

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

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Lumumba Kenyatta Incumaa,	)	C/A No. 9:12-3493-CMC-BM
Plaintiff,	)	
	)	RESPONSE TO
vs.	)	SUMMARY JUDGMENT.
	)	
Honorable William R. Byars, Jr.,	)	
as Director of the SCDC,	)	
<u>Defendant.</u>	)	

STATEMENT OF THE CASE

Plaintiff, in the above-captioned civil action Filed a 42 U.S.C. § 1983 Verified Complaint against the Defendant as Director of the South Carolina Department of Corrections (SCDC), seeking only declaratory and injunctive relief, for violation of his rights protected by the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 and the Fourteenth Amendment to the United States Constitution.

Specifically, the Defendant's promulgated Security Threat Group (STG) Policy designating Plaintiff's God Centered Culture of Islam (i.e. Religion) that is the Nation of Gods and Earths (NOGE) itself a STG and prohibiting the exercise thereof within the SCDC, whether in the general prison population or in the Special Management Unit (SMU), is imposing a substantial burden on Plaintiff's exercise of his God Centered Culture of Islam (i.e. Religion) that is the NOGE by punishing Plaintiff with the

Restrictive confinement of the SMU until he renounce (abandon) his God Centered Culture of Islam (i.e. religion) that is the NOGE; and that Plaintiff's confinement within the SMU is an atypical and significant hardship in both duration and degree of restriction in relation to the ordinary incidents of prison life, violating Plaintiff's liberty interest protected by the Fourteenth Amendment to the U.S. Constitution.

The Defendant Filed an Answer to Plaintiff's Complaint on March 15, 2013.

Plaintiff Filed with the Court on May 20, 2013 as Entry Number 21, 21-1 and 21-2 Plaintiff's Brief In Support of His Verified Complaint and Plaintiff's Affidavit with Exhibits attached thereto, all of which Plaintiff fully incorporates herein.

The Defendant Filed a Motion For Summary Judgment dated July 16, 2013 pursuant to Rule 56, FRCP.

Plaintiff herein Files his Response To Summary Judgment showing that there are genuine issues of dispute as to the material facts precluding the granting of Defendant's Motion For Summary Judgment. Plaintiff's Response is based upon his Brief In Support of His Verified Complaint, Affidavits, Exhibits, and any other matters as may be required by the Court.

RESPONSE

I.

Plaintiff submits that the Nation of Gods and Earths (NOGE) is a God Centered Culture of Islam (i.e. Religion) which is equivalent to any mainstream religion being practiced in America today, and occupies a place in Plaintiff's life parallel to that filled by the orthodox belief in God in more mainstream religions which are widely accepted in the U.S.

Several U.S. Federal courts have held that the designation of the NOGE (also commonly known as Five Percenters) as a STG is unconstitutional, Marria v. Broadus, 2003 U.S. Dist. LEXIS 13329 (S.D.N.Y. July 31, 2003), Hardaway v. Haggerty, 2009 WL 6093273 (E.D. Mich. Aug. 17, 2009), adopted in relevant part, 2010 WL 1131446 (E.D. Mich. Mar. 22, 2010); and several state prison Directors and officials in America have voluntarily removed the STG designation from the NOGE and are now affording prisoners within those states the opportunity to freely exercise the God Centered Culture of Islam (i.e. Religion) that is the NOGE, such as the Massachusetts Department of Corrections.

In accord with the test upheld by the Fourth Circuit in the case Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986), the doctrines of the God Centered Culture of Islam (i.e. religion) that is the NOGE, concerns ultimate questions of human life, as

do the doctrines of recognized religions, believes in another world (so-called afterlife), and has a "broad concern for improving the quality of life for others." The doctrine of the God Centered Culture of Islam (i.e. religion) that is the NOGE teach and practice ceremonies parallel to those of recognized religions, and members practice both individually and collectively. See Plaintiff's Affidavit Filed with the Court on May 20, 2013 as Entry Number 21-1.

