

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MOHAMED A. EL-TABECH,
Plaintiff,

V.

HAROLD CLARKE, MIKE
KENNEY, FRANCIS BRITTEN,
RANDY COLE, ELIZABETH
CONLEY, JANSSEN WILLIAMS,
DAVE THOMAS, DOUGLAS SELL,
BRIAN SHIPMAN, MARY
CARMICHAEL, all in their
individual and official
capacities,
Defendants.

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
04 JUN 28 PM 3:36
GARY D. McFARLAND
CLERK

COMPLAINT
UNDER THE
CIVIL RIGHTS ACT

4:04CN3231

I. PRELIMINARY STATEMENT

This is a civil rights petition seeking injunctive and declaratory relief as well as, damages, against the defendants, for committing and/or omitting acts under color of law whereby, depriving plaintiff of his Constitutional

and Statutory Rights secured under the United States and Nebraska Constitutions, and Laws, by causing, and conspiring to cause, harm, and irreparable harm, subjecting plaintiff to cruel and unusual punishment, discriminating against, and denying plaintiff his due process, and equal protection Rights. ALL defendants are state officials, employees, or under contract with the state to deliver services.

II. JURISDICTIONAL STATEMENT

Jurisdiction of this Court is vested pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1997e(a) and (e), and 28 U.S.C. § 1343. Moreover, plaintiff invokes pendent jurisdiction of this Court, over claims of state law germane to plaintiff's claims as set forth more fully in the cause(s) of action. The prerequisite exhaustion of Administrative Remedies has been fulfilled, and is predicated on the denial of relief through the grievance system, exhibits of which are incorporated hereto.

III. PARTIES

A. Plaintiff: Mohamed A. EL-Tabech, the plaintiff, Nebraska prison NO. 36752, is and was

at all times relevant to this complaint, confined on a form of Administrative Segregation called Intensive Management, hereinafter IM. plaintiff's IM status started on April 25, 2001, at Nebraska State Penitentiary, hereinafter NSP, located in the city of Lincoln, County of Lancaster, Nebraska, where he was housed in the Control Unit, hereinafter CU, a segregation unit. On July 18, 2002, plaintiff was transferred to Tecumseh State Correctional Institution, hereinafter TSCI, located in the city of Tecumseh, County of Johnson, Nebraska, where he remains housed at the Special Management Unit, hereinafter SMU, a Segregation Unit, under IM status. Both NSP and TSCI are Maximum security prisons, and both CU and SMU are Segregation units. plaintiff's address is: 2725 North Highway 50, P.O. Box 900, Tecumseh, NE 68450.

B. Defendants:

1. Harold Clarke, is and was, at all times relevant to this complaint, the Director of all Nebraska prisons. The Director's duties include, but are not limited to; final Administrative Segregation reviews and decisions; classification decisions; conditions of Confinement; providing meaningful

access to Courts; protection From harm and irreparable harm; treating ALL similarly situated prisoners the same; and overseeing the overall operations at NSP and TSCI by supervising the duties of their Wardens, their employees, their subordinates, and all employees working under a Contract to provide services.

Defendant Clarke's address is: Folsom & W. prospector pl., Bldg. #15 (Lincoln Regional Center Campus) Lincoln, NE 68522.

Defendant Clarke is being sued in both individual and official capacities.

2. Mike Kenney, was at all times relevant to this complaint, the Warden at NSP. Kenney's duties included, but were not limited to: Final authority on classification and recommendations by the institutional classification Committee; Final authority on recommendations to the Director's subcommittee and appeals to the Director's review Committee; providing medical care by supervising medical staff in providing care for prisoners; providing meaningful access to Courts, and adhering to written policies derived From Constitutional and statutory Law and authority. Defendant Kenney's address is: 14th & pioneers Blvd., P.O. Box 2500, Lincoln, NE 68542-2500.

Defendant Kenney is being sued in both individual and official capacities.

3. Francis Britten, is and was, at all times relevant to this complaint, the Warden at TSCI. Defendant Britten's duties include, but are not limited to; final authority on classification and recommendations by the institutional Classification Committee; Final authority on recommendations to the Director's Subcommittee, and appeals to the Director's review Committee; providing access to Courts through meaningful and adequate law library access; providing medical care to prisoners, by monitoring the delivery of Medical Services by those under contract with TSCI to provide and deliver medical Services; protection from harm and irreparable harm; treating all those similarly situated prisoners at TSCI the same; adhering to written policies derived from Constitutional and Statutory Law and authority, and providing for the needs of segregated prisoners and monitoring their conditions of Confinement. Defendant Britten's address is: TSCI, 2725 North Highway 50, P.O. Box 900, Tecumseh, NE 68450.

Defendant Britten is being sued in both individual and official capacities.

4. Randy Cole, is and was, at all times relevant to this complaint, employed as

the Medical Director For Nebraska prisons. Defendant Cole's duties include, but are not limited to; providing specific medical treatment that ensure compatability with a Community standard of health care; supervision of all medical staff employed by, and under a contract with, a prison, mainly Medical Doctors; providing regular Medical care through medical staff employed by, or under a contract with, a prison; referral of prisoners to Medical specialists not in the employ of the prisons, and adherence to duties as set forth by Nebraska statutes specifically, § 83-4, 157 and § 83-181. Defendant Cole's address is: Folsom & W. prospector pl., Bldg #15 (Lincoln Regional Center Campus) Lincoln, NE 68522.

