

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

 Adib Eddie Ramez Makdessi, Prose - PETITIONER

 v.
Lt. Fields, et al.

(APPENDIX A) 16 pages
and

(APPENDIX B) 11 pages

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-6121

ADIB EDDIE RAMEZ MAKDESSI,

Plaintiff – Appellant,

v.

LT. FIELDS; SGT. KING; CAPT. GALLIHAR,

Defendants – Appellees,

and

HAROLD W. CLARKE, Director of Virginia Corrections; DAVID BELLAMY; TIMOTHY SUMPTER; GLEN BOYD; BRANDON WOODWARD; THOMAS HALL; CLARENCE SHUPE; JANE DOE; DENNIS SLUSS,

Defendants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Glen E. Conrad, District Judge. (7:11-cv-00262-GEC-PMS)

Argued: October 25, 2017

Decided: December 7, 2017

Before MOTZ, SHEDD, and WYNN, Circuit Judges.

Affirmed by unpublished opinion. Judge Wynn wrote the majority opinion, in which Judge Motz joined. Judge Shedd wrote an opinion concurring in the result only.

(APPENDIX A)

ARGUED: Stephen William Kiehl, COVINGTON & BURLING LLP, Washington, D.C., for Appellant. Matthew Robert McGuire, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees. **ON BRIEF:** Daniel Suleiman, COVINGTON & BURLING LLP, Washington, D.C., for Appellant. Mark R. Herring, Attorney General, Stuart A. Raphael, Solicitor General, Trevor S. Cox, Deputy Solicitor General, Richard C. Vorhis, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

WYNN, Circuit Judge:

Plaintiff-Appellant Adib Eddie Ramez Makdessi alleges that several correctional officers at the prison where Makdessi was housed recklessly disregarded an obvious risk to his safety in violation of the Eighth Amendment. The district court previously dismissed Makdessi's claims on grounds that the officers disclaimed actual knowledge of any risk to Makdessi's safety. Concerned that the district court failed to consider whether circumstantial evidence established that the risk to Makdessi was so obvious that the officers had to have known of it, we vacated the district court's decision and remanded the case for application of the correct legal standard. *See Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015). On remand, the court adverted to and applied the correct legal standard and again concluded that Makdessi failed to introduce adequate factual support for his claims. Because we find no clear error in the court's judgment, which largely rested on its credibility assessments, we affirm.

I.

A.

Makdessi is serving a life sentence for committing two murders. The events giving rise to the present dispute occurred while Makdessi was housed at Wallens Ridge State Prison. At that time, Makdessi was 5 feet 4 inches tall, weighed 207 pounds, was approximately 46 years old, and suffered from back pain and asthma. Makdessi did not affiliate with any prison gangs. Throughout his term of incarceration at Wallens Ridge,

Makdessi “had problems with all of his cellmates and [was] forced to pay for protection in the prison with commissary items.” J.A. 1101.

During Makdessi’s confinement at Wallens Ridge, he filed numerous grievances, many of which related to alleged assaults by other prisoners. Although prison officials at times responded to Makdessi’s grievances, many were lost or received no response. Makdessi also composed several letters to the Federal Bureau of Investigation—to at least one of which he affixed postage so it was “ready to be mailed”—recounting the alleged abuse he received at the hands of his fellow inmates. *Id.* at 1122.

Makdessi’s accounts have varied as to the number of prison assaults he suffered, and he has generally been “unable to provide the names of the offenders, dates of the alleged incidents, any other evidence to support the allegations or provide any investigative leads.” *See id.* at 416. On one of the few occasions Makdessi provided prison officials with details regarding an alleged assault—which Makdessi maintains was captured “on [a] security camera” that an “investigator . . . h[ad] seen”—the prison official who investigated the claim found no corroborating evidence. *Id.* at 259

On August 13, 2010, prison officials moved Makdessi to a cell with inmate Michael Smith. At that time, Smith was 5 feet 11 inches tall, weighed 194 pounds, and was approximately 34 years old. Incarcerated for “robbery and carjacking,” Smith was a known member of the “Gangster Disciples,” a gang characterized by prison officials as “one of the smaller [prison] gangs.” *Id.* at 1062, 1067. During the three years leading up to the incident at issue, Smith committed nearly 20 prison infractions, and, based on those

infractions, received 115 days in segregation. Prison officials classified Smith at one security level higher than Makdessi.

On the first day of Makdessi and Smith's cohabitation assignment, Makdessi walked out of their cell and told the floor correctional officer that he did not want to be housed with Smith. The floor correctional officer said he would pass that request on to Sergeant Christopher King. Makdessi subsequently filed numerous complaints and requests for a single cell. Makdessi testified that he received no response, and that the complaints and requests "disappeared." *Id.* at 541.

Notwithstanding Makdessi's complaints and requests, prison officials continued to house Makdessi with Smith. Makdessi testified that during that time, Smith and his Gangster Disciples associates physically and sexually assaulted Makdessi on numerous occasions. Makdessi claims he tried to report the assaults to Sergeant King, the Assistant Warden, and the Federal Bureau of Investigation.

Makdessi further testified that on December 20, 2010, during a meeting with Lieutenant Tracy Fields regarding an unrelated informal complaint Makdessi had filed, Makdessi told Lieutenant Fields "that he feared for his life due to his cellmate Smith, a gang leader, and that he wanted to be placed in protective custody." *Makdessi*, 789 F.3d at 130. According to Makdessi, Lieutenant Fields said he would advise Sergeant King of Makdessi's concerns and request. According to Lieutenant Fields, at the meeting Makdessi never mentioned Smith or any danger to his life. As further detailed in this Court's prior opinion, Smith physically assaulted and allegedly raped Makdessi the

following day. *Id.* at 129–31. The assault and alleged rape caused Makdessi serious physical and mental trauma. *Id.*

B.

Seeking redress for the harms he suffered from the assault and alleged rape, Makdessi filed suit against numerous Wallens Ridge officials under 42 U.S.C. § 1983, alleging that the officials failed to take reasonable measures to protect Makdessi’s safety, in violation of his rights under the Eighth Amendment. Makdessi’s claims against the three correctional officers party to this appeal—Lieutenant Fields, Sergeant King, and Captain Arvil J. Gallihar (collectively, “Defendants”)—survived summary judgment. After a two-day evidentiary hearing, a magistrate judge issued a report and recommendation finding that Makdessi failed to introduce sufficient evidence to support his claims. *Makdessi*, 789 F.3d at 131. In particular, the magistrate found that Makdessi established the first element of his Eighth Amendment claim—that he was “‘incarcerated under conditions posing a substantial risk of serious harm’”—but failed to produce evidence sufficient to support the second element of the claim—that the defendant officials were “‘deliberate[ly] indifferen[t]’” to the serious risk Makdessi faced. *See id.* at 133 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834–35 (1994)). The district court agreed, entering judgment in favor of all defendants.

This Court vacated the district court’s decision, expressing concern that the district court had rested its finding that Makdessi failed to show that the Defendants were “deliberately indifferent” exclusively on the basis that Makdessi did not put forward credible *direct* evidence of the officers’ actual knowledge of the substantial risk Smith

mental health department, rather than any Defendant. The magistrate found there was no evidence that Defendants saw that complaint or any of the other documents in which Makdessi made sexual assault allegations. Additionally, the magistrate highlighted other facts she found weighed against a finding of obviousness, including that Makdessi weighed more than Smith and that no Defendant knew of the full breadth of Smith's institutional violations. In her obviousness analysis, the magistrate also found significant Captain Gallihar's credible testimony that an inmate's underlying crime could inform cell assignments, and Makdessi's murders were at least as violent as Smith's robbery and carjacking; that the Gangster Disciples was not one of the prison's most violent gangs; and, finally, that only *truthful* claims of prior sexual assaults are relevant to determining if an inmate is vulnerable to future victimization.

Over Makdessi's objection, the district court adopted the magistrate's report and recommendation. In particular, the district court agreed with the magistrate's resolution of the conflicting testimony—i.e., largely discrediting Makdessi's narrative in favor of Defendants' rebuttals—and concluded that even if Defendants did, in fact, "know" of facts giving rise to an inference of an obvious risk to Makdessi's safety, Defendants sufficiently rebutted that inference through evidence establishing that they "believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.* at 1218 (quoting *Farmer*, 511 U.S. at 844). Makdessi timely appealed.

II.

Because this case arises from a bench trial, we review factual findings for clear error and conclusions of law de novo. *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 215 (4th Cir. 2011). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Helton v. AT & T, Inc.*, 709 F.3d 343, 350 (4th Cir. 2013) (quoting *Evergreen Int'l, S.A. v. Norfolk Dredging Co.*, 531 F.3d 302, 308 (4th Cir. 2008)). And "[i]n cases in which a district court's factual findings turn on assessments of witness credibility or the weighing of conflicting evidence . . . , such findings are entitled to even greater deference." *Id.* (quoting *Evergreen*, 531 F.3d at 308).

In the present case, Makdessi does not argue that the district court misstated the law, but instead that the evidence below compels judgment in his favor. In this regard, Makdessi principally argues that Defendants knew or must have known of the obvious risk to Makdessi's health and safety as a result of his physical vulnerability, his grievance filings, and Smith's many prison infractions. We address each in turn.

The Eighth Amendment imposes upon "prison officials . . . a duty . . . to protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833 (second alteration in original). As stated above, liability attaches when a plaintiff prisoner establishes: (1) he was "incarcerated under conditions posing a substantial risk of serious harm" and (2) the defendant prison official had a "sufficiently culpable state of mind." *Id.* at 834. In the present case, only the second prong is at issue; the court below

found—and we agree—that the evidence of Makdessi’s injuries from the assault and alleged rape satisfied the first prong by demonstrating “serious or significant physical . . . injur[ies] resulting from the challenged conditions” of confinement. *De’Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003).

The sole remaining question, therefore, is whether there is sufficient evidence to establish that the defendants had “a ‘sufficiently culpable state of mind’ to be held liable.” *Makdessi*, 789 F.3d at 133 (quoting *Farmer*, 511 U.S. at 834). This required mental state is one of “‘deliberate indifference’ to inmate health or safety,” *Farmer*, 511 U.S. at 834, often characterized as “somewhere between negligence and purpose or knowledge: namely, recklessness of the subjective type used in criminal law,” *Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995). An inmate plaintiff may demonstrate deliberate indifference through direct or circumstantial evidence. *Farmer*, 511 U.S. at 842; *Makdessi*, 789 F.3d at 133. Because a plaintiff may prove deliberate indifference through circumstantial evidence, even in the absence of direct evidence that a prison official knew of a risk posed to the plaintiff, “an injury might be so obvious that the factfinder could conclude that the [official] *did* know of it because he could not have failed to know of it.” *Makdessi*, 789 F.3d at 133 (quoting *Brice*, 58 F.3d at 105).

Prison officials may rebut such a showing of obviousness. *Id.* at 134; *see also* *Farmer*, 511 U.S. at 844 (“That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so.”). To that end, “[p]rison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore

unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.”

Farmer, 511 U.S. at 844.

Because the magistrate and district court’s analysis focused on whether Defendants rebutted any circumstantial evidence establishing the obviousness of the risk to Makdessi’s safety, we assume, without deciding, that circumstantial evidence indicated that housing Makdessi with Smith presented an obvious risk. Under this assumption, Defendants may be charged with knowledge of the obvious substantial risk unless they demonstrate that the facts and circumstances “prove that they were unaware even of an obvious risk to inmate health or safety” or did not appreciate the risk’s severity. *See id.* (emphasis added). Accordingly, we consider only whether the court below correctly concluded that Defendants sufficiently rebutted Makdessi’s showing of obvious risk by demonstrating that they either did not subjectively know of the risk or did not appreciate its severity.

Makdessi contends that several associated facts establish that Defendants knew or must have known of the substantial risk inherent in his cell assignment with Smith: (1) Makdessi was smaller than Smith, older than Smith, and had health problems; (2) Makdessi filed numerous grievances and many times checked himself into segregation, both indications of vulnerability; and (3) Smith was a violent inmate. Defendants respond that the district court’s ultimate conclusion—that Defendants rebutted any such showing by demonstrating “that none of the[m] . . . knew before Makdessi ran out of his cell on December 21, 2010, that housing him in the same cell

with Smith presented a substantial risk”—is based exclusively on well-founded credibility determinations. Appellees’ Br. 31. We agree with Defendants.

Although Smith was in better condition than Makdessi—Makdessi suffered from back problems and asthma, and Smith was seven inches taller than him and twelve years younger—the district court did not clearly err in finding that none of the Defendants thought the physical disparity presented a risk. Lieutenant Fields testified that he only vaguely remembered Makdessi, and that although he would generally notice vulnerable inmates, Makdessi did not stand out as one. Likewise, Captain Gallihar testified both that he never noticed “anything out of the ordinary” with Makdessi, and that neither Makdessi’s height nor age stood out as compared to the other inmates or “in the context of the whole you have to look at” in making cell assignments. J.A. 1061. The magistrate and district court did not clearly err in crediting this testimony as establishing that Defendants believed that any risk suggested by Makdessi’s physical condition “was insubstantial or nonexistent.” *Farmer*, 511 U.S. at 844.

Nor did Defendants consider Makdessi’s numerous grievance filings and voluntary self-segregation check-ins as indicating that he faced a risk of suffering serious physical injuries. Although Captain Gallihar and Lieutenant Fields received reports of Makdessi’s grievance filings and requests for segregation, including his numerous allegations of physical and sexual abuse, Lieutenant Fields testified that he would receive complaints “all the time” and that multiple prisoners would “daily” request the appropriate forms. J.A. 770. And in testimony the magistrate and district court found credible, Captain Gallihar said he was unaware of anything “ha[ving] been proven to be

true regarding [Makdessi] being sexually assaulted,” *id.* at 1068, and that a correctional officer “would not consider [a complainant] a victim until the investigation bears that out,” *id.* at 1073. Furthermore, Captain Gallihar testified that it was “a common practice” for inmates to request segregation because it could be used “to manipulate cell moves.” *Id.* at 1081. Again, the magistrate and district court reasonably credited this testimony as establishing that Defendants believed that any risk suggested by Makdessi’s grievance filings and requests for segregation “was insubstantial or nonexistent.” *Farmer*, 511 U.S. at 844.¹

Finally, the district court did not clearly err in concluding that Defendants did not believe Smith’s prison-infraction history and membership in the Gangster Disciples indicated that Smith posed a serious risk to Makdessi. When Makdessi was assigned to Smith’s cell, Smith had received approximately 20 prison infractions and had spent 115 days in segregation. But Captain Gallihar and Sergeant King investigated and resolved only one infraction related to Smith. And, in testimony credited by the magistrate and district court, Sergeant King said that, other than that incident, he was not aware of any

¹ Nor does the “Institutional Classification Authority Hearing” summary produced at the second evidentiary hearing alter this conclusion. The summary—issued a week after Smith assaulted Makdessi—recommended changing Makdessi’s security level to protective custody because he “is a known snitch among staff and other inmates;” has “exhibited poor institutional adjustment;” has “been moved to just about every housing unit” at the prison; was placed in a special unit “[d]ue to his vulnerability;” and could no longer “be safely housed . . . in general population” because “his safety is compromised.” J.A. 1098–99. There is no indication, however, that this post-assault security analysis—prepared by a non-party to this suit—established that Defendants knew or must have known of a serious risk to Makdessi’s safety at the time of the assault.

other infraction committed by Smith. Likewise, Lieutenant Fields testified that he was unaware of *any* of Smith's infractions. And although Captain Gallihar's higher-ranking position necessarily supplied him with knowledge of more of Smith's infractions, Captain Gallihar stated, in testimony credited by the court, that the correctional officers' weekly review of segregated inmates encompassed "several hundred inmates;" that Smith did not "stand[] out" in those reviews; that "[n]early all" of the inmates had at least one infraction; and that he did not consider Smith to be a "particularly violent inmate." J.A. 1063–65. Furthermore, Captain Gallihar testified that the Gangster Disciples was "one of the smaller gangs" and "by far not the . . . most aggressive bunch." *Id.* at 1062–63. In light of this evidence, we cannot conclude that the magistrate and district court clearly erred in finding that Defendants did not believe that Smith's infraction history posed a substantial risk to Makdessi's safety.

To be sure, the evidence above often conflicts and paints a troubling picture, prompting both the district and magistrate judge to note that "it is clear" that Defendants "should have been more diligent in handling Makdessi's claims of sexual assault." *Id.* at 975, 1009. But, deferring to the district court's credibility findings, the evidence at worst establishes that Defendants here "knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Farmer*, 511 U.S. at 844. This is insufficient to establish liability.²

² Makdessi also argues that the district court incorrectly resolved certain factual disputes or otherwise misstated relevant facts and improperly relied on considerations not relevant to the *Farmer* analysis. Makdessi's factual objections, however, principally turn (Continued)

IV.

In sum, Makdessi's arguments and evidence on appeal fail to surmount the high bar of clear error review. Accordingly, we affirm the dismissal of Makdessi's claims against Defendants.

AFFIRMED

on the district court's findings that Makdessi's testimony was largely not credible and that Defendants' testimony was credible. Given that on several occasions Makdessi changed or recanted his narratives and allegations and that we afford a factfinder's credibility determinations substantial deference, the court did not clearly err in resolving credibility disputes in Defendants' favor. Likewise, after careful review of the record we conclude that district court's judgment did not rest on any considerations not relevant to the *Farmer* analysis.

SHEDD, Circuit Judge, concurring in result only:

In my view, the magistrate judge and the district judge properly analyzed this case during the original bench trial. *See Makdessi v. Fields*, 789 F.3d 126, 139-45 (4th Cir. 2015) (Shedd, J., concurring in part and dissenting in part). On remand, the magistrate judge and the district judge once again properly analyzed this case. Because the findings of fact are not clearly erroneous, and the judges committed no discernible legal error, I concur in the majority's decision to affirm the judgment.

JAN 24 2017

JULIA C. DUDLEY, CLERK
BY: *[Signature]*
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ADIB EDDIE RAMEZ MAKDESSI,) CASE NO. 7:11CV00262
v.)
Plaintiff,)
LT. FIELDS, ET AL.,) MEMORANDUM OPINION
Defendants.) (Adopting Report and Recommendation)
)
) By: Glen E. Conrad
) Chief United States District Judge
)

This prisoner civil rights action filed pursuant to 42 U.S.C. § 1983 claims that three supervisory prison officials failed to protect the plaintiff from sexual and physical assaults by his cell mate, in violation of his Eighth Amendment rights. The parties presented their evidence in a bench trial, and the case is presently before the court on the report and recommendation ("the report") of Magistrate Judge Pamela Meade Sargent, pursuant to 28 U.S.C. § 636(b)(1)(B), recommending judgment for the defendants. After de novo review of the evidence, for the reasons that follow, the court will overrule the plaintiff's objections, adopt the report, and enter judgment for the defendants, Lt. Fields, Sgt. King, and Capt. Gallihar.

Background

The plaintiff, Adib Eddie Ramez Makdessi was incarcerated at Wallens Ridge State Prison ("Wallens Ridge") at the time his § 1983 claims arose.¹ Makdessi has presented copies of numerous administrative complaints he filed, beginning in 2007, claiming vulnerability to physical attacks from other inmates and alleging that he had been the victim of prior sexual assaults from cell mates. He has also testified that he made written and verbal complaints about fearing injury from Michael Smith, who became his cell mate in early August 2006. Makdessi

¹ The court offers only a brief summary of events here to provide context for discussion of the issues.

(APPENDIX B)

has testified that on December 21, 2010, Smith physically and sexually assaulted him over a three-hour period inside their cell. Video footage and other evidence indicates that when officers unlocked the cell door for routine removal of lunch trays and trash, a bloodied Makdessi ran out of the cell with Smith in pursuit to continue his assault, joined by other inmates in the pod. After a warning shot from the control booth, Smith and these other inmates immediately fell to the ground, and Makdessi ran into the vestibule. Officers took Makdessi to the medical unit, where he received stitches to close two cuts on his face and underwent x-rays. Officers also transported him to an outside hospital for a Physical Evidence Recovery Kit ("PERK") test. Six weeks later, Makdessi was transferred to a protective custody unit at another prison facility.

Makdessi's pro se § 1983 complaint alleged that several Wallens Ridge officers orchestrated and/or failed to protect him from Smith's attack or failed to intervene promptly once that attack began. The court denied summary judgment as to Makdessi's claims against Defendants Gallihar, Fields, King, Sumpter, Boyd, Bellamy, and Hall, and referred the matter to Judge Sargent for appropriate proceedings under § 636(b)(1)(B). Shortly thereafter, counsel entered an appearance to represent Makdessi.