The 1995 designation of the NOGE as a STG by then SCDC Director Michael Moore, was based on the actions of individual members of the NOGE. See In Re: Long Term Administrative Segregation of Inmates Designated As Five Percenters, 174 F.3d 464 (4th Cir. 1999) (hereafter referred to as Five Percenters). Actions which SCDC officials deemed to be violent, disruptive and/or criminal in nature. Director Moore's designation of the NOGE as a STG WAS NOT based on the teachings, beliefs and practices of the God Centered Culture of Islam (i.e. religion) that is the NOGE itself, but on the actions of members of the NOGE which were (ARE) contrary to the teachings, beliefs and practices of the NOGE itself.

The God Centered Culture of Islam (i.e. religion) that is the NOGE itself does not teach one to be a criminal, and nor does it encourage and/or condone criminal, disruptive or violent acts and/or behavior. The Founder of the NOGE (Five Percenters) Allah "The Father" did not teach any of that. Allah "The

Father" taught a righteous path of salvation which leads us back to our divine nature within. The NOGE is a God Centered Culture of Islam (i.e. religion) which when lived out each and everyday in a righteous and civilized way, consciously awakens us to the truth that we are not simply human beings seeking a spiritual existence, but we are in truth spiritual beings living a human existence, and consciously "ties us Fast" to our divine nature that is the supreme creator (Allah) (God) existing on earth in physical Flesh. This is the legitimate God Centered Culture of Islam (i.e. religion) that is the NOGE and the pathway of salvation which Plaintiff lives daily.

The NOGE (Five Percenters) itself has had a legitimate and law-abiding existence in the U.S. since its Founding in 1964 by Allah "The Father" almost 50 years ago. A legitimate existence which was acknowledged in 1967 by then New York Republican Mayor John Lindsay and Governor Nelson Rockefeller. Mayor Lindsay gave the Founder of the NOGE (Five Percenters) Allah "The Father" the building in which the First NOGE School was opened in 1967 in Harlem, New York, where it remains today. In 1968 then N.Y. Governor Nelson Rockefeller publicly embraced and commended Allah "The Father" for his work with the youth and for him and his Five Percenters helping to keep the peace in Harlem, New York after the assassination of Martin Luther King, Jr on April 4, 1968. See Exhibit 1 attached hereto, page 3 of The Five Percenter newspaper, Vol. 18.9, May 2013.

This is part of the living history and legitimate existence of the NOGE in America for almost 50 years now. Not of a STG and/or gang, but a legitimate God Centered Culture of Islam (i.e. religion) which is equivalent to any mainstream religion being practiced as a legitimate pathway to God in America. Are there those who identify themselves as being of the NOGE who have done things which are contrary to the teachings, beliefs and practices of the NOGE itself, such as violent, disruptive and criminal acts?

Yes, but what religion does not include these type Followers? There can be found numerous documented incidents inside and outside of the SCDC where Christians, Muslims, and others have either individually and/or collectively committed violent, disruptive and/or criminal acts. However, SCDC Directors have not designated none of these religions as a STG or gang. The Court in MARRIA v. BROADDUS, supra. observed:

"We stress that we are not saying that there are not prisoners who would describe themselves as Five Percenters who have committed crimes or otherwise violated prison regulations. However, the limitations of this 'Fact' should be obvious."

"There are prisoners who would describe themselves as Catholics, Protestants, Jews, Muslims, NOI, etc. who likewise violate prison regulations, and it is easy to imagine a situation where the common ethnic or religious bond shared by members of a group could serve as the impetus for some to band together and at times act cohesively, but no one would suggest that such facts preclude the classification of these recognized groups as religions deserving of First Amendment protection."

In sum, the Fourth Circuit's decision in In Re Long Term Administrative Segregation of Inmates Designated As Five Percenters was evaluated and decided on the deferential standard of Turner v. SaFley, 482 U.S. 78, 89 (1987), and not the strict scrutiny/least restrictive means standard of the RLUIPA of 2000. The NOGE is a legitimate God Centered Culture of Islam (i.e. Religion) which the Defendant has designated a STG, imposing a substantial burden on Plaintiff's exercise of his God Centered Culture of Islam (i.e. Religion) that is the NOGE, a genuine issue of dispute as to the material Facts, precluding the granting of the Defendant's Motion For Summary Judgment.

