motivation for the adverse action was at least in part based on discriminatory animus, the plaintiff is entitled to bypass the *McDonnell Douglas*

F.3d 1042 (5th Cir. 1996), *citing Briggs v. Anderson,* 796 F.2d 1009, 1019-21 (8th Cir.1986) .

[17]"The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Texas Dep't of Com'ty. Affairs v. Burdine,* 450 U.S. 248 (1981). In *McDonnell Douglas,* the Court described an appropriate model for a prima facie case of racial discrimination in employment: The plaintiff must show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802. The Court added, however, that this standard is not inflexible, as "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Id.*, at 802, n. 13.

framework altogether, and the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor. *See Fierros v. Texas Dep't. of Health,* 274 F.3d 187, 191-192 (5th Cir.2001); *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir.1993); *Moore v. U.S. Dep't of Agric.,* 55 F.3d 991, 995 (5th Cir.1995). Plaintiff Johnson has shown Defendants' discriminatory motive through both circumstantial and direct evidence.

Direct evidence is "evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption." *Portis v. First Nat'l Bank,* 34 F.3d 325, 328-29 (5th Cir.1994) (quoting *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d at 861). Direct evidence "includes any statement or document which shows on its face that an improper criterion served as a basis, not necessarily the sole basis, but a basis, for the adverse [...] action." *Fabela v. Socorro Indep. Sch. Dist.,* 329 F.3d 409, 415 (5th Cir.2003); *see also Fierros,* 274 F.3d at 192; *Portis,* 34 F.3d at 329.

The statements that Bowman, Kuyava, Norwood, Ranjel, and Wathen made to Plaintiff in denying him protection from rape (*e.g.*,"we don't protect punks [homosexuals];" "There's no reason why a Black punk can't fight if he doesn't want

to f—") are classic examples of direct evidence of discriminatory intent. *Compare, e.g., Fierros,* 274 F.3d at 195 (plaintiff's statement that her employer said she had been denied a pay increase because she filed a discrimination complaint against him was direct evidence of retaliatory motive); *Portis,* 34 F.3d at 329 (plaintiff's testimony that her employer told her that she "wouldn't be worth as much as the men would be to the bank" was direct evidence of the employer's discriminatory intent); *Brown,* 989 F.3d at 861-862 (evidence that a supervisor referred to the plaintiff and other African Americans as "niggers" was direct evidence that racially discriminatory animus motivated the contested disciplinary action). Because Plaintiff presented direct evidence of Defendants' discriminatory intent, the burden has shifted to them to prove at trial by a preponderance of the evidence that they would have taken the same action regardless of the impermissible criterion they employed.[18] *See supra* at 62. Even if Defendants had presented such evidence, it would have been insufficient to secure summary judgment but merely created a

[18] Defendants rely on *E.E.O.C. v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996) for the proposition that comments alone do not violate the equal protection clause. Def.Br.1:21. Plaintiff does not claim that Defendants' words violated his rights; their failure to grant him protection violated his rights, and their words illuminated their discriminatory motive. In *Texas Instruments*, the Court noted that "direct and unambiguous" comments may show discriminatory intent depending upon the context. 110 F.3d at 1181. Here, Defendants made the offensive comments in the context of denying safekeeping.

triable issue of fact. *See Fabela,* 329 F.3d at 418.[19]

Vitolo and Boyle point out that Plaintiff does not attribute specific racist or homophobic remarks to them, and they contend that they denied him protection solely because he did not produce enough evidence to persuade them that he was at risk. Def. Br. 1:21-22.[20] Plaintiff met that contention with ample circumstantial evidence from which a trier of fact could conclude that this purported reason was a pretext, covering up an impermissibly discriminatory motive: Plaintiff showed: (1) he was plainly eligible for protection under TDCJ's official policy; (2) TDCJ generally does *not* require prisoners to present "objective" proof that they will be victimized before granting safekeeping, but to the contrary in the vast majority of cases grants safekeeping without such proof; (3) Vitolo and Boyle participated in UCCs during which their fellow committee members explained the UCC's refusal to grant safekeeping with racist and homophobic remarks; (4) rather than distancing

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[19]The two cases Defendants cite are distinguishable. In *Wheeler v. Miller*, 168 F.3d 241 (5th Cir. 1999), and *Beeler v. Rounsavall*, 328 F.3d 813 (5th Cir. 2003), comparison with other similarly situated persons was necessary because plaintiffs, each of whom were members of a "class of one," had no direct evidence of discrimination.