Judge Sargent conducted an evidentiary hearing on March 12-14, 2013, and issued her first report and recommendation in the case on May 3, 2013, recommending judgment for the defendants. Makdessi filed objections. After conducting a de novo review of pertinent parts of the report and the evidence, the court overruled the objections, adopted the report, and granted judgment to defendants. Makdessi appealed. The United States Court of Appeals for the Fourth Circuit affirmed the judgment in part, but reversed and remanded the case as to Makdessi's claims against Fields, King, and Gallihar. See Makdessi v. Fields, No. 7:11CV00262, 2013 WL 5353330 (W.D. Va. Sept. 24, 2013), rev'd in part by 789 F.3d 126, 136 (4th Cir. 2015).

The parties presented additional evidence and argument before Judge Sargent in November 2015, but otherwise agreed to rely on the evidence presented during the March 2013 proceedings. Judge Sargent has now entered her second report recommending judgment for the defendants. Makdessi has filed written objections to portions of the report that the court must now resolve.

Standards of Review

In a civil case, the plaintiff carries the burden of proving each of the elements of his claim by a preponderance of the evidence. In re Winship, 297 U.S. 358, 371 (1970). “The burden of showing something by a preponderance of the evidence . . . requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.” Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quotation marks omitted); see also McNeal v. United States, 689 F.2d 1202 (4th Cir. 1982) (affirming a finding for the defendant where the evidence was in equipoise).

The magistrate judge’s report under § 636(b)(1)(B) makes only a recommendation to this court. Mathews v. Weber, 423 U.S. 261, 270-71 (1976). “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation marks omitted); Fed. R. Civ. P. 72. In contrast, the court is charged with making a de novo determination of any portions of the magistrate judge’s recommendation to which a specific objection is made. 28 U.S.C. § 636(b)(1)(C). Although the district court may give a magistrate judge’s proposed findings and recommendations “such weight as [their] merit commands and the sound discretion of the judge warrants,” the authority and the responsibility to

make an informed final determination remains with the district judge. United States v. Raddatz, 447 U.S. 667, 682-83 (1980) (internal quotation marks and citation omitted). Therefore, in performing a de novo review, the district judge must exercise “his non-delegable authority by considering the actual testimony, and not merely by reviewing the magistrate’s report and recommendations.” Wimmer v. Cook, 774 F.2d 68, 76 (4th Cir. 1985) (citation omitted).

Discussion

Among duties the Eighth Amendment’s prohibition against cruel and unusual punishment imposes on prison officials is an “obligat[ion] to take reasonable measures to guarantee inmate safety,” specifically, “to protect prisoners from violence at the hands of other prisoners.”” Makdessi, 789 F.3d at 132 (quoting Farmer v. Brennan, 511 U.S. 825, 833 (1994)). A prisoner alleging that prison officials have failed to keep him reasonably safe from other inmates must show that (i) objectively, the prisoner was incarcerated under conditions posing a substantial risk of serious harm, and (ii) subjectively, the official must have had a ““sufficiently culpable state of mind’ to be held liable,” namely, the state of ““deliberate indifference”” to the substantial risk of serious harm. Id. at 133 (quoting Farmer, 511 U.S. at 834).

The report recommends a finding of fact and conclusion of law that Makdessi has satisfied the first, objective element of this standard by demonstrating that he was assaulted on December 21, 2010, and suffered serious physical injuries. (Report 10, 21, ECF 201.) In the absence of any objection from the parties, and finding no clear error, the court adopts this portion of the report.

Proving deliberate indifference requires showing ““more than ordinary lack of due care for the prisoner’s interests or safety,’ and ‘more than mere negligence,’ but ‘less than acts or omissions [done] for the very purpose of causing harm or with knowledge that harm will result.””

Id. (quoting Farmer, 511 U.S. at 135). “[A]n official’s failure to alleviate a significant risk that he should have perceived but did not, . . . cannot [constitute] infliction of punishment.” Farmer, 511 U.S. at 838. Specifically, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Id. at 837. Therefore, “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” Id. at 847.

A prison official’s subjective actual knowledge can be proven through circumstantial evidence showing, for example, that the “substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus ‘must have known’ about it.” Farmer, 511 U.S. at 842, 114 S.Ct. 1970 (quotation marks omitted). Direct evidence of actual knowledge is not required. See id. at 842-43, 114 S. Ct. 1970.

Accordingly, prison officials may not simply bury their heads in the sand and thereby skirt liability. “[E]ven a guard able to prove that he was in fact oblivious to an obvious injury of sufficient seriousness may not escape liability if it is shown, for example, that he merely refused to verify ‘underlying facts that he strongly suspected to be true,’” or that he “‘declined to confirm inferences of risk that he strongly suspected to exist.’” Brice [v. Virginia Beach Corr. Ctr.], 58 F.3d [101,] at 105 [(4th Cir. 1995)] (quoting Farmer, 511 U.S. at 843 n. 8, 114 S. Ct. 1970). And “it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.” Farmer, 511 U.S. at 843, 114 S. Ct. 1970. Nor is it dispositive that the prisoner did not give advance warning of the risk or protest his exposure to the risk. Id. at 848-49, 114 S. Ct. 1970.

A prison official remains free to rebut the deliberate indifference charge, even in the face of an obvious risk. “Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.” Id. at 844, 114 S. Ct. 1970. But absent successful rebuttal, they may be held liable for obvious risks they must have known. Id. at 842, 114 S. Ct. 1970.

Makdessi, 789 F.3d at 133-34. Furthermore, as stated,

prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure reasonable safety, a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions

Farmer, 511 U.S. at 844-45 (internal quotation marks and citations omitted).

In the section titled "Facts," Judge Sargent's report and recommendation offers a 73-page, detailed summary of the record evidence, including witness testimony, video footage, and admitted documentation. Throughout, this summary of the evidence reflects bald contradictions between portions of Makdessi's testimony, between his testimony and the testimony of other inmate and staff witnesses, between statements Makdessi made in various administrative remedy forms and in follow up interviews with mental health staff or prison investigators, and between Makdessi's testimony and documents in evidence. The report also notes Makdessi's lack of dates and repeated use of generic terms like "cell mates" and "they" in his written allegations and his testimony of past assaults and retaliation as undermining the credibility of such accounts.

Makdessi states that his objection brief will highlight "certain facts" not mentioned or given insufficient weight in the report. The brief then provides a 10-page summary of parts of Makdessi's testimony and other evidence he presented, stated in the light most favorable to him. The court has specifically reviewed the evidence Makdessi has highlighted. The court has also conducted de novo review of the hearing transcript and the exhibits noted. Makdessi does not, however, identify any item of evidence omitted from the report that warrants rejection or amendment of the report's evidence summary, and the court finds no such disposition to be

necessary.² Therefore, the court adopts the “Facts” section of the report as an accurate summary of the evidence presented.

The analysis portion of the report recommends finding that much of Makdessi’s testimony, as well as many statements in his numerous written complaint and grievance forms in the record, are not credible. This portion of the report offers some examples of discrepancies that undermine the veracity of Makdessi’s accounts. But the report’s finding on witness credibility also clearly relies on the many other discrepancies and contradictions reflected in the lengthy summary of the evidence. The report recommends finding credible the officers’ testimony denying personal knowledge of a substantial risk of serious harm presented by Makdessi’s continued assignment as Smith’s cell mate. Finally, the report recommends finding unpersuasive Makdessi’s circumstantial evidence purporting to show that differences between him and Smith posed risks so obviously substantial that the officers must have known of them, despite their denials of knowing.

Makdessi makes no specific objection to the report’s conclusion that the defendants did not have “actual knowledge of the danger posed by Smith because they were the reason Smith had attempted to harm Makdessi or because Makdessi had told them that Smith had assaulted him in the past or that he feared for his life.” (Report 82.) In the absence of an objection and finding no clear error, the court will adopt this finding.

Makdessi contends that the report overemphasized his credibility problems and ignored evidence of obvious safety concerns the defendants must have known about continuing to cell him with Smith. Among other things, he asserts that evidence proves: the defendants’ job duties

² Makdessi faults the accuracy of the report’s facts section in only one particular regard: its statement that locator cards contradicted Makdessi’s testimony on the number of days he spent in segregation after he feared harm from his cell mate in September 2007. Makdessi claims that the cards prove the accuracy of his testimony on this point. The court finds this minor discrepancy immaterial, given the fact that extensive other evidence summarized in the report, unchallenged by Makdessi, severely undermines his credibility on numerous other points.

must have exposed them to his prior complaints seeking protection because of his vulnerabilities and past inmate assaults; Smith's gang affiliation, Makdessi's reputation as a snitch and physical disabilities, and the five-inch height and fifteen-year age differences between Makdessi and Smith as cell mates presented obviously substantial risks of serious harm; and Smith's 115 days of segregation and the defendants' encounters with him must have put them on notice that his disciplinary history (including injury to another inmate in February 2010) presented a substantial risk of harm to Makdessi as his cell mate.

In hindsight, it is undisputed that from 2007 to 2010, Makdessi made complaints about being vulnerable to physical and sexual assaults from other inmates. It is also undisputed that Smith assaulted and harmed Makdessi on December 21, 2010; and that, thereafter, prison officials concluded that Makdessi could no longer be safely housed in the general population at Wallens Ridge. The defendants did not, however, have the benefit of hindsight in reaching the perceptions about the cell mates that directed their actions.

Moreover, the court cannot find that the report ignores evidence, unfairly evaluates witness credibility, or improperly relies on a lack thereof in reaching its findings and conclusions. The weight of the evidence indicates that these defendants never actually saw or heard Makdessi's complaints of prior physical or sexual cell mate assaults before the December 21, 2010, incident, and that the allegations in Makdessi's prior complaints were of doubtful veracity in any event; that a Wallens Ridge mental health professional had assessed Makdessi and found no reason for him to be assigned to a single cell, as he had requested; that Makdessi is serving a life sentence for a brutal double murder, while in 2010, Smith was within nine years of completing his sentence for carjacking;³ that Smith and Makdessi were classified at the same

³ Inmate records online indicate that Smith's expected release date is June 17, 2019.

security level; and that the visible physical and age differences between the cell mates and Smith's gang affiliation and segregation time did not present "red flags" to these experienced corrections officials of danger in maintaining the cell assignment. The evidence also indicates that under Wallens Ridge policies, inmates were assigned as cell mates only if they agreed to the arrangement, and an inmate who refused to return to his cell out of fear for his safety would be immediately placed in segregation for protection purposes, pending an investigation.⁴ In nearly five months as Smith's cell mate, Makdessi never refused to return to his cell, a fact that undermines the credibility of his claim that he himself truly feared for his safety from Smith before December 21.

Makdessi's primary objection is that the report devoted only three paragraphs to analyzing whether the differences between Smith and Makdessi so obviously presented a substantial risk of serious harm to Makdessi that the defendants must have known of it. Makdessi argues that this evidence of obvious risk wins his case for deliberate indifference because the defendants failed to rebut it with additional evidence. The court cannot agree.

First, the Supreme Court has expressly rejected the notion that "a prison official who was unaware of a substantial risk of harm to an inmate may nevertheless be held liable under the Eighth Amendment if the risk was obvious and a reasonable prison official would have noticed it. Farmer, 511 U.S. at 842 (emphasis added). "That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so." Id. at 844 (emphasis added). Second, the defendants did offer rebuttal testimony that the differences between the cell mates in age, height, disciplinary history, and gang affiliation did not necessarily signal that changing the cell assignment for safety reasons was warranted. See id. at 845 (noting that officials may

⁴ The court finds that this immediate segregation policy itself qualifies as a reasonable response to the undeniable, inherent risk that men convicted of violent crimes and then confined for long periods in a small prison cell may develop conflicts that may escalate, over time, to physical contact.

escape liability if “they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent”).

Weighing the evidence as a whole, including witness credibility and other factors emphasized in the report and the objections thereto, the court finds by a preponderance of the evidence that none of the defendants knew before Makdessi ran out of his cell on December 21, 2010, that housing him in the same cell with Smith presented a substantial risk that Smith would cause him serious harm. Thus, the court concludes that the defendants are entitled to judgment.

Conclusion

For reasons discussed herein, the court will overrule Makdessi’s objections as immaterial or without merit and adopt the magistrate judge’s report. Based on the the report and the court’s de novo review of the evidence as reflected in this opinion, the court concludes that Makdessi has failed at trial to prove his case by a preponderance of the evidence. Therefore, the court will enter judgment for the defendants. An appropriate order will enter this day.

ENTER: This 24th day of January, 2017.



Chief United States District Judge

JAN 24 2017

JULIA C. DUDLEY CLERK
BY: 
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ADIB EDDIE RAMEZ MAKDESSI,) CASE NO. 7:11CV00262
)
 Plaintiff,)
 v.)
) FINAL ORDER
)
)
)
 HAROLD W. CLARKE, ET AL.,) By: Glen E. Conrad
) Chief United States District Judge
 Defendants.)

In accordance with the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

that after de novo review of the pertinent portions of the record, the plaintiff's objections to the report and recommendation are **OVERRULED**; the report and recommendation (ECF No. 201) is **ADOPTED**; the court hereby grants **JUDGMENT** for the defendants; and this action is **DISMISSED WITH PREJUDICE**.

ENTER: This 24th day of January, 2017.



Chief United States District Judge

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

■ Adib Eddie Ramez Makdessi, Pro se - PETITIONER
v.

Lt. Fields, et al.

(APPENDIX C) 87 pages

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ADIB EDDIE RAMEZ)
MAKDESSI,)
Plaintiff,) Civil Action No.: 7:11cv00262
)
)
)
v.)
)
)
HAROLD W. CLARKE, et al.,) REPORT AND RECOMMENDATION
Defendants.) By: PAMELA MEADE SARGENT
) United States Magistrate Judge
)

The plaintiff, Adib Eddie Ramez Makdessi, an inmate formerly housed at Wallens Ridge State Prison, ("Wallens Ridge"), in Big Stone Gap, Virginia, filed this action for monetary damages and injunctive relief under 42 U.S.C. § 1983.¹ This case is before the undersigned magistrate judge on referral, pursuant to 28 U.S.C. § 636(b)(1)(B). In his Complaint and Amended Complaint, Makdessi raised claims against numerous defendants employed at Wallens Ridge, alleging that the defendants failed to protect him from assaults by his cellmate, in violation of his constitutional rights. (Docket Item Nos. 1, 127). Following dispositive motions, trial, appeal and remand, the only claims and defendants remaining before the court are Makdessi's Eighth Amendment claims against Lieutenant Tracy Fields, Sergeant Christopher King and Captain Arvil Gallihar, for failure to protect him from assaults by his cellmate on December 21, 2010.

¹ Makdessi initially filed this case pro se, seeking only monetary damages. Thereafter, subsequent to the court's appointment of counsel, pro bono, to represent plaintiff, the Complaint was amended to add a request for injunctive relief.

Based on the evidence presented in this matter, I find that the defendants were not deliberately indifferent to a danger posed to Makdessi by his cellmate and, therefore, did not fail to protect Makdessi from the assault by his cellmate. I recommend that the court enter judgment in favor of all of the defendants on Makdessi's § 1983 claims.

I. Facts

This case was tried before the undersigned on March 12-14, 2013. Upon remand from the United States Court of Appeals for the Fourth Circuit, additional evidence was presented before the undersigned on November 12, 2015.

At the 2013 bench trial, Makdessi described himself as a 5-foot, 4-inch, 49-year-old man with both physical and mental ailments rendering him vulnerable to harassment and attacks by other inmates. In particular, Makdessi testified to continuing back problems following surgery in 1993, as well as asthma, bronchitis and depression. He testified that, due to this vulnerability, and a lack of gang affiliation, he has had problems with all of his cellmates and has been forced to pay for protection in the prison with commissary items.

Makdessi said that problems with his cellmate arose soon after his arrival at Wallens Ridge in 2007. Makdessi testified that he filed Emergency Grievance Form Log # 56287, (Plaintiff's Exhibit No. 1, Docket Item No. 147-1), on September 29, 2007, after an unnamed Wallens Ridge sergeant ripped up his original Emergency Grievance because he documented too much information on it. Makdessi said that the original Emergency Grievance, which was destroyed, stated that he had been assaulted by his cellmate. He said that sergeants do not like

allegations of assault because they have to be investigated. Makdessi said that the sergeant told him, "Dude, we know you're a snitch, and you can't do this." He said the sergeant then instructed him on what to write on the form. He said that the sergeant told him that if he wrote that he feared for his life, the correctional officers would remove him from the cell, place him in segregation for three days and then transfer him to another cell. Makdessi said that, after he filed the Emergency Grievance, he was removed from the cell and placed in segregation, where he stayed for 35 days.

In October 2007, while in segregation, Makdessi said, he sent Inmate Request For Information #356250 to the Assistant Warden, which included allegations of mistreatment by his cellmate and that correctional officers were calling him a snitch. (Plaintiff's Exhibit No. 2, Docket Item No. 147-2), Makdessi alleges that no investigation into his complaints ever occurred. The response by the Assistant Warden shows that a copy of this form was sent to defendant Arvil Gallihar, who was a lieutenant at Wallens Ridge at that time.

Makdessi said that when he was moved from segregation, he was placed in a cell by himself for approximately 30 days. After 30 days, Makdessi said that he was placed in a cell with Jared Swartzmiller, an inmate he knew from the Virginia Beach jail. Makdessi said that, while at the Virginia Beach jail, he had charged Swartzmiller with assault and battery. Makdessi said that he told the sergeant, who he could not name, that Swartzmiller was on his enemies list. He said the sergeant responded, "If you have problems, let me know." Makdessi said that he was housed with Swartzmiller for approximately two and a half years. He said Swartzmiller never sexually assaulted him, but Swartzmiller did kick Makdessi on one occasion and punched him on others.

Makdessi testified that he also had many problems with Sgt. Christopher King while incarcerated at Wallens Ridge. Makdessi testified that he tried to approach King to complain about being housed with Swartzmiller, but King would tell him, "Get the F away from me, you bitch." Makdessi said that he did not push the issue, because Swartzmiller was a better cellmate than the cellmates who sexually assaulted him.

Makdessi also testified that the first day at Wallens Ridge, Sgt. King began calling him names like "fucking Mexican" and "sand nigger." He also testified that Sgt. King called him a "bitch."

Makdessi said that he sent a Request For Services/Complaint Form to the Wallens Ridge Medical Department on December 20, 2009, reporting that he had been sexually assaulted four times in the three years he had been at Wallens Ridge. (Plaintiff's Exhibit No. 4, Docket Item No. 147-4.) On this form, Makdessi stated:

I have been suffering from post-traumatic stress disorder & depression, I have lost social status in the incarcerated community due to the sexual assaults that I had suffered 4 times in the past 3 years that I have been in [Wallens Ridge]. Sitting in the hospital cell without T.V. had made me remember it all & started getting more into depression & that does not include the rape & beating & broken left leg & broken rib & black eyes & split chin I suffered at Virginia Beach Jail in 2003.

(Plaintiff's Exhibit No. 4, Docket Item No. 147-4.) Makdessi also noted on the form, "Confidential please." Qualified Mental Health Professional, ("QMHP"), Clark responded:

Sir – I am sorry that you are in medical but it is necessary at this time. If you have any issues that are related to psychology –

please let us know and we will do whatever we can to help you. Hopefully you will be well soon.

(Plaintiff's Exhibit No. 4, Docket Item No. 147-4.) Makdessi said that no one ever spoke to him or investigated his complaints of prior sexual assaults. Makdessi offered no testimony as to when the four sexual assaults he mentioned had occurred or who sexually assaulted him.

Makdessi testified that he had problems obtaining the forms necessary to bring his complaints and requests to the attention of officials at Wallens Ridge. In particular, Makdessi testified that he sent an Inmate Request For Information form to the Inmate Grievance Office on February 22, 2010, complaining about his inability to obtain Informal Complaint forms. (Plaintiff's Exhibit No. 5, Docket Item No. 147-5.) B. Ravizee responded to this Informal Complaint by providing Makdessi with a copy of an email that she sent to Lt. Fields along with Lt. Fields's response, "He has never asked me for one, I will speak to him." (Plaintiff's Exhibit No. 5, Docket Item No. 147-5.) Makdessi said that Lt. Fields did call him into his office one day after this and gave him one Informal Complaint form. Makdessi said that he told Lt. Fields that he filed the complaint because the sergeants would not give him Informal Complaint forms.

Makdessi also sent a hand-written note to Assistant Warden Harvey on March 10, 2010, alleging that Sgt. King hated him and would not listen to him. (Plaintiff's Exhibit No. 6, Docket Item No. 147-6.) Makdessi said that he wrote this note because he could not get an Informal Complaint form. Makdessi alleged that Sgt. King and other correctional officers retaliated against him whenever he wrote to the Assistant Warden, and he testified that the officers somehow all knew

what he wrote about. Makdessi testified that he never received a response to this complaint.

