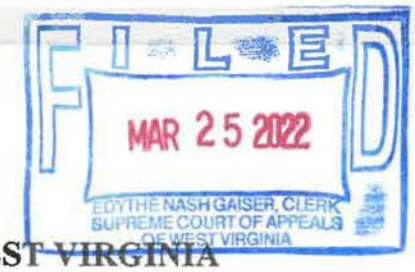

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0906

OFFICER ISAIAH BLANCARTE AND OFFICER BRYON WHETZEL, ET AL.,

Defendants Below, Petitioners,

v.

DAMEIN ROBBINS

Plaintiff Below, Respondent

(On Appeal from Order of the Honorable C. Carter Williams; Circuit Court of Hampshire County, West Virginia; Civil Action: 20-C-24)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This is an appeal from an October 8, 2021, order entered by the Circuit Court of Hampshire County wherein the circuit court appropriately and correctly denied Defendant Isiah Blancarte ("Defendant Blancarte") and Defendant Bryon Whetzel's ("Defendant Whetzel") motions to dismiss on the grounds of qualified immunity. Contrary to Defendants assertions, the circuit court correctly found that plaintiff, Damein Robbins ('Robbins") alleged more than sufficient facts to satisfy this Court's heightened pleading standard that Defendant Blancarte and Defendant Whetzel engaged in conduct violating Robbin's clearly established rights under the Eight Amendment of the United States Constitution. [JA 259-271.]

On July 20, 2018, Robbins, a required registrant of the West Virginia Sexual Offender Registry, was ordered to serve forty-eight (48) hours of incarceration at Potomac Highlands Reginal Jail ("PHRJ"). [JA 078.] PHRJ is in Hampshire County, West Virginia. On Juley 21, 2018, during the intake process, an unknown correctional officer elicited and openly communicated information about Robbin's status as a sexual offender in a nonconfidential setting in the view of and hearing of other PHRJ inmates in violation of the Prison Rape Elimination Act. [JA 078] Robbins was initially placed in a misdemeanor pod within the PHRJ, however, during his short time in the misdemeanor pod he was "checked off" the misdemeanor pod because of threats against him by other inmates because of his status as a registered sex offender[1]. [JA 078]. Following these threats to Robbins, he requested to be transferred from the misdemeanor pod for his own safety. Correctional officers moved Robbins away from other inmates to an interview room for several hours. Robbins was then moved to a segregated felony lockdown pod referred to

[1] Being "checked off" a pod means that another inmate makes threats of bodily harm against another inmate.

as "A-6." Robbins was assured that no one would be allowed in his locked individual cell, and he would not be permitted out of his cell because it was a segregated felony unit. [JA 078.] Sadly, that sense of protection proved to be illusory.

Early Sunday, July 22, 2018, three (3) inmates housed in the A-6 felony pod entered Robbin's "lock down" cell (after it was unlocked remotely by Defendant Whetzel) and severely physically and sexually assaulted Robbins over the course of several hours. [JA 079.] The three inmates gained entry into Robbin's locked cell by Defendant Whetzel, who was serving in the capacity of tower officer. Whetzel unlocked remotely Robbins cell door at the unauthorized request of the three violent inmates who were freely roaming unsupervised in the A-6 pod. [JA 079.] Defendant Whetzel was terminated for his wrongful conduct after an investigation confirmed his reckless acts which violated PHRJ policy. [JA 079.] Upon entering Robbin's cell, the three inmates "closed Robbins's cell door behind them, covered the windows of the cell door, covered the window to the exterior, and turned the lights off inside the cell." [JA 079.] These inmates forced Robbins to drink urine and consume human feces; sexually assaulted and sodomized Robbins with a broomstick; and physically and brutally assaulted Robbins for hours. [JA 079.] The three inmates told Robbins they would kill him if told anyone what occurred. [JA 080.] Robbins was informed by the three inmates that "this is what happens to sex offenders." [JA 079.]

Throughout the remainder of the vicious assault, the three inmates paraded Robbins throughout the pod from cell to cell for the purpose of humiliating him, offering him to perform sexual acts for inmates and to show off to other inmates what they did to him, all within plain view of the tower and roving officer. [JA 079.] Defendant Whetzel observed the actions yet did nothing to intervene. [JA 079.]

Along with Defendant Whetzel, Defendant Blancarte was responsible for the care and safety of inmates housed in pod A-6. During the violent assault, Defendant Blancarte was the correctional officer assigned as "rover" for pod A-6, yet he also did nothing to intervene or protect Robbins. [JA 080.] The violent repeated assault would continue until Robbins discharge at approximately 4:45 p.m. on July 22, 2018. [JA 080.] Robbins spent multiple days in the hospital following his forty-eight (48) hour sentence. Robbins was diagnosed with multiple broken ribs and fractured orbital bone in his cheek as well as other injuries from the sexual assault. [JA 079].

