IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 98-7337

ALEXANDER MICKLE, ET AL.,

Appellants,

v.

MICHAEL MOORE, ET AL.,

Appellees.

"IN RE: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS"

On Appeal from the United States District Court for the District of South Carolina Charleston Division

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Richmond, VA

18 September 1998

No. 98-7337 Long Term Admin v. Moore

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

NOTE: ONLY ONE FORM NEED BE COMPLETED FOR A PARTY EVEN IF THIS PARTY IS REPRESENTED BY MORE THAN ONE ATTORNEY. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUALS AS WELL AS CORPORATIONS AND OTHER LEGAL ENTITIES. DISCLOSE PUBLICLY OWNED CORPORATIONS AND ENTITIES ONLY. EXCLUDE WHOLLY OWNED SUBSIDIARIES. COUNSEL HAS A CONTINUING DUTY TO UPDATE THIS INFORMATION.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Moore, Catoe and McKellar (name of party) who ~~xx~~ are appellees (appellant/appellee),

makes the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity? (check one) ( ) YES (xx) NO

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

   (check one) ( ) YES (x) NO

   If the answer is YES, state the name of the entity and its relationship to the party:

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (see Local Rule 26.1(b))?

   (check one) ( ) YES (x) NO

   If the answer is YES, state the name of the entity and the nature of its financial interest:

(signature) 9/28/98 (date)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. On this summary judgment record, were the actions of prison officials reasonably related to legitimate penological interests according to Turner v. Safley and, therefore, not in violation of the inmates' Free Exercise or Equal Protection rights when prison officials designated the Five Percenters a Security Threat Group and reclassified them to a higher custody level based on their record of violence within the South Carolina Department of Corrections?

2. Do the non-prisoner cases of Employment Division v. Smith and Church of Lukumi Babalu Aye, Inc. v. City of Hialeah apply to the inmates' Free Exercise claims, or are those claims governed by the prisoner case of Turner v. Safley?

3. If Employment Division v. Smith and Church of Lukumi Babalu Aye, Inc. v. City of Hialeah are applicable, did the prison officials violate the inmates' Free Exercise rights when they designated the Five Percenters a Security Threat Group and re-classified them to a higher custody level following the Department of Corrections' Security Threat Group policy that is of general applicability and neutral toward religion?

4. Did the prison officials violate the inmates' Equal Protection rights when the officials' actions met the "reasonableness" standard of Turner v. Safley?

5. Did the prison officials violate the inmates' Eighth Amendment rights when there is no showing of any "serious deprivation of a basic human need" nor "deliberate indifference" on the part of prison officials?

6. Are the prison officials protected by qualified immunity when their actions to designate the Five Percenters as a Security Threat Group and to re-classify them to a higher

custody level did not violate any clearly established, specific right of which a reasonable person would have known?

7. Did the District Court abuse its discretion or commit clear error in denying class certification when no prejudice has been shown to any party?

STATEMENT OF THE CASE

Approximately forty nine inmates confined in the South Carolina Department of Corrections ("SCDC") filed individual lawsuits challenging their confinement in Administrative Segregation or "M" Custody on account of their membership in a group known as the Five Percenters. Some also challenged an SCDC ban on Five Percenter literature. Those individual actions were consolidated by Order of the District Court filed October 25, 1996. In that Order the Court denied class certification.

On December 31, 1996, a First Amended Complaint was filed on behalf of forty four individual inmates making First Amendment, Equal Protection and Eighth Amendment challenges, among others, to the inmates' confinement in administrative segregation or "M" Custody (initially called "ML5"), and also making a First Amendment challenge to SCDC's ban on Five Percenter literature. Named as defendants were Michael Moore, Director of SCDC; William Catoe, Deputy Director of SCDC; and Kenneth McKellar, SCDC Director of Security (hereinafter sometimes "the prison officials").

The inmates moved for a preliminary injunction. Thereafter the prison officials moved for summary judgment, both on the ground of qualified immunity and on the merits. On December 3, 1997, the Honorable Patrick Michael Duffy granted the prison officials' motion for summary judgment except as it related to the ban on Five Percenter literature, and he denied the motion for preliminary injunction except that he ordered pendente lite that prison officials must allow properly censored Five Percenter literature to inmates confined in administrative segregation or "M" Custody.

On August 21, 1998, the parties entered into a consent order whereby SCDC agreed that the preliminary injunction would be made a permanent injunction, so that all inmates in segregated confinement within SCDC would be allowed to possess Five Percenter literature after the literature is censored by SCDC to remove passages that may encourage violence or that would be so inflammatory as to pose a security threat. The inmates have now appealed the entry of summary judgment against them as well as the denial of class certification.

STATEMENT OF FACTS

The Five Percenters are an organization who have been identified by the Federal Bureau of Prisons as a "criminal group" that "operates behind a facade of cultural and religious rhetoric." [Federal Bureau of Prisons Intelligence Summary, JA 193] Inmates belonging to the Five Percenters have been present within SCDC since at least 1992. [Information Memorandum, Case No. 01-0111, JA 149] Members have said their group is "like a religion" to them. [Declaration of Azem, JA 356; Declaration of Mickle, JA 360; Declaration of Jenkins, JA 364; Declaration of Stevenson, A, 369]

Within SCDC, the Five Percenters have been a very assertive group of inmates who try to undermine prison authority and try to establish control over other inmates. [Affidavit Miro, JA 138-30] They are rebellious and resistant to authority, and they aggressively recruit new members. [Affidavit Frederick, JA 135] They are a fear-based group who roam as a wolfpack and their members engage in strong arming and assaults. [Affidavit Maxey, JA 143]

On or about June 16, 1995, Michael Moore, Director of the South Carolina Department of Corrections ("SCDC"), designated the Five Percenters a Security Threat Group ("STG"). [Affidavit Moore, JA 131] His decision was based on their history of violence within SCDC and other prison systems around the country. [Id.; Memorandum from McKellar to Moore, JA 185]

The Security Threat Group policy for SCDC sets out a procedure for "validating" or confirming an individual inmate as a member of an STG, which includes giving the inmate a hearing. [Affidavit Moore, JA 131; SCDC Procedure No. OP-21.01(OP), JA 123] Any inmate validated as a member of an STG is transferred to Administrative Segregation, pending

reclassification into a heightened custody level in accordance with procedures outlined in SCDC Policy 1200.5. [Id.] Confinement in the heightened custody level allows prison officials to maintain closer supervision of those inmates and reduces the inmates' opportunity to organize and conduct criminal activity. [Affidavit Moore, JA 131] Prison security has improved since the Five Percenters have been designated a Security Threat Group and those inmates reclassified to a higher custody level. [Affidavit Moore, JA 132; Affidavit Hayes, JA 134; Affidavit Maxey, JA 143] This suit challenges the action taken by SCDC to designate these inmates a threat group and to reclassify them to a higher custody level.