II.

Plaintiff Fully incorporates herein, Plaintiff's Brief In Support of His Verified Complaint, Plaintiff's Affidavit and Exhibits Filed with the Court on May 20, 2013 as Entry Numbers 21, 21-1 and 21-2.

Plaintiff, unlike in Versatile v. Johnson, 2011 WL 5119259 (E.D. Va. 2011), has presented to the Court prima facie evidence that the God Centered Culture of Islam (i.e. Religion) that is the NOGE meets the standard as to what is a religion set forth by the Fourth Circuit Court of Appeals in Dettmer v. Landon, supra, even despite the fact that the NOGE is not a religion in the conventional use of the term. See Plaintiff's Brief In Support of His Verified

Complaint and Exhibit C attached thereto.

Plaintiff has shown that the God Centered Culture of Islam (i.e. religion) that is the NOGE occupies a place in his life "parallel to that of more conventional religions." The standard which the Fourth Circuit upheld in Dettmer to determine whether a professed Faith is a religion protected by the Free exercise clause of the First Amendment. As the Court in Dettmer found with the Church of Wicca, when it upheld the District Court's decision that the Church of Wicca occupies a place in the lives of its members "parallel to that filled by the orthodox belief in God" in religions more widely accepted in the U.S., this also holds true for Plaintiff and his God Centered Culture of Islam (i.e. religion) that is the NOGE. As Plaintiff enumerated in his Affidavit filed with the Court on May 20, 2013 as Entry Number 21-1, the God Centered Culture of Islam (i.e. religion) that is the NOGE deals with the ultimate questions of human life, believes in another world, has a broad concern for improving the quality of life for others, teach and practice ceremonies parallel to those of recognized religions, and its members practice individually and collectively.

The Defendant, through the Affidavit of Elbert Pearson, falsely label the NOGE itself a gang, hate group that teaches a racist ideology and black supremacy. The NOGE is not a gang, and is not a hate group that teaches a racist ideology and black supremacy. It is true that the NOGE teach that the

Blackman is God and the white man is the devil. However, by teaching such does not make the NOGE a gang and/or hate group that teaches a racist ideology and black supremacy. The NOGE also teach that the white man who lives a righteous life lives as a civilized man, and the Blackman who lives a life of devilishment is living as a devil. Why is it that when the NOGE teach that the Blackman is God and the white man is the devil, it is a gang and hate group that teaches a racist ideology and black supremacy; but when Christianity teach that God is a white man via images of God and Jesus as white men (Caucasian), and that the devil is a man of color via images of the devil as a man with swarthy skin, it is not? Why is Christianity not deemed a hate group that teaches a racist ideology and white supremacy?

There is no religion on earth that all people on earth are in 100% agreement with its teachings, beliefs and/or practices. There are some people who do not agree with or like the teachings of Jesus Christ when he taught the kingdom of God is within (St. Luke 17:21), when he taught a people "ye are gods" (St. John 10:34), or when he taught that a people were of their father the devil (St. John 8:44). Christians don't agree with the teachings of Muslims and say they are all going to hell no matter how much righteousness and good deeds they do because they have not accepted Jesus Christ as the only begotten son of God who died for their sins. Muslims don't agree with the teachings of Christians and say they are all going to hell no matter how much righteousness and good deeds they do,

because they have not accepted Allah as the one true God and Muhammad as his last Prophet and messenger. Jews don't agree with neither Christian or muslim and say they are both going to hell, because they are the "chosen people" of God on earth.

These examples can go on with all the mainstream religions on earth, wherein are even different denominations who do not agree with each other, and they have fought and killed each other in the millions over their disagreements and differences. They still are till this day.