Makdessi testified that on May 3, 2010, he sent an Inmate Request For Information form to the Operations Officer, Ms. Taylor, requesting to speak to her confidentially about "some sexual assaults that caused post-traumatic stress disorder." (Plaintiff's Exhibit No. 7, Docket Item No. 147-7.) On this form, Makdessi stated, "Last time I wrote the psychologist & tried to get help [on] 12-20-09 I did not get any response except for the request form back saying be well soon." Makdessi said that he also sent an Offender Request For Information form on May 3, 2010, to the Mental Health Department. (Plaintiff's Exhibit No. 8, Docket Item No. 147-8.) On this form he wrote: "I wrote you back [on] 12-20-09 about the post-traumatic stress disorder & depression due to the sexual assaults that I suffered in the past 4 years in [Wallens Ridge]. Once again I am asking for help from Mental Health. If you can help." Makdessi said that he was seen by someone from the Mental Health Department after filing this form.

Makdessi introduced a Complaint and Treatment note completed by Psychology Associate I Mellason Gordon Clark dated May 6, 2010, and summarizing her Sexual Assault Assessment of Makdessi. (Plaintiff's Exhibit No. 9, Docket Item No. 147-9.) This form stated that Operations Officer Taylor had notified the Mental Health Department that Makdessi was alleging that he suffered from post-traumatic stress disorder as a result of sexual assaults at Wallens Ridge and that Mental Health had received a request form stating the same information. The form also states:

QMHP met with offender in Pod office in C6 without an officer present in compliance with policy for conducting a Sexual Assault Assessment. Offender came willingly to interview. Offender presented with appropriate mood and affect, good hygiene, alert and oriented. Offender denies [suicidal ideation/homicidal ideation]. Offender stated that there had been 3 incidents of sexual assault during his incarceration at [Wallens Ridge] all occurring in 2007 shortly after his arrival at this facility. He further stated that all 3 incidents ha[d] been previously reported to security. Offender also states he was raped while in [Virginia] Beach Regional jail. Offender states that the assaults he has reported at [Wallens Ridge] did not involve him being raped and that the only physical assault he has endured is being hit or "jumped on" by previous cell partners.

Offender states that he has had and continues to have conflicts with some security staff that causes him a great deal of stress. Offender states that a recent conflict with security is responsible for difficulties he is currently experiencing, including inability to sleep, nightmares, flashbacks, depression and anxiety.

When asked what Mental Health could do to assist him, the Offender stated that he was not sure. He reports having been on Prozac following the death of his wife in 1996 but states that he does not especially like medication and tries to avoid it. Offender stated that talking about his situation was helpful. During this interview, the offender maintained good eye contact, spoke with normal volume and speed and was polite and cooperative.

Clark also noted that she screened Makdessi for post-traumatic stress disorder, ("PTSD"). She wrote that Makdessi would be monitored and referred to a staff psychiatrist if warranted.

Makdessi testified that he told Clark that the security staff would not give him Informal Complaint forms or let him report any assaults or sexual assaults to them. He also said that no one investigated the allegations that he made to Clark. Makdessi said that, despite what was noted on the form, he was never monitored for PTSD or further referred to Mental Health. He did state that Clark came by and

checked on him about a week later. He said that she asked if he wanted to go into an office to speak privately, and Lt. Fields came by and said, "Oh, he's fine. There's nothing wrong with him." Makdessi said that Clark then asked him if he was okay, and he did not know what to say. Makdessi said that he wanted to talk with Clark in private to receive some counseling, but he did not tell her that because he did not want to say much with other inmates around. He said that Clark said she would check with him again later and left the pod. Makdessi said that he never heard from Clark again. He said, "I'm not even sure if she worked there again, because whenever someone tried to help me, they'd disappear."

When Makdessi was asked if Lt. Fields ever told him that he knew about the allegations of sexual assault that he had shared with Clark, he responded that Fields mentioned a few times that he was sick and tired of him filing complaints and making allegations.

Makdessi testified that, in July 2010, he complained to unnamed correctional officers in the C2 Pod that offender Jay Perez did not give him bread with his meal tray. Makdessi said that Perez later approached him, threw a punch at him, spit in his face and called Makdessi a "snitch." Makdessi said that Perez told him that he, Perez, ran the pod and to look around, that there were no correctional officers to protect him. He said that Perez told him he was going to beat him up. He said that Perez used a key to open a closet and told him to get in the closet and perform oral sex on him. Makdessi said that he told Perez, "I'm not gay. I'm not going to do that." He said that Perez told him that he would have to start providing him with his commissary to pay for protection. Makdessi said that he reported this incident in a letter to the Director of the VDOC with copies to the Warden, the Grievance

Office, the Investigator, and to the Special Investigations Unit. (Plaintiff's Exhibit No. 11, Docket Item No. 147-11.)

In this letter, Makdessi wrote:

On Friday 7-30-2010 I was threatened & almost punched in the face & sexually assaulted

I will start from the begin[n]ing. On Friday 7-30-2010 at lunch time I was given a tray there was one piece of bread missing I told inmate Perez C-206 who was handing out the trays, he said to me you cannot have another tray you will take this one or you will not eat & threatened me. I went to my cell & pushed the button & told the [correctional officer] what happened. I was given bread, then after dinner we came out for pod [recreation] at about 3:30 pm the inmate Perez ... that I had the problem with approached me threatening & yelling & calling me names & pointing his finger in my face almost taking my eye out & spit in my face, he said "I run this pod" he said the [correctional officer] told him that I am a snitch & that he is going to teach me a les[s]on for complaining to the [correctional officers] he said he will kick my ass & to look around there is not one [correctional officer] not in the pod & not in the tower he then throw a punch at me & I backed up he missed I raised my hands to block his punches & told him I don't want to fight. I cannot fight because of my back disability because of my back surgery. He then said o.k. come on I want to talk to you. I followed him thinking he only wants to talk, he opened the door to the tool room next to the shower he must have his own keys. [H]e said get in this room & you will suck my dick. I said I am not get[t]ing in this room I am not gay you punk....

Makdessi stated that after reporting this incident, Investigator John McQueen met with him in the C2 Pod Office on August 6, 2010. Makdessi introduced an Investigative Interview form that he said was in front of McQueen when he entered the pod office. (Plaintiff's Exhibit No. 12, Docket Item No. 147-12.) He said the form was completed before he entered the office to speak with

McQueen. He said that McQueen told him that if he would sign the form, he would be transferred to another pod. He said McQueen told him that, if he did not sign the form, "Look behind you, the office as glass." Makdessi said that he looked and saw Perez and three other inmates trying to intimidate him. Makdessi said, "[T]hey were looking straight at me and they looked like they were ready to jump on me and beat me up." Makdessi said that he did not want to drop his allegations, but he believed that he had no choice but to sign the form.

The form stated:

The letter I sent to the Regional Director is a true and accurate statement. Inmate Perez did not hit me, but I felt threatened and intimidated. The issue has been settled. I do not fear for my safety.

I wish to drop all of these allegations.

(Plaintiff's Exhibit No. 12, Docket Item No. 147-12.) Makdessi testified that no one ever investigated his allegations that he was made to drop his complaint against Perez.

Makdessi wrote another letter to Director Johnson on August 8, 2010, reporting the incident with Perez and alleging that officials at Wallens Ridge were covering up the incident. (Plaintiff's Exhibit No. 14, Docket Item No. 147-14.) In this letter Makdessi wrote:

On Friday 7-30-2010 I was threatened & almost punched in the face & sexually assaulted. & this was covered up by this prison again.

On Friday after dinner I came out for pod recreation at about 3:30 pm the inmate Perez ... that I had the problem with for not giving me bread when he was handing out food trays, he approached me threatening & yelling & calling me names & pointing his finger in

my face almost taking my eye out & spit in my face, he said "I run this pod" he said the [correctional officer] told him that I am a snitch & that he is going to teach me a les[s]on for complaining to the [correctional officers] he said he will kick my ass & to look around there is not one [correctional officer] not in the pod & not in the tower he then throw a punch at me & I backed up he missed I raised my hands to block his punches & told him I don't want to fight. I cannot fight because of my back disability because of my back surgery & my left leg [is numb] all the time. [H]e then said o.k. come on I want to talk to you. I followed him thinking he only wants to talk, he opened the door to the tool room next to the shower he must have his own keys he said get in this room & you will suck my dick. I said I am not get[t]ing in this room I am not gay you punk. [H]e then said I will have to pay when I get my commissary & if I tell the [correctional officer] or sergeant he will know, they will tell him & that he runs this pod I believe him because there was no [correctional officers] anywhere not in the pod & not in the tower, which is very strange.

All this is on security camera the investigator McQueen said he seen it all on video, I was made to drop the complaint out of "fear" when I did not want to.

I have been suffering from post-traumatic stress disorder & depression. I have lost social status in the incarcerated community due to the 5 different sexual assault[s] that I had suffered in the past 4 years that I have been in this prison & it was all covered up after my complaints were rip[p]ed up & I was told to forget about it. I was made to feel less of a human being by some [correctional officers] & few sergeants & two lieutenants when I tried to report it, all this does not include the beatings I got from cell mates & broken left leg & broken ribs & black eyes & split chin I suffered at this prison as well as the [V]irginia [B]each Jail.

I am disliked by other inmates and some [correctional officers] & few sergeants & some lieutenants in this prison who threatened me & called me a snitch & bitch & they told the inmates in this prison that I am a snitch & endangered my life & because I am physically small (5'4") weak inmate (in appe[a]rance) as well as, due to my medical problems & disability from my back surgery, I have been getting treated for it & taking medications for pain in the past seven years that I have been incarcerated & because of the (loss of social status) because I was called a snitch & made to be known as a snitch by officers of this prison because of reporting the sexual assaults &

having violated the “(code of silence)” I was [intimidated] by officers of this prison in order to drop my complaints, & the cover-ups continue in this Wallens Ridge State [P]rison & there is nothing I can do except to pay for protection just like I have been doing, because the investigator of this prison is bias & he said he is going to tell the inmate that I did snitch on him, I was made to drop the complaints out of “fear” when I did not want to.

I am so depressed & helpless I need someone to help. I should be in a single cell because I can not defend myself & I get assaulted. I was mad[e] to move into a pod where I don’t feel safe. I think I will check in to [protective custody] because I cannot be with a cell mate. This will be my second time in [protective custody].

I need someone to help me without threatening me with telling inmate that I am a snitch & get my life in danger & making me drop the sexual assault complaints & int[i]midate me.

Makdessi said that he did not name any specific correctional officers in his letters because, when he had done so, they would retaliate against him. Makdessi stated that he was talking about Lt. Fields in the letters, but he also claimed that Lt. Ealy in C2 had tried to intimidate him as well. Makdessi said that Ealy came to him before he ever saw Investigator McQueen about this incident. He said that Ealy “came in and intimidated me the day before and yelled at me, and he said I’m a trouble maker, and that Lieutenant Fields told him that I’m a trouble maker, and a snitch, and that somebody was going to break my neck, and things like that.”

Makdessi testified that, on August 13, 2010, he was moved into cell D-142 with Michael Smith, a known gang member with ties to the Gangster Disciples. He testified that Smith “smirked” at him and stated that Sgt. King “told him [he was] coming.” Makdessi said that he turned around and exited the cell and went straight to the floor correctional officer to request that he be placed in a different cell or protective custody, and the officer said he would advise Sgt. King.

Makdessi testified that he did not remember who the correctional officer was. Makdessi said that he remained in the same cell with Smith even though he filed numerous complaints. He said that he never received any copies of these complaints. "They disappeared," he said. Makdessi said he also filed Grievances which disappeared.

Makdessi testified that Sgt. King and Lt. Fields told him that they were "sick and tired of me filing complaints, and I needed to stop, and that my complaints, you know, not to worry about my complaints, they were gone, and things like that." Makdessi also testified that he saw Sgt. King destroy emergency grievances that he had filed "a few times," including one regarding being housed with Smith.

Makdessi said that he filed an Informal Complaint with Mental Health about being denied mental health treatment for PTSD "due to ... sexual assaults" on October 6, 2010.² (Plaintiff's Exhibit No. 15, Docket Item No. 147-15.) QMHP Clark responded that Makdessi had been assessed for 'his claim of sexual assaults that occur[r]ed prior to his transfer to [Wallens Ridge]. ... Makdessi was not found to be in need of psychiatric services.' She also stated that Makdessi would be seen by a QMHP upon his request, but that he had not requested to be seen. Makdessi testified that the statement that the sexual assaults had occurred before he arrived at Wallens Ridge was not an accurate statement.

On October 27, 2010, Makdessi filed a Regular Grievance Form requesting to be assigned single cell status. (Plaintiff's Exhibit No. 16, Docket Item No. 147-16.) Makdessi stated that he sent copies of this Grievance Form to numerous

² Makdessi testified that he filed this Informal Complaint on 5/6/2010, but the document is dated "10-6-10."

parties including the VDOC Director and the Warden of Wallens Ridge. On this Grievance Form, Makdessi wrote:

I have requested a single cell status many times but was denied. Due to all the cruel & unusual punishments I am suffering, from all the sexual assaults I had suffered, I have been advised ... to start filing grievances even when such efforts brings me ... unwanted attention & retaliation from prison staff & inmates because this would be grounds for lawsuit. There has not been one inmate that I was placed in the cell with that did not assault me or sexually assaulted me or charged me commissary for protection & still assaulted when commissary ran out. [B]ecause I am high profile & every inmate knows about my case from the news I always suffered retaliation from cellmates. [E]very time I report the assaults I get intimidat[i]ed & made to drop the complaints & the cell mates/inmates are told I am a snitch & I get put in danger & I have to pay more commissary for protection.

... I do not want to be retaliated against by staff & I don't want to be placed in segregation. I want to do my time without torture.

I want to be in a single cell so I can feel safe because I find having contact with prisoners in the same cell too painful & frightening for me.

Makdessi testified that he filed this Grievance because he could not get any Informal Complaint forms. He said that he did not name the particular guards or officers who had retaliated against him because he was "afraid of them." In particular, Makdessi testified that Lt. Fields, Sgt. King and Major Gallihar had instructed him not to put their names down on any complaints. Makdessi testified that the Grievance was rejected and returned to him with the box for insufficient information checked, with instructions to "provide the following information to the Grievance Office before the grievance can be processed." The Grievance Form contains handwritten instructions, which stated, "Attach Request for Single Cell Complaint attached/Submit Request for Medical Services or QMHP." The form was signed by B.J. Ravizee, Institutional Ombudsman/Grievance Coordinator.

Makdessi said that no one investigated his allegations of sexual assaults contained on this form.

Makdessi said that he filed another Grievance Form on the same day directed to the Warden. (Plaintiff's Exhibit No. 17, Docket Item No. 147-17.) On this Regular Grievance Form, Makdessi wrote:

Cruel and Unusual punishment. Obviously. The security of [Wallens Ridge] are not the only ones that cover up my past 4 years of reporting of sexual assaults & assaults & battery. This time I have attached proof that mental health is also part of the cover-ups. I have made many complaints & requests to security as well as to the mental health psycholog[i]sts who met with me on 5-3-10 in pod D-6 copy of proof (request attached) I have attached to this grievance three requests forms that proves I reported sexual assaults that happened to me in [Wallens Ridge] & also attached an informal complaint asking why I did not get help. & the response was I never reported sexual assaults that happened to me at [Wallens Ridge] & I did not ask for help. When I did in fact ask for help & reported the sexual assaults in the request forms I attached to this grievance. The past four years in [Wallens Ridge] my complaints were rip[p]ed up, was placed in segregation for reporting it.

I don't want to be retaliated against by staff like before. & I don't want to be placed in segregation like before. I want to do my time without Torture. I need to be in single cell to start recovery from all the post-traumatic stress & also need therapist who would not smile & think my pain is funny. I am a human being. & please don't plant contraband on me just because I filed this grievance, as staff said would....

Makdessi testified that this Grievance was returned to him with the Request for services box checked with instructions to "No request since initial assessment submit request to QMHP for evaluation/single cell[,] If not satisfied with assessment resubmit your complaint date you were seen by QMHP." The form was

signed by Ravizee. The Grievance filed with the court did not have any prior requests or complaints attached to it. Makdessi stated that he had made many requests to see a QMHP since May 2010, but no one responded to any of his requests.

Makdessi testified that he filed an Informal Complaint form on October 28, 2010, directed to the Warden, requesting single cell status. (Plaintiff's Exhibit No. 18, Docket Item No. 147-18.) On this form, Makdessi wrote:

I have requested a single cell status many times but was denied. Due to all the CRUEL & UNUSUAL PUNISHMENTS I am suffering. From all the sexual assaults & assault & battery I had suffered I have been advised ... to start filing grievances even when such efforts bring me an unwanted attention & RETALIATION from prison staff & inmates because this would be lawsuit. Due to my high profile trial every inmate knows me. I always suffers retaliation. I need to be in a single cell.

QMHP Clark responded to this Informal Complaint:

You were assessed by Mental Health. You do not qualify for a single cell for mental health issues. You do not have a mental health diagnosis.

Makdessi stated that this Informal Complaint was first assigned to security, but that he saw Lt. Fields scratch through the assignment to security and write in "QMHP." He said that Fields did this after Fields and Sgt. King yelled at him and told him that they were not happy with the way he was filing complaints. Makdessi said that no one from Mental Health came to speak to him regarding this Complaint.

Makdessi testified that, on October 28, 2010, while housed in a cell with Michael Smith, he filed an Offender Request For Information form with Mental Health, asking why he had not received help for the symptoms he said that he suffered as a result of previous sexual assaults. Makdessi admitted three nearly identical copies of this Request form into evidence. (Plaintiff's Exhibit No. 19, Docket Item No. 147-19.) On one copy of this form, the second page of Plaintiff's Exhibit No. 19, stated in the "PLEASE STATE YOUR QUESTION" field:

I have reported to you many times [t]hat I was sexually assaulted at Wallens Ridge State Prison. I have copy of request forms as proof. I also said I am suffering from depression & post-traumatic stress. I asked you for help many times I have copy of response as proof, but I can not get help [] [f]rom you. Obviously, because you have ignored & denied me help. I need to see some one that can & wants to help me. I have not been eating good[.] I lost weight because of few reasons.

If you were to ask me if I am O.K. in front of inmates & Lt. Field[s] like before in pod D-6, I will say I am O.K. but if you are to sit down with me in private I will tell you the truth that I am not O.K. I am afraid to talk to you in front of staff in fear of retaliations.

The two other copies of this form, the first and third pages of Plaintiff's Exhibit No. 19, appear to be identical in content in the "PLEASE STATE YOUR QUESTION," with additions in italics below:

I have reported to Security & filed many Grievances but no help. I have reported to you many times [t]hat I was sexually assaulted at Wallens Ridge State Prison. I have copy of request forms as proof. I also said I am suffering from depression & post-traumatic stress. I asked you for help many times I have copy of response as proof, but I can not get help [] [f]rom you. Obviously, because you have ignored & denied me help. I need to see some one that can & wants to help

me. I have not been eating good[.] I lost weight because of few reasons. *Sexually assaulted by my current cellmate*

If you were to ask me if I am O.K. in front of inmates & Lt. Field[s] like before in pod D-6, I will say I am O.K. but if you are to sit down with me in private I will tell you the truth that I am not O.K. I am afraid to talk to you in front of staff in fear of retaliations. *From Sgt. King & Lt. Fields.*

The Staff Response is identical on all three copies of the form and stated: "Mr. Makdessi you were assessed and it has been determined that you do not have a mental health issue." The Response is signed by QMHP Clark.

Makdessi testified that, after he filed this Request:

The response was they were very, very angry. And again, they didn't investigate it; they just came to yell at me, tell me not to put their names down, and told me that, again, I'm a bitch, and I'm a snitch, and I'm this, and that, and I believe there was a mental health person with them at that [time], also.

Makdessi did not, however, identify who "they" were, nor did he identify the "mental health person." He also did not state what day this response came.

Makdessi testified that the first page of Plaintiff's Exhibit No. 19 was the original Request Form completed by him. Makdessi said that, when "they" were threatening him over filing this Request, "they handed me what appeared to be a copy on top of that original, and so they handed me both...." Makdessi said that he took both when he left when "they were done yelling at me and telling me I should not put their names down, ... and they were intimidating me." Makdessi said, as he walked away, "they called me back and asked for the copy back...." Makdessi said that he gave them the copy, but he kept the original.

Makdessi testified that the second page of his Exhibit No. 19 was a copy of the original Request Form that he previously had filed in this case as Docket Item No. 11. That is why, he said, that he wrote "copy" on the top of it. He also testified that the third page of his Exhibit No. 19 was a copy of the original Request Form that he previously had filed in this case as an attachment to Docket Item No. 92. When asked if he noticed anything different about the second page of his Exhibit No. 19, Makdessi stated, "I do now. I did not at the time." He said it looked like, "somebody whited out" parts of the original Request Form, including, "the part where it says that I have filed many grievances, but no help, and also the bottom From Sgt. King & Lt. Fields."