History of security problems involving Five Percenters leading up to their designation as a Security Threat Group within SCDC

1. One of the early documented security problem within SCDC involving Five Percenters was an altercation in 1992 at Central Correctional Institution ("CCI"). [Intelligence Information Memorandum, Case No. 01-0111, JA 149; Affidavit Moore, JA 130] One of the inmates involved, Bobby Brooks a/k/a Lord Shameal Allah, is also a plaintiff in this case. [Intelligence Information Memorandum, supra] He has a dangerous reputation and is feared by other inmates because of his leadership among the Five Percenters. [Affidavit Maxey, JA 143]

2. In 1994, an inmate at Kirkland Correctional Institution ("KCI") reported through his attorney that a group of inmates known as the Five Percenters was threatening him with harm. [Intelligence Information Memorandum, Case No. 31-0001, JA 150]

3. In December 1994, SCDC received intelligence information that the Five Percenters were threatening a widespread prison uprising in the South Carolina and the North Carolina prison

systems on or around the 1995 New Years holiday. [Affidavit Moore, JA 130; Affidavit McKellar, JA 185] SCDC took precautions, and no disturbance occurred. [Memo from McKellar to Moore, JA 185]

4. In January 1995, three correctional officers were injured in a riot at Allendale Correctional Institution ("ACI") involving five inmates "from a Muslim group ...known as the five percenters." [Report by Investigator Stevens, JA 141] It was reported that the inmates "acted as a group," and that they "have formed an organization" that involved other inmates. [Id.] Each of the rioting inmates was questioned during the course of a subsequent investigation, and, according to the investigator, "all inmates felt as if they were acting in a manner acceptable to the (sic) religious beliefs," and they "spoke of more violence to come." [Id.] In the riot, the Five Percenters struck one correctional officer on the head, knocking him to the ground; another was struck in his eye and on his head; the third officer was struck about his upper body and arms; and the Five Percenters sprayed two of the officers in the face with pepper mace. [Id.]

5. Also in January 1995, a violent incident occurred at Lieber Correctional Institution in which six inmates, most of whom were admitted Five Percenters, assaulted three other inmates. [Investigative Summary, JA 151] During the incident, one correctional officer was hit in the face and an inmate was stabbed. [Id.]

6. In February 1995, a New Jersey state prison investigator reported to SCDC officials that a South Carolina inmate was corresponding with a New Jersey inmate about Five Percenter beliefs and practices, and that the correspondence was "full of references to the evil white man and blacks who do not follow their beliefs." [Intelligence Information Memorandum,

Case No. 26-0022, JA 156] The investigator reported that the New Jersey State Prison was "very concerned about the growth of this group and that the network that is being established across the country could be a problem for correctional agencies." [Id.]

7. In March 1995, officials at Perry Correctional Institution received confidential information that a Five Percenter named Wayne Hemingway, also a plaintiff in this case, was attempting to induce other black inmates to stage a fight so they could then attack the responding officers. [Intelligence Information Memorandum, Case No. 26-0024, JA 157] The warden was warned there may be another disturbance involving Five Percenters and white inmates. [Id.]

8. Prior to April 1995, there was a large group of Five Percenters at Lee Correctional Institution ("LCI") who were considered "troublemakers" and who were a negative influence on the inmate population. [Affidavit Hayes, JA 133] One inmate, Willie Gary, was considered the leader of the Five Percenters at LCI, and another Five Percenter inmate, Sheldon Crawford, acted as his bodyguard. [Id.] There were also some Five Percenters known as "righteous teachers" who recruited new members and carried out instructions from their leaders to steal and prey on other inmates who could not protect themselves. [Id.] A lower level of Five Percenter inmates, who were either Five Percenters or who were "wannabees" or "tag alongs," were involved in strong arming and assaults on other inmates. [Id.] Gary and Crawford were later transferred to Broad River Correctional Institution because of information received that they were going to seize a female hostage. [Id.]

9. On April 17, 1995, a major disturbance occurred at Broad River Correctional Institution in which six Five Percenters and one other inmate, including Five Percenter inmates

Gary and Crawford, seized a correctional officer and two staff employees as hostages, and stabbed, beat, and/or poured scalding water on six other correctional officers. [Criminal Investigative Report, JA 158; List of confirmed Five Percenters incarcerated in SCDC, JA 401-402] Inmate Gary, the Five Percenter leader transferred from LCI, appeared to act as leader of the hostage takers. [Criminal Investigative Report, JA 170]

Designation of the Five Percenters as a Security Threat Group

10. According to Director Moore, the Five Percenters within SCDC were becoming more violent and their assaults were becoming more vicious, and he realized the group was a growing threat to the security and safety of the prison system. [Affidavit Moore, JA 130]

11. Moore received information that the Five Percenters are a racist group; [Memo from McKellar to Moore, JA 186; Confidential Intelligence Form, New Jersey Department of Corrections, JA 190; Five Percenter Lesson Number Two, JA 206]; and that "the group attempts to align itself with the Muslim religion to hide covert acts of criminal activity." [Memo from McKellar to Moore, JA 185]

12. According to a Federal Bureau of Prisons intelligence report on the Five Percenters, one of their goals or methods is fighting. [JA 193] The report further explains that "the group is often boldly racist in its views, prolific in its criminal activities, and operates behind a facade of cultural and religious rhetoric." [Id.]