These religions and others like them are the religions described in the conventional use of the term religion, which the NOGE does not identify itself with.

One of the great things about America and the U.S. Constitution is that one can have Religious teachings, beliefs and practices which others may not agree with or like, even the government, but are still free to exercise those teachings, beliefs and practices as long as they do not infringe upon the rights of others, violate the law and/or cause others harm. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"). The Defendant is denying Plaintiff this right and protection for his God Centered Culture of Islam (i.e. religion) that is the NOGE.

The NOGE teach that the Blackman is God and the whiteman is the devil, not to teach a racist ideology, black supremacy or hate of white people. The Founder of the NOGE Allah "The Father" publicly stated that the NOGE (Five Percenters) is not pro-black or anti-white, but is pro-righteousness and anti-devilishment. In Fact, there are white Five Percenters. See Exhibit 1 attached hereto, page 2 of The Five Percenter newspaper, Vol. 18.9, May 2013. Further, while the NOGE does teach that the Blackman is God and the whiteman is the devil, there is nothing in the teachings, beliefs and practices of the NOGE, as taught and understood by the God Centered Culture of Islam that is the NOGE, that teach hate of white people, a racist ideology or black supremacy, and nor is there found anything which teaches one to be a criminal, act in a violent and destructive way, or condone such behavior. See Plaintiff's Affidavit Filed with the Court on May 20, 2013 as Entry Number 21-1 and 21-2.

Plaintiff submits that the NOGE is a God Centered Culture of Islam (i.e. religion) which has had a legitimate and law-abiding existence outside prisons for almost 50 years now, and which is equivalent to any mainstream religion which others use as their path to God. This is Plaintiff's conscience choice as his path to God, and his path to God may not be acceptable, logical, consistent, or comprehensible to the Defendant, it is still Plaintiff's conscience choice as his path to God, and the Defendant has no right to pressure him to apostate.

A. Substantial Burden.

The Fourth Circuit has held that a substantial burden is one that "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs", or... Forces a person to 'choose between Following the precepts of her religion and Forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand." Smith v. Dzmint, 578 F.3d 246, 251 (4th Cir. 2009).

As Plaintiff has shown in his Brief In Support of His Verified Complaint and Affidavit attached thereto, the Defendant's STG Policy substantially burden the exercise of his God Centered Culture of Islam (i.e. religion) that is the NOGE by designating the NOGE a STG and pressuring Plaintiff to renounce (abandon) his God Centered Culture of Islam and violate his beliefs in order to be released from the restrictive and punitive confinement of the SMU to the general SCDC prison population.

The Defendant would like the Court to believe that SCDC is not putting pressure on Plaintiff to renounce his beliefs and return to the general population. This is untrue. Plaintiff submits that confinement in the restrictive and punitive conditions of the SMU is being used as a punishment which will not end until Plaintiff abandon (renounce) his God Centered Culture of Islam that is the NOGE. Plaintiff was

Released From the Maximum Security Unit in 2005 to the SMU, where he has since been subjected to the restrictive and punitive conditions of the SMU as a means to pressure him to renounce his God Centered Culture of Islam that is the NOGE. Whether or not the STG Policy provides a mechanism or procedure for a STG member to renounce or "attempt to renounce his beliefs and further affiliation or participation in an STG", is not the issue for Plaintiff. Plaintiff is not a STG member and nor is the NOGE a STG. Plaintiff is a member of the God Centered Culture of Islam (i.e. religion) that is the NOGE, and the Defendant is using the restrictive and punitive confinement in the SMU to punish and pressure Plaintiff into renouncing his legitimate beliefs and practices of the God Centered Culture of Islam (i.e. religion) that is the NOGE.

In essence, the Defendant is punishing Plaintiff until he renounce (abandon) his God Centered Culture of Islam (i.e. religion) that is the NOGE. However, the Defendant wants the Court to believe that "what the Plaintiff is really contending is that the greater privileges and better conditions of confinement existing for inmates in the general population is what is pressuring him to renounce his "religious beliefs." Plaintiff submits that if all he wanted was greater privileges and better conditions, he would have renounced his God Centered Culture of Islam (i.e. religion) that is the NOGE eighteen (18) years ago. Plaintiff is enduring this punishment within these restrictive and punitive conditions of confinement because of his sincerely held religious beliefs.