Oddly, an examination of Plaintiff's Exhibit No. 19 shows that, on the page that Makdessi identified as the original, the handwriting that he claimed had been "whited out" on the copy crosses over the lines printed on the form and also obstructs other written characters. This section could not have been "whited out" without obstructing the lines on the forms and these other characters, which are not obstructed on the page Makdessi identified as the copy.

Makdessi testified that he continued to file many grievances about his cellmate Smith. He said, "I filed so many grievances, and I sent out so much request forms, and most of them, like, disappeared." Makdessi said that Plaintiff's Exhibit No. 20 was an Informal Complaint that he had filed on December 7, 2010, about the loss of his "legal property, documents that was just removed and went missing." On this Informal Complaint, Makdessi wrote:

Last time my cell mate packed my property up I lost about (3,000) legal documents out of the (15,000) legal documents I had in

my cell. I also lost 20 stamps & pens & paper pads. I know nothing will be done about this complaint[]. I may be int[i]midated in drop[p]ing this complaint just like the other complaints, but the court require[s] that I make a record[] of the loss of my legal documents in order to send them a copy because this prison will not protect my legal documents & will not allow me to pack up my legal documents.

(Plaintiff's Exhibit No. 20, Docket Item No. 147-20.) Makdessi testified that, on this form, he referenced the times that he had been intimidated into dropping complaints about physical or sexual assaults. Makdessi said that "Lt. Fields" is written on the top of this form because, although he had addressed the complaint to the Warden, he met with Lt. Fields concerning this complaint on December 20, 2010. He said that it was noted on the form that it had been assigned to Security and that Lt. Fields was "head of the building." The written response provided on this form is from Sgt. R. Young and stated:

Upon review of your file, I find that the last time you were sent to Segregation was 12/16/09. This has been over one year ago. At that time you signed that all of your property was present and accounted for.

Unfounded.

Makdessi testified that on December 8, 2010, he filed a Regular Grievance with the Grievance Department and also sent a copy of it to the Warden of Wallens Ridge and the Special Investigation Unit of the VDOC in Richmond. (Plaintiff's Exhibit No. 21, Docket Item No. 147-21.) On this Grievance, Makdessi wrote:

Obviously, this time the Grievance department is part of the cover-up, because I filed the attached informal complaint [Makdessi drew an arrow to the following written in the margin: filed date 11/1/2010 Informal com #630-10-INF-02113] & addressed it to the WARDEN of [Wallens Ridge] but they sent it to psychology dep.

when it had nothing to do with psychology. [I]t had to do with the Cruel and Unusual punishment by making me suffer SEXUAL assaults & assault & battery. I have been called a (sand nigger) in this prison by staff & was retaliated against. [I]f you look at the attached (Exhibit 1) you will see proof that I was placed in the cell with an inmate that was on my enemy list since 2004, but they placed me with him for 2½ years, from 2008 to 2010. I suffered. I was kicked so hard last year he broke my ribs. [T]he bone is still pop[p]ed out, but Dr. Thompson said it is part of old age to have it pop[p]ed out. I am 47 years old. [P]lease don't hate me because I am Arab. I am a [C]hristian not Muslim.

... I don't want to be retaliated against by staff like before & I don't want to be placed in segregation like before, I want to do my time without torture. ... I need to be in a single cell ... to start recovery. I am a disabled human being because of my back surgery, & please don't plant contraband on me just because I filed this grievance, as staff said would, & don't hate me because I am Arab. I am [C]hristian not Muslim.

Makdessi said that this Exhibit was a copy of what he filed and that the original "went missing." The "attached informal complaint" was not provided to the court.

Makdessi testified that on December 14, 2010, he filed an Offender Request For Information form with the Offender Grievance Office asking about the status of the Grievance he filed on December 8, 2010. (Plaintiff's Exhibit No. 22, Docket Item No. 147-22.) On this Request form, Makdessi wrote:

I have filed a Grievance dated 12-8-10 [t]hat was sent to your office last Wednesday an (Exhibit 1) was attached to it, as well as a copy of an informal complaint. [I]t was in regard to the CRUEL & Unusual punishment I have suffered due to SEXUAL Assaults & assault & battery. I never received any Grievance Receipt can you please check. [I]f some one once again trashed my Grievance. [I]f so, then you can get a copy of it from the Special Investigation Unit, If they don't have a copy of the Grievance & the Exhibit please let me

know because I know the F.B.I. did receive a copy I will send you [their] address, if you need the address to get a copy.

[F]or the past four years I have been in this prison I have lost many Grievances & legal mail & correspondences.

Thank you for your help.

The Staff Response was provided by D. Crabtree in the Grievance Office and stated: "This office has no record of receiving your form. ALL Grievances are processed within two working days. Please Re-Submit." (Plaintiff's Exhibit No. 22, Docket Item No. 147-22.) This response is dated December 17, 2010.

Makdessi stated that he resubmitted this Grievance "a few times, and still it was lost." He said that no one ever came to investigate his allegations of sexual assault.

Makdessi testified that on December 8, 2010, he was stabbed by Smith and other Gangster Disciples while in a vestibule area returning from dinner in the afternoon. Makdessi said that, as he walked into the vestibule area, a "shank" came from behind him and stabbed him. Makdessi said that, as the shank stabbed him, it hit a bone and broke and did not stab all the way in. Makdessi did not identify who stabbed him. Instead, he said only that "four of them was behind me, and I knew it was one of them." He did not identify any of the four people who were in the vestibule, other than Smith. Makdessi testified that he just wanted to get away and get a correctional officer. He said that, when he entered the building, there were no correctional officers on the floor.

Makdessi said that "his cellmate" caught up to him and told him "No, no. You can't report this to anybody. They will kill you. That's why you pay me

protection money. Come on, I'll protect you.'" Makdessi said that he tried to get the attention of "any correctional officer anywhere." When he could not, he said, he kept walking toward his cell.

Makdessi said he suffered a cut when stabbed with the shank and that this cut bled through the shirt he was wearing. He said that he did not receive any medical treatment. He said that he believes he can see a scar where he was cut.

Makdessi said that after he returned to his cell, Smith returned and convinced him that he would protect him. Later that same afternoon, Makdessi said, Smith began beating him and calling him a snitch. He said that Smith told him that he needed to be taught a lesson and be put back in his place. Makdessi testified that Smith then raped him.

Makdessi testified that he tried to report this incident to Sgt. King the next day, but King told him to "get the hell away" from him, and no investigation occurred. On cross-examination, Makdessi testified that, when he attempted to report this assault the next day, Sgt. King said, "Get the F away from me, you bitch. Go sit down back at your table."

Makdessi claimed that Smith threw a bloody shirt and underwear from this assault into the pod trash. However, Makdessi claims to have retrieved these items, placing them that day into two large envelopes along with letters to the FBI and Justice Detention International. He placed postage on these envelopes, and they were ready to be mailed. In the letter to the FBI, Makdessi wrote, in part:

I am afraid that the staff in this prison are trying to get me killed, because some staff said that I am a ("sand nigger") & that I don't deserve to live [off] American tax money and that some one should take me out and brake my neck.

Sergeant King and Lt. Fields are the ones that are trying to have me killed, they tried to take a contract out on my life with the blood gangs, and at this time I think that they have taken the contract out on my life with the [G]angster [Disciples], because I was stabbed about two weeks ago and sexually assaulted but I am still in the cell with the gangster and today I told Lt. Fields that my life is in danger and that I need to be in [protective custody] but he did not do anything to help me and walked away.

Please help before I am killed...

(Plaintiff's Exhibit No. 23, Docket Item No. 147-23.)

At one point, Makdessi testified that he wrote and included this letter in the envelope with his bloody clothes on the day of the assault, December 8. However, the letter is dated "12-20-10" at the top. (Plaintiff's Exhibit No. 23, Docket Item No. 147-23.) At another point in his testimony, Makdessi said that the meeting with Lt. Fields referenced in this letter occurred on December 20, 2010, and was about his complaints over his missing legal property which he filed on December 7. At another point in his testimony, Makdessi stated that the envelopes containing these clothes and the letters were in his cell and were removed when he was placed in protective custody on December 21. He said he never saw them again, but received a form from Investigator McQueen stating that one package of his legal work had been confiscated. (Plaintiff's Exhibit No. 25, Docket Item No. 147-25.) He said the form was dated December 21, 2010, but he did not receive it until after he filed a complaint because his television and some legal envelopes were missing from his property. Makdessi later testified that Plaintiff's Exhibit Nos. 69 and 70 are photographs of a large envelope in which he had placed the smaller envelopes

containing the bloody shirt and the shorts he was wearing when he was stabbed on December 8. (Docket Item Nos. 147-67, -68.) He testified that the form on the top of the envelope is the form that he had filled out so that postage would be placed on the envelope when he mailed it.

Makdessi said that, at his December 20, 2010, meeting with Fields, he told Fields that his life was in danger and that he wanted to be placed in protective custody. He said that he told Fields that his cellmate, Smith, was the leader of a gang in the pod and Fields responded, “No, he’s not. KC is.” Makdessi said that Fields told him that he would tell Sgt. King, and Fields walked away.

Makdessi claimed that he heard King say that he was going to take a “hit” out on him one time, but he did not testify when or under what circumstances this occurred.

Makdessi testified that, on one occasion, he reported King to a correctional officer who he had never seen before and that officer must have reported his complaints to Security because they came and met with Fields and King and Makdessi and asked Makdessi what happened. Makdessi did not state when this meeting occurred or who from “Security” was present. He does claim that he told the participants in this meeting about “the hit.” He said that King was really angry in this meeting. He also testified that a “few days later they met with Sgt. King.” Again, Makdessi did not identify who “they” were. Makdessi stated that King walked out of the office and slammed the door, walked straight up to him and said, “I ought to punch you in the face right now.”

Makdessi testified that Smith assaulted him approximately 10 times while they were cellmates, two of which were sexual assaults, and the remaining eight were physical assaults. In fact, on cross-examination, Makdessi testified, at one point, that he had been either assaulted or sexually assaulted by every cellmate with whom he had ever been housed. On further questioning, Makdessi admitted that, after his conviction, he was held at the VDOC's receiving center in Powhatan and that he was not assaulted by any of his "few" cellmates there. Makdessi admitted that he had used these allegations, as well as his asthma and back problems, in an attempt to gain single cell status.

Makdessi testified that, despite his statements to Fields on December 20, he was left in the cell with Smith. Makdessi testified that, on the following day, December 21, 2010, he was dozing off on his bed when Smith returned from class at approximately 9:20 or 9:30 a.m. He stated that Smith jumped on him and began punching him and beating him, calling him a snitch. Smith showed Makdessi a copy of the letter Makdessi had sent to the Assistant Warden regarding the December 8 assault, which Smith stated he had received from Sgt. King. Makdessi said that Smith told him, "Before the day is over, we're going to kill you." Makdessi said that he understood this to mean Smith and some of his fellow gang members. Makdessi said that he denied that he had written the letter, but Smith said that the Gangster Disciples leader, K.C., had "analyzed" Makdessi's handwriting by comparing the handwriting in the letter to some of Makdessi's notes they had stolen.

Makdessi testified that Smith then ripped up the letter and flushed it down the toilet. He then resumed punching and kicking Makdessi, who yelled for help and tried to push the emergency button in his cell, but could not do so because

Smith pushed him back onto the bed. According to Makdessi, this struggle was very loud. Makdessi stated, "I was yelling for help, and I was screaming...." Makdessi also testified that he was bleeding profusely from his head as he was trying to get to the emergency button.

Makdessi testified that, after a while, Smith got on top of him and raped him on the bottom bunk. He testified that Smith held him face down on the bottom bunk and continued to punch him in the back and ribs, making it difficult to breathe, and he stated that when he tried to scream, Smith would punch him again. However, Makdessi testified that his screams could have been heard.

Makdessi stated that he was unsure how long the sexual assault lasted. Makdessi testified that after Smith ejaculated onto the bed, Smith continued to beat him. Eventually, Smith began to clean himself and the cell, and he filled cups with water and threw them onto Makdessi, telling him to clean himself. Smith also gave him a rag that he had used to clean the floor to clean himself with. Smith threw Makdessi's underwear and shirt into the trash. Makdessi redressed in clean underwear, but the same pants he had been wearing prior to the assault. At one point Makdessi testified that he put his shirt back on. Shortly later, Makdessi testified that he did not put a shirt on due to shoulder pain from the assault.

Testimony at trial established that Wallens Ridge was on restricted movement on December 21, 2010, and the inmates had to eat lunch in their cells instead of going to the Chow Hall. When opening cell doors to allow inmates to come out to retrieve lunch trays, four cell doors at a time are opened randomly by the Control Room Operator. Correctional officers testified it was not unusual for inmates to not come out of their cells for lunch, and when this happened, standard

procedure requO again would cycle the cell doors open for inmate pod workers to retrieve trash and trays.

Makdessi testified that when his cell door opened for lunch on December 21, 2010, Smith would not allow him to leave. Makdessi testified that he called for help while the door was open, but Smith continued beating him, no one came to help him, and the cell door closed. On cross-examination, Makdessi testified that after the cell doors closed for lunch, Smith forced him to perform oral sex, during which time Makdessi bit Smith, causing him to jump away and scream. At that point, Smith began beating him again. Makdessi also testified that Smith also used a “shank” or a handmade weapon to stab him in the face and his nose that day. Makdessi, however, could not describe how Smith held the shank.

On cross-examination, Makdessi admitted that every time he tried to yell for help, Smith told him to shut up, and, if Makdessi did not shut up, Smith punched him again. He also admitted that his ribs were hurting him so badly that he could barely breathe. Makdessi also testified that Smith ransacked their cell that morning in an effort to find notes that Makdessi had made. Makdessi said that when Smith located his notes, he tore them up and threw the pieces in the toilet and flushed them down. Makdessi also stated that Smith covered the window in their cell door at some point during the assault.

Makdessi testified that while this assault was taking place, other Gangster Disciples named K.C., Peety and Flaco were coming by the cell door. He also testified that correctional officers were performing rounds and looking into his cell, but did nothing to intervene. Smith packed Makdessi’s television in a laundry bag, and he took some of his commissary items and a holiday packet to give to another

gangster when the cell door was opened for the collection of trash and trays. At one point, Smith yelled for Flaco to come take Makdessi's things, which Makdessi testified was loud enough for anyone to hear. When the cell door opened for trash and trays to be collected, Makdessi ran out as Smith knelt down to place his television outside of the cell for another gangster to retrieve. Flaco caught Makdessi at the top of the stairs, followed shortly thereafter by Smith. Makdessi testified that he heard another gangster, known as K.C., say "Throw him off the second tier." Smith caught Makdessi again on the stairs and began throwing punches. A warning shot was fired, and Smith, Flaco and KC immediately hit the ground, but Makdessi continued to run toward the vestibule.

Makdessi testified that the first thing he remembered occurring after he ran into the vestibule was that Sgt. King jumped on him and handcuffed his hands behind his back. Makdessi said that he was screaming, telling King that he had a shoulder injury. He said that Gallihar walked into the vestibule followed by Lt. Fields. Makdessi said that he told Fields, "I told you yesterday that I need to be in pc [protective custody], that they wanted to kill me." Makdessi said, "Lieutenant Ealy started screaming, 'Shut the F up. You didn't get enough? Maybe we should put you back and beat you up some more. You shut the F up. And get this guy out of here.'" Makdessi said that he was placed in a wheelchair and taken to the infirmary.

Makdessi testified that a doctor, who he did not name, started working on him as soon as he arrived in the infirmary. Makdessi said that he told the doctor, "I was fighting my rapist off for three hours, and nobody came to help.... Why didn't you help me? I reported to you." Makdessi said that the doctor told him that he did not recall that. Makdessi claimed that, while he was in the infirmary, a number of

correctional officers also were there and were making fun of him, calling him cry baby. Makdessi did not, however, identify any particular officer who he claimed did this. Makdessi testified that he received stitches to his face and x-rays of his ribs while at Wallens Ridge. Makdessi said that, while he was in the x-ray room, numerous correctional officers came into the room and made fun of him there, also. Makdessi said that Sergeant Sweeney, Lieutenant Hamilton and Captain Gallihar were present at some point while he was in the x-ray room, but he did not identify who made fun of him. He testified that, after x-rays were taken, Hamilton and Sweeney pushed on his injuries, causing him more pain. He said they told him, "...[W]hen you go to the hospital, you already slipped up and said you reported the sexual assault, you cry baby." He did not identify which of these two officer said this; he simply testified that "they" told him this.

Makdessi testified that he was transported to Lonesome Pine Hospital for a Physical Evidence Recovery Kit, ("PERK"), test. The medical records of this hospital visit were admitted into evidence as Plaintiff's Exhibit No. 71. (Docket Item No. 147-69.) Makdessi testified that he waited an hour at the emergency room to be seen by a doctor. During this time, Makdessi said that Investigators Yates and McQueen were present and questioned him. Makdessi also testified that there was a correctional sergeant present who was holding Makdessi on a "dog leash." Makdessi did not identify this officer, but he said that the officer "pulled on me with a dog leash every time I tried to talk to Investigator Yates[. H]e told me that he [was] going to go ahead and make my life miserable."

Makdessi testified that he informed medical staff at the infirmary that Smith had ejaculated onto the sheets and blankets, but these items were never analyzed. Makdessi further testified that, while he was in the x-ray room at Wallens Ridge,

he overheard an unidentified “investigator” and “couple of officers” say, “We need to get rid of the sheets and the blankets.

Makdessi introduced into evidence several photographs taken of the injuries he sustained on December 21, 2010. (Plaintiff’s Exhibit Nos. 40-49, Docket Item Nos. 147-38 to -47.) These photographs show that Makdessi suffered cuts and scrapes to his nose and face, including a large cut over his left eye and a cut to his lower lip. These photographs also appear to show a number of scratches on Makdessi’s right breast. (Plaintiff’s Exhibit No. 41, Docket Item No. 147-39.) Makdessi stated that these photographs were taken in the prison infirmary and show that he was bleeding profusely from the injuries on his head and face. Makdessi testified that one of the photographs, (Plaintiff’s Exhibit No. 43, Docket Item No. 147-41), showed where Smith stabbed the end of his nose with a shank. Makdessi said that Plaintiff’s Exhibit No. 48 showed a bruise where Smith had punched him in the back. (Plaintiff’s Exhibit No. 48, Docket Item No. 147-46.) Makdessi also testified that one of the photographs showed a scar from where he had been stabbed two weeks before the December 21 assault. (Plaintiff’s Exhibit No. 47, Docket Item No. 147-45.)

Makdessi also introduced into evidence the medical records of his treatment by the medical personnel at Wallens Ridge on December 21, 2010. (Plaintiff’s Exhibit No. 72, Docket Item No. 147-70.) These medical records note that Makdessi said that he was kicked, punched and raped by his cellmate. There is a note that Makdessi had multiple lacerations to his face and complained of back pain, but had no contusions. The notes reflect that at least two of Makdessi’s facial lacerations required sutures. A nurse’s note on December 24, 2010, reflects that Makdessi told her that he was chased and beaten by four men. The notes reflect

that Makdessi continued to complain of soreness through at least January 20, 2011, and that the nurses noted bruising on his face through January 8, 2011.

Makdessi testified that Plaintiff's Exhibit No. 50 was a photograph of blood that dripped off of him while he was being treated in the infirmary. (Plaintiff's Exhibit No. 50, Docket Item No. 147-48.) Makdessi said that Plaintiff's Exhibit Nos. 52 and 53 were photographs of Smith's shoes and socks taken after the assault showing Makdessi's blood on them. (Plaintiff's Exhibit Nos. 52, 53, Docket Item Nos. 147-50, -51.) Makdessi testified that Plaintiff's Exhibit Nos. 54-59 are photographs of the inside of his cell after the assault. (Plaintiff's Exhibit Nos. 54-59, Docket Item Nos. 147-52 to -57.) He said that these photographs show that his television, which should have been sitting on the bottom shelf was gone after the assault. He also testified that these photographs did not accurately portray the scene in his cell immediately after the assault. In particular, he said that there should have been more blood on the bottom bunk sheets than are shown in these photographs. He also said that the pillow had been moved from the opposite end of the bunk and that someone had placed a Bible where his pillow should have been. Makdessi testified that Plaintiff's Exhibit Nos. 60-63 were photographs taken of his bottom bunk after the assault. (Plaintiff's Exhibit Nos. 60-63, Docket Item No. 147-58 to 61.)