Defendant Cole is being sued in both individual and official capacities.

5. Elizabeth Conley, is and was, at all times relevant to this complaint, the Regional Medical Director for, Correctional Medical Services, hereinafter CMS, a Contractor with TSCI, to provide and deliver medical services to prisoners. Defendant Conley is the Final authority on approval by CMS, to refer a prisoner to a specialist, and allow for the performance of surgeries when needed.

Defendant Conley's address is: Correctional Medical Services, Missouri Regional office, 3702 West Truman, Suite 104, Jefferson City, MO 65109. Defendant Conley is being sued in both individual and official capacities.

6. Janssen Williams, is and was, at all times relevant to this complaint, employed by CMS, as the head physician at TSCI. Address: TSCI, 2725 North Highway 50, P.O. Box 900, Tecumseh, NE 68450. Defendant Williams is being sued in both individual and official capacities.

7. Dave Thomas, is and was, at all times relevant to this complaint, employed by CMS, as the Medical Administrator at TSCI. Address: TSCI, 2725 North Highway 50, P.O. Box 900, Tecumseh, NE 68450. Defendant Thomas is being sued in both individual and official capacities.

8. Douglas Sell, is and was, at all times relevant to this complaint, employed at and by TSCI, as the head of Mental Health program. By being a psychologist, his duties include, but are not limited to; membership in the Institutional Classification Committee which makes recommendation to defendant Britten, the Warden, regarding

prisoners in segregation; conducting personal interviews with segregated prisoners, and preparing written reports in that regards; making psychological assessment at least every (3) three months when a prisoner is confined in segregation for an extended period, as mandated by Administrative Regulation 201.5. Defendant Sell's address is: TSCI, 2725 North Highway 50, P.O. Box 900, Tecumseh, NE 68450. Defendant Sell is being sued in his individual as well as, his official capacity.

9. Brian Shipman, is and was, at all times relevant to this complaint, employed by Aramark, a Food Service Company, as the Food Service Director, under a contract with TSCI, to provide meals to TSCI. Defendant Shipman's address is: 2725 North Highway 50, P.O. Box 900, Tecumseh, NE 68450. Defendant Shipman is being sued in both individual and official capacities.

10. Mary Carmichael, is and was, at all times relevant to this complaint, employed by and at TSCI, as Contract Monitor. Defendant Carmichael's duties include, but are not limited to; monitoring a Contractor with TSCI, for providing

Services at TSCI under a contract; ascertaining that the Contractor delivers services to prisoners without discrimination, nor in violation of a prisoner's Constitutional and Statutory rights. Defendant Carmichael's address is: TSCI, 2725 North Highway 50, P.O. Box 900, Tecumseh, NE 68450. Defendant Carmichael is being sued in both individual and official capacities.

IV. previous Civil Actions

None. Additionally, there are no civil actions in State or Federal Courts dealing with the claims brought by plaintiff in this Complaint, pending nor otherwise.

V. Statement of Claim

A. Statement of Facts.

(1) NSP and CU Claims.

On April 25, 2001, at the conclusion of an escape attempt from NSP, where plaintiff was confined with a life sentence for a 1985 murder conviction from Lancaster County, and after complying with the orders of

guards, aiming their weapons at plaintiff, to lie face down with arms and legs spread on the ground. While in that position, a guard by the name of Ware, arrived on the scene with other guards, and jumped with his close to 200 lbs. body weight and knees on plaintiff's shoulders and back, even though plaintiff was motionless. Ware twisted plaintiff's right forearm after having his left knee press against it, and pushed plaintiff's left hand in the opposite direction of its regular course. plaintiff told Ware that he was hurting him, only to hear Ware say: "Don't move". plaintiff replied "I can't move even if I want to." Ware applied handcuffs to plaintiff's hands, while contorting them, and told plaintiff to stand up while his knees were still pressing against plaintiff's shoulders. plaintiff naturally could not stand up. Ware pulled plaintiff by the handcuffs, where plaintiff's body weight rested and felt as Ware pushed at the handcuffs in an upward direction, when, plaintiff felt a severe and excruciating pain in both shoulders. Thereafter, Ware and other guards, took plaintiff to a holding room/cell in the Administration building, where plaintiff was taken later on to the CU, where plaintiff was housed from April 25, 2001, to July 18, 2002.

a. Classification and Conditions of Confinement:

Within hours of plaintiff's arrival at the CU,

plaintiff was given a "Notice of Immediate Segregation Review" sheet stating the reasons for placement on "Immediate Segregation" status. See Exhibit #1. The following day, an "Immediate Segregation Review" sheet was delivered to plaintiff's cell stating why placement on "Immediate Segregation" status should continue. See Exhibit #2.

② The CU is one of two Segregation Units at NSP. The other is Housing Unit #4. Death row was housed in the CU before this Court determined that the CU is a disciplinary segregation unit for punitive penalties in John Rust, et al., v. Frank Hopkins, et al., CV84-L-712. Thereafter, Death Row was moved to Housing Unit #4 which houses/housed other segregated prisoners.