Further, the record is clear "that SCDC is using the privileges and conditions in general population to pressure the Plaintiff to modify or change his beliefs." The Defendant has made it clear through his STG Policy, if Plaintiff do not renounce (abandon) his God Centered Culture of Islam (ie. Religion) that is the NOGE, Plaintiff will never be allowed any of the privileges and conditions in general population, but will suffer only the punishment of the restrictive and punitive conditions of the SMU. In effect, if you want these privileges and conditions in general population, you got to modify and change your beliefs.

Furthermore, Plaintiff is only being allowed to possess religious literature in the SMU. Plaintiff is not being allowed to observe any of the Honor (Holy) Days of the NOGE. The Fourth Circuit in Five Percenters may have noted that "[e]ven in high-security confinement the Five Percenters remain free to pray, fast, and study religious materials", however in truth SCDC does not recognize any of the Honor (Holy) Days of the God Centered Culture of Islam (ie. Religion) that is the NOGE, and prohibits their observance within the SCDC whether in the SMU or general population.

In sum, the Defendant's STG Policy, as it is being applied to Plaintiff and his God Centered Culture of Islam (ie. Religion) that is the NOGE, substantially burden his religious exercise, and on this basis Plaintiff's RLUIPA claim should be granted. A

genuine issue of dispute as to the material facts precluding the granting of Defendant's Motion For Summary Judgment.

B. Compelling Governmental Interest/Least Restrictive Means.

Having shown that the Defendant's STG Policy, as it is being applied to Plaintiff and his legitimate God Centered Culture of Islam (i.e. Religion) that is the NOGE, substantially burden his religious exercise, the burden shifts to the Defendant to demonstrate that this substantial burden is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.

The compelling governmental interest which the Defendant assert as furthering his STG Policy designating the NOGE a STG, substantially burdening Plaintiff's exercise of his God Centered Culture of Islam (i.e. Religion) that is the NOGE, by punishing him with the restrictive and punitive conditions of the SMU until he renounce (abandon) his God Centered Culture of Islam, is that it preserves "internal order, and discipline and maintaining institutional security."

Plaintiff submits that the compelling governmental interest which the Defendant has asserted as being furthered by designating Plaintiff's God Centered Culture of Islam (i.e. Religion) that is the NOGE a STG and prohibiting the exercise thereof within the SCDC, can be shown not to be compelling by the fact

that other state Department of Corrections in America recognize the God Centered Culture of Islam (i.e. religion) that is the NOGE and allow NOGE members to freely exercise their God Centered Culture of Islam within those state Department of Corrections without causing any disruption to their internal order, discipline or institutional security. See Marria v. Broaddus, 2003 U.S. Dist. LEXIS 13329 (S.D.N.Y. July 31, 2003), Haradaway v. Haggerty, 2009 WL 6093273 (E.D. Mich. Aug. 17, 2009) adopted in Relevant part, 2010 WL 1131446 (E.D. Mich. Mar. 22, 2010). See also Procunier v. Martinez, 416 U.S. 396, 414 n.14 (1974) where the Court noted "while not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."

The Defendant has presented no evidence showing how designating the NOGE itself a STG is the least restrictive means of furthering the compelling governmental interest of "preserving internal order and discipline and maintaining institutional security." A God Centered Culture of Islam (i.e. Religion) that is the NOGE which has had a legitimate and law-abiding existence outside prison for almost 50 years, the Defendant is treating exclusively as a STG (gang), and have outright banned the exercise thereof within the SCDC, whether in the general population or in the SMU.