13. The Five Percenters have been designated a Security Threat Group by the Federal Bureau of Prisons and by the New Jersey Department of Corrections. [Memorandum from McKellar to Moore, JA 186]

14. The Five Percenters have demonstrated that they try to separate inmates and staff along racial lines [Affidavit Miro, JA 138-39], and that they use methods of racism to recruit new members. [Affidavit Shaheed, JA 145]

15. Director Moore knew that prison racist groups could cause highly volatile and dangerous confrontations among inmates in prison. [Moore Affidavit, JA 131]

16. Based on the Five Percenters' history of violence within SCDC and other prison systems around the country, Moore decided that inmates affiliated with the Five Percenters were a threat to security and he designated them a Security Threat Group; and directed that all Five Percenters be taken out of the general prison population and be placed in a higher custody level so SCDC could better control the security risks they presented by giving them closer supervision and reducing their opportunity to organize and conduct criminal activity, or to recruit new members. [Moore Affidavit, JA 131]

17. The Security Threat Group policy for SCDC sets out a procedure for validating an individual inmate as a member of an STG, which includes giving the inmate a hearing. Any inmate validated as a member of an STG is transferred to Administrative Segregation, pending reclassification in "M" custody in accordance with SCDC procedures. [Affidavit Moore, JA 131]

18. While serving as a deterrent to inmates joining the Five Percenters, the conditions of confinement for an inmate in Administrative Segregation or in "M" custody are intended to be non-punitive.[Affidavit Moore, JA 131]

19. Administrative segregation and "M" custody are within the normal limits or range of custody which SCDC is authorized to impose on the plaintiffs by virtue of their convictions, and SCDC policy on Administrative Segregation (Policy No. 1500.13) and on Classification, Monitoring, and Reclassification (Policy No. 1200.5) was followed as to each of those plaintiffs so reclassified. [Affidavit Moore, JA 131]

20. Prison officials believe the institutions are less dangerous with the Five Percenters removed from the general population and reclassified to a higher custody level. [Affidavit Moore, JA 132; Affidavit Hayes, JA 134; Affidavit Maxey, JA 143] In their judgment, if the Five Percenters were released from segregated confinement, there is the potential for more violence within the prison system; and inmates, staff and the public would be less safe than they are now with all of the identified Five Percenters in segregated confinement. [Affidavit Moore, JA 132; Affidavit Miro, JA 139 Affidavit Hayes, JA 134; Affidavit Maxey, JA 144]

21. As of March 1997, approximately 64 inmates were confirmed as Five Percenters and placed in a higher security classification. [Affidavit Moore, JA 131]

22. According to SCDC policy, inmates reclassified to a higher custody level because of their status as a member of a Security Threat Group may be returned to a lower custody level if they renounce their affiliation with that group. [SCDC Procedure OP-21.01(OP), JA 127]

SUMMARY OF ARGUMENT

The decision of SCDC Director Moore to respond to security concerns presented by Five Percenters by designating them a Security Threat Group and reclassifying individual Five Percenter inmates to a higher custody level pursuant to SCDC's Security Threat Group policy

does not violate the inmates' Free Exercise or their Equal Protection rights because the actions of the prison officials were reasonably related to legitimate penological interests of promoting institutional safety and security. Therefore the prison officials' actions should be upheld under Turner v. Safley, 482 U.S. 78 (1978) and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). If Employment Division v. Smith, 494 U.S. 872 (1990) and Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) were held applicable to the inmates' Free Exercise claims, the decision below should be affirmed because the Security Threat Group policy being applied by the prison officials was a generally applicable regulation, neutral toward religion.

The inmates' reclassification into a higher custody level does not violate the Eighth Amendment because there is no evidence the inmates are deprived of any basic human needs or that prison officials are deliberately indifferent to their well-being. Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993); Lopez v. Robinson, 914 F.2d 486 (4th Cir. 1990).

The order granting the prison officials qualified immunity should be affirmed because they did not violate any specific right of which a reasonable person would have known. Finally, the lower court's order denying class certification should be affirmed because the inmates have shown no clear error nor any abuse of discretion, nor have they shown any prejudice.

ARGUMENT

I. THE PRISON OFFICIALS HAVE NOT VIOLATED THE FIVE PERCENTERS' FIRST AMENDMENT RIGHTS BECAUSE THE ACTIONS TAKEN WERE REASONABLY RELATED TO LEGITIMATE PENOLOGICAL INTERESTS OF PROMOTING INSTITUTIONAL SAFETY AND SECURITY.

The law is well-established that "when a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, (1987). This standard specifically applies to an inmate's Free Exercise claim. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348-49 (1987); Hines v. South Carolina Department of Corrections, 148 F.3rd 353, 358 (1998).[1]

As further explained by the Supreme Court,

> [t]o ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a "reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.

O'Lone, supra at 349. This deferential approach, the Court explained,

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[1]The inmates seek to impose a stricter standard on prison officials, citing a thirty year old decision of the Seventh Circuit. Cooper v. Pate, 382 F.2d 818 (7th Cir. 1967). That case, which imposes a "clearest and most palpable proof" requirement on prison officials, supra at 521, pre-dates Turner v. Safley, and was never followed by the Fourth Circuit. They argue, as well, that the holding in Cooper is similar to the holding of this Court in Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961), and this should call for heightened scrutiny of SCDC's actions. [App. Br. 15-16]. Sewell, however, was another pre-Turner case reversing the dismissal of a complaint that alleged religious discrimination and was not a challenge to disciplinary measures. The instant case involves actions taken by prison officials for security reasons and their actions should be judged by the "reasonableness" standard of Turner v. Safley.

> ensures the ability of corrections officials "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to "resolution by decree."

O'Lone, supra at 349 (internal citations omitted).

Under Turner and O'Lone four factors are to be considered when assessing a regulation's reasonableness:

> First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it.... A second factor ... is whether there are alternative means of exercising the right that remain open to prison inmates.... A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally.... Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns.

Turner, supra at 89-90, 107 S.Ct. at 2262. The challenged actions of the SCDC officials satisfy each of these four factors, and the District Court's summary judgment order should be affirmed.