③ The CU was formerly known as the Adjustment Center in Wolff v. McDonnell, 418 U.S. 539, 564, 94 S.Ct. 2963, 2978 (1974). In a Memorandum dated September 3, 1985, defendant Clarke, Associate Warden then, stated: "Notify staff and inmates in the Adjustment Center that the Department of Correctional Services rules 5 and 6 have been revised mandating a change in the Sentencing of inmates to the Adjustment Center. Specifically, inmates could not receive more than 60 days in the Adjustment Center for any one incident". In the Summer of 1990.

the Adjustment Center's name was changed to that of CU, without any change in the living conditions within its confines.

④ The CU was built in 1950. It was designed to physically punish a prisoner by the following but not limited to, conditions of confinement:

(A) Total isolations with no exterior windows in any cell to allow sun light from outside.

(B) Total isolation from physical contact with visitors such as family members, friends, or associates in the community, and isolation from prison staff and prisoners by means of no contact.

(C) Denial of, and the unavailability of a chair, table, mirror, trash sack, drinking cup, or any exercise equipment.

(D) Showers given only (3) three times a week for 15 minutes each, including shaving, at whim of guards.

(E) Access to outside yard for only (1) one hour a day, five days a week at whim of guards, as they decide the time of day without considering the need to have sunlight.

(F) Access to law library is limited to one (1) hour a week, with handcuffs and leg irons during the hour.

(G) Rodents, i.e. mice and rats; spiders; ants and other insects are the norm. Throughout plaintiff's classification to the CU, he

suffered bites, and was awoken many nights by mice roaming around the cell and spiders crawling on his face.

(H) The cell in the CU is a box car with a sink, Toilet, and a concrete slab to serve as a bed, and a solid steel door.

⑤ As a result of the escape attempt, plaintiff received (60) sixty days disciplinary segregation, yet, plaintiff was housed in the CU from April 25, 2001 to July 18, 2002, by Defendants Clarke and Kenney, in violation of Chapter 6 of Title 68 of Nebraska Department of Correctional Services rules and regulation rule 003.03 which states: "Disciplinary action shall not be capricious, retaliatory or revengeful"

⑥ Administrative Regulation 201.5 defines "Intensive Management" status as "— confine inmates who pose an imminent threat to the life, health, or safety of staff or other inmates — placement on, continuation of, and removal from Intensive Management must be approved by the Director's Review Committee..." and that classification procedures for segregated confinement including Intensive Management (IM) require that a prisoner receives a written Notice, a classification hearing, and be allowed a staff representative, to obtain and present necessary evidence during the classification

hearing, and at page 4, B, it states:

"IF the inmate has been referred for Intensive Management Status, the Director's Subcommittee may rely on the Findings of the Disciplinary Committee or make its own findings of fact."

- ⑦ From April 25, 2001, to March 12, 2002, plaintiff was placed on "Intensive Management" IM status in violation of Administrative Regulation 201.5 as he was not given:
- 1 - A Notice of a hearing before the Director's Subcommittee, or any other Committee!
 - 2 - A hearing before the Director's Subcommittee.
 - 3 - Any notification of any shape, way, or form, that the Director's Review Committee approved his placement on IM. Thus, Defendants Clarke and Kenney, violated plaintiff's due process rights, by violating Administrative Regulation 201.5.

- ⑧ IM status was a punitive status plaintiff endured without removal from the CU, after he received the (60) sixty days disciplinary segregation penalty, for violation of the code of offenses in attempting to escape from NSP. plaintiff was found guilty of Escape and Escape paraphernalia, both charges stem from (1) one Misconduct report he received for the incident on

April 25, 2001. plaintiff was not found guilty by the prison (NSP) disciplinary Committee of any other charge. Therefore, plaintiff's confinement in the CV exceeded the (60) sixty days limit in violation of the rules and regulations, as well as, the Memorandum of defendant Clarke, stated above in ③.

⑨ On March 7, 2002, plaintiff was given a "Notice/Waiver of Hearing" sheet stating the "possibly continuation on Intensive Management Status. ---" see Exhibit # 3, and the date to have a hearing before the Director's Classification Subcommittee.

Included with the sheet were a "Reclassification Action Form - Addendum A" sheet stating the reasons for Continuation (Even though the sheet read "possible placement") on IM. Addendum A contained False information, unsubstantiated allegations against plaintiff, attributed actions to plaintiff he had nothing to do with during the escape attempt, i.e., possession of any Weapons, assaulting a Hostage, and the use of dismissed Misconduct reports, and Misconduct reports that were on Appeal in the District Court of Lancaster County. See Exhibit # 4.

⑩ On March 12, 2002 (Contrary to the Notice (Exhibit # 3) which stated "hearing set for

March 11, 2002) plaintiff appeared before the Director's subcommittee. The meeting with said Committee (And all subsequent classification hearings) ~~were~~ a farce, as plaintiff's due process rights were unequivocally violated by: 1. Denial of representation that plaintiff is entitled to under Administrative Regulation 201.5.

2. Denial of right to call witnesses, same reason as in (1.) above.

3. Denial of right to present documentary evidence, ~~nor~~ to present any rebuttal to the false statements, same reason as in (1.) and (2.) above, i.e. Administrative Regulation 201.5, page 4, B. which states:

"-- The inmate shall have the opportunity to present documentary evidence and witnesses -- as well as refute the information as presented and submit ~~any~~ any relevant information in his/her own behalf..."