Further, the Defendant, quoting from the Fourth Circuit

decision in Five Percenters, assert that if they act only after a inmate's demonstration of individual dangerousness, it would deprive them of the all-important option of prevention. Plaintiff submits that SCDC officials daily act only after inmates commit violent, disruptive and/or criminal acts within the SCDC, and by doing so it has not eroded one bit, their ability to "preserve internal order, and discipline and maintaining institutional security", or their "option" of prevention. If the Defendant can use this least restrictive means with all other SCDC inmates and still further the compelling interest of order, discipline and security, why can they not do the same with Plaintiff? This is a "less restrictive alternative to security detention" of Plaintiff, who has not had a disciplinary conviction in the last seventeen (17) years.

The Defendant is punishing Plaintiff with the restrictive and punitive confinement of the SMU solely because of his conscience choice not to renounce (abandon) his God Centered Culture of Islam (i.e. Religion) that is the NOGE; and while in this confinement are prohibiting Plaintiff from observing any of the Honor (Holy) Days of the NOGE.

The Defendant in his Memorandum In Support of Motion For Summary Judgment quotes profusely from the Court's decision in Five Percenters, 174 F.3d 464 (4th Cir. 1999) which was evaluated and decided using the deferential standard of Turner v. Safley, 482 U.S. 78, 89 (1987), and not the

strict scrutiny/least restrictive means test of the RLUIPA of 2000. In this way, the Defendant is trying to get around the burden of persuasion having to present evidence to demonstrate that the substantial burden which his STG Policy is imposing on Plaintiff's exercise of his God Centered Culture of Islam (i.e. Religion) that is the NOGE, by designating the NOGE a STG and prohibiting the exercise thereof within the SCDC, furthers the compelling interest which he has asserted, and is the least restrictive means to do so; and the Defendant is attempting to misconstrue to the Court, that the more deferential standard of TURNER is the standard to be used to evaluate and decide a claim brought under the RLUIPA of 2000.

The Defendant has failed to establish that his STG designation of the God Centered Culture of Islam (i.e. Religion) that is the NOGE itself and complete ban on the exercise thereof within the SCDC, whether in general population or the SMU, furthers the compelling interest of preserving internal order, discipline and maintaining institutional security and that it is the least restrictive means of doing so under the RLUIPA of 2000; and Plaintiff has shown that under the strict scrutiny/least restrictive means analysis of RLUIPA, the Defendant has available to him a least restrictive means, which he uses daily with other SCDC inmates, to punishing Plaintiff with the restrictive and punitive confinement to the SMU until he renounces (abandon) his God Centered Culture of Islam (i.e. Religion) that is

the NOGE.

It is undisputed that maintaining the order, discipline and security of prisons are compelling governmental interests, and that judicial tradition states that due difference is afforded to the experience and expertise of prison officials in establishing policies to maintain the order, discipline and security of prisons consistent with consideration of costs and limited resources. It is also equally undisputed that "prison walls do not form a barrier separating prison inmates from the protections of the constitution", Turner v. Safley, 482 U.S. 78, 89 (1987), and that due difference to prison officials does not mean the courts altogether abdicate its role in constitutional cases brought by inmates. Thus, while prison officials are given due difference in making decisions for the safety, security and order of the institutions, staff and other inmates, they cannot merely brandish the words "security", "safety", and "order" and expect that their actions will automatically be deemed constitutionally permissible conduct.

The Defendant has presented no evidence demonstrating how designating the NOGE itself a STG, is the least restrictive means of furthering the compelling interests which he have asserted, other than to merely quote profusely from the Fourth Circuit's decision in Five Percenters, which was evaluated and decided using the deferential standard of Turner v. Safley, and not the strict scrutiny/least restrictive means test of

RLUIPA; and Plaintiff has shown herein, a least restrictive means which the Defendant use daily with other inmates, which furthers the compelling interests asserted in a least restrictive means to punishing Plaintiff with confinement to the restrictive and punitive conditions of the SMU until he renounce (abandon) his God Centered Culture of Islam (i.e. Religion) that is the NOGE.

Thus, showing genuine issues of dispute as to the material facts of Plaintiff's RLUIPA claim, precluding the granting of the Defendant's Motion For Summary Judgment.