First, it is undisputed in the record that Director Moore designated the Five Percenters a Security Threat Group and reclassified those inmates into a higher custody level for reasons of institutional safety and security, an undisputed penological objective. [Moore Affidavit, JA 131] Pell v. Procunier, 417 U.S. 817, 822-23 (1974). Five Percenters were involved in an increasing number of serious incidents within SCDC, which included hostage taking, rioting, attacking correctional officers, and assaulting other inmates. According to evidence available to SCDC officials, the Five Percenters often acted as a group. [Intelligence Information Memorandum, Case No. 31-0001, JA 150; Report by Investigator Stevens, JA 141; Intelligence Information

Memorandum, Case No. 26-0022, JA 156; Criminal Investigative Report, JA 158; Federal Bureau of Prisons Intelligence Summary, JA 193] In addition, Moore had information about a growing Five Percenter network that would present problems for correctional agencies. [Intelligence Information Memorandum, Case No. 26-0022, JA 156; Memorandum from McKellar to Moore, JA 185]

The inmates make the legal argument that the Five Percenters are a religious group and for that reason should not be subject to treatment as a Security Threat Group.[2] While the prison officials dispute that contention and believe instead that they are a threat group that "operates behind a facade of cultural and religious rhetoric," [Federal Bureau of Prisons, Intelligence Summary, JA 193], nevertheless the District Court, viewing the evidence in a light most favorable to the inmates, assumed that the Five Percenters are a religion. [Order, JA 528-29] The result is unchanged, because the Turner "reasonableness" analysis applies specifically to Free Exercise claims by prisoners. O'Lone, 482 U.S. 348-49.

By designating the Five Percenters as a Security Threat Group, SCDC has been able to provide closer supervision over them, reducing their opportunity to organize and conduct unlawful activity, and to recruit new members. [Moore Affidavit, JA 131] Testimony in the record from prison officials reflects that the institutions are less dangerous with the Five Percenters removed from the general population and reclassified to a higher custody level. [Affidavit Moore, JA 132;

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[2]The inmates argue in a footnote that one U.S. District Court has ruled that the Five Percenters are a religion, citing Breland v. Goord, No. 94 CIV 3696 (HB), 1997 WL 139533, at *4(S.D.N.Y. Mar.27, 1997). [App. Br. 4] They read too much into that unreported decision. That district court merely denied summary judgment to prison officials, holding that "[t]he question of what constitutes religion is thus particularly ill-suited to determination on summary judgment. Id.

Affidavit Maxey, JA 143; Affidavit Hayes, JA 134] In the judgment of these officials, if the Five Percenters were returned to a lower custody level, there is the potential for more violence within the prison system; and inmates, staff and the public would be less safe. [Affidavit Moore, supra; Affidavit Miro, JA 139; Affidavit Hayes, supra; Affidavit Maxey, supra]

The inmates argue that the prison officials have not satisfied the first Turner factor because the challenged policy is not "content neutral." [App. Br., 17] They mischaracterize the Turner requirement. Turner holds that

> the government objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression. (emphasis added)

Turner, 482 U.S. at 89-90.

The Supreme Court further explained this "neutrality" requirement in Thornburgh v. Abbott, 490 U.S. 401, 403 (1989), a case challenging Federal Bureau of Prisons regulations that broadly permit federal prisoners to receive publications from the "outside," but authorize prison officials to reject incoming publications found to be detrimental to institutional security. The "neutrality" requirement was explained as follows:

> As to neutrality, "[w]e have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Turner, 482 U.S. at 90, The ban on all correspondence between certain classes of inmates at issue in Turner clearly met this "neutrality" criterion, as did the restrictions at issue in Pell [v. Procunier, 417 U.S. 817 (1974)] and Bell [v. Wolfish, 441 U.S. 520 (1979)]. The issue, however, in this case is closer.
>
> On their face, the regulations distinguish between rejection of a publication "solely because its content is religious, philosophical, political,

> social or sexual, or because its content is unpopular or repugnant" (prohibited) and rejection because the publication is detrimental to security (permitted). (Citation omitted). Both determinations turn, to some extent, on content. But the Court's reference to "neutrality" in Turner was intended to go no further than its requirement in Martinez that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." 416 U.S. at 413. (Footnote omitted) Where, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are "neutral" in the technical sense in which we meant and used that term in Turner. (Footnote omitted)

Thornburgh v. Abbott, 490 U.S. at 415-16. In other words, "neutrality" does not refer to the content or subject being singled out, but instead to the governmental interest being served by the action.

The inmates try to fashion an argument which applies the "neutrality" requirement to something other than the governmental interest being furthered by SCDC's designation of the Five Percenters as a Security Threat Group. Obviously the Five Percenters were singled out when they were designated a Security Threat Group [JA 185-86], and in that regard the designation is arguably not "content neutral." That argument, however, misses the point. The decision to designate them a Security Threat Group was made to further the important governmental interest of institutional safety and security, and was "unrelated to the suppression of expression." Id. Therefore it was "neutral" under the requirements of Turner. Thornburgh v. Abbott, 490 U.S. at 415-16.

The inmates also argue that summary judgment was improper because the evidence offered by SCDC under the Turner reasonableness test was conclusory and insufficient for summary judgment. While some of the testimony does reflect discretionary judgments by prison

officials about the threat presented by Five Percenters, those judgments are entitled to deference under O'Lone. 482 U.S. at 349. Furthermore they are supported by other very specific evidence in the record which includes names of inmates, dates of occurrences, and official SCDC records documenting incidents and threats by Five Percenters over a period of several years[3]. Significantly, the inmates do not dispute the underlying evidence, but instead argue that the prison officials should have reached another conclusion based on that evidence.

For instance, the inmates argue that "these reports describe various acts of misconduct or suspected misconduct that could have been committed by any randomly selected group of inmates, regardless of their religious affiliation." [App. Br. 8] They overlook the evidence in the record that most of these incidents involved acts of violence by groups of Five Percenter inmates, or intelligence information about threatened activity by a network of Five Percenters. They overlook that this group has been identified as a threat group in other jurisdictions as well.