[20]Defendants also advance this argument on behalf of Mooneyham, Willingham, and Paul, although Plaintiff relinquished his equal protection claim against them at the close of discovery. *See* R5:1223-24.

themselves from those remarks they essentially adopted them.[21] This circumstantial evidence permits the inference that in denying safekeeping Vitolo and Boyle were motivated by the same invidious discriminatory intent as their fellow committee members who openly expressed their homophobic and racial bias. *See McDonnell Douglas Corp. v. Green,* 411 U.S. at 804-805 (providing examples of evidence by which pretext may be proved, and ruling that plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision").

3. Plaintiff Adequately Alleged That Defendants' Conduct Was Not Rationally Related to Legitimate Correctional Needs

Defendants contend that the Complaint does not state an equal protection claim because it fails to allege that their policy of refusing safekeeping to Blacks and homosexuals was devoid of a rational relationship to a legitimate penological goal. Def. Br. 1:22-24. According to Defendants, *Plaintiff* had the burden of alleging that

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[21]When Wathen told Johnson, " "There's no reason why Black punks can't fight and survive in general population if they don't want to f—," Vitolo voted to table the life endangerment claim; she responded with laughter to Defendant Norwood's lewd remark to the effect that Plaintiff was not entitled to safekeeping because he was gay and probably enjoyed sexual abuse. *See supra* at 19, 28. Boyle later told Plaintiff that since he had not been stabbed or "gutted," prison officials would not place him in safekeeping, and that unless Plaintiff signed a waiver of his life endangerment claims, "we are really going to f--- you over." *See supra* at 32.

"the use of race was *not* rationally related to a legitimate penological interest," and since he did not so allege, "the great deference afforded state prison officials requires this Court to assume" that their race-based decision to deny safekeeping was related to a legitimate penological interest. Def. Br.1:26. This argument is based on multiple fallacies.

First, the "rational relationship" standard does not apply to prisoners' racial discrimination claims: a strict scrutiny test applies, and *prison officials* have the affirmative burden of demonstrating that there are "particularized circumstances" in which racial tensions make it essential for the sake of security to consider race in making housing assignments. *See Lee v. Washington*, 390 U.S. 333, 334 (1968); *accord, Sockwell v. Phelps*, 20 F3d 187, 191 (5th Cir. 1994).

Second, in cases when the rational basis test does apply, Defendants' premise that "to survive a motion to dismiss, a prisoner must *allege*" lack of rational basis, Def. Br. 1:22, is incorrect. In *Turner v. Safley*, 482 U.S. 78 (1987), the Court made it plain that when a prisoner challenges a prison policy as an infringement of constitutional rights, it is prison officials who have the initial burden of articulating a "legitimate penological objective" for the policy. *See Turner*, 482 U.S. at 89-90. It then becomes the prisoner's burden to prove that the purported justification is invalid, because "the logical connection between the regulation and the asserted goal

is so remote as to render the policy arbitrary or irrational," or because it is not "neutral," or because it is "an exaggerated response." *Id.* at 89-91.[22]

Defendants here have never had the temerity to assert that they have a legitimate penological interest in refusing safekeeping status on the basis of any prisoner's race or sexual orientation. To the contrary, they have flatly denied that race played any part in their decisions to deny Plaintiff safekeeping. [RE TAB 6 at 81- 85] In moving for summary judgment they insisted that the sole reason they refused to grant Plaintiff safekeeping was that he could not prove to their satisfaction that he was being victimized. [R4:932-934] And even while urging this Court to "assume" that they have a legitimate reason for denying safekeeping based on race and homosexuality, *see* Def. Br. 1: 22-24, they nowhere identify what that interest might be.