Makdessi said that Plaintiff's Exhibit Nos. 64 and 65, (Docket Item No. 147-62, -63), showed cloths and a sponge Smith had used to attempt to clean up Makdessi's blood after the assault. Makdessi said that Plaintiff's Exhibit No. 66 was a photograph of Smith's top bunk. (Docket Item No. 147-64.) He said that the shank used on him by Smith is shown in the photograph lying next to the rolled up mattress.

Makdessi testified that Plaintiff's Exhibit No. 35 is a diagram that he made of the D-1 Pod at Wallens Ridge. (Plaintiff's Exhibit No. 35, Docket Item No. 147-34.) He testified that Plaintiff's Exhibit Nos. 36, 37 and 38 were photographs of the inside of the D-1 Pod. (Plaintiff's Exhibit Nos. 36, 37, 38, Docket Item Nos. 147-35, -36, -37.) Makdessi testified that these exhibits show that the cell that he shared with Smith on December 21, 2010, Cell D-142, was located at the top of the stairs on the second tier.

Video surveillance recordings of the D-1 Pod on December 21, 2010, also were introduced into evidence. (Plaintiff's Exhibit No. 39.) Makdessi testified that this video recording showed that his cell door opened at 9:25 a.m. on December 21, 2010, to allow Smith, who was returning from class, to enter the cell. The court's review of the video confirms that the cell door does open at 9:25:24 a.m., and a person approaches and appears to enter the cell because he is not seen on subsequent frames. The video recording showed no movement in the pod until approximately 9:39 a.m., when at least two correctional officers walk across the pod floor. The video also showed correctional officers on the pod floor at approximately 9:44, 10:36, 10:45, 11:13 and 11:44 a.m. A number of inmates also are seen on the video starting at approximately 9:39 a.m., and it appears that these inmates were collecting laundry. The video showed inmates going by Makdessi's cell door at approximately 9:40 and 10:37 a.m. The video appears to show a correctional officer on the top tier of the pod beginning at 10:46:26 a.m. At 10:47:31 a.m., the video shows an officer on the opposite side of the top tier. It cannot be determined from the video whether this is the same officer who walked around the top tier or another officer. The video appears to show this officer walking down the steps to the bottom tier and entering the pod office. The video

also appears to show another correctional officer pass by the door to Makdessi's cell at approximately 10:56 a.m.

At approximately 11:09 a.m., the video shows a person near the door to Makdessi's cell. Makdessi testified that this person was the Gangster Disciples leader in the pod, K.C., because K.C.'s cell door is shown open at the time. The video is not clear enough to determine whether this person is an inmate or a correctional officer.

The video shows that a couple of inmates brought lunch trays to the pod at approximately 11:11 a.m. At approximately 11:15 a.m., the video shows several cell doors opening at a time as inmates leave their cells and pick up their lunch trays and then return to their cells. A number of inmates from the top tier pass by Makdessi's cell at this time. The video shows the door to Makdessi's cell opening at approximately 11:25 a.m. At 11:25:56, the video shows a person, dressed like an inmate, standing in the doorway to Makdessi's cell. By 11:26:21, it appears that the door to Makdessi's cell has been closed. At approximately 11:57 a.m., the video shows that the doors to all of the cells on the top tier were opened. Several inmates leave the cells. While it is difficult to tell what, if anything, is occurring in the pod, at 11:57:02, there appear to be a number of inmates on the stairs in front of Makdessi's cell. At 11:57:04, the video shows a person on the stairs who does not appear to be wearing a shirt. In this frame and the next one, it appears that another inmate has his hands on the inmate without a shirt. Makdessi testified that this was the inmate he identified as Flaco. The rapid eye camera then panned away from this side of the pod, but by 11:57:27, the video shows two inmates lying on the pod floor near the bottom of the stairs. By 11:57:55, the video shows a

correctional officer with a dog present with three inmates on the floor of the pod. By 11:58:24, the video shows correctional officers restraining these inmates.

After discharge from the hospital, Makdessi testified, he was housed in Mental Health, ("MH-1"), in the infirmary at Wallens Ridge for 47 days. Makdessi testified that he spoke with a QMHP on December 21, 2010, and that a Sexual Assault Assessment form dated 12-21-10 accurately summarized their discussion. (Plaintiff's Exhibit No. 74, Docket Item No. 147-72.) The Assessment was completed by QMHP K. David Jones, M.Ed., on December 21, 2010, and stated in part:

The inmate states that he was assaulted today, 12-21-10, from about 9:30 am to about 11:30 am. The inmate says that this assault happened in his cell, D142. Inmate Makdessi says that his cell-partner, Micheal Smith. He said that M. Smith covered the cell door window and hit him, kicked him and "raped me." I asked him what he means by rape and his response was that he did not want to describe it.

On the Assessment, Jones also noted that Makdessi alleged that he had been the victim of other sexual assaults while in the custody of the DOC and, in particular, while in the C-1, D-2 and A-6 pods at Wallens Ridge. Jones noted, however, that Makdessi stated that he could not remember who had assaulted him in the past. Jones stated that Makdessi reported feeling depressed, problems sleeping, worrying about another sexual assault, difficulty eating and experiencing dreams and "flashbacks." At one point, Jones noted that Makdessi stated that he had not had any thoughts of suicide since the incident. At another point, Jones wrote, "He says that he has had thoughts of suicide, but can not kill himself due to his Christian faith, but wishes that someone else would kill him so he would not suffer

anymore." Jones also noted that Makdessi was a weak inmate and was in danger of re-victimization.

Makdessi testified that, while in MH-1, Sgt. King came by and stated "I told these guys to go ahead and kill you," and he also said "You need to stop filing all these grievances because what happened to you is nothing compared to what happens when you come out." Makdessi testified that he sent a letter to Investigator Yates on January 20, 2011, informing him of King's threat. (Plaintiff's Exhibit No. 33, Docket Item No. 147-32.) This letter stated:

Today Sergeant King came to MH1 & he was standing at the door & looking at me as if he wanted to kill me, then he said come to the door, he said he told them to kill me, then smiled & walked away. This happened on 1-20-2011 at about 10:30 a.m. morning.

Then Sergeant King came back about 5:45 p.m. & called me an F-ing snitch, we will get you when you come out, he said.

When this happened on 12-21-2010 as I was in the x-ray room Sergeant [Sweeney] & another Lt. was pushing on my broken ribs & broken nose causing me so much more pain & saying you better not say anything about Lt. Fields or Sergeant King. You better not snitch any of us out to the special investigation unit, & this is why I could not say anything before, but today because Sergeant King came to my door & thre[a]tened me & I am in fear of them I am talking.

Makdessi stated that he never received any response from Yates regarding this letter. He also claimed that he had written additional information in the letter that had been removed. For instance, he said that he had written that these encounters with King were on the security cameras.

Following this incident, Makdessi was transferred to Keen Mountain Correctional Center, (“Keen Mountain”), where he was placed in protective custody. At the time of trial, he remained incarcerated at Keen Mountain.

Makdessi testified that, after this assault, he began suffering from migraine headaches. He also said that his depression had worsened, and he began suffering from nightmares and flashbacks of the assault. He said he was forgetful. He said he was paranoid and scared all of the time. Makdessi said that he complained of these symptoms to the Mental Health Department at Keen Mountain. Makdessi admitted nine of his Informal Request Forms seeking services from the Mental Health Department at Keen Mountain. (Plaintiff’s Exhibit No. 73, Docket Item No. 147-71.)

Makdessi testified that he sent Investigator McQueen an Offender Request For Information form on December 22, 2010, while he was still being treated in the Medical Department for injuries suffered in Smith’s attack. (Plaintiff’s Exhibit No. 26, Docket Item No. 147-26.) On this Request form, Makdessi requested to talk to Investigator Yates with the Special Investigations Unit because Makdessi alleged that Smith had a copy of a letter Makdessi had sent to Assistant Warden Kiser, which meant someone on the security staff had given it to Smith. Makdessi said that he never received any response to this Request form.

According to Operating Procedure, (“OP”), 830.6, “Offender Enemy Information Management,” its purpose is to establish a standardized system of identifying, verifying and documenting offender enemies and separation needs within facilities operated by the DOC. (Plaintiff’s Exhibit No. 76, Docket Item No. 147-74). This OP states that when an Officer in Charge determines there is an

immediate need to separate offenders because a potentially dangerous situation exists, or there may be an escalation of a conflict and the safety of staff or offenders may be threatened, the Officer in Charge shall take appropriate measures to protect those offenders involved and maintain the security of the facility. Operating Procedure 830.6 proceeds to state that such measures may include internal separation or placement in General Detention and that such offenders will be referred to the Institutional Classification Authority, (“ICA”), to review the case and make a recommendation regarding the need for assignment to segregation, enemy documentation or other actions. An “enemy” is defined as a Virginia DOC offender whose identity is known and verified by correctional staff to pose a significant threat to the life of another offender.

Makdessi testified that he filed an Informal Complaint form directed to Yates, Special Investigation Unit, on December 26, 2010, on which he wrote:

I am in fear for my life in this prison from Captain Gallihar & his staff who was not around to help me when I was getting raped for three hours & almost got killed if I did not run out the cell door, because my [rapist] said he is going to kill me before the day is over. Captain Gallihar wrote me up for ‘[fighting my [rapist] off for three hours” any ignorant person will look at my bed full of blood & will know I got jumped in bed & I was on the bottom fighting my [rapist] off in bed. I am in fear from the assistant warden who gave the gangs the letter I sent him to kill me.

(Plaintiff’s Exhibit No. 27, Docket Item No. 147-27.) Makdessi said that he received a written response from McQueen stating, “Your allegations will be forwarded to the Special Investigations Unit, who are currently conducting an investigation of this incident.” The response is dated January 10, 2011.

Makdessi said that he filed an Emergency Grievance Form on December 28, 2010, stating that he was in fear for his life and alleging that Capt. Gallihar and his staff had attempted to get gang members to kill him. (Plaintiff's Exhibit No. 28, Docket Item No. 147-28.) The Staff Response notified Makdessi, "Your grievance does not meet the definition for an emergency. Reason/s: This is a current ongoing investigation being conducted by this special investigations unit."

On January 3, 2011, Makdessi filed an Informal Complaint Form with the Assistant Warden seeking to be reimbursed for \$185 for the television and \$21.15 for the headphones he claims the "gangs stole" from him during Smith's December 21, 2010, sexual assault. (Plaintiff's Exhibit No. 29, Docket Item No. 147-29.) The Staff Response stated that these items had been confiscated and were being held as part of an active Special Investigations Unit investigation. Makdessi was informed that these items would be returned to him after the investigator was finished with them.

Makdessi testified that he was charged with an institutional infraction of fighting for fighting off Smith's attempts to sexually assault him on December 21, 2015. An audio recording of Makdessi's disciplinary hearing on the charge was admitted into evidence. (Plaintiff's Exhibit No. 39.) At this hearing, Makdessi stated that a form indicating that he did not wish to call any witnesses or present any evidence was not correct. Makdessi said that he had requested witnesses and the surveillance video taken in the D-1 Pod that day as evidence. Makdessi denied that he had told Capt. Gallihar after the assault on December 21 that he and Smith had been fighting in the cell for three hours. Makdessi stated that he told Gallihar that he had been "fighting my rapist off for three hours."

At this disciplinary hearing, Makdessi testified fairly consistently with his testimony in this court except that he said that Smith put the bed covers over his head at one point to prevent anyone else from hearing him scream for help. He also said that, as a 50-year-old man, he would have been “stupid” to start a fight with his cellmate. He also pointed out that he was the only person injured in the incident.

Makdessi said that he appealed his conviction on this institutional infraction. On January 18, 2011, he filed an Informal Complaint Form with the Assistant Warden because he had not received an appeals packet within the 15-day time limit for the filing of an appeal. (Plaintiff’s Exhibit No. 30, Docket Item No. 147-30.) On this Form, Makdessi wrote that the hearing officer told him that he would not have been charged if he had not fought off Smith’s sexual assault. The Staff Response on the Complaint Form stated that Makdessi received his appeal packet on the same day as he filed the Informal Complaint, January 18, 2011, and that the 15-day appeals period did not start to run until after Makdessi received his appeals package. The response also denied that the hearing officer told Makdessi he would not have been charged if he had not fought off his attacker.

Makdessi conceded that he did receive his appeals package on January 18, 2011, and he said that he immediately filed an appeal of his conviction on the institutional infraction of fighting. (Plaintiff’s Exhibit No. 31, Docket Item No. 147-31.) On the Disciplinary Appeal form, Makdessi wrote as the basis for his appeal:

Any IGNORANT person will look at my bed full of blood and will know I got jumped in bed & I was on the bottom fighting my

[rapist] off in bed for three hours & I am the only one that was severely beaten with two black eyes, cuts & stitches over both eyes, broken nose, cut lips, broken ribs, bleeding [buttocks] hole. My [rapist] & his gangs that beat me did not have a scra[t]ch on them. [A]ll this because [C]aptain Gallihar & his staff was not around to save me. I told the hearing officer but he suggested during the hearing that if I let him rape me when he asked for sex & did not fight him off then I would not have gotten written up & therefore I was found guilty. The day before I said I wanted to be in [protective custody.]

Above this section on the form, Makdessi wrote: "The day before this happened on 12-20-2010 I told Lt. Fields my life [was] in danger & I want to check into [protective custody]. [H]e said we will see & walked away. [I]t[']s all in the D-1 security camera, (morning) about 10:30 a.m."

Makdessi testified that, on or about January 24, 2011, he wrote a short summary of the December 21 sexual assault for the Special Investigation Unit investigator, Yates. (Plaintiff's Exhibit No. 34, Docket Item No. 147-33.) This summary stated:

After I was made to drop the complaint of sexual assault in pod C-2 that happened on 7-30-2010 I was moved to D-142 into a known gangster. The first day I told the [correctional officer] that moved me from C-2 to D-1 I told him I fear for my life. [H]e said I will tell [S]ergeant King who was on duty. [S]ergeant King said [too] bad stop being a bitch & he told my [rapist] that I am trying to check into [protective custody] & to teach me a les[s]on. I was made to pay the [\$45] of commissary that I had for protection & I was told to keep my mouth shut because if I try to get into [protective custody] [S]ergeant King will tell him & I will get beat up. [T]hey took so much of my commissary about \$300 in three month[s]. I then wrote so many Grievances & sent copies to the Special Investigation[s] Unit, Richmond, ... When I wrote the assistant warden on 12-8-10 & I put it in the mail box on 12-9-10 as I was going to commissary about

10:30 am & also a grievance that was lost in the mail. But I was told that night [Correctional Officer] Benefield went [through] the mail & took the letter that I wrote the assistant warden & the Grievance & he gave it to [S]ergeant King who gave a copy of it to my [rapist] & that is what triggered all this, the rape & attempted murder on my life.

For the past 3 years in this prison, I have paid about \$1,400 for protection to cell mates & gang members just because I can not get protection from prison staff.

I am called “(sand nigger)” by some staff & I am told I don’t deserve to live [off] American tax money & that I will not live long in this prison.

I fear for my Life.

The day before this happened I told Lt. Fields that I fear for my life & I want[ed] to be in [protective custody]. [H]e said we will see & he left fast.

[T]wo weeks before this happened I told Sergeant King I was stabbed he said don’t be a bitch get the F away from me.

Makdessi testified that his written summary was accurate. He said that he sent this statement to Investigator Yates in the mail, but neither Investigator Yates, nor anyone else, came to talk to him about the December 21, 2010, assault.

Lieutenant John McQueen, the Institutional Investigator at Wallens Ridge on December 21, 2010, also testified. McQueen testified that VDOC policy required that the Special Investigations Unit, (“SIU”), conduct the investigation of any allegations of sexual assault. He stated that, if an allegation of a sexual assault were made while he was the Institutional Investigator at Wallens Ridge, he turned that allegation over to Sergeant Yates, who worked for the VDOC Special Investigations Unit. McQueen said that if any VDOC employee learned of an allegation of sexual assault, that employee was supposed to report it to him. He further said that, if such a report was received, he would secure the alleged crime scene and separate the victim and the suspect and report the incident to SIU.

McQueen testified that, while he had received a complaint from Makdessi that he had been physically assaulted by one other inmate before December 21, 2010, the only report that he had received regarding an alleged sexual assault of Makdessi was the report of the December 21, 2010, incident. McQueen said that, on December 21, 2010, he responded to notification of an altercation in the D-1 Pod. He said that he did not recall how he learned that day that Makdessi claimed that he had been sexually assaulted. McQueen said that he sealed Makdessi's cell that day, Makdessi was taken to Medical, and he might have taken Makdessi's clothing and put them in paper bags to be taken to the hospital along with Makdessi before SIU Investigator Yates arrived at Wallens Ridge.

McQueen testified that after Yates arrived at Wallens Ridge, they conducted interviews and then they went to Makdessi's cell. McQueen said that he took a number of photographs of Makdessi's cell and helped Yates collect evidence. He said that during their examination of the cell, they found a shank underneath the mattress on the top bunk of the cell. (Plaintiff's Exhibit No. 67, Docket Item No. 146-65.) McQueen also stated that the sheets on the bottom bunk of the cell appeared to have blood on them. He said that he believed the sheets were collected as evidence, but he agreed that Yates's report did not say that anyone had ever examined the sheets to see if they contained any evidence. McQueen testified that he collected a large envelope from Makdessi's cell and photographed it and turned it over to Yates. He said that he did not open the envelope and does not know what happened to the envelope.

McQueen testified that the investigators collected the clothing that Makdessi was wearing at the time of the assault on December 21, 2010. He said that the underwear Makdessi was wearing appeared to have blood on them. (Plaintiff's

Exhibit No. 77.) McQueen stated that he was not aware of any lab testing being performed on the underwear. McQueen stated that they also seized the clothing and shoes that Smith was wearing that day, but he was not aware of any analysis being performed on this clothing. McQueen also said that he did not take, and was not aware that anyone took, any swabs of Smith's groin area that day.

McQueen testified that a PERK test was performed on Makdessi. He stated that, according to the report, the PERK test was negative for the presence of sperm or seminal fluid in the anorectal sample or the perianal/buttocks sample taken from Makdessi. (Plaintiff's Exhibit No. 78, Docket Item No. 147-75.) However, the report states that blood was indicated in the anorectal sample and on the inside back of Makdessi's underpants. Also according to the report, blood was indicated and apparent tissue was observed from Makdessi's fingernail scrapings, but no DNA profile foreign to Makdessi was developed.

McQueen testified that, according to Yates's report, Smith told him:

On December 21, 2010 at 11:30 hours I saw my cellmate with a weapon in his hands. He started talking about me being a spy for DOC. I took the knife from him, and threw it on the top bed. We did fight, and I did hit him, as well as he struck me several times. After the fight we both got back in our beds. I did clean up the blood so the COs would not see it. Neither of us wanted to go to the hole. And he jumped from his bed when the door opened and ran outside. I did go after him, and I now know I should not have done that. Again, I heard the shotgun go off, and walked to the pod floor and laid down. ... I at no time sexually assaulted him. I will supply DNA to prove that I was not strong arming him for protection. I will take a polygraph test about this incident.

McQueen testified that, prior to December 21, 2010, Makdessi had made a previous allegation that another inmate, Perez, had made sexual comments and advances toward him. McQueen said that, when he spoke to Makdessi about his allegations, Makdessi recanted his allegations when he learned that McQueen also would speak to Perez. McQueen said that he spoke to Perez, who denied the allegations, and reviewed the pod video footage, which did not show anything other than the two inmates talking.

McQueen testified that he was present when Yates took Makdessi's statement later that day in the emergency room at Lonesome Pine Hospital. McQueen said that Yates wrote down Makdessi's statement on an Investigative Interview form. (Defense Exhibit No. 3, Docket Item No. 144-3.) On this form Yates wrote:

On today's date at about 0930 hrs. I was attacked by my room mate. I was lying on the bed and he started to kick me in my head and back area. He then removed my cloth[e]s and sexual[ly] assaulted me. After this he threw my under cloth[e]s in the bucket near the doorway. He thr[e]w water on me and told me to clean myself. He washed himself and the floor and walls with a wash cloth. He covered the window with a [piece] of paper so no one could see in. At one point another inmate named K.C. knocked on the door and my roommate removed the paper and ask[ed] was this ok and [K.C.] said hit him a few more times. My room mate hit me again. Then inmate P.D. came to the door and advised give him a couple more hits. My room mate then packed up my TV and Christmas packet to give to [Flaco] the houseman. When the door opened I pushed my way outside and ran down the stairs to the bottom pod area. All three inmates came after me and hit & kicked me until the [correctional officer] fired a shotgun round. I was taken to medical and seen by the doctor and transported to [Lonesome Pine Hospital] for a [PERK] kit....