The inmates argue further that "the Five Percenter religion does not encourage violence" and that SCDC should have made "individualized determinations of dangerousness" rather than placing all Five Percenters in segregated confinement. [App. Br. 20-21] In effect, they are arguing for a return to the conditions under which SCDC was unsuccessfully attempting to deal with the Five Percenter problem before they were designated an STG. Given SCDC's actual and threatened security problems with Five Percenters, its decision to reclassify inmates who are Five

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[3]For this reason, the inmates' reliance on Hanafa v. Murphy, 907 F.2d 46 (7th Cir. 1990) and Caldwell v. Miller, 790F.2d 589 (7th Cir. 1986) is inapposite as they argue that summary judgment was improper. In those cases, summary judgment was reversed because the prison officials' evidence was conclusory. In the instant case, the record contains evidence of specific security problems involving Five Percenters upon which SCDC's actions and opinions were based.

Percenters into a higher custody level has a valid, rational connection to institutional safety and security. This conclusion is further supported by the undisputed evidence in the record that the institutions are safer and there is less violence since the Five Percenters have been removed to segregated confinement. [Affidavit Moore, JA 132; Affidavit Hayes, JA 134; Affidavit Maxey, JA 143]

In addition, the inmates argue that the District Court erroneously applied Turner as a "subjective" test for the prison officials rather than an "objective" one, and that it failed to consider the inmates' evidence. [App. Br. 21-22] The inmates, however, have pointed to no evidence in the record that was overlooked or that created a genuine issue of material fact. Furthermore, the lower court found that, applying an objective standard to the evidence in the record, the prison officials' actions were reasonably related to promoting institutional safety and security. [Order, JA 531-32 ("Given this information, the magistrate did not err when he concluded that placing the Five Percenters in a higher security category is rationally and reasonably related to the legitimate penological interest of promoting safety and security in SCDC facilities."(emphasis added)] The "reasonableness" standard of Turner requires that "due deference" be given to expert opinions of prison officials. Ali v. Dixon, 912 F.2d 86, 91 (4th Cir. 1990). For all these reasons, SCDC has satisfied the first prong of the Turner test.

SCDC has met, as well, the second part of the Turner analysis which inquires whether there are alternative means of exercising the constitutional right that remain open to prison inmates. The inmates do not address this issue in their brief. As found by the District Court, while the Five Percenters' heightened custody level prevents them from meeting in "cyphers" or "universal parliaments" as dictated by their beliefs, they are still able to pray, meditate, fast,

follow dietary restrictions, and study the Qu'ran, the Bible, and literary materials of the Nation of Islam. [Order. JA 532-33] Furthermore, they are allowed to posses Five Percenter literature that has been censored by SCDC to remove passages that may encourage violence or that would be so inflammatory as to pose a security threat. [Consent Order, JA 549] It is undisputed on this record that the Five Percenters are free to participate in most of the religious practices they wish to follow, subject to the security restraints imposed by their custody level. [Affidavit Shaheed, JA 145-46] For this reason, the prison officials have satisfied the second part of the Turner standard. See Scott v. Mississippi , 961 F.2d 77, 81 (5th Cir. 1992); Iron Eyes v. Henry, 907 F.2d 810, 815 (8th Cir. 1990).

The third Turner factor requires the court to consider the impact accommodation of the asserted right will have on guards and other inmates and on the allocation of prison resources generally. The inmates argue that SCDC should lower the custody level of Five Percenters who do not have disciplinary records and return them to the general population until they commit a disciplinary infraction warranting reclassification. That, however, is the way SCDC was attempting to deal with the Five Percenters before they were designated a Security Threat Group. Serious incidents involving Five Percenters were increasing, and Director Moore believed that institutional safety and security required them to be reclassified under the Security Threat Group policy.

The Court has made clear that Turner allows corrections officials "to anticipate security problems." O'Lone, 482 U.S. at 350. When faced with the ever-present potential for violent confrontation and conflagration, "prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile

a dossier on the eve of a riot." Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132-33 (1977). As stated by the District Court below, "accommodating Plaintiffs rights (which would entail releasing many or all of the Five Percenters back into the general population) would, again, run the risk of creating the very security risk which Defendants intended to alleviate -- thus, it can hardly be said that the impact on prison administration would be 'minimal.'" [Order, JA 534] "When accommodation of an asserted right would have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." Turner, 482 U.S. at 90. For these reasons the third Turner factor weighs in favor of SCDC.

The fourth factor under Turner involves an inquiry whether there are obvious, easy alternatives which would indicate whether the challenged decision is an exaggerated response to prison concerns. The inmates have argued that SCDC should have made "individualized determinations of dangerousness." [App. Br. 20-21] As pointed out above, that is what SCDC was formerly doing before it made the STG designation. That simply did not allow prison officials to control the growing security problem because incidents involving Five Percenters were increasing in number and seriousness. [Affidavit Moore, JA 130] The Supreme Court has held that "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." Turner, 482 U.S. at 90-91. There are no obvious, easy alternatives to the challenged action by the prison officials, and particularly no alternative consistent with the deference that should be afforded the informed judgment of prison officials seeking "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." Turner, 482 U.S. at 89. For all

these reasons, the prison officials are entitled to summary judgment based on the "reasonableness" standard of Turner.

II. THE FIVE PERCENTERS ARE NOT ENTITLED TO RELIEF UNDER *EMPLOYMENT DIVISION V. SMITH*, 494 U.S. 872 (1990), OR *CHURCH OF LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH*, 508 U.S. 520 (1993).

The inmates argue that their Free Exercise claim should not be governed by the prisoner case of Turner v. Safley, 482 U.S. 78 (1987), but rather by Employment Division v. Smith, 494 U.S. 872 (1990), and Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Relying on these later authorities, they argue that the challenged policy is unconstitutional because it explicitly punishes the exercise of particular religious beliefs, and violates the Church of Lukumi Babalu Aye prohibition against "a law targeting religious beliefs." They are wrong for two reasons.

A. *Smith* and *Church of Lukuli Babalu Aye* are not prisoner cases and, therefore, are not applicable to the Five Percenters' First Amendment claims.

There is no controlling precedent applying Smith or Church of Lukumi Babalu Aye to claims by prisoners against prison authorities. This Court has declined to hold that Turner and O'Lone no longer apply to inmates' Free Exercise claims. See Hines v. South Carolina Department of Corrections, 148 F.3d 353, 357 (4th Cir. 1998).