III.

Plaintiff restates herein section II. of his Brief In Support Of His Verified Complaint Filed with the Court on May 20, 2013 as Entry Number 21, to show the merits of his Fourteenth Amendment procedural due process claim.

Plaintiff submits that his continued administrative segregation confinement within the Special Management Unit (SMU) is an atypical and significant hardship in both duration and degree of restriction, in relation to the ordinary incidents of prison life, violating his liberty interest protected by the Fourteenth Amendment.

To determine whether the conditions in administrative

Segregation confinement amounts to an atypical and significant hardship in relation to the ordinary incidents of prison life, the Fourth Circuit Court of Appeals in Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997) used the general prison population as a comparative baseline. Unlike the general SCDC prison population, within the SMU Plaintiff:

- a. Is confined to a cell 24 hours a day on non-recreation and non-shower days.
- b. Is allowed recreation only on either Monday, Wednesday and Friday OR on Tuesday and Thursday for only one (1) hour, which depends on what days of the week the recreation rotation period falls. Three (3) days recreation one week, two (2) days the next week, three (3) days the next week, etc., etc.,
- c. Is allowed only a ten (10) minute shower only on Monday, Wednesday and Friday.
- d. Is stripped searched, made to lift and shake his genitalia, made to bend over, spread his buttocks in the direction of the officer so that he may look at Plaintiff's anus, then made to squat and cough, and afterwards hand cuffed behind his back every time he leaves the cell, even to the shower where he is locked in a single occupancy shower stall.
- e. Is served smaller portions of food each meal, compared to the portions which are being served to the general SCDC prison population.
- f. eats all meals in the cell.
- g. personal and legal property limited to what can fit into a 15" x 12" x 10" size box.
- h. Is denied all canteen privileges.
- i. Is denied the opportunity for a work assignment.
- j. Is denied educational and vocational opportunities.
- k. Is denied the opportunity to receive mental health treatment for his diagnosed mental health condition.

Plaintiff submits that he daily suffers these and more restrictive and punitive conditions within the SMU in administrative segregation confinement, not because he has committed disciplinary infractions, but solely because of his conscience choice not to abandon (renounce) his God Centered Culture of Islam (i.e. religion) that is the NOGE.

Plaintiff has been placed in administrative segregation confinement under the STG Policy since 1996, and his continued confinement to the restrictive and punitive conditions within the SMU is indefinite, because Plaintiff is serving a sentence of life without parole. Indefinite confinement to administrative segregation to the SMU within conditions which amounts to an atypical and significant hardship in both duration and degree of restriction in relation to the ordinary incidents of prison life (general SCDC prison population), solely because Plaintiff choose to follow his conscience and not renounce (abandon) his God Centered Culture of Islam (i.e. religion) that is the NOGE.

Compared to the conditions of confinement which Plaintiff could expect to experience in the general SCDC prison population as an ordinary incident of prison life, the restrictive and punitive conditions of Plaintiff's continued administrative segregation confinement within the SMU, combined with the extreme length of time of his confinement, 18 years to date,

with no end in sight, amounts to an atypical and significant hardship in relation to the ordinary incidents of prison life under the Sandin standard, thereby creating for Plaintiff a protected liberty interest in his continued administrative segregation confinement to the SMU. Sandin v. Conner, 515 U.S. 472 (1995) (held liberty interest exists where conditions of confinement result in an atypical and significant hardship, in either duration or degree of restriction, in relation to the ordinary incidents of prison life). See also, Colon v. Howard, 215 F.3d 227 (2d Cir. 2000) (held 305 day confinement satisfied the Sandin standard); Shoats v. Horn, 213 F.3d 140 (3d Cir. 2000) (held segregation for eight years triggered due process right); Koch v. Lewis, 216 F. Supp. 2d 994 (D. Ariz. 2001) (held five and one-half years of confinement, with no end in sight, gave rise to protected due process liberty interest); Iqbal v. Hasty, 490 F.3d 143, 161 (2d Cir. 2007) (held segregation of longer than 305 days is sufficiently atypical to require procedural due process protection under Sandin).