(11) Since March 12, 2002, hearing, all subsequent hearings, before the Director's Classification Sub-Committee, that plaintiff had (Exhibits attached) violated plaintiff's due process rights, specifically, ~~denying~~ denying plaintiff's rights stated in 1., 2., and 3. (10) above. Additionally, at every hearing plaintiff's

request to tape record or video-tape the 2-3 minute hearing, to precisely reflect what took place at the hearing was denied.

(12) On March 30, 2002, plaintiff received at the CU a "Disposition of Classification Hearing" sheet dated March 25, 2002. Please see Exhibit #5. The sheet was signed by a Peggy Lange, presumably in the programs and Community Services, advising plaintiff that due to the hearing held on March 12, 2002, he is "Continued" on Intensive Management Status (IM), when he was never before March 12, 2002, present for any Classification Hearing before the Director's Classification sub-Committee. Notably, Exhibit #5 does not make any reference whatsoever, to the authority of the Director's Review Committee, as mandated by Administrative Regulation 201.5, see (6) above. This sheet (Exhibit #5) amounts to nothing short of an unequivocal violation of plaintiff's Due process rights, hence making placement of plaintiff on IM and Continuing on IM status invalid legally. Thus, defendants Clarke and Kenney, have conspired by their actions and inactions, to retaliate against plaintiff by keeping him in the CU beyond the (60) sixty days, thereby subjecting him to the conditions of confinement

stated in ④, and denied him due process.

⑬ plaintiff appealed the "Invalid" Disposition of Classification hearing (Exhibit #5) to Defendant Clarke. In a letter dated April 8, 2002, which served as a denial of plaintiff's appeal, See Exhibit # 6, defendant Clarke acknowledged the use of information by the Director's Classification Sub Committee that plaintiff asserted would be a violation of due process i.e. Misconduct reports on Appeal in the District Court (state) and information that are False i.e. use of Weapons (or possession). Defendant Clarke makes a reference to the Director's Review Committee's decision on March 22, 2002, which is nowhere mentioned in the Disposition of Classification Hearing (Exhibit #5) as mandated by Administrative Regulation 201.5 and ⑥ above.

⑭ Defendants Clarke and ~~Kennedy~~, denied plaintiff equal protection by classifying him to IM, subjecting him (still ongoing) to discrimination by class, by the punitive IM status. Other Segregated prisoners including Death row are not/were not subjected to the punitive status plaintiff was/is subjected to. By being segregated, plaintiff have ceased to be a security threat, and the need to preserve security was/is eliminated.

(15) ~~Classifying~~ Classifying plaintiff to the CU, under IM, after he completed his (60) sixty days disciplinary segregation time, under the egregious living conditions stated in (4) above amounted to Cruel and unusual punishment.

Death row in Housing Unit #4 at NSP had mirrors in their cells; had windows on their doors and walls allowing light to come in; are not isolated from other prisoners, staff, or visitors; had chairs, tables, desks, mirrors, drinking cups, exercise equipment; were allowed to shower and shave daily; received (2) hours a day, seven days a week yard time when the Sun is out; accessed the Law Library (2) two hours a day, five days a week without any leg irons or handcuffs, and the cells in their living quarters/cells were not infested with mice, rats, spiders, ants and other insects. By keeping plaintiff in the CU (beyond the (60) sixty days) defendants violated rule 003.03 stated in (5) above and violated Rule 003.04 of chapter 6 of Title 68 of Nebraska Department of Correctional Services rules and regulations which states: "Corporal punishment of any kind is strictly prohibited". Other prisoners at the CU were moved to Housing Unit #4 with Death row after completion of their disciplinary time, plaintiff was not.

Defendants Clarke and Kenney violated Chapter 6, Rule 008 of Title 68 in the Department of Correctional Services rules and Regulations which reads: "The maximum sanction involving disciplinary segregation shall not exceed sixty days for all violations arising out of one incident" by keeping plaintiff in the CU beyond the (60) days disciplinary segregation under the conditions stated in (4) above. The aforesaid violations were done maliciously, willfully, and intentionally, with the objective to cause harm to plaintiff thus, violating plaintiff's rights to be free from cruel and unusual punishment and due process. The prisoners who were moved to Housing Unit #4 from the CU had their living conditions and cells similar to that of death row, and given job opportunities. plaintiff was denied job opportunities thus, leaving him totally dependent on assistance from friends and acquaintances, as well as, family, in meeting his needs to get necessities and necessities. Death row, Segregated prisoners and protective custody prisoners, all of whom are on Administrative Confinement ~~are~~ are provided job opportunities.