In explaining the reason a different standard applies to prisoner claims, the Supreme Court has held that

> [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives -- including deterrence of crime, rehabilitation of

> prisoners, and institutional security. (Internal citations and quotations omitted)

O'Lone, 482 U.S. at 348. For these reasons, the Supreme Court has held that prisoners' claims alleging infringements of constitutional rights are to be judged under a more deferential "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. Turner v. Safley, 482 U.S. at 86-87; O'Lone v. Estate of Shabazz, 482 U.S. at 349.

Furthermore, O'Lone, one of the two companion cases in which the "reasonableness" standard was announced, was a First Amendment Free Exercise claim by a prison inmate decided under the Turner reasonableness standard. In applying the reasonableness test, the Court explained that "[t]his approach ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration,' (citation omitted), and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.' (Citations omitted)." O'Lone, 342 U.S. at 349-50. The inmates have cited no authority nor made any compelling argument for abandoning the "reasonableness" test and for eroding the deference that should be given to decisions of prison officials. For all these reasons, Smith and Church of Lukumi Babalu Aye should be held inapplicable.

B. **Even if *Smith* and *Church of Lukumi Babalu Aye* were held applicable, the Five Percenters' First Amendment rights were not violated by the prison officials because the Security Threat Group policy they were applying is a generally applicable law, neutral toward religion.**

Even if the more recent First Amendment decisions were applicable to these claims, the inmates would fare no better. This Court recently explained those authorities as follows:

> The Supreme Court held in Smith that a neutral, generally applicable law does not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice. See Smith, 494 U.S. at 876-79, see also American Life League, Inc. v. Reno, 47 F.3d 642, 654 (4th Cir.1995) (explaining Smith). A law is considered neutral if it proscribes conduct without regard to whether that conduct is religiously motivated or not. See id. If the law makes no distinction between action based on religious conviction and action based on secular views, it is a generally applicable law, neutral toward religion and not violative of the First Amendment. See id.

Hines v. South Carolina Department of Corrections, 148 F.3d 353, 357 (4th Cir. 1998). In this case, the prison officials were enforcing and applying OP-21.01 [JA 120-128], a general policy provision in the SCDC Operations Manual dealing with prison security and Security Threat Groups. The policy is neutral toward religion and its provisions apply to all inmates within SCDC.

The policy sets out a procedure for dealing with a Security Threat Group, which it defines as follows:

> [A]ny formal or informal organization, association, or group of three (3) or more inmates that have a common name, and whose members or associates engage or have engaged in two (2) or more activities that include planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of misconduct classified as serious threats or potential threats to the safety and security of the public, the Department, employees, visitors and/or

> other inmates. Designation of a group as a Security Threat Group requires the approval of the Agency Director.

[SCDC Policy OP-21-01, JA 120] The Five Percenters were designated an STG, not because of any religious beliefs or practices, but because of the increasing seriousness of their acts of violence within SCDC and elsewhere. [Affidavit Moore, JA 130-31]. There is no evidence that SCDC officials were punishing Five Percenters on account of their religious beliefs. The Security Threat Group policy is, on its face, neutral toward religion, and the record is undisputed that the Five Percenters fit within the policy -- they are a group of three or more inmates, having a common name, and whose members have committed unlawful acts classified as safety and security threats. [JA 120] There is no evidence of a pretextual motive or unconstitutional animus on the part of the prison officials toward the Five Percenters. Prison officials applied a neutral policy under which the Five Percenters were implicated. For these reasons, even if the standard of Smith and Church of Lukumi Babalu Aye would apply, the Five Percenters' Free Exercise rights were not violated.

III. THE PRISON OFFICIALS DID NOT VIOLATE THE INMATES' EQUAL PROTECTION RIGHTS BECAUSE SCDC'S ACTIONS MET THE *TURNER* "REASONABLENESS" STANDARD.

The inmates contend SCDC's classification of Five Percenters as a Security Threat Group violates Equal Protection because the Five Percenters were singled out for discriminatory treatment. This claim should be dismissed based on the application of the Turner "reasonableness" standard for the reasons set out above.

The Turner rule should be applied to this alleged Equal Protection claim because, by its own terms, it applies broadly "when a prison regulation impinges on inmates' constitutional

rights." 482 U.S. at 89. Although the Supreme Court has not applied Turner in the context of an Equal Protection claim, it has applied it to an alleged Due Process violation. Washington v. Harper, 494 U.S. 210, 223 (1990)(holding that lower court erred in not applying Turner "reasonableness" standard to prisoner's claim of due process violation based on anti-psychotic drugs being administered without his consent). While the Fourth Circuit has not expressly spoken on this issue, other Courts of Appeals have held that the Turner standard applies to prisoners' Equal Protection claims. Allen v. Cuomo, 100 F.3d 253, 261 (2nd Cir., 1996); Clark v. Groose, 36 F.3d 770, 772-73 (8th Cir. 1994); Templemen v. Gunter, 16 F.3d 367, 371 (10th Cir. 1994); Benjamin v. Coughlin, 905 F.2d 571, 575 (2d Cir.1990); Kahey v. Jones, 836 F.2d 948, 950 (5th Cir.1988). In addition, other District Courts within this Circuit have reached the same conclusion. Jenkins v. Angelone, 948 F.Supp. 543, 549 (E.D.Va. 1996); Shaheed v. Winston, 885 F.Supp 861, 868-69 (E.D.Va. 1995), aff'd 1998 WL 610585 (4th Cir.1998); Salaam v. Collins, 830 F.Supp. 853, 855-59 (D.Md. 1993), aff'd, 70 F.3d 1261 (4th Cir. 1995). For these reasons, there was no Equal Protection violation because the prison officials' actions were reasonably related to a legitimate penological interest.

Furthermore, the Supreme Court has held that "[t]here is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat to institutional disruption or violence." North Carolina Prisoners' Labor Union, 433 U.S. 119, 136 (1977). The threat of the Five Percenters to institutional disruption and violence has been shown on this record. There is no evidence in the record of similar security threats by "other religious group[s]" such as would call into question the prison officials' decision

to "target" the Five Percenters as a Security Threat Group. [See App. Br. 9] For all these reasons, the prison officials are entitled to summary judgment in their favor as to the Plaintiffs' Equal Protection claims.