McQueen said that Yates's notes made no mention of Makdessi saying anything about a weapon or Smith forcing him to perform oral sex on him. McQueen admitted that he did not ask Makdessi any questions during the interview and that he could not remember what questions Yates had asked Makdessi. McQueen admitted on cross-examination that Yates conducted more than one interview of Makdessi and that Yates, in his investigative report, wrote that Makdessi told him that Smith had a weapon. (Plaintiff's Exhibit No. 80, Docket Item No. 144-12.) In this report, Yates wrote:

Makdessi advised Smith had sexually and physically assaulted him. He reported that he remembers Smith removed his clothing, pushed him face down on the bottom bunk, but could not remember at that time if Smith penetrated him due to his head injury. He reported that he has suffered memory loss and blackouts and does not remember the entire incident. Makdessi denied possessing the weapon found in the cell or using it to threaten Smith. He claimed that Smith is the person that was in possession of the weapon and remembers Smith having something black his hand prior to the assault. Smith told him it was a weapon.

Yates also wrote on this form that on May 12, 2011, Makdessi told Institutional Investigator Barbetto that he was "now certain that Smith did insert his penis into his anus." McQueen testified that this report also does not mention any claim that Smith forced Makdessi to perform oral sex on him.

Inmate Curtis Leon Thomas, Jr. testified that he was housed in cell D-141 on December 21, 2010. Thomas stated that he returned to his cell from school sometime after lunch trays were passed out, but before the lunch trays and trash were collected. He said that, while he could not hear what was being said, he heard an altercation between Makdessi and his cellmate. Thomas said that the

argument appeared to be about Makdessi being a snitch because he heard Makdessi say he was being set up and that he was not a snitch. He said that he had heard similar allegations made against Makdessi in the pod, but he stated that he had never heard a correctional officer call Makdessi a snitch. He said that he had never heard a correctional officer in the D1 Pod use derogatory terms toward anyone. He also testified that he never saw another inmate exercise any type of control over Makdessi. He said he never saw any correctional officers exercise any physical domination over Makdessi either.

Thomas said that if an inmate at Wallens Ridge needed a complaint or grievance form, he would ask a lieutenant or sergeant for one. He said that, on occasion, the officer might not give the inmate the form, if the officer could resolve the issue. Thomas did state that it was normal for correctional officers to discourage inmates from filing complaints. He further testified that he had seen inmates who had filed complaints not receive a prison job. Thomas testified that, in December 2010, he did not observe King or any other officer encourage or permit other inmates to regulate how the D1 Pod was run.

Inmate Jermaine Chambers testified that he was housed at Wallens Ridge in December 2010. Chambers testified that he did not recall if he had ever observed an altercation between Sergeant King and Makdessi or if he had ever heard King threaten to punch Makdessi in the face.

Dr. Theodore Thompson testified that he was a contract physician at Wallens Ridge in December 2010. Dr. Thompson testified that he examined Makdessi on December 21, 2010, when he was brought to the Medical Department. Dr. Thompson said that Makdessi had suffered multiple contusions,

especially to his face, and bruising and contusions to his left rib area. He said that Makdessi said that he had been kicked, punched and raped by his cellmate at 10 a.m. that day. Dr. Thompson testified that his notes reflected that Makdessi reported no loss of consciousness, no nausea, vomiting or visual changes. He said that Makdessi also complained of back pain.

Dr. Thompson said that Makdessi had two lacerations, one to his right lateral eye area and the other in the left eyebrow area. Dr. Thompson said that these lacerations appeared to have been caused by fighting, but he admitted that they could have been stab wounds. Dr. Thompson specifically testified that Makdessi did not have any stab wounds to his nose. Dr. Thompson stated that he placed two sutures in the laceration on Makdessi's right eye area and three sutures in the laceration on his left eye area. He said that he ordered antibiotic ointment be provided for Makdessi to use on these cuts and Tylenol Extra Strength to be provided. He ordered that Makdessi remain in the infirmary. He said that he ordered x-rays be taken of Makdessi's chest and left rib area to determine if he had a fractured rib. He also ordered x-rays of Makdessi's nose and facial area. He stated that the x-rays did not reveal any fractures. Because Makdessi said that he had been sexually assaulted, Dr. Thompson said that he was taken to a local hospital for a PERK kit to be performed on him.

Dr. Thompson stated that Makdessi never told him that he had been stabbed two weeks earlier. He also said that he did not see any scar on Makdessi's body to indicate a recent stab wound. Dr. Thompson specifically testified that Plaintiff's Exhibit No. 47, a photograph taken of Makdessi's right side on December 21, 2010, did not show anything to indicate a stab wound two weeks prior.

Dr. Thompson said a finding of blood in a person's rectum did not necessarily mean that the person had suffered trauma to his rectum. He also said that the report from Makdessi's examination in the emergency room did not make any mention of any sign of injury in the genital/rectal area of his body. Dr. Thompson stated that the fact that Makdessi suffered from gastroesophageal reflux, for which he took Prilosec, could be the cause of the blood in his rectum. Dr. Thompson also stated that the absence of sperm in a person's rectum did not mean that the person had not been raped. Dr. Thompson said that he did not know why the report of the analysis of the PERK kit noted that a number of samples taken had not been examined. He agreed that this indicated an incomplete analysis of the PERK kit evidence.

Dr. Thompson testified that he examined Makdessi again on December 22, 2010, through his cell door. He said that, on this date, Makdessi retracted his allegation of being raped by Smith. He said that he specifically asked Makdessi, "Were you really raped?" He said Makdessi answered, "No." Dr. Thompson said that his nurse was present with him when he had this conversation with Makdessi, but he could not recall if there were other inmates in the infirmary or if there were correctional officers present.

William Barbetto testified that he worked as an Investigator at Keen Mountain from July 2010 to July 2011. In his role as Investigator, he said that Investigator Yates asked him to take a statement from Makdessi regarding the December 21, 2010, incident. Barbetto stated that he spoke with Makdessi on May 21, 2011, at 2:15 p.m. in the lieutenant's office at Keen Mountain. Barbetto said that, during this interview, Makdessi did not mention a weapon being used, nor did he say that Smith had demanded that Makdessi perform oral sex on him.

Barbetta's Investigative Interview report, which was admitted into evidence as Defense Exhibit No. 1, (Docket Item No. 144-1), states:

On May 12, 2011, at 2:15 pm I met with Investigator W. Barbetta in reference to a sexual assault that happened on December 21, 2010, at Wallens Ridge State Prison. At approximately 9:00 am I was in my cell D-142 lying in my bunk with my headphones on watching television half asleep. My cell partner Michael Smith returned to cell D-142 from school at approximately 9:00am and entered the cell. When Inmate Michael Smith entered D-142 he started punching me in the head and face area while I was in my bunk. I attempted to get out of bed by kicking toward him to stand up. Inmate Michael Smith then started kicking me in the chest, face, and head. I attempted to roll over to avoid being kicked. Inmate Michael Smith started calling me a snitch and showed me a piece of paper I wrote to the Assistant Warden. Inmate Michael Smith said Sergeant King gave the note to him. Inmate Michael Smith then told me I was going to be dead by the end of the day. An inmate in the cell D-141 told Inmate Michael Smith he was going to look out for the Officers for him. I know this inmate in D-141 as Peanut. I was still on the bed because I felt my ribs were broken when Inmate Michael Smith removed my shirt first then my pants and underwear. Inmate Michael Smith then got on top of me. I tried to get Inmate Michael Smith off me but was unable to do so. The inmate I know as Peanut started yelling there was an officer coming. Inmate Michael Smith then went to the cell door as Officer Sutner walked by. Inmate Michael Smith then walked back to me and started punching me again and told me to shut up. Inmate Michael Smith then got on top of me again, pushed his pants and underwear down and inserted his penis into my anus. I am sure it was my cell partner Michael Smith who sexually assaulted me. Inmate Michael Smith then threw several cups of water on me and gave me a wash cloth and told me I had to clean myself off, I cleaned myself, put on a pair of underwear from the laundry bag, and covered myself with a blanket. Inmate Michael Smith was tearing up my paperwork and flushing it. An inmate I know as KC and as a leader of the Gangster Disciples came to the cell door and told Inmate Michael Smith, "Make sure you clean him up before count, then after count you can start on him again after count." Then an inmate from D-

137 I know as Flaco came to the cell door and told Inmate Michael Smith, "Get the television and holiday package ready for pick up when the door opens for trash and trays." Then Inmate Michael Smith picked up my television, wrapped it up in a sheet, and got it ready. Then Inmate Michael Smith packed up my holiday package. An inmate I know as Peety D-139 came to the door and told Inmate Michael Smith that was enough for now and to take his time. Then the inmate I know as Peety left the cell door. Then Inmate Michael Smith started punching on me again because I was moaning in pain. Inmate Michael Smith then told me to take some Tylenol. I took 2 Tylenol and Inmate Michael Smith told me to take more and he forced me to take 2 more Tylenol. Then lunch trays arrived, and I heard that the control room opened 5 doors. I was going to get my tray but Inmate Michael Smith told me I better not get off my bunk or make a sound. Then the cell doors closed back. About a half an hour later Inmate Michael Smith started packing my television and holiday package again by making sure it was all tied up. Inmate Michael Smith told the Inmate I know as Flaco who was outside the cell door the items were ready to be picked up during trash call. Then the door opened. I took my socks off so I wouldn't slip, and seen Inmate Michael Smith placing my stuff outside the cell. I ran out of the cell and made it to the stairs when Inmate Michael Smith and the inmate I know as Flaco caused the cut above the right eye by punching me. Then I heard a gun shot and ran out of the pod into the vestibule.

I was assaulted and sexually assaulted in December 2003 by Aaron Taylor while housed at the Virginia Beach Jail, and there were 3 attempted sexual assaults against me at Wallens Ridge State Prison (July 2007, September 2007, and July 30, 2010)

Barbetto testified that, to his knowledge, none of the defendants worked at Keen Mountain, and none of the defendants were present when he took Makdessi's statement.

Kelly Cress testified that she worked as a nurse at Wallens Ridge on December 21, 2010. Cress stated that she saw Makdessi's cellmate, Smith, on this

date and that he refused medical treatment. She said that she also examined Makdessi on December 21, 2010. Cress's note of her interactions with Smith and Makdessi was admitted as Defense Exhibit No. 2. (Docket Item No. 144-2.) Cress stated that the second page of this Exhibit is a diagram she made of Makdessi's injuries on an anatomical figure. Cress noted on page 3, "Altercation between two inmates. [Makdessi] advised he was raped by his cell partner at 10 a.m. today. [Presented with [i]njuries to face and complaints of rib pain." She also noted that three sutures were placed in Makdessi's left eyebrow area and two sutures in his right lateral eye area. She also noted edema or swelling above his right eyebrow and bruising and swelling under his left eye. Cress said that she did not see any evidence that Makdessi had been stabbed.

Lieutenant Tracy Fields testified that he had worked for the Department of Corrections for 15 years. Fields stated, as Lieutenant of Wallens Ridge's D Pod in 2010, his duties included making security rounds and ensuring that all equipment was there and that the Sergeant was making rounds. Fields said that he had a Sergeant and correctional officers working for and reporting to him at that time. Fields stated that, as a Lieutenant at Wallens Ridge, he reported to the Watch Commander, the Major, Assistant Warden and Warden.

Fields testified that he was present in the D Pod and had made a round on the bottom of the pod with the Assistant Warden on the morning of December 21, 2010. He said that he was not on the top tier of the pod before Makdessi ran out of his cell that morning. In fact, Fields said that he was not in the pod when Makdessi ran out of his cell, but he said that he responded to notice of an inmate fight in progress.

Fields stated that, as part of his job, he would routinely provide grievance and complaint forms to inmates. Fields said that he was not reluctant to provide the forms and that it did not bother him if a complaint was filed against him. He said, "It was just an allegation that they're making. I have them all the time." Fields stated that when complaints were filed in his pod, they were forwarded to his attention. He said that he would answer them the "best I can."

Fields testified that he had little interaction with Makdessi prior to December 21, 2010. He testified that Makdessi was "standoffish" and that he had no reason to believe that Makdessi was vulnerable or had been picked on by the other inmates prior to December 21, 2010.

Fields specifically denied that he ever interrupted an attempt by a mental health worker to speak to Makdessi. Instead, he stated that he would not be present when a mental health worker was speaking with an inmate unless he had been requested to be present. Fields said this was because many inmates would not talk in front of security officers. Fields also specifically denied that he had ever seen Makdessi's October 28, 2010, Informal Complaint form claiming that he had suffered sexual assaults, or that he had scratched out assigning the Complaint to Security and written in "QMHP." (Plaintiff's Exhibit No. 18, Docket Item No. 147-18.)

Fields also specifically disputed Makdessi's allegation that he complained of any problems with his cellmate on December 20, 2010, that he indicated that he was in fear for his life from anyone, that he was being sexually assaulted or that he feared being sexually assaulted by anyone. Fields testified that Makdessi did not appear particularly fearful at that time. Lieutenant Fields testified that when an

inmate informs him that he is in fear for his life, the inmate is immediately placed in segregation. He stated that several individuals have the authority to do this, not just the lieutenant. Fields testified that if an inmate alleges sexual assault, both parties are immediately placed in segregation on general detention status. He also stated that if an inmate refuses to return to his cell, he is placed in segregation.

Fields admitted that he had met with Makdessi shortly before December 21, 2010, to discuss a long-standing property issue. Fields said that Makdessi's cellmate, Smith, was not discussed during this meeting with Makdessi. Fields specifically denied that Makdessi told him of any current or past problem with Smith. He also said that Makdessi did not complain that his life was in danger or that he had been sexually assaulted or feared being sexually assaulted. Fields stated that, when their meeting was finished, Makdessi returned to his cell.

Fields testified that he had worked with Sgt. King between seven and 10 years. He said that he had never heard King use a racial slur against or curse an inmate. Fields said that he had no knowledge of officers ever making deals with inmates. He said that, if he ever learned of such a deal, he would report the officer for disciplinary action.

Fields testified that, as a lieutenant, he did not see every complaint or grievance filed by inmates in his pod. Instead, he saw only those complaints or grievances that were directed to his attention to address or answer. Fields did admit that, if a complaint or grievance dealt with a security issue in his pod, it should have been directed to his attention.

Fields admitted that, in 2006, he received a Written Notice issued by A. David Robinson, the Warden of Wallens Ridge, for a violation of DHRM Policy 1.80-Workplace Violence for placing his hand on the neck/throat area of a subordinate officer. (Plaintiff's Exhibit No. 81, Docket Item No. 144-13.) Fields also admitted that one of his previous performance evaluations as a sergeant stated: "Sgt. Fields is hesitant to accept new responsibilities as well as learn new tasks. In some areas, to include taking formal count, (count Officer), Sgt. Fields does not like to act as the count Officer and therefore does not 'carry his share of the load'." (Plaintiff's Exhibit No. 83, Docket Item No. 144-15.) Fields testified that his 2010 and 2011 Performance Evaluations were "spotless." (Defense Exhibit Nos. 4, 5, Docket Item Nos. 144-4, -5.)

Fields agreed that an Institutional Classification Authority Hearing Form, dated January 25, 2010, and admitted into evidence by the plaintiff, showed that it was recommended that Makdessi be approved for reduction to Security Level 4 and transferred to Keen Mountain. (Plaintiff's Exhibit No. 84 at page 1, Docket Item No. 144-16.) Fields also agreed that a VDOC Classification Summary Report of the same date stated that Makdessi had a total score of 23 and that an inmate with that score should have been classified at a Security Level 3. (Plaintiff's Exhibit No. 84 at page 3, Docket Item No. 144-16.) The court notes that this Summary Report also states that an H7 Discretionary Override should be applied for a "Gradual Reduction."

Fields agreed that an Institutional Classification Authority Annual Review Summary completed for Smith for the period of May 2010 to May 2011 showed that Smith was classified as a Security Level 5. (Plaintiff's Exhibit No. 84 at page 2, Docket Item No. 144-16.) This Review Summary also stated that Smith had two

100 series and one 200 series disciplinary infractions within the previous 12 months. Fields stated that a 100 series charge was a more serious charge than a 200 series charge. Fields testified that an Institutional Classification Authority Annual Review Summary completed for Smith for the period of May 18, 2009, to May 18, 2010, showed that Smith was classified as a Security Level 5 during this period, also. (Plaintiff's Exhibit No. 84 at page 4, Docket Item No. 144-16.) The Review Summary stated that Smith had no 100 series and three 200 series infractions within the previous 12 months.

Fields testified that, based on his experience, it did not violate any VDOC policy to house a Security Level 5 inmate with a Security Level 3 inmate. Fields testified that he was unaware that Smith had 18 prior disciplinary infractions prior to being placed in the cell with Makdessi. He said that, as a lieutenant, he had more than 200 inmates under his supervision and that he did not have time to routinely review every inmate's disciplinary record. Fields testified that, as a lieutenant, he had no role in the institutional classification of inmates other than determining when to release inmates from segregation. He said that counselors completed inmate annual reviews. He also testified that he did not make decisions about which inmates to cell together.

Fields testified that an Institutional Classification Authority Hearing Form, completed by Capt. A.J. Gallihar and dated February 2, 2010, showed that Smith was placed in segregation because he admitted to fighting with another inmate on February 1, 2010. (Plaintiff's Exhibit No. 85, Docket Item No. 144-17.) It was noted on this form on February 4, 2010, that Smith remained in segregation because he "need[ed] longer period of adjustment." Fields said that, as a lieutenant, he would have seen this form.

Correctional Sergeant David Bellamy also testified at the March 2013 trial. Bellamy said that he was working at Wallens Ridge on December 21, 2010, as a floor officer. He said that his duties as a floor officer were to see that the inmates in the pod were fed, to ensure that the inmates were safe and to make security rounds. Bellamy testified that he recalled making rounds on the top tier and speaking to Makdessi on the morning of December 21, 2010. He testified:

On that day I was doing the top tier, walking around the top tier looking in the cells, and Makdessi yelled at me and said, "Bellamy," and I stopped and went to the door and looked in. And he said, "How are you doing today?" And that was quite out of the ordinary for me, and I said – because he had never stopped me before like that, he usually wouldn't talk to me through the door when I was doing rounds – and I told him everything was going okay. And I was looking in the cell and nothing was out of the ordinary, so I continued on.

From his review of the rapid eye video recording of the pod on December 21, Bellamy testified that it showed that he was in front of Makdessi's cell at 10:56:15 a.m. He agreed that, two seconds later, the video showed that he was no longer at Makdessi's cell door. Bellamy said that, when he spoke to Makdessi, Makdessi was near his bunk, but that he could not remember if Makdessi was standing near or sitting on the bunk, when he spoke to Makdessi. Bellamy said that Makdessi's cellmate, Smith was lying on his top bunk at the time. Bellamy testified that he did not see any blood, paper or trash strewn around or anything else out of the ordinary when he stopped and spoke to Makdessi. Bellamy also testified that he did not remember any cell door windows being covered as he made rounds on the top tier that day. He said that, after he made rounds on the top tier that morning, he left the pod to take his lunch break. Bellamy said that he was

not present in the pod when the inmates were provided their lunch trays or when Makdessi ran from his cell.

Bellamy testified that Makdessi had never told him that his life had been threatened. He also said that Makdessi never told him that he had been, or that he feared he would be, sexually assaulted.

Bellamy said that he has worked with Sergeant King a few years and had never heard him use any racial slurs or curse any inmate. He also said that he had never heard Sergeant King threaten an inmate. Bellamy said that, if he had ever heard a correctional officer use a racial slur toward an inmate, he would report the officer.

Lt. Christopher King testified that, on December 21, 2010, he was working as a correctional sergeant at Wallens Ridge. King testified that the D Building was short-staffed on that day and that, when a building was short-staffed, the inmates' recreation or time out of their cells was usually restricted. He also testified that, at that period of time, the inmates at Wallens Ridge were fed lunch in the pods. King said that on a short-staffed day, the officers would typically open only about four cells at a time to allow the inmates in those cells to retrieve their lunch trays and return to their cells to eat. King said that, after the inmates have time to eat, the cell doors are then opened, four at a time, to allow the inmates to set their trash outside of their cells to be retrieved.

King said it was not unusual, however, for an inmate to not come out of his cell to retrieve a tray. He said when neither Makdessi nor Smith came out of their cell to get a lunch tray on December 21, 2010, it did not concern him. King said it

was standard procedure to close a cell door if the inmates did not come out to get a meal tray. King said that, when Makdessi's cell door was reopened to allow for the collection of trash, the video showed that, at 11:57 a.m., someone set what appeared to be a laundry bag outside the cell and then, shortly after that, Makdessi came running out of the cell at 11:57:02 a.m. King testified that, at 11:57:04 a.m., the video appears to show Smith attempting to strike Makdessi. King testified that, by 11:57:06, no inmates appeared on the video. He said that was because Officer Boyd had fired a warning shot from the control room, and all the inmates laid down on the pod floor except for Makdessi, who ran out into the vestibule.