(16) Defendants Clarke and Kenney violated plaintiff's due process and equal protection rights, by violating Chapter 6, Rule 009.2

of Title 68 in the Department of Correctional Services rules and regulations which reads:
"An inmate may be restricted From any Correctional facility activities for disciplinary reasons except the recognized worship activity for his/her religious Faith group, dining Hall, designated group or individual therapy, and school, for a period of time not to exceed ninety days for all violations arising out of one incident." plaintiff was (and continues to be) deprived of and denied worship activity, group dining Hall, educational opportunities, as well as, a Job opportunity. Additionally, those prisoners who were moved to Housing Unit #4 from the CU, were given cells as those of the general populations; provided Job opportunities, were allowed visits with family and Friends (3) Three hours a week, without Leg irons and handcuffs in Belly Restraints. Said visits were Contact visits. Plaintiff was allowed only (1) One hour a week visit behind an inch thick glass, restrained by Leg shackles and handcuff belly chain, via a telephone. Denial of said opportunities violated plaintiff's rights under the equal protection Clause. See Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The defendants herein violated plaintiff's right to

be treated as those who were similarly situated in Administrative Segregation, by providing death row and protective custody prisoners who were housed in housing unit #4 with cells with windows and sunlight, communal meals, daily showers, daily exercise yard time with weights and recreational equipment, a "Day room" for socializing, and a contact visit with family and friends non-restrained (3½) hours session twice a week. ■

(17) In Clarke V. Benson, CV83-L-671 (D.Neb. 1985) this Court has found that a prisoner has a Liberty interest in remaining free from Administrative Segregation. Through IM classification, defendants Clarke and Kenney, have imposed restrictions on plaintiff's conditions of confinement that violate his due process rights by subjecting him to an atypical and significant hardship in relation to ordinary incidents of prison life, in particularly the total isolation, deprivation of social opportunities afforded to other prisoners through job opportunities, communal meals, educational and recreational as well as religious activities. See Sandin V. Conner, 515 U.S. 472, 115 S.Ct. 2293 (1995). Also see McClary V. Kelly, 4 F. Supp. 2d 195 (W.D.N.Y. 1998) 237 F. 3d 185 (C.A.2, 2001)

(18) Defendants Clarke and Kenney have deployed

the mental health department as their tool, to further their retaliations and conspiracies. In that, mental Health always cosigns through its staff, on any classification recommendations or segregation review. Mental Health is a "correctional employee" under a different title. The mental Health department and staff are always in agreement with defendant's Clarke and his employees. They are peons serving Clarke's agenda. At no time, while at NSP (and later at TSCI) did any mental Health psychologist or psychiatrist conduct a "personal interview" with plaintiff every (3) three months after confinement continued for an extended time. Administrative Regulation 201.5 mandates said "interview" and a written report as well as, an assessment. The mental Health role was always to sign the "segregation status review sheet" which is used to keep plaintiff on IM status, indefinitely, by making it look like a review of status is done on regular basis when, it amounts only to a printed and prepared sheet beforehand with a decision ~~sheet~~, waiting to be signed to make it look legitimate. Said sheet is sent through the mail to plaintiff, without any input from plaintiff, even if he chooses to go to the once a month meeting, with a staff member from the CU and a represen-

tative From mental Health "Department" it amounts to a maximum of a two minutes meeting where plaintiff is expected to initiate the conversation while CU staff and mental Health staff eat Donuts and peanuts and drink soda and Coffee. The meeting which is optional is called "physical review" and the sheets are sent by mail to plaintiff every (2) two weeks. See exhibit #7 and exhibit #8.

(19) ALL those whose signature/Initials appear on the "Segregation Status Review sheets" are told what to recommend and what action to take by defendant's Clarke and ~~Kenney~~ Kenney. They are not known to plaintiff except that one member of the "Institution Classification Committee" is a mental Health staff (Approves anything, and whatever defendant Clarke and Kenney tells him/her) while the rest are administrators, none of whom have any meeting with plaintiff.

b. Medical treatment:

① After placement in the CU, plaintiff complained about an excruciating pain in his left shoulder, even though there were pain in the right shoulder. The Medical Department at NSP saw plaintiff on many occasions, but, provided no treatment. By the time plaintiff filed his grievances making defendants Kenney and Clarke ^{aware} of his medical

needs, both of plaintiff's shoulders became a source of severe pain, and weakness; numbness, and lesser range of motion increased as time went by.

Medical staff at NSP refused to provide treatment to plaintiff. A complaint was filed with the Ombudsman's office after exhaustion of the grievance system produced no relief. See Exhibit # 9. Upon filing the complaint, Deputy Ombudsman James Davis, contacted plaintiff and informed him that he was assigned to handle plaintiff's complaint.

② Due to the inquiry by the Ombudsman, plaintiff was seen by an orthopedist, Frederick A. Hathaway, M.D., who informed plaintiff that treatment must be provided to both shoulders, as his examination showed by the limited range of motion, numbness, weakness and the cracking sounds that the likelihood of a full tendon tear is very high. Dr. Hathaway advised plaintiff that treatment must be done with one shoulder at a time (Even though plaintiff must endure the pain of waiting) while the other shoulder is in the healing process after a surgery. Dr. Hathaway decided to start with plaintiff's left shoulder, by ordering an MRI on it.

③ On September 6, 2001 (4 months and 11 days after plaintiff has complained to defendant's Clarke and Kenney) an MRI was done at

Bryan LGH Hospital in Lincoln, revealing a complete tear of the supraspinatus tendon in the Left Shoulder. It was not until May 10, 2002 (One year and fifteen days after plaintiff's complaint to defendants Clarke and Kenney of the excruciating pain and serious shoulder's condition) that NSP medical staff through Dr. Hathaway did the surgery at Bryan-LGH Hospital. During a Follow up on the shoulder condition, Dr. Hathaway advised plaintiff that treatment of the right shoulder (despite the pain) must wait (90) ninety days, from May 10, 2002, to allow the left shoulder a healing time.