IV. THE PRISON OFFICIALS DID NOT VIOLATE THE INMATES' EIGHTH AMENDMENT RIGHTS BECAUSE THE RECORD DOES NOT REFLECT ANY "SERIOUS DEPRIVATION OF A BASIC HUMAN NEED" NOR "DELIBERATE INDIFFERENCE" ON THE PART OF PRISON OFFICIALS.

The inmates allege that their confinement in "M" custody (or Administrative Segregation in the case of one inmate [JA 234]) violates the Eighth Amendment's prohibition against cruel and unusual punishment because they "are denied contact with others and access to television and radio...receiving only five hours of out-of-cell exercise per week." [App. Br. 26] In addition, they argue, "[t]hey may not participate in prison programs, including work, school, or even in-cell study programs, and thus cannot earn the credits toward completion of their sentences that they would normally receive for work and school." [Id.] Finally, they allege "emotional distress, severe depression requiring medication, and physical pain and suffering, including back problems and weight loss." [Id.] It should be noted that conditions in "M" custody and Administrative Segregation are within the normal limits or range of custody which SCDC is authorized to impose on the inmates by virtue of their convictions. [Affidavit Moore, JA 131] For that reason, the inmates' reclassification does not, by itself, implicate constitutional standards. Sandin v. Connor, 515 U.S. 472 (1995); Meachum v. Fano, 427 U.S. 215, 225 (1976); Slezak v. Evatt, 21 F.3rd 590, 594 (4th Cir. 1994)("The federal constitution itself vests no liberty interest in inmates retaining or receiving any particular security or custody status '[a]s long as the [challenged] conditions or degree of confinement..is

within the sentence imposed...and is not otherwise violative of the Constitution.'") SCDC has successfully defended at least one Eighth Amendment challenge to conditions in its "high security" classification. Slezak v. Evatt, supra.

The requirements of the Eighth Amendment have been explained by the Fourth Circuit as follows:

> In order to make out a prima facie case that prison conditions violate the Eighth Amendment, a plaintiff must show both "(1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials."

Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir. 1993)(citing Williams v. Griffin, 952 F.2d 820, 824 (4th Cir. 1991). Long term confinement, by itself, does not give rise to an Eighth Amendment violation. According to the Fourth Circuit, "[t]he duration of an inmate's stay in segregation is not controlling on the issue of cruel and unusual punishment, even when that duration is quite long." Ross v. Reed, 719 F.2d 689, 697 (4th Cir. 1983)(internal citation omitted); Sweet v. South Carolina Department of Corrections, 529 F.2d 854, 861 (4th Cir. 1975)("Nor will the fact that the segregated confinement is prolonged and indefinite be sufficient in itself to command constitutional protection....")(emphasis added).

The inmates argue that "harsh conditions" of their custody level implicate the Eighth Amendment because they are suffering emotional and physical harm as set out above. The Fourth Circuit has further held that:

> The existence of merely "harsh" or "restrictive" prison conditions does not implicate the eighth amendment, as such conditions could be thought part of the penalty that criminals must pay, so courts must consider whether the deprivations alleged are of constitutional magnitude....[W]e have held that "before pain of a constitutional magnitude can be said to exist, there must

be evidence of a serious medical and emotional deterioration attributable to" the challenged condition.

Lopez v. Robinson, 914 F.2d 486, 490 (4th Cir. 1990)(internal citations omitted). This standard has been further explained as follows: "If a prisoner has not suffered serious or significant physical or mental injury as a result of the challenged condition, he simply has not been subjected to cruel and unusual punishment within the meaning of the Amendment." Strickler v. Waters, 989 F.2d 1375, 1380-81 (4th Cir. 1993) (citations, footnotes, and internal quotations omitted). As stated by the lower court, "[w]hile prolonged isolation and restricted activity can be threats to a person's psychological and emotional health, 'Eighth Amendment standards are offended by prolonged and indefinite confinement only when basic nutrition, sanitation, and health standards are ignored or when the segregated confinement bears no reasonable relation to the purpose for which a prisoner is committed.' " citing Bukhari v. Hutto, 487 F.Supp. 1162, 1179 (E.D.Va. 1980). [Order, JA 537-38] The inmates have made a broadside attack on segregated confinement in prison, but they have shown no "serious" or "significant" injury or deprivation of "basic human needs;" nor have they shown any "deliberate indifference" on the part of prison officials. Therefore the prison officials have not violated the inmates' Eighth Amendment rights.

V. THE PRISON OFFICIALS IN THEIR INDIVIDUAL CAPACITIES ARE PROTECTED BY QUALIFIED IMMUNITY BECAUSE THEY DID NOT VIOLATE ANY CLEARLY ESTABLISHED RIGHT OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN.

The District Court did not err in holding that the prison officials were entitled to qualified immunity. [Order, JA 538-39] It is well established that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, (1982); see Anderson v. Creighton, 483 U.S. 635, 638-39, 107 S.Ct. 3034, 3038 (1987). "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Harlow v. Fitzgerald, 457 U.S. at 818 (footnote omitted). Because of "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties," such officials are accorded qualified immunity from liability for civil damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson, 483 U.S. at 638. The defense of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986); see Wilson v. Layne, 110 F.3d 1071, 1075 (4th Cir. 1997).

In general, defendants are entitled to qualified immunity unless they have violated a specific right, as opposed to one that is abstract or generalized. In other words, it must be "sufficiently particularized" to put the defendants on notice that their conduct is likely to be unlawful. See DiMeglio v. Haines, 45 F.3d 790, 803 (4th Cir. 1995). Furthermore, the unlawfulness of the official action must be apparent when assessed from the perspective of an objectively reasonable official charged with specific knowledge of the established law. "`Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'"

Wilson, 110 F.3d at 1075; Hodge v. Jones, 31 F.3d 157, 167 (4th Cir. 1994); both quoting Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992). As this Court held in Wilson,

> although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest.