Third, even if plaintiffs did have the burden under *Turner* of pleading lack of rational purpose, the Complaint here amply met any such burden. It abounds with

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[22] The cases Defendants cite are inapposite. In *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002), the issue was surveillance of male prisoners by female guards; the court did not analyze the plaintiff's equal protection claim using the *Turner* standard but affirmed summary judgment because the male and female prisoners were not similarly situated. *Id.* at 746. In *Thompson v. Patteson*, 985 F.2d 202, 207 (5th Cir. 1993), the court noted that the plaintiff had *not* alleged discrimination on the basis of race or some other personal or class characteristic or that he was treated differently because of any improper motive. *Overton v. Bazzetta*, 123 S.Ct. 2162, 2168 (2003) says nothing about pleading requirements; it merely states, consistent with *Turner*, that the burden "is not on the State to prove the validity of prison regulations but on the prisoner to

allegations, both general and specific, that Defendants' conduct was arbitrary and irrational, and thus, *ipso facto,* not "rationally related to a legitimate penological interest." *See Turner*, 482 U.S. at 89-90 ("[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."). Plaintiff alleges, for example, that in denying him protection from sexual victimization, Defendants subjected him to "an irrational and arbitrary classification based on his sexual orientation, and treated him differently than other similarly situated inmates based on their hostility and animus toward non-aggressive gay men." [RE Tab 5, ¶ 124] He alleges that Defendants' own official policy explicitly recognizes homosexuality as a major risk-factor for sexual victimization and a reason to *grant* safekeeping, yet Defendants arbitrarily relied on his homosexuality as a reason to *deny* him safekeeping. [RE Tab 5,¶ ¶ 30, 33, 55, 86]

4. Plaintiff's "Information and Belief" Allegations Were Proper

Defendants assert that it is "not proper" under the Federal Rules of Civil Procedure to plead on information and belief, Def. Br. 1:20,[23] citing *McClendon v.*

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disprove it." *Id.*

[23]The only allegations that Plaintiff pled "on information and belief" are that "the Allred Defendants follow a custom and practice of denying safekeeping to vulnerable Black inmates even in cases of obvious need," that they are "far less likely to grant safekeeping to Black inmates than

City of Columbia, 302 F.3d 314, 323 (5th Cir. 2002). *McClendon* concerned the sufficiency of the evidence on summary judgment, "after significant discovery," and had nothing whatsoever to do with the adequacy of allegations pled "on information and belief."

Defendants also assert that "[i]n those areas where a party may plead on information and belief, the party must articulate the facts which lead them to the alleged belief." Def. Br.1:20. Defendants' sole source for this proposition is *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 201 F.3d 336 (5th Cir. 2002), a case which concerned only the *statutory* pleading requirements for securities fraud claims under the Private Securities Litigation Reform Act, which specifically provides that "'if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is based. '" 201 F.3d at 350 (quoting the statute).

5. Even if Plaintiff Were Required to Meet a Heightened Pleading Standard He Has Met That Standard

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to other similarly situated inmates," and that they "follow a custom and practice of denying safekeeping to non-aggressive, gay men in need of protection." [RE Tab 5, ¶ 2] Plaintiff sought to discover documents on these points but Defendants refused to produce them, and Plaintiffs opposed summary judgment with a Rule 56(f) affidavit on this ground. *See supra* at 60. The case Defendants rely on, *see* Def. Br. 1:20, is completely inapposite. *Taylor v. Books A Million, Inc.*, 296 F.3d 376 (5th Cir. 2002) held that a plaintiff's allegation that his complaint was "timely" filed was insufficient because the complaint was untimely *on its face* due to a rebuttable legal

Defendants assert that this Court's decision in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc), requires § 1983 plaintiffs suing state officials in their individual capacities to meet a heightened pleading requirement. Def. Br. 1:12. That contention is inaccurate. Rather,"[w]hen a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail." *Schultea*, 47 F.3d at 1433.[24] Defendants here never moved for an order requiring Plaintiff to file a reply,[25] the District Court did not exercise its discretion to order a reply *sua sponte*, and the propriety of that exercise of discretion is not at issue in

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presumption, which the facts alleged in the complaint failed to contradict. *Id.* at 389-380.