On October 26, 2020, Damein Robbins filed his Amended Complaint in the circuit court of Hampshire County, West Virginia naming the West Virginia Department of Corrections and Rehabilitation ("WVDCR"), Jeff Sandy, Betsy Jividen, Edgar L. Lawson, Officer Bryon Whetzel, and Officer Isaiah Blancarte as defendants.[2] Robbins' Amended Complaint alleges six causes of action: (1) violation of the 8th Amendment on the United States Constitution against cruel and unusual punishment in violation of 42 U.S.C. § 1983; (2) failure to protect; (3) negligent infliction of emotional distress; (4) failure to train and supervise; (5) vicarious liability; and (6) attorneys' fees.

On December 20, 2020, Defendants Blancarte and Whetzel filed motions to dismiss asserting that they were separately entitled to qualified immunity because Robbins failed to allege facts that, if proven true, would establish that they violated a clearly established law, which, in this case, is the 8th Amendment to the United States Constitution's prohibition against cruel and unusual punishment. [JA 051-074.] On October 8, 2021, in a thorough and well-reasoned ruling, the Circuit Court of Hampshire County denied the motions to dismiss and concluded that Robbins had sufficiently plead facts that established the deliberate indifference and negligence of the

[2] Prior to ruling on Defendants' Motion to Dismiss, Plaintiff voluntarily dismissed Jeff Sandy, Betsy Jividen and Edgar L. Lawson as parties to this action.

defendants that led to Robbins brutal sexual assault at the hands of inmates housed in PHRJ. Specifically, the circuit court judge concluded that Robbins sufficiently met the heightened pleading standard given that Defendants: (1) were aware of threats made against [Robbins] which necessitated moving him throughout the corrections facility several times before leaving him exposed and vulnerable to physical attack from other inmates; (2) placed Robbins in an unsecured cell; (3) permitted known violent felons entry into Robbins cell; (4) allowed violent felons to roam around the "A" pod despite it being a lock-down pod: (5) failed to supervise felons roaming around the pod; (6) failed to observe that [Robbins] was paraded around from cell to cell being offered as a sex slave; and (7) failed to monitor [Robbins] condition at any point until he was discharged. The circuit court concluded that alleged conduct was sufficient to state a claim for violation of Robbins' Eighth Amendment Rights; and therefore, Defendants were not entitled to qualified immunity at this early stage of the proceedings. [JA 183.]

Defendants Blancarte and Whetzel now appeal the Order Denying Defendant's Motion to Dismiss by continuing to assert an erroneous claim that they are entitled to qualified immunity at this early stage of the proceedings.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Robbins asserts that oral argument is not necessary because the circuit court's well-reasoned order correctly applied this Court's, and the United States Supreme Court's, jurisprudence to the facts of this case. Should this Court deem that oral argument is necessary, an argument under Rule 19 would be appropriate.

SUMMARY OF THE ARGUMENT

The circuit court correctly denied the Defendants' Motion to Dismiss based upon Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and based upon qualified immunity when

it conducted a thorough and well-reasoned analysis of the facts and legal theories contained in Robbins' Amended Complaint. The circuit court appropriately applied this Court's heightened pleading standard in cases involving immunities. The circuit court further engaged in the two-part test when analyzing Eighth Amendment claims and when viewed in light of Robbins, and granting him all reasonable inferences, correctly determined that neither Defendant Blancarte, nor Defendant Whetzel were entitled to qualified immunity.

Robbins has set forth sufficient facts (especially considering the benefit of all reasonable inferences) to establish that the Defendants objectively denied him the minimum of required life necessities; and that the Defendants were aware of facts from which an inference could be drawn that a substantial risk of serious harm existed. Robbins was brutally sexually assaulted, physically assaulted, and tortured for hours after being placed in a segregated lock down pod for his own protection. This was done after correctional staff was put on notice of physical threats made against him because of his status as a registered sex offender. Robbins has sufficiently plead that Defendant Blancarte and Defendant Whetzel ignored the brutal sexual and physical assault; and ignored Robbins being paraded around the segregated lock down pod while the damage inflicted upon him was celebrated. [JA 082]. This clearly displayed not only their deliberate indifference to Robbins' health and safety; but further, their actions were willful, malicious, and performed recklessly or with wanton disregard for Robbins clearly established constitutional right to be free from cruel and unusual punishment. [JA 082]

Any argument advanced by the Defendants that the circuit court cavalierly or capriciously concluded that Robbins sufficiently alleged an Eighth Amendment violation; therefore, defeating qualified immunity, is simply without merit, without support after a clear review of the order, and

should be wholly disregarded by the Court. Thus, this Court should affirm the circuit court's *Order Denying Defendant's Motion to Dismiss*