④ Before the Left shoulder surgery took place, plaintiff complained to NSP Medical staff about a hernia pain and problems and advised the Ombudsman of the problem. While the shoulders and hernia treatments were being addressed, plaintiff was advised of his pending transfer to TSCI (Date and time unknown for security reasons). Plaintiff advised the Ombudsman of the pending transfer. The Ombudsman, Mr. Davis, advised plaintiff that he spoke with the medical Department and with Dr. Elliott, the head physician at NSP, to put plaintiff's transfer to TSCI on hold, to avoid starting with a new medical system and avoid a delay in treatment, which already has

been overdue. Mr. Davis advised plaintiff, that he was assured by NSP medical staff that plaintiff WILL not be transferred before having his shoulders and hernia problems treated.

⑤ plaintiff advised Dr. Elliott around May 1, 2002, that the shoulder problems and Hernia need to be addressed and that he was reminding him to ascertain that the transfer to TSCI be put on hold. Dr. Elliott confirmed that the surgery on the left shoulder was imminent and that the other shoulder treatment will have to wait (90) days after the left shoulder surgery.

⑥ In late June, 2002, plaintiff inquired from Dr. Elliott about the Hernia treatment. Dr. Elliott advised plaintiff, in writing, that he was scheduled to see a specialist in Lincoln, a Dr. John Buckley. Dr. Elliott's response was dated July 1, 2002.

Despite assurances from the Ombudsman, Mr. James Davis, and from Dr. Elliott, that plaintiff WILL not be transferred to TSCI before treatment of his right shoulder and hernias, plaintiff was transferred to TSCI on July 18, 2002, without treating his right shoulder, nor his hernias.

(2) TSCI and SMU Claims.

On July 18, 2002, plaintiff was the first

prisoner on IM status to get transferred From the CU at NSP, to C gallery in the SMU at TSCI. C gallery is one of only two galleries in the SMU (the other being D) designated by defendants Clarke and Britten, to house prisoners on IM status. Plaintiff remains in a cell on C gallery since his transfer from NSP.

A general description of the SMU design and operations is germane to the causes of action in this complaint as set forth below.

a. The special Management Unit (SMU)

The SMU is the segregation unit at TSCI. It houses administrative Segregation prisoners, including Death row. It consists of two separate, but adjacent buildings. One building contains A, B and C galleries, while the other contains D, E and F galleries.

C and D galleries (IM galleries) are built with only (16) cells each, on a ground level tier (Total of 32 cells). A, B, E and F galleries each consists of an upper and lower tiers, each of which contains (20) twenty cells. Death row is housed on upper A gallery. There are other segregated prisoners housed with death row on upper A gallery. With the exception of C and D galleries, each gallery

has its showers and yard (Recreational) Located outside the cells, and prisoners housed on those galleries are allowed outside their cells to walk freely to and fro the showers and the yards, and to perform their job assignments. Death row is allowed communal meals, a "Day room" for socializing, and a pop machine is located on upper A gallery for Death row use. Death row meals are served while each prisoner stands in line on the gallery, inspects his tray before food is placed on it, and observes the food service, while choosing what ~~he~~ he wants to be placed on his tray.

ALL cells at SMU contain a fire alarm and a pressurized water sprinkler that can be set off by a fire, or by tampering with it (A very easy task for a determined prisoner). The fire alarm is a centralized and ~~loud~~ loud system, whereby, if a fire alarm goes off for any reason, including tampering, in any cell, it is heard by every cell occupant at SMU.

With the exception of C and D (IM) galleries, no water drains are designed, nor exist in any cell, or on the gallery, which makes the flooding of A, B, E and F galleries a tempting and a very desirable task, within reach, and an entertainment tool for segregated prisoners, who are on disciplinary, deranged, or mentally

disturbed (Nothing is more Joyful and humorous than watching the guards laboriously working to drain and clean the water and sewage on a gallery hallway). The space at the bottom of a cell door allows the water and sewage to reach the gallery hallway and other cells when it is the result of a Flooded toilet cell, or the result of tampering with the Fire alarm which automatically sets off the Water sprinkler.

The gallery cells and hallway can also be Flooded by tampering with the Fire alarm on the gallery, when a prisoner is on the gallery thus, having access to it. The Flooding of cells and (gallery) hallways and the setting off of the fire alarms have been an ongoing and never ending cycle.

The cells on A, B, E and F galleries have only (1) one door, contrasted with (2) two for C and D galleries. That one door is known as the slider door. It slides on rails. It is opened and closed through a mechanized and computerized system, operated by a guard in an ~~obscur~~-Secured control center. The slider door has an I shaped glass window which allows the occupant of a cell to see the hallway. It also allows the guards a view of the inside, and the cell's occupant.

b. Intensive Management (IM) cell and operations

1. prior to leaving his cell and at all times outside his cell, an IM status prisoner must wear Full restraints i.e. Leg irons, belly chain belt and handcuffs. An escort is always present with the prisoner. In plaintiff's case two escorts are assigned by defendants Clarke and Britten's orders. Only when a certain medical necessity or a Court hearing is set, an IM status prisoner is allowed to leave the SMU building without wearing an orange jumpsuit, i.e. Khaki shirt and pants.