[24]In *Schultea*, this Court decided that henceforth it would not rely upon a requirement of heightened pleading of complaints as the procedural mechanism for protecting state actors from invalid claims at the pleading stage, but rather would rely upon Federal Rule of Civil Procedure Rule 7(a), which permits the district courts to order a reply to an answer in cases where it believes more particularity is required. *Id.* at 1433. The Court held that a district court "*may, in its discretion*, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity. . . . *when greater detail might assist." Id.* at 1434 (emphasis added).

[25] Defendants offer a peculiar explanation for their failure to move for a Rule 7(a) reply: They say that they had an "informal conversation with the court's staff" which "confirmed" that Rule 7(a) replies were "disfavored" in the Northern District. Defs.' Br. 1:14 n.36. Whatever Defendants may have gleaned from an informal conversation entirely outside the record in this case, the reality is that Rule 7(a) motions *are* entertained in the Northern District, and the District Court grants such motions in appropriate cases. *See Forge v. City of Dallas*, No. 3-03-CV-0256-D, 2003 WL 21149437, (N.D. Tex. May 19, 2003) (unpublished) (granting the defendants' motion to require the plaintiff to file a Rule 7(a) reply where the complaint failed to allege any facts regarding the defendants' conduct).

this appeal. *See* Appellants' Statement of the Issues, Def. Br. 1:3.[26] Thus, the issue posed in this appeal is whether Plaintiff's Complaint satisfies the requirement of Federal Rule of Civil Procedure 8(a) as a "short and plain statement of the claim showing that [he] is entitled to relief." The Complaint far exceeds that standard.

Furthermore, even if Defendants had moved for an order requiring Plaintiff to file a Reply, it would have been pointless for the District Court to order one since Defendants' Answer to the Complaint merely made a blanket denial of Plaintiff's factual allegations, without addressing a single one of the specific allegations regarding Defendants' wrongful conduct. [RE Tab 6, ¶1, 11-16] Thus, the Complaint itself provided even more detail than would have been required by a Reply: "By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations. A defendant has an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply." *Schultea*, 47 F.3d at 1433. In this case, greater detail from Plaintiff would not have assisted the District Court, and the District Court certainly did not abuse its discretion in not *sua sponte* ordering a Rule 7(a) reply.

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[26]Because Defendants failed to raise this issue on appeal, they have waived it. *See Andrade v. Chojnacki,* 338 F.3d 448, 457 (5th Cir. 2003); *United States v. Valdiosera-Godinez,* 932 F.2d 1093, 1099 (5th Cir. 1991).

See id. at 1434.

In any event, even if Plaintiff were required to meet a heightened pleading standard, he has met it. Defendants concede that even heightened pleading requires no more than "claims of specific conduct and actions giving rise to a constitutional violation" rather than mere "conclusory allegations." Def.Br. 1:16 (citing *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985)).[27] The Complaint amply meets this standard. It identifies each of the Defendants who were personally involved in the constitutional violations alleged, and the specific acts or omissions of each that were causally connected to the constitutional violations alleged. *See Anderson v. Pasedena Indep. Sch. Dist.*, 184 F.3d 439, 443-444 (5th Cir.1999) (stating that, in order to meet a heightened pleading standard in a § 1983 case, a plaintiff "must identify defendants who were either personally involved in the constitutional violation or whose acts are causally connected to the constitutional violation alleged;" plaintiff had sufficiently pled a causal connection to overcome qualified immunity even though the plaintiff did not know prior to discovery whether each defendant had voted for or dissented from those decisions).