King testified that he was working in Makdessi's pod in the control room on December 21, 2010, while Officer Boyd was working the gunman position. King testified that it did not raise any red flags when no one emerged from Makdessi's cell when the door opened for lunch, and he stated that standard protocol was to close the cell door for security when this occurred. King testified that when Makdessi's cell door was opened for the collection of trash and trays, a laundry bag was set out and then a few seconds later, Makdessi came running out followed by Smith. King saw Smith attempt to strike Makdessi. King said that Makdessi appeared to have a cut above his left eye. Two other inmates ran from their cells toward the scuffle before King could close all of the cell doors. King testified that it was then that Officer Boyd gave a verbal command to stop, he activated the emergency alert buzzer and then fired a blank round as a warning shot. Although the three inmates chasing Makdessi laid face down on the floor, Makdessi continued running into the vestibule area beneath the control room. At this time, King already had notified staff by radio of the fight and was opening the doors so responding officers could enter the pod. King said the canine officer showed up within two seconds of Boyd's warning shot. King said that he had to open doors to

allow staff to respond to the disturbance and then he had to shut cell doors to secure the inmates.

King also testified that he completed an Incident Report regarding the events of December 21, 2010. (Defense Exhibit No. 6, Docket Item No. 144-6.) That Incident Report stated:

On December 21, 2010 at approximately 11:55 AM I Sergeant King was in D1 control running the control board for D1, 2, 3 pods. I Sgt. King made an announcement on the pod intercom system in D-1 to stand by for trash and tray pick-up. I Sgt. King began cycling the top tier doors so the trays could be placed on the tier. When cell D142 opened, inmate A. Makdessi set some property out on the tier [and stepped] back in the cell. Inmate Makdessi then stepped back out of the cell onto the tier. Inmate Makdessi was not wearing a shirt and ... appeared to have a cut on his head. Inmate Makdessi then began coming down the steps and his cell partner, inmate M. Smith, came out of their cell D142 and began hitting inmate Makdessi in the head. Officer Boyd sounded the horn and I made notification over the radio of a fight in D1 pod. I Sgt King immediately secured the doors to the top tier cells. At this time V. Hoehn from D127 and K. Christopher from D133 began coming down the tier towards the incident. Officer Boyd gave them several orders to stop. ... [I]nmates continued down the steps and Officer Boyd fired a blank round. D1 inmates involved stopped and laid down on the floor except inmate Makdessi. Inmate Makdessi entered the vestibule area as I let responding staff in the pod. Inmate Makdessi laid down on the vestibule floor. I Sgt. King was then relieved by Officer Coleman and went to D-1 pod. I Sgt. King placed inmate Makdessi in restraints in the vestibule. I then stepped in D1 pod where all three other inmates were in restraints. I then escorted inmate Smith to A-3 along with Sgt. Carico. Inmate Smith was placed in the showers and his clothes were confiscated by Sgt. Carico. I Sgt. King was then relieved by Sgt. Cochrane.

King filed another Incident Report that day documenting that he replaced the blank round in the shotgun that Boyd had fired. (Defense Exhibit No. 7, Docket Item No. 144-7.)

King testified that he never had used any racial slurs or epithets against, nor had he ever threatened, Makdessi. He further testified that he never asked any inmate to harm or kill Makdessi. King specifically denied that he had ever told Makdessi, "Why I'll punch you." He said that Makdessi had never told him that he feared for his life or that he feared being sexually assaulted. He also said that he had never learned that Makdessi feared for his life or feared being sexually assaulted indirectly through a complaint or grievance or by a comment from another correctional officer. King said, Makdessi "never informed me of any problems he was having."

King testified that, if Makdessi had ever told him that he feared for his life or feared being sexually assaulted, he would have erred on the side of caution and placed Makdessi in segregation until an investigation could be conducted. King admitted that he was aware of allegations that inmates in the D-1 Building were involved in gang activity at that time. When asked about Makdessi's claim that he told King he had been stabbed two weeks prior, King responded, "I have no idea what he's talking about." King said that, if Makdessi had ever told him he had been stabbed, he would have immediately removed Makdessi from the pod and taken him to the Medical Department for treatment. King said that he did not take it personally when inmates filed complaints about him or the officers under his supervision. He said that he viewed inmates filing grievances against him as just part of his job.

King testified that DOC records showed that Smith had received the following institutional charges prior to December 21, 2010:

1. January 8, 2007 – possession of contraband;
2. April 11, 2007 – possession of contraband;
3. April 11, 2007 – threatening bodily harm to any person;
4. April 25, 2007 – attempting to possess contraband;
5. April 11, 2007 – possession of a weapon or sharpened instrument;
6. August 7, 2007 – intentionally throwing, discarding trash except in an approved receptacle;
7. January 3, 2008 – tampering with security materials, devices or equipment;
8. Illegible date – vulgar and insolent language directed toward an employee;
9. March 25, 2008 – disobeying an order;
10. May 17, 2008 – possession of contraband;
11. August 13, 2008 – simple assault upon a nonoffender;
12. August 13, 2008 – possession of contraband;
13. March 14, 2009 – lewd or obscene acts directed toward or in the presence of another;
14. July 4, 2009 – failure to stand for count; and
15. September 7, 2009 – failure to follow published, posted or written rules and regulations.

(Plaintiff's Exhibit Nos. 87-95, 97-101, Docket Item No. 144-18 to -27, -29 to -33.) King also admitted that a June 20, 2008, Internal Incident Report alleged that Smith had been involved in a fight with other inmates in the B Yard. (Plaintiff's Exhibit No. 96, Docket Item No. 144-28.) This Incident Report noted that each inmate involved was charged with fighting with any person. Another Internal Incident Report, dated February 2, 2010, showed that Smith had been accused of fighting and injuring another inmate, King said. (Plaintiff's Exhibit No. 102, Docket Item No. 144-34.) According to this Incident Report, Smith was charged with fighting with any person.

King testified that he was not the charging officer for any of these offenses charged to Smith. King said the only charge against Smith that he had any personal knowledge of was a July 18, 2012, charge of making sexual advances/physical/verbal in nature toward nonoffender. (Plaintiff's Exhibit No. 110, Docket Item No. 144-42.) King said that it would not be unusual for an inmate at Wallens Ridge to have as many disciplinary offenses as Smith. King testified that, as a correctional sergeant or lieutenant, he had no role in inmate housing assignments. King said that he would be involved only if an inmate requested to be removed from a cell.

Correctional Officer Thomas Hall, Jr., also testified that he was working as a floor officer in the D Building at Wallens Ridge on December 21, 2010. Hall said that he was present in the D Building, but not Makdessi's pod, when Makdessi ran from his cell. Hall testified that he was in the segregation pod doing a security check when he heard the notice on the radio of a fight and responded. He said that he saw Makdessi run into the vestibule, and he ordered him to get on the ground. He said Makdessi complied.

Hall completed an Incident Report that day, which stated:

On [December 21, 2010, at approximately 11:55 a.m.] I c/o T. Hall while conducting a security check in D-3 pod responded to a fight in D-1. As I was entering D-1 pod I/M A. Makdessi #1187976 came running out the slider. I ordered him to get down on the ground and he complied. I/M M. Smith #1051464, I/M V. Hoehn #1006311, and I/M K. Christopher #1198405 were already lying facedown when I entered the pod. Several officers along with K-9 responded. All inmates were restrained and fight was controlled. I along with C/O P. Sumter then escorted I/M V. Hoehn to D-3 shower where he was stripped and searched. C/O P. Sumter and I then escorted I/M V. Hoehn to D-316.

(Defense Exhibit No. 8, Docket Item No. 144-8.)

Hall said that, prior to December 21, 2010, Makdessi had never told him that he feared for his life. He said that he had never observed Makdessi and Smith having any problems prior to December 21. He said that he never saw them fighting or having a verbal altercation before this date. Hall specifically denied that Makdessi had ever told him that he was sexually assaulted by his cellmate or any other inmate. He said that, if Makdessi requested any type of form from him, he gave it to Makdessi. Hall stated that, as an inmate, Makdessi would have access to numerous officers, other than the defendants, to whom he could speak or from whom he could request grievance forms.

Hall stated that, if an inmate told him that the inmate was in fear for his life, he would report it to his sergeant immediately. He said that he would immediately separate the complaining inmate from the inmate he feared. Hall stated that he had worked with King and Fields for about three years and that he had never heard either of them make a derogatory remark to an inmate or threaten an inmate. He said that he had never seen the defendants or any other officer tear up an inmate grievance form. He said that he had no knowledge that King or Fields or any other defendant had taken "a contract out on Makdessi's life."

Correctional Officer Glen Alan Boyd also testified that he was working in the D-1 Control Room at Wallens Ridge on December 21, 2010. He said that he started working as the control operator that morning, controlling all the movement in the pod. He said that, around 10 a.m. that morning, he switched to the role of gun man in the D-1 Control Room when King came in to assume the role of control operator. Boyd said that he noticed nothing odd about Makdessi's and

Smith's cell that morning. He said it was not unusual for inmates to not come out of their cells to get lunch trays. He said that he noticed that Makdessi and Smith did not come out to get trays that day, but that it did not raise any concern for him. He said that, when inmates did not come out to get trays, that cell's door would be closed.

Boyd said that, when Makdessi's cell door opened for the removal of trays and trash, he noticed an arm reach out of the cell and drop something on the tier. Within a few seconds, he said, he saw Makdessi "burst out" of the cell for the steps. He said Smith was directly behind Makdessi, and they began to struggle on the steps, as Smith caught Makdessi and struck him in the head. Boyd said, that by that point, he had hit the buzzer and ordered the inmates to stop fighting and get on the floor. He said he then saw two other inmates running toward the steps, and he fired one blank round. Boyd said the three inmates other than Makdessi laid on the ground. Makdessi, he said, ran into the vestibule as the door opened.

Boyd testified that he completed an Incident Report that day, which stated:

On [December 21, 2010, at 11:55 a.m.] I C/O A. Boyd was in D-1 Gun as the doors were opened for trash and trays I saw A. Makdessi 1187926 cell D142 run out of his cell with blood on him then his cellmate M. Smith 1051464 D142 ran out behind him and chased him down the steps with V. Hoehn 1006311 D137 and K. Christopher 1198405 D133. At that time, I C/O Boyd hit the alarm. They did not lay down. At that time, I fired a blank round and everyone laid down on the floor. I C/O Boyd felt if I did not fire a round A. Makdessi 1187926 would have been greatly injured or killed.

(Defense Exhibit No. 9, Docket Item No. 144-9.)

Boyd testified that, prior to December 21, 2010, Makdessi had never told him that he feared for his life or that he had been, or feared that he was going to be, sexually assaulted. Boyd said that he had never heard King use a racial slur against an inmate or to curse an inmate. He said that he had never heard any of the other defendants use a racial slur against an inmate or to curse an inmate. Boyd specifically denied that he had met with Makdessi shortly after his alleged previous sexual assault on December 8, 2010. In fact, he said that he had checked the prison's records, and he was not working on December 8 or 9, 2010. Boyd said that his work attendance records showed that those days were "rest days." (Defense Exhibit No. 10, Docket Item No. 144-10.) Boyd also testified that, since Makdessi was in general population, he would have access to correctional officers other than the defendants in this case on an unrestricted movement day. Boyd said that it was standard protocol to immediately place an inmate in segregation if he claimed that his life was in danger. Boyd said that, if he had been aware that Makdessi was in fear for his life or safety, he would have immediately separated him from his cellmate or whoever was threatening him.

Boyd testified that the D-1 Control Room has a window that can be closed, but that was open on the morning of December 21, 2010. He said that the control room is level with the top tier in the D1 Pod and is 30 to 40 feet away from cell D142.

Defendant Arvil J. Gallihar also testified at the March 2013 trial. Gallihar stated that he was the Watch Commander on duty at Wallens Ridge during the morning of December 21, 2010. Gallihar stated that, as Watch Commander, he was responsible for the overall operations during the day shift. Gallihar said that he was not present in the D-1 Pod on December 21 when Makdessi ran from his cell.

He said that, when he arrived in the D-1 Pod, Makdessi was slouching in a corner of the vestibule, already restrained. He said he asked Makdessi, "So what was this all about?" He said that Makdessi told him that he and Smith had been fighting for the last three hours. Gallihar said that he asked Makdessi what they were fighting about, and Makdessi said, "He's been trying to rape me for the last three hours or so."

Gallihar stated that, based on Makdessi's statements, he charged him with a disciplinary charge for fighting. The Disciplinary Offense Report charging Makdessi with fighting stated:

On December 21, 2010 at approximately 11:55 am I, Capt. Gallihar, responded to a fight in the D-1 Pod. As I entered the D-1 Vestibule, I observed inmate Makdessi sitting on the floor with blood on his face. Makdessi was asked what had happened between him and inmate M. Smith #105146. Inmate Makdessi stated "We've been fighting for the last three hours". Therefore this charge is written....

(Defense Exhibit No. 11, Docket Item No. 144-11.) Gallihar conceded that he did not include Makdessi's statement that he was fighting Smith because Smith was attempting to sexually assault him. Gallihar said that he did not remember if he accompanied Makdessi to the Medical Department or if he, otherwise, saw Makdessi while he was in the Medical Department that day. He specifically denied that he called Makdessi any name or laughed at him while he was being examined that day.

Gallihar said that, if he received a report of sexual assault by a prison inmate, he would report it to the prison's Chief of Security. He stated that he immediately would separate the victim and alleged assailant by placing them both

in segregation, would have the victim seen by medical personnel and would start an investigation of the allegations. Gallihar testified that, if an inmate reported that he had been threatened by another inmate, he also immediately would separate the inmates and begin an investigation. He said that an assault or a threat of assault should be reported to the Chief of Security, and the prison Investigator would begin an investigation.

Gallihar admitted that VDOC policy on enemy information management required “[a] staff member who becomes aware of the possible need to separate offenders should immediately notify the officer in charge or administrator on duty.” (Plaintiff’s Exhibit No. 76.) Gallihar testified that he had no knowledge of a VDOC inmate ever remaining in a cell with another inmate who he claimed had threatened to harm him. Gallihar said that, even if the allegations were determined by the investigation to be unfounded, the two inmates would not be placed in the same cell in the future.

Gallihar specifically denied that he was aware of any allegations by Makdessi that Michael Smith had threatened his safety prior to Smith’s assault of Makdessi on December 21, 2010. He specifically denied that Makdessi had ever told him that he feared for his life. He also said that Makdessi had never made any allegation that he had been raped or sexually assaulted by another inmate prior to December 21, 2010. Gallihar said that he did not recall receiving a letter that Makdessi had addressed and sent to the Assistant Warden prior to December 21, 2010. Gallihar said that he did not provide any letter or complaint that Makdessi had written to any other inmates. Gallihar said that he would not do that because it would put both Makdessi and the orderly operation of the prison at risk.

Gallihar stated that, to file a grievance form, the inmate would place the form in the institutional mail to be sent to the Grievance Coordinator. He said that the Grievance Coordinator would then distribute each grievance to the department that would address the grievance. Gallihar specifically denied that he had ever seen any grievance filed by Makdessi claiming that he had been sexually assaulted while an inmate at Wallens Ridge. Gallihar said that the Grievance Coordinator could assign grievances regarding allegations of sexual assault directly to an investigator for an investigation.

Gallihar also specifically denied that QMHP Clark ever told him that Makdessi had made allegations that he had been sexually assaulted by his then-current cellmate. Gallihar testified that the plaintiff had admitted two versions of the same Offender Request For Information form. One copy contained an allegation that he had been sexually assaulted by his current cellmate and one copy did not contain this allegation. (Plaintiff's Exhibit No. 19, Docket Item No. 147-19.) Gallihar said that the version of the form that contained the allegation of having been sexually assaulted also contained a statement that Makdessi had reported it to Security and filed many grievances, but received no help. This statement also was not on the other version of this form, he said. Gallihar admitted that there would have been no reason for QMHP Clark to notify Security if the form received from Makdessi did not contain the allegations of sexual assault by his current cellmate. Gallihar conceded, however, that both forms mentioned Makdessi's fear of retaliation by staff, which should raise a security concern.

Gallihar said that he did not recall Makdessi ever requesting any grievance forms from him, and he did not recall ever denying him any such forms. He specifically denied that he ever told Makdessi not to put correctional officers'

names on grievance forms. He also specifically denied that he had ever ripped up any of Makdessi's grievance forms. He said that he had never seen any of the other defendants rip up Makdessi's forms, either. Gallihar said that he had never called Makdessi a derogatory name or racial slur, and he had never heard any of the defendants call Makdessi a derogatory name or by a racial slur. He said that he had never witnessed any of the defendants try to intimidate Makdessi to prevent him from filing grievance forms. He said that he had never witnessed a correctional officer be aggressive toward Makdessi. He said that, if he ever witnessed such behavior, he would report it. Gallihar also testified that he had no knowledge of any of the defendants ever taking out a contract with Smith to kill Makdessi.

Gallihar testified that the February 2, 2010, Institutional Classification Authority Hearing Form that alleged that Smith had been in a fight with another inmate showed that Smith was immediately placed in prehearing detention pending resolution of the charge against him. (Plaintiff's Exhibit No. 85, Docket Item No. 144-17.) Gallihar admitted that he had signed this form, stating that Smith admitted that he had been in a fight with another inmate. He said that his signature on the form simply meant that he approved placing Smith in prehearing detention. Gallihar said that he had nothing to do with the hearing or disposition stating that Smith "needs longer period of adjustment."

Gallihar testified that he was not involved in decisions with regard to the placement of inmates in certain cells. He said that those decisions were handled by the counselors. He said that the counselors consider a number of factors in matching cellmates, including the crime committed, the length of sentence imposed, age and whether the inmate was a victim or predator. Gallihar said that Makdessi's ICA Annual Review Summary for May 2010 to May 2011 noted that

he was designated a Security Level 5 even though his total score was a 23, which would place him at a Security Level 3. Gallihar stated that, as the form indicated, the counselors had some discretion to override the security level based on the inmate's score to increase the security level. Gallihar said that he was not sure why this had occurred in Makdessi's case.

Additional evidence was taken in this matter on remand on November 12, 2015. This evidence included copies of Makdessi's and Smith's Offender Locator Cards and printouts of their housing assignments while at Wallens Ridge. (Plaintiff's Exhibit No. 1, Docket Item No. 199-1.) Makdessi's card and records show that, while an inmate at Wallens Ridge, he was housed in the A, B, C and D Buildings. They show that he was placed in Cell D-142 with Smith on August 6, 2010. They also show that Makdessi was 5 feet, 4 inches tall and weighed 207 pounds. Smith's card shows that he was 5 feet, 11 inches tall and weighed 194 pounds. They also show that, while an inmate at Wallens Ridge, Smith was housed in the A, B and D Buildings. These records show that Smith was placed in cell D-142 on March 10, 2010.

Furthermore, these records refute Makdessi's testimony that he was placed in segregation for 35 days after filing an Emergency Grievance on September 29, 2007. In particular, the records show that Makdessi was moved from Cell A-643 to a cell in the C Building on September 29, 2007. The records do not indicate whether this cell was in segregation or not. However, the records do show that Makdessi was moved from this cell to a cell in the Medical Department on October 17, 2007 – only 18 days later. These records also refute Makdessi's testimony that he was held in a mental health cell in the infirmary for 47 days. The records show

that Makdessi was transferred from Wallens Ridge to Keen Mountain on January 27, 2011 – 37 days later.

Plaintiff also submitted excerpts from Gallihar's deposition testimony taken in the matter. (Plaintiff's Exhibit No. 2, Docket Item No. 199-2.) During this testimony, Gallihar said that, if an inmate made an allegation that he had been threatened, he would move that inmate to segregation for his protection pending an investigation. Gallihar testified that, in December 2010, building lieutenants and counselors worked together to make the decision as to where to place an inmate when the inmate was released from segregation. Gallihar said that when that determination is made a “double-cell assignment” form would go to the Watch Office to be entered into the prison’s computer system and for the watch commander or the shift supervisor to “sign off on it.”

Gallihar also testified at the November 12 hearing. Gallihar testified that Makdessi’s height, 5 feet, 4 inches, did not make him particularly short compared to the other inmates, and Makdessi’s age of 49 did not make him particularly old compared to the other inmates. He said that these characteristics of Makdessi raised no issue of vulnerability with him. He also said that, prior to 2010, he had not noticed anything about Makdessi’s gait while walking that would have made Makdessi vulnerable. Gallihar testified that, in 2010, there were estimated between 300 and 400 gang members among the approximately 1,200 inmates at Wallens Ridge. He said that the Gangster Disciples was one of the smaller gangs and was not one of the most violent gangs.