2. An IM cell measures approximately 8x15 ft. encumbered and 5 x 15 ft. unencumbered. It has a sink, a toilet, a mirror, a 3x7 ft. steel bed mounted/bolted to the wall, two Π shaped glass windows that allow natural light (not sunlight), one small shelf bolted to the wall at the edge of the bed, and two shelves for books or other use. There are four radio jacks in the wall (Each for a certain radio station determined by the guards). A light can be dimmed, but not completely shut off. There is an intercom with a button to ask for help or a concern, while allowing the guards to listen or speak to the cell occupant when they please, or want. The floor of the cell is concrete. No chair, or table are provided. A drinking cup

is not provided, Unless a prisoner participate in a program to earn a drinking cup (he must purchase) he can not possess one without being in the program.

3. The cell has three doors. 1) A "slider door" (similar to the A, B, E and F, in control and sliding on rails). The slider door has an $\square$ shaped glass window to allow the guards a view of some areas inside the cell. The slider door also contains two 6x18 inch. hatches, opened by the guards when a prisoner is taken outside the cell. The "below the hips" hatch is used to place handcuffs, and the "above the ankle" hatch is used to place leg irons, and to give out cleaning supplies on the once a week cleaning day. 2) A "shower door" is situated approximately 5 ft. from the slider door. This door is also controlled by a guard in a secured control center, through a computer system. This door is opened when a prisoner needs to take a shower, or is leaving the cell due to a specific reason justifying absence from the cell. This door has a hatch 6x18 inch. that serves as an opening to give or receive mail; give back or receive a tray of food; delivery of laundry bags after and before washing; and sometimes to receive razors, shaving creams, and a jumpsuit on shower days. This door has an 18x34 inches glass that allows the guard to view all the inside of a cell when standing

outside the door. Towards the bottom, it has thick hardened cross shaped wires to allow air, and to add in a "better" view of the inside of a cell.

The area between the shower door and the slider door is the "shower area" which measures approximately 5 x 5 ft. An institutional stainless steel shower that measures 3 x 3 x 7 ft. is secured to the wall. 3) The third door is called the yard door. It has an Π shaped glass window, is controlled by the guard in the Control Center by / through a computer system. The guards open it when a prisoner is given his yard time.

4. The yard area is an extension to the cell, whereby, it is reached upon having the yard door (explained above) opened by the guard electronically. The yard area consists of an area the same size as the cell i.e. 8 x 15 Ft. while on one side of the yard there is ~~the~~ yard door leading to the cell, the opposite side is bordered by a steel gate with a cross-shaped, thick-hardened wires. The Floor is concrete, and concrete walls surround the yard area. There are no Toilets, or water sources on the yard. Defendant Clarke and Britten through instructions to their guards do not allow plaintiff inside the cell, once outside, until the full hour yard time expires. Even when plaintiff is / was willing to give up,

or forgo what was left of his one (1) hour yard time, he was denied the opportunity to go inside the cell to use the rest-room due to a diarrhea, dizziness, and sickness. Some guards do not allow plaintiff the time, or opportunity, to use the rest room, or drink water before going to the yard, despite having SMU "Inmate handbook" on page 10 under "Recreation" clearly stating that a prisoner must be given the opportunity to do so. Thus, plaintiff is being denied his yard time (A Constitutional right) by defendants Clarke and Britten, by their employees' malice, and infliction of pain on plaintiff, and denial of a natural human need (sickness and using a restroom). There is an intercom with a button on the yard door, and a wall mounted, can not be reached, camera, for monitoring the yard area and plaintiff.

5. The bed is installed and located in an area inside the cell that do not allow a guard looking through the Π shaped glass window, on the slider door, during checks and rounds, to see plaintiff when he is sleeping especially, when sleeping on one side. Unless the guard opens the slider door he/she is unable to see plaintiff. Opening the slider door is a very disturbing matter and by virtue of the noise "Ringing a bell" it wakes plaintiff up and disturbs him as well as, deprives him of sleep. This fact is an issue in plaintiff's claim below.

6. Meals are served through the hatch in the

IM gallery (to plaintiff) through the shower door hatch. The Food cart is pushed on the gallery during meal's time. plaintiff is not allowed, nor given the opportunity, to see how the Food is being served or handled, to inspect the tray for sanitation before food is placed on it, or to inform the guards what to place and what not to place on the tray by virtue of religious adherence. The food cart is outside the slider door, yet not visible to allow plaintiff a view.

7. Even in case of an emergency, the guards are ordered to suit up in full Riot gear, before entering an IM cell when an IM status prisoner is unconscious. To enter a cell without having a prisoner in full restraint requires assembling an Emergency Response Team or "ERT" that is made up of at least 5 or 6 guards, plus a Leader, and a video recording staff. With the shortage of staff at TSCI, it would take a minimum of 15 to 20 minutes to get an "ERT" assembled and ready to enter an IM cell, and take the prisoner out for medical care. This time could mean the difference between life and death and/or partial, or total paralysis in cases of a heart attack, or a stroke. This current policy by defendants Clarke and Britten, has the potential for causing

irreparable harm, and proves culpability and deliberate indifference, as numerous courts have found that knowing of the potential for harm and failure to take steps to prevent it proves indifference (deliberate) and culpability.