110 F.3d at 1075 (emphasis added), citing Anderson, 483 U.S. at 640.

In this case, the prison officials did not transgress any "bright lines" as they responded to the threat presented by the Five Percenters. The authority of prison officials to place prison gang members in administrative segregation has regularly been upheld by the courts. Munoz v. Rowland, 104 F.3d 1096, 1098 (9th Cir. 1997)("California's policy of assigning suspected gang affiliates to SHU [Segregated Housing Unit] is...designed to preserve order in the prison and protect the safety of all inmates [and]...is essentially a matter of administrative discretion."); Pichardo v. Kinker, 73 F.3d 612, 613 (5th Cir. 1996)(Dismissing as "frivolous" a suit by inmate gang member challenging his placement in administrative segregation because of his gang affiliation.); Lloyd v. Suttle, 859 F.Supp. 1408, 1411 (D.Kan. 1994)(Upheld placement in administrative segregation of inmate gang leader.) Rather than violating clearly established law, the prison officials' actions were consistent with established law.

The Plaintiffs argue that their case is different because they view themselves as a religion rather than a gang. The record is undisputed, however, that at least one other state, as well as the Federal Bureau of Prisons, has categorized the Five Percenters as a security threat group. [Memorandum from McKellar, JA 186] The law is well established that merely calling one's group a religion does not, by itself, trigger constitutional protections under the First Amendment.

U.S. v. Meyers, 95 F.3d 1475 (10th Cir. 1996)(The "Church of Marijuana" was not a religion for purposes of the First Amendment); Wiggins v. Sargent, 753 F.2d 663, 666 (8th Cir. 1985); Africa v. Com. of Pennsylvania, 662 F.2d 1025, 1036 (3d Cir. 1981); Theriault v. Silber, 453 F.Supp. 254, 260 ("The Church of the New Song appears not to be a religion, but rather [is] a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities...."). At the time they designated the Five Percenters a Security Threat Group, the evidence available to the prison officials indicated the Five Percenters were a group that engaged in unlawful activity and that "operate[d] behind a facade of cultural and religious rhetoric." [Federal Bureau of Prisons Intelligence Summary, JA 193]

Significantly, there is no case law recognizing the Five Percenters as a "religion." See Patrick v. LeFevre, 745 F.2d 153, 158 (2d Cir. 1984)(reversed summary judgment in favor of prison officials finding there were triable fact issues whether the Five Percenter beliefs and practices were religious in nature.) It is of further significance that the district court in this case assumed that the Five Percenters were a religion, and still ruled against them on summary judgment. [Order, JA 529] In granting qualified immunity to the prison officials, the district court held that, based on the record of disturbances caused by Five Percenters, based on the classification of the Five Percenters as a threat group in at least two other prison systems, and based on the opinion of the SCDC Muslim chaplain that the Five Percenters were a gang that attempted to align themselves with Muslim teachings to create the appearance of a legitimate religion, "it is clear that a reasonable prison official could conclude that the Five Percenters are

a gang, and that restrictive measures of the types imposed by Defendants would directly improve prison security and safety." [Order, JA 539] Furthermore, there is no basis on this record for concluding that the prison officials should have known that their actions, which were reasonably related to institutional safety and security, violated any inmate's clearly established right. The inmates have identified in their argument only rights that are abstract and generalized.

Under these circumstances, there is no "authority...such that the unlawfulness of the [prison officials'] conduct is manifest." Wilson, 111 F.3d at 1075. Therefore the prison officials in their individual capacities are entitled to summary judgment in their favor as to all of the inmates' claims on the ground of qualified immunity.

VI. THE ORDER DENYING CLASS CERTIFICATION SHOULD BE AFFIRMED BECAUSE THERE IS NO SHOWING THAT THE DISTRICT COURT ABUSED ITS DISCRETION OR COMMITTED CLEAR ERROR, AND THERE HAS BEEN NO SHOWING OF PREJUDICE TO ANY PARTY.

The inmates argue that class certification was permissible in this case, but they have pointed out no error as a matter of law in the lower court's decision to deny class certification. The law gives district courts broad discretion in deciding whether a class should be certified, and their decision will not be disturbed on appeal unless it is clearly erroneous or an abuse of discretion. Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283, 305 (4th Cir. 1992); Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986). Rather than certifying a class, the district court below consolidated the pending Five Percenter cases for trial, and counsel for the inmates acknowledges that such an order was permissible. [App. Br. 34]

The inmates have shown no clear error or abuse of discretion. It is apparent that SCDC is treating all Five Percenters alike, whether they are parties to this action or not. [See Para. 6,

Consent Order, JA 549] There has been no showing of prejudice to any party by the court's denial of class certification or from the entry of the consolidation order. The inmates have not made the necessary legal showing to reverse the "broadly discretionary" order of the lower court denying class certification, and the order below should be affirmed.

CONCLUSION

The prison officials' decision to designate the Five Percenters a Security Threat Group and to reclassify them into a heightened custody level does not violate the First Amendment or Equal Protection, and should be upheld under Turner v. Safley because those actions were reasonably related to legitimate penological interests of safety and security, and because that governmental interest being served was neutral, i.e., unrelated to the suppression of expression. If Employment Division v. Smith and Church of Lukumi Babalu Aye were held applicable to the inmates' First Amendment Free Exercise claims, the decision below should be affirmed because the Security Threat Group policy being applied by the prison officials was a generally applicable regulation, neutral toward religion.

The prison officials are entitled to judgment as a matter of law as to the inmates' Eighth Amendment claim because there is no evidence in the record of any serious deprivation of a basic human need while inmates are in "M" custody or administrative segregation, nor of "deliberate indifference" to prison conditions on the part of prison officials. The order granting the prison officials qualified immunity should be affirmed because they did not violate any specific right and the inmates have identified in their argument only rights that are abstract and generalized. Finally, the lower court's order denying class certification should be affirmed because the inmates have shown no clear error, no abuse of discretion, nor any prejudice to a party.

For all these reasons, the order of the district court should be affirmed.

Respectfully submitted,

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Columbia, South Carolina

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 98-7337

ALEXANDER MICKLE, ET AL.,

Appellants,

v.

"MICHAEL MOORE, ET AL.,

Appellees.

"IN RE: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS"

On Appeal from the United States District Court
for the District of South Carolina
Charleston Division

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she served two copies of the **BRIEF OF APPELLEES** on counsel of record by causing same to be deposited in the United States Mail, proper postage prepaid, this 10th day of December, 1998, addressed as follows:

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