Plaintiff was released from the Maximum Security Unit (MSU) to the SMU in June of 2005, where he has remained confined in administrative segregation for approximately the last eight (8) years.

Plaintiff, having established his protected liberty interest in his continued administrative segregation confinement to the

SMU, which is for all intents an indefinite confinement, submits that the U.S. Supreme Court in Hewitt v. Helms, 459 U.S. 460 (1983) held that administrative segregation may not be used as a "pretext for indefinite confinement of an inmate" and "prison officials must engage in some sort of periodic review of the confinement of such inmates." *Id.* at 477, n.9. While Sandin abandoned Hewitt's reasoning to determine if a liberty interest exists, it did not overrule the decision.

Plaintiff submits that SCDC officials are not engaging in any meaningful review of his continued administrative segregation confinement to the SMU, but are merely sending Plaintiff a copy of SCDC Form 19-30 "SMU INSTITUTIONAL CLASSIFICATION COMMITTEE REVIEW" stating Plaintiff remain in Security Detention (SD) Level II because of his STG status. See Exhibit D. [attached to Brief] They are using the same justification on the Form in a rote fashion, and their sending Plaintiff a copy of the SCDC Form 19-30 is perfunctory. In fact, if the Court will please take note of Exhibit D, they are not even filling out new forms, they are simply photocopying the same filled out form and are just adding a new date; and if the Institutional Classification Committee Person changes, a new name.

Plaintiff has never appeared before any board and/or individual, or been visited by anyone, who has reviewed his

Continued administrative segregation confinement to the SMU. Plaintiff will receive no meaningful periodic review of his continued confinement to the SMU until he is no longer in STG status. SCDC officials, by their actions, are making it perfectly clear that Plaintiff will receive no actual review of his continued administrative segregation confinement to the SMU until he renounce (abandon) his God Centered Culture of Islam (i.e. religion) that is the NOGE.

Plaintiff submits that his continued administrative segregation confinement to the SMU in conditions which amounts to an atypical and significant hardship in both duration and degree of restriction, in relation to the ordinary incidents of prison life, without any actual meaningful periodic review of his continued confinement violates Plaintiff's liberty interest protected by the Fourteenth Amendment.

Based on the foregoing, Plaintiff has presented a viable claim for violation of his liberty interest protected by the Fourteenth Amendment, and a genuine issue of dispute as to the material facts precluding the granting of the Defendant's Motion For Summary Judgment.

IV.

The United States Supreme Court in the case Muhammad v. Close, 540 U.S. 709 (2004) (per curiam) clarified that prisoners are not required to file a petition for habeas corpus before bringing an action under 42 U.S.C. § 1983 seeking release from administrative segregation confinement if such action will not affect his release date. As Plaintiff is serving a sentence of life without parole, his release from the SMU will not affect his release date. Plaintiff has no good time to get back. The Court held that such actions are not governed by the rule established by the Court in Preiser v. Rodriguez, 411 U.S. 475 (1973) and Heck v. Humphrey, 512 U.S. 477 (1994).

Plaintiff has met the exhaustion requirements of the Prison Litigation Reform Act (PLRA) by following and raising this issue through the CDC institutional grievance procedure. Jones v. Bock, 549 U.S. 199 (2007) ("Compliance with prison grievance procedures... is all that is required by the PLRA to 'properly exhaust.'")

Based on the foregoing facts and legal authorities, Plaintiff has made a viable request for relief to be released from the atypical and significant hardship of his continued confinement in administrative segregation (SMU).

CONCLUSION

Based on the foregoing response, facts and analysis Plaintiff respectfully requests the Court to deny the Defendant's Motion For Summary Judgment, and that Plaintiff's Causes of Action be set for trial and/or the Relief stated in his verified Complaint be granted.

Respectfully submitted,

Ridgeville, South Carolina
August 1, 2013

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