8. plaintiff is allowed to shower (3) three times a week, yard time (5) five times a week, Law Library session (1) one hour a week with Full restraints (only one hand free) and Legal Aide is prohibited by defendant's Clarke and Britten policy, from doing any work to assist plaintiff. plaintiff is allowed only (1) one hour a week visit via Closed Circuit Television CCTV (No contact visit).

The shower is provided to plaintiff (3) three times a week for (15) fifteen minutes including shaving, and the yard is provided (5) five times (days) a week for (1) one hour per day. Only through an incentive program a participant can earn an extra shower day a week (extra 15 minutes shower time) and an extra one (1) hour yard time, and an extra (1) one hour a month of a visitation session. Those earned yard, shower, and visits (Incentive) can be taken away for any reason. There is no penological interest, or concern, why plaintiff cannot shower every day, have yard time every day, especially, when

the shower is inside the cell where plaintiff is housed. With the push of a button, the guard turns the shower on, and with the push of a button, the yard door is opened. Unlike death row and other galleries (Non-IM), immediate supervision is needed as prisoners are outside the cells, plaintiff and IM status prisoners stay within the confines of the cell 24 hours a day, 7 days a week.

C. Classification

1. The same process of classification at the CU at NSP is being adopted and implemented in keeping plaintiff on IM status.

Ten days after arriving at TSCI, plaintiff was provided with a copy of an "Addendum A" Reclassification Action form. See Exhibit # 10. The same information used in Exhibit #4 (Identical) was used in this Exhibit recommending that plaintiff remains on IM status, using false information, and the same information used to place plaintiff on IM status at NSP. A notice of hearing was provided to plaintiff deciding in advance to deny him his right under Administrative Regulation 205.1 to have a representative. The Notice is dated "20 August, 2002". See Exhibit # 11.

The "Segregation Status review sheet" approved by

defendant Britten relies on the same repetitious recommendation as evidence (seriousness of the incident) rather than new evidence. See Exhibit #12.

On August 23, 2002, plaintiff appeared before the Director's Classification Subcommittee where he was denied his rights under Administrative Regulation 201.5 i.e. to have representation, present documentary evidence, witnesses and evidence to refute the contents of Exhibit #10. plaintiff emphasized to the Committee (And all subsequent Committees that plaintiff went before) that they are violating his due process rights, only to hear the same response from all Committees: "you can appeal our decision". All committees replied to plaintiff's inquiry as to why they want to keep him on IM status by: "what you did on April 25, 2001".

When plaintiff inquired from the Committee (And all subsequent Committees) how long was he going to be on IM status he heard the response of: "Along time, indefinitely, (15), (20) years". This statement was made to plaintiff by the managers of the CU at NSP, and the SMU at TSCI. When plaintiff inquired about this serious, without evidence, or justification, statement, which violates the clear language of Administrative Regulation 201.5, which mandates new evidence, they all replied: "what you did on April 25, 2001". These

Committees act under the direct authority of defendants Clarke and Britten.

plaintiff received the "Disposition of Classification hearing" dated September 20, 2002, advising plaintiff of the Decision of the Director's Review Committee to Continue plaintiff on IM Status. See Exhibit # 13

A timely appeal within the (15) fifteen day time period was filed pursuant to Administrative Regulation 201.5. See Exhibit # 14. The Appeal was mailed to defendant Clarke on September 30, 2002. When plaintiff did not receive a response on the Appeal, to defendant Clarke, within (25) twenty five days (working) as that of a step II Grievance, he filed a grievance and exhausted it to step II. The response by defendant Clarke was that "---- this time limit does not apply to decisions in appeals from Classification actions ----". See Exhibit # 15. If anything, it is a due process violation and a proof that the decision to keep plaintiff on IM status has been determined, and a response to an appeal is not important. This clearly leads to the conclusion, that the (6) six months review, that the "Segregation Status review sheet" includes prior to the scheduled hearing before the Director's classification

Subcommittee (Exhibit # 13 and all other sheets) are only a farce. They serve as means to keep plaintiff on IM status in a "looks like regular review" when they mean nothing other than a pathetic informality, any agent of Clarke and Britten, on the institutional or departmental level, can change when and how they please, when the need arises, only in violation of due process rights.

Defendant Clarke denied plaintiff's appeal on November 18, 2002, using the same false and illegal charges he used in prior appeals. See Exhibit # 16.

The indifference by defendants Clarke and Britten, to the (6) six months IM status review, will simply be proven, and will substantiate plaintiff's claims of due process violations. It is exhibited by what happened next.

The "Disposition of Classification Hearing" dated September 20, 2002 (Exhibit # 13) states: "next classification hearing is February 13, 2003". When no hearing took place on February 13, 2003, plaintiff through an Emergency grievance requested immediate release to the general population as his Tentative Release date was February 13, 2003, see Exhibit # 17. "prop Seg A's TRD: 2-13-2003". The Emergency grievance clearly stated the foregoing fact. See Exhibit # 18. Defendant Britten's response was indifferent, in turn, defendant Clarke has violated plaintiff's due process right as the "TRD"