Gallihar testified that, in 2010, he was not aware that Smith was a particularly violent inmate. He said that nearly all VDOC inmates have

institutional infractions. He said that he could not recall any of Smith's other assaults being particularly violent. He also said Smith's last serious assault had occurred more than two years prior to being housed with Makdessi. Gallihar said that he does not remember whether, in 2010, he knew that Smith had fought with his cellmate in February 2010. Gallihar said that he did not consider the combination of Smith and Makdessi as a security mismatch. In fact, Gallihar stated that Makdessi's crime for which he was sentenced was more violent than Smith's crime. Makdessi, he said, was serving a sentence for double murder. Smith, he said, was serving a sentence for robbery and carjacking. Gallihar said that, based on their crimes, he would have classified Makdessi as the more aggressive inmate. He said that, prior to December 2010, he knew of no "red flags" that either would victimize the other. Gallihar said that an inmate who claimed he had been sexually assaulted multiple times would be designated as a victim only if his claims were proven to be true. He said that he knew of no allegations of sexual assault by Makdessi that had been proven true prior to December 2010.

This evidence also includes Institutional Classification Authority Hearing records showing that Makdessi was designated for transfer to the Protective Custody Unit at Keen Mountain on December 30, 2010. (Plaintiff's Exhibit No. 3, Docket Item No. 199-3.) According to this form, Makdessi stated: "I [cannot] go back to [general population] here at [Wallens Ridge] or the other inmates will kill me. They all know I am a snitch and it follows me to every pod...." It is written in the Reporting Staff Comments section:

Offender Makdessi has been at [Wallens Ridge] since 2007. He is a known snitch among staff and other inmates. He was on my caseload from the start and the first words he spoke to me [were] "I know where the drugs are in this pod". He has continued to exhibit

this behavior with staff making these statements in front of other offenders. He has had numerous cellmates and been moved to just about every housing unit at [Wallens Ridge]. He [cannot] be safe[ly] house at [Wallens Ridge] in general population.

In the Rationale section of this form, completed by Jeffrey B. Kiser, it is written:

Inmate Makdessi arrived at [Wallens Ridge] 1/07 and has exhibited poor institutional adjustment evidenced by making himself a high profile inmate and possible victim from other offenders. He has a history of "checking into segregation" for "fear for my life" numerous times. He has been placed with several different cell partners with double cell criteria closely checked as he has claimed on several occasions of being sexually/physically assaulted or "almost assaulted". . .

His crime is periodically shown on the television program "Forensic Files" and the crime can be located on the internet.

He is well known among staff and inmates for being a "snitch" as he does not try to hide it. It is possible that he may do this subconsciously to try to get protection from staff.

He claims that he can't protect himself due to previous back surgery and can't defend himself against cell partners.

He has made himself a possible target and victim in several incidents, especially when claiming "I can tell you where the drugs are". He has not been a reliable information giver, but other offenders, only know that he "snitches".

Due to his vulnerability, he was placed in the SAM unit where all the inmates protect and watch out for the others as they tend to be weaker inmates. However, he once again made unfounded statements against others. He once again checked in from this pod.

[Wallens Ridge] is recommending [protective custody] due to the fact that he is unable to function within the general population and his safety is compromised.

II. Analysis

Makdessi alleges that the remaining defendants, Fields, King and Gallihar, failed to protect him from a beating and alleged sexual assault by Smith, in violation of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. *See U.S. CONST. amend. VIII.* This amendment not only prohibits excessive sentences, but it also protects inmates from inhumane treatment and conditions while imprisoned. *See Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996). The Eighth Amendment also requires prison officials to take reasonable measures to guarantee the safety of inmates. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984). It imposes a duty on prison officials "to protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833. Prison officials violate an inmate's Eighth Amendment right to be free from physical harm inflicted by other inmates when prison officials are deliberately indifferent to "specific known risks of such harm." *Pressly v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987) (citing *Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979)).

To establish that prison officials are liable under § 1983 for failure to protect an inmate from violence at the hands of other inmates, a plaintiff must show: (1) "serious or significant physical or emotional injury," *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003), and (2) that the prison officials had a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834 (internal quotation marks omitted); *see Odom v. S.C. Dep't of Corrs.*, 349 F.3d 765, 770 (4th Cir. 2003). As to the first prong, "[o]nly extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim regarding conditions of confinement." *De'Lonta*, 330 F.3d at 634. As to the second prong, the requisite state of mind is

one of “deliberate indifference” to the inmate’s health or safety. *Farmer*, 511 U.S. at 834.

A prison official is deliberately indifferent if he knows of an excessive risk to an inmate’s health or safety and disregards or fails to respond to that risk. *See Farmer*, 511 U.S. at 844-45. Therefore, liability under this standard requires two showings. First, the evidence must show that the prison official subjectively recognized a substantial risk of harm. It is not sufficient that the official should have recognized it; he must actually have perceived that risk. *See Rich v. Bruce*, 129 F.3d 336, 340 n.2 (4th Cir. 1997). Second, the evidence must show that the prison official subjectively recognized that his actions were “inappropriate in light of that risk.” *Rich*, 129 F.3d at 340 n.2. It is insufficient that the official should have recognized that his actions were inappropriate; the official actually must have recognized that his actions were insufficient. *See Brown v. Harris*, 240 F.3d 383, 390-91 (4th Cir. 2001).

The plaintiff asserting a § 1983 claim has the burden of proof. *See Oliver v. Powell*, 250 F. Supp. 2d 593, 598 (E.D. Va. 2002). Furthermore, it is insufficient to show that the prison system, generically, failed to protect an inmate. To establish liability under § 1983, a plaintiff must prove that the defendants “acted personally in the deprivation of the plaintiff’s rights.” *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985). Therefore, in order for Makdessi to prevail on his failure to protect claim against Fields, King and Gallihar, he must persuade this court that he suffered a serious, significant injury because each defendant knew of an excessive risk to his health or safety, and each defendant disregarded or failed to respond to that risk.

I find that Makdessi has met his burden to show that he suffered serious physical injuries resulting from the December 21, 2010, assault by Smith. While the parties contest whether Makdessi was sexually assaulted by Smith, the uncontradicted medical records and the uncontradicted testimony of the medical staff established that Makdessi suffered serious physical injuries in the assault, including multiple facial lacerations and contusions, contusions to the left rib area, lacerations to the nose and swelling to the right forehead region. He received three sutures in the left eyebrow and two sutures in the right lateral eye region.

The remaining issue for the court's determination is whether Makdessi has met his burden to show that Fields, King and Gallihar were deliberately indifferent to a known substantial risk to his safety, but disregarded it or subjectively acted inappropriately in light of that known risk. For the reasons that follow, I find that Makdessi has failed to persuade the court that these specific defendants were deliberately indifferent to a known substantial risk to his safety and, therefore, that they failed to protect him in violation of the Eighth Amendment. In reaching this conclusion, I specifically recognize that subjective "actual knowledge" may be proven by circumstantial evidence that a risk was so obvious that it had to have been known by these defendants. *See Makdessi v. Fields*, 789 F.3d 126, 133-36 (4th Cir. 2015) (citing *Farmer*, 511 U.S. at 842-43, 848-49). I simply am not persuaded that the evidence presented demonstrated an obvious risk to Makdessi's safety that must have been known by these defendants.

My decision on this issue is based in large part on my finding that much of Makdessi's testimony is not credible. Makdessi's testimony, itself, was contradictory. For instance, at one point in his testimony, Makdessi claimed that he had been assaulted or sexually assaulted by every cellmate he had ever had.

Upon further questioning, Makdessi admitted that this was not true. Makdessi also testified that he had put stamps on a missing envelope and that he had done so because it would be a crime for anyone to open mail with postage on it. At another point, Makdessi testified that he had mailed the letter that he said was contained in this envelope. In fact, he claimed this was the letter that had been intercepted somehow by the defendants after being placed in the mail and given to Smith by King. When confronted with a photograph taken in his cell after the December 21 assault, which Makdessi identified as a photograph of the missing envelope, (Plaintiff's Exhibit No. 70, Docket Item No. 147-68), he admitted that a sheet attached to the envelope was there so that he could obtain postage to put on the envelope to place it in the mail.

Also, Makdessi claimed that he screamed loudly enough during the December 21 assault that any correctional officers in the pod should have heard him. Makdessi also testified that, when he attempted to scream, Smith would punch him in the back and ribs, making it difficult for him to breathe. He also testified that, during the sexual assault, Smith held him face down on the bottom bunk. Makdessi also testified that, after the assault, he put his shirt back on. At another point he testified that he could not put his shirt back on after the assault due to pain in his shoulder. The video evidence showed that he did not have a shirt on when he ran from his cell that day.

Evidence submitted by Makdessi also contradicted his testimony. In particular, Makdessi testified that, when he complained about being assaulted by his cellmate in 2007, he was placed in segregation for 35 days. Makdessi's Offender Locator Cards contradict this. (Plaintiff's Exhibit No. 1, Docket Item No. 199-1.) Makdessi testified that he was housed in the infirmary at Wallens Ridge for

47 days after the December 21, 2010, assault. Again, the DOC housing records he submitted into evidence contradict this. (Plaintiff's Exhibit No. 1, Docket Item No. 199-1.) These records show that he was transferred to Keen Mountain on January 27, 2010 – 37 days later.

Makdessi testified that the stab wound he alleged that he suffered on December 8, 2010, had healed leaving a scar, which he said was shown by the photograph admitted as Plaintiff's Exhibit No. 47. By his own testimony, however, Makdessi concedes that he did not seek any medical treatment for this stab wound. Both Nurse Cress and Dr. Thompson denied seeing any evidence of a recent stab wound when they examined Makdessi on December 21, 2010. Dr. Thompson also testified that the photograph admitted as Plaintiff's Exhibit No. 47 did not show any visible scar.

The documents submitted into evidence, mainly by Makdessi, contain contradictory statements made by Makdessi. In particular, Makdessi has made numerous different representations as to the number of sexual assaults he has suffered while at Wallens Ridge. On a December 20, 2009, Request for Services/Complaint Form, he stated that he had been sexually assaulted four times. (Plaintiff's Exhibit No. 4, Docket Item No. 147-4.) According to a mental health record, Makdessi told QMHP Clark on May 6, 2010, that he had been sexually assaulted three times, all occurring in 2007. (Plaintiff's Exhibit No. 9, Docket Item No. 147-9.) In an August 8, 2010, letter, Makdessi wrote that he had been sexually assaulted five times. (Plaintiff's Exhibit No. 14, Docket Item No. 147-14.) According to Investigator Barbetto, Makdessi told him in May 2011 that he had been sexually assaulted three times at Wallens Ridge, once in July 2007, once in

September 2007 and once in July 2010. (Defense Exhibit No. 1, Docket Item No. 144-1.)

In Makdessi's December 21, 2010, statement given to Yates, there is no mention of being assaulted by Smith on December 8, nor is there any mention of any attempt to report this assault to King or of his telling Fields that he feared for his life the day before the assault. In the January 24, 2011, summary Makdessi prepared for Investigator Yates, Makdessi did not mention being beaten and raped by Smith on December 8. Instead, Makdessi said that he told King only that he was stabbed. In this account, Makdessi said that King responded "don't be a bitch get the F away from me." In his May 12, 2011, statement to Investigator Barbetto Makdessi stated only that he had been sexually assaulted while in the Virginia Beach jail and that "there were 3 attempted sexual assaults against me at Wallens Ridge ... (July 2007, September 2007, and July 30, 2010)." All of these dates were before Makdessi was placed in the cell with Smith in August 2010. Makdessi's statement to Barbetto makes no mention of any stabbing, beating or rape by Smith on December 8, 2010. It also makes no mention of Makdessi attempting to report this to King or of Makdessi telling Fields he feared for his life on December 20.

In two of Makdessi's letters, (Plaintiff's Exhibit Nos. 11, 14, Docket Item Nos. 147-11, -14), Makdessi said that he was sexually assaulted by an inmate named Perez. His account of the event contained in these letters and his testimony at trial made clear that no sexual assault occurred. Other than the alleged sexual assaults by Perez and Smith, Makdessi did not identify any other inmate who he claims sexually assaulted him while he was housed at Wallens Ridge. According to

QMHP Jones, Makdessi told him on December 21, 2010, he could not remember who had assaulted him in the past.

Also, Makdessi could not, or at least, did not, testify as to the identity of many of the people involved in the events he relayed to the court. For instance, Makdessi did not name the Wallens Ridge sergeant who he claimed tore up an emergency grievance soon after his arrival at Wallens Ridge. Makdessi did not name the Wallens Ridge sergeant who he claimed he told that his cellmate, Swartzmiller, was on his enemies list. Also, Makdessi often testified that "they" did this or "they" said this without identifying who "they" were. Furthermore, at trial, Makdessi often changed his testimony or embellished it after further questioning by his counsel.

Makdessi argued that Fields and King had actual knowledge of the danger posed by Smith because they were the reason Smith had attempted to harm Makdessi and because he had told them that Smith had assaulted him in the past or that he feared for his life. Makdessi testified that he was repeatedly threatened, cursed and called racial slurs by Fields and King. Both Fields and King denied that they had ever threatened or cursed Makdessi. This testimony is supported by the testimony of officers Hall and Boyd and inmate Thomas.

Fields, King and Gallihar specifically denied that Makdessi had ever complained to either of them that he feared for his life, had been sexually assaulted at Wallens Ridge or feared being sexually assaulted. Fields stated that he did meet with Makdessi shortly before December 21 to discuss a long-standing property issue. Fields specifically denied that Makdessi told him of any threat posed by Smith. When asked about Makdessi's claim that he had told King that he had been

stabbed on December 8, King responded, "I have no idea what he's talking about." I find that the testimony of these defendants is strengthened by that of Officers Bellamy, Hall and Boyd, all of whom testified that Makdessi never advised them that he feared for his life, that he was sexually assaulted or that he feared being sexually assaulted.

In addition to this testimony by the defendants regarding Makdessi's failure to personally advise them of his alleged fear of his cellmate, Fields testified that if an inmate refused to return to his cell, he would immediately be placed in segregation. Thus, if Makdessi truly feared for his safety or his life at the hands of Smith, all he had to do on December 20 was refuse to return to his cell. Makdessi did not do this.

Furthermore, while Makdessi alleges that the defendants were, essentially, out to harm him or even kill him, both Hall and Boyd testified that Makdessi came in contact with correctional officers other than the defendants on a daily basis. Makdessi could have informed any of these other correctional officers that he feared for his life or safety and, according to standard protocol, as testified to by the defendants, Makdessi and Smith would have been separated. However, Makdessi does not allege that he told any of these other correctional officers about such fears. Instead, he chose to share these concerns only with the very officer that he claims intended to harm him.

Based on this evidence, I am not persuaded that any of the defendants had actual knowledge of the danger posed by Smith because they were the reason Smith had attempted to harm Makdessi or because Makdessi had told them that Smith had assaulted him in the past or that he feared for his life.

Makdessi also argued that all three of the defendants had actual knowledge of the danger posed by Smith because of his many written complaints. Only one form was admitted into evidence on which Makdessi stated that he was sexually assaulted by Smith prior to December 21, 2010. However, this Offender Request For Information, dated October 28, 2010, was directed to Mental Health, not Fields, King or Gallihar. (Plaintiff's Exhibit No. 19, Docket Item No. 147-19.) There was no evidence presented that the defendants ever saw this form before December 21, 2010.

Also, Makdessi himself admitted two versions of this form into evidence, and he testified that someone had tampered or altered this evidence. In one version of the form submitted, Makdessi stated that he had "reported to security [and] filed many grievances but no help." He further stated that he was sexually assaulted by his "current cellmate," which would have been Smith, and that he was afraid to talk to QMHPs in the presence of staff because he feared retaliation from "Sgt. King & Lt. Fields." Makdessi testified that the form he submitted contained this information and that someone has removed these allegations from the other version of the form. The defense disputes that the original form contained these allegations, arguing instead that Makdessi added them later. As stated above, based on my review of the two versions of this form, it appears to me more likely that these allegations were added later by Makdessi. Furthermore, if these allegations were submitted on the original form on October 28, 2010, it would have been before Makdessi claimed he had ever been sexually assaulted by Smith.

While other documents offered into evidence by Makdessi made allegations of previous sexual assaults at Wallens Ridge, there was no evidence presented that the defendants saw any of these forms. It is clear from these forms and the

responses to these forms, that the Mental Health Department at Wallens Ridge was aware that Makdessi alleged that he had been sexually assaulted at Wallens Ridge prior to December 21, 2010. The mental health records also show, however, that, when QMHP Clark spoke to Makdessi about his allegations of previous sexual assaults at Wallens Ridge on May 6, 2010, Makdessi denied that he had ever been raped at Wallens Ridge, but rather he said that he had only been hit or "jumped on" by previous cellmates. At least three grievance forms submitted by Makdessi prior to December 21, 2010, referenced prior sexual assaults, but these forms were responded to by B. J. Ravizee, Grievance Coordinator, or D. Crabtree. Fields testified that he would only see those grievances that were assigned to him upon leaving the mailroom. King specifically testified that he was never made aware of any grievances by Makdessi that he feared for his life or that he feared being sexually assaulted. Gallihar also testified that he did not recall seeing any grievances regarding sexual assaults filed by Makdessi. The evidence did show, however, that, when Security was made aware that Makdessi was alleging that inmate Perez had sexually assaulted him, McQueen conducted an investigation, during which Makdessi admitted that no sexual assault ever occurred.

For all of the above-stated reasons, I am not persuaded that the defendants knew of a substantial risk of harm to Makdessi based on grievance forms filed by him prior to December 21, 2010. I also am not persuaded that these defendants were deliberately indifferent to an obvious, substantial risk of harm posed by Makdessi's condition or by his being housed in a cell with Smith. The evidence showed that, while Makdessi was shorter than Smith, Makdessi actually weighed more than Smith. The evidence also showed that Makdessi's prior crimes -- two murders -- were at least as violent, if not more so, than Smith's -- carjacking and robbery. Furthermore, Gallihar testified that, prior to December 21, 2010, both

Smith and Makdessi were classified at a Security Level 5. He specifically testified that he did not consider the combination of Smith and Makdessi as a security mismatch. Gallihar testified that, prior to December 21, 2010, he knew of no "red flags" that either Smith or Makdessi would victimize the other.

While Smith had a number of disciplinary charges prior to December 21, 2010, Fields testified that he was not aware of this. King testified that he was aware of only one disciplinary charge against Smith prior to December 2010, a charge of making sexual advances/physical/verbal in nature toward a nonoffender. The evidence does show that Gallihar was aware that Smith had been charged in February 2010 with fighting with his cellmate. However, Gallihar said that there was nothing about Smith's criminal or institutional record to indicate that he was a particularly violent inmate. Gallihar further testified that the Gangster Disciples was not one of the prison's most violent gangs.

Fields specifically testified that he had no reason to believe that Makdessi was particularly vulnerable or had been picked on by other inmates prior to December 21, 2010. Gallihar testified that Makdessi's height or age did not raise any issue of vulnerability with him. He also said that he had never noticed anything about Makdessi's gait that would make him vulnerable. He further testified that only truthful claims of multiple prior sexual assaults would be relevant to determining if the inmate was vulnerable to being victimized in the future.

Based on the above-stated reasons, I find that Makdessi has not shown that the defendants failed to protect him from the assault that occurred on December 21, 2010. I, therefore, recommend that the court enter judgment in favor of all of the defendants on Makdessi's § 1983 claims.

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Makdessi suffered serious physical injuries resulting from the December 21, 2010, assault by Smith;
2. Makdessi has not met his burden to show that Fields, King and Gallihar were deliberately indifferent to a known substantial risk to his safety, but disregarded it or subjectively acted inappropriately in light of that known risk; and
3. Therefore, Fields, King and Gallihar were not deliberately indifferent to a risk of harm to Makdessi, and they did not fail to protect him from the assault that occurred on December 21, 2010, in violation of the Eighth Amendment.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court grant judgment in the defendants' favor on Makdessi's § 1983 claims.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The

judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen E. Conrad, Chief United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: September 2, 2016.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE

FILED: April 20, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6121
(7:11-cv-00262-GEC-PMS)

ADIB EDDIE RAMEZ MAKDESSI

Plaintiff - Appellant

v.

LT. FIELDS; SGT. KING; CAPT. GALLIHAR

Defendants - Appellees

and

HAROLD W. CLARKE, Director of Virginia Corrections; DAVID BELLAMY; TIMOTHY SUMPTER; GLEN BOYD; BRANDON WOODWARD; THOMAS HALL; CLARENCE SHUPE; JANE DOE; DENNIS SLUSS

Defendants

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc. The court denies the motion for order of protection and to

(APPENDIX E)

transfer plaintiff away from appellees retaliations.

For the Court

/s/ Patricia S. Connor, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**