B. Defendants Had Fair Warning That Arbitrary Discrimination

[27]As this Court has pointed out, the difference between "heightened pleading"and the notice-pleading required by Rule 8(a) has amounted in practice merely to a requirement that a plaintiff plead more than conclusions. *Schultea,* 47 F.3d at 1430.

Against Prisoners on the Basis of Race or Sexual Orientation Violated Their Right to Equal Protection of the Laws

Defendants maintain that the qualified immunity question posed by this appeal is whether it was clearly established, at the time of the events on which the Complaint is based, that "the use of race or sexual orientation as a factor in state prison classification decisions violates the Equal Protection Clause, when the use *is rationally related to a legitimate penological interest.*" Def. Br. 1:25 (emphasis added). That is certainly *not* the question here. Plaintiff alleged and submitted competent evidence to prove that Defendants' decisions denying Plaintiff protection from assault were arbitrary and irrational, the product of deliberate indifference, racism, and homophobia. Thus, the qualified immunity question in this case is whether Defendants violated Plaintiff's constitutional rights by arbitrarily refusing him protection from known risks of sexual assault, and if so whether that right was clearly established at the time of Defendants' actions.

By the year 2000, any reasonable correctional official would have known that the Equal Protection Clause forbids arbitrary discrimination against prisoners on the basis of their race. *See Lee v. Washington*, 390 U.S. 333 (1968). While Defendants claim that *Lee*'s prohibition on discrimination is limited to "segregation" based on race, Def. Br. 1:25, that is flatly incorrect: the Supreme Court has explained that *any*

"invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to 'prison security and discipline.'" *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (citing *Lee v. Washington*).[28]

Similarly, Defendants had fair warning that they could not deny safekeeping to a prisoner merely because he is a homosexual. Years before the events that are the subject of the Complaint, the Supreme Court held that a state violates the Equal Protection Clause when it deliberately seeks to disadvantage homosexuals, since, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996) (internal quotation marks and citation omitted). *Cf. Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam) (holding that allegations of "irrational and wholly arbitrary" government action, "quite apart from ... subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.").

Defendants do not and cannot claim that they had any legitimate interest in denying Plaintiff safekeeping on account of his sexual orientation: according to their own

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[28]Defendants' claim that classification decisions on the basis of race are evaluated under *Turner, see* Def. Br. 1:23 & n.71, is simply incorrect. *See supra* at 66.

official policy, homosexuality provides a prima facie justification for safekeeping.

CONCLUSION

The Court should affirm the District Court's denials of summary judgment and judgment on the pleadings.

Respectfully submitted this 29th day of December 2003.

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Margaret Winter (Attorney in Charge)

Amy Fettig

Craig Cowie

National Prison Project of the ACLUF, Inc.
733 15th Street, NW, Suite 620
Washington, D.C. 20005
Tel.: 202.393.4930;
Fax:202.393.4931
mwinter@npp-aclu.org

Edward Tuddenham

1203 Newning, Austin, TX 78704
Tel: 512.441.9759; Fax: 512.443.4258

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct paper copy and a true and correct electronic copy of BRIEF OF PLAINTIFF-APPELLEE has been served by first class United States Mail, postage prepaid, and that the brief has also been transmitted by email, this 29th day of December 2003 to:

Celamaine Cunniff
P.O. Box 12548, Capitol Station
Austin, Texas 78711
Cela.Cuniff@oag.state.tx.us

Counsel for Defendants-Appellants

_____

Margaret Winter
National Prison Project of the
ACLUF, Inc.
733 15th Street, NW, Suite 620
Washington, D.C. 20005
Tel.: 202/393-4930
Fax.: 202/393-4931
mwinter@npp-aclu.org

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C) and Fifth Circuit Rules 32.2 and 32.3, the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) as follows:

1. This brief contains 18,784 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) as counted by WordPerfect 10, the word-processing software used to prepare the brief;
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Margaret Winter
Attorney for Plaintiff-Appellee