STANDARD OF REVIEW

A circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." *W. Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 197, 800 S.E.2d 230, 235 (2017). The circuit court's disposition of the motion will be reviewed *de novo*, and the Court will apply the same standard as employed by the underlying court. *Id.*

A motion under Rule 12(b)(6) challenging whether a complaint fails to state a claim is not favored and is not meant to adjudicate the merits of the claims. Instead, such a motion merely tests the sufficiency of the complaint and should rarely be granted. See, *Cantley v. Lincoln County Comm'n,* 221 W.Va. 468, 655 S.E. 2d 490 (2007); *Bowden v. Monroe county Comm'n,* 232 W.Va. 47, 750 S.E.2d 263 (2013). In appraising the sufficiency of a complaint, a court is not permitted to dismiss the action unless it determines beyond any doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Bowden,* 750 S.E.2d 263 (2013); *R.K. v. St. Mary's Medical Center,* 229 W.Va. 712, 735 S.E. 2d 715 (2012), *certiorari denied,* 133 S.Ct. 1738. As was noted in Bowden.

> "[t]he trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings."

Id. at 269. If the complaint states a claim under any legal theory the motion must be denied. See, *Cantley, Supra.* With regard to the contents of the complaint, the law is also clear that a pleader is only required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that those elements exist. *Mandolidis v. Elkins Industries,*

Inc., 161 W.Va. 695, 246 S.E. 2d 907 (1978). The Court is required to construe the complaint in the light most favorable to the plaintiff. *Highmark West Virginia, Inc. v. Jamie,* 221 W.Va. 487, 655 S.E.2d 509 (2007). In civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff. *Hutchison v. City of Huntington*, 198 W. Va. 139, 150, 479 S.E.2d 649, 660 (1996)

Applying these standards to the Amended Complaint, the circuit court did not err when it denied Defendant Blancarte and Defendant Whetzel's Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Proceeding. Furthermore, the circuit court did not err when it correctly determined that Defendant Blancarte and Whetzel were not entitled to qualified immunity at this stage of the proceedings.

ARGUMENT

"In an oft-repeated formulation, the United States Supreme Court wrote that the law [qualified immunity] seeks to balance "two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *W. Virginia Div. of Corr. v. P.R.*, No. 18-0705, 2019 WL 6247748, at *8 (W. Va. Nov. 22, 2019) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The Eight Amendment guarantees the right of the people to be from the infliction of "cruel and unusual punishments." U.S. Const. Amend. VIII. That guarantee imposes upon prison officials the duty and obligation to "provide humane conditions of confinement' to the incarcerated. *Farmer v. Brennen*, 511 U.S. 825, 832 (1994). It further requires officials to "take reasonable measures to guarantee the safety of the inmates." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). This includes the responsibility "to protect prisoners from violence at the hands of other prisoners." *Farmer*, 511

U.S. at 833. These clearly established constitutional rights are at the very heart of the allegations in Robbins' Amended Complaint which details, with specificity, the manner in which Defendants violated these protections owed to Robbins.

It is with these Constitutional guarantees is mind, that this Court should affirm the Circuit Court's October 8, 2021, *Order Denying Defendants' Motion to Dismiss* and permit the action to proceed accordingly.

A. The circuit court did not err when it denied Defendants' Motion to Dismiss because Robbins sufficiently plead facts to establish that Defendants violated his clearly established Eight Amendment Right to be free was from cruel and unusual punishment.

In applying a heightened pleading standard, the circuit court correctly determined that Robbins sufficiently pled factual allegations that Defendant Blancarte and Defendant Whetzel violated his clearly established constitutional rights. Although Defendants grasp to convince this Court that the circuit court simply disregarded a heightened pleading standard, a simple review of the circuit court order refutes this assertion. Indeed, the circuit court specifically addressed and recognized the heightened pleading standard, yet still held that "the Plaintiff has alleged in the Amended Complaint sufficient "particularized facts to satisfy such requirement on the matter of a clearly established right in this instance and at this stage of the proceedings." [JA 214.] Finally, Defendants mistakenly assert that the circuit court failed to conduct a proper qualified immunity analysis. It appears this argument is really simply a disagreement with the court's conclusion but without legal support for the assertion that the circuit court abused its discretion.

Regarding qualified immunity and a "heightened pleading standard," this Court previously has stated:

> We believe that in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff. *See Schultea v. Wood,* 47 F.3d 1427 (5th Cir. 1995) (*en banc*) (a § 1983 action); *see generally Parkulo v. West*

> *Virginia Board of Probation and Parole*, [199 W. Va. 161, 483 S.E.2d 507] [(1996)]. *To be sure, we recognize the label "heightened pleading" for special pleading purposes for constitutional or statutory torts involving improper motive has always been a misnomer. A plaintiff is not required to anticipate the defense of immunity in his complaint, Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923-24, 64 L. Ed. 2d 572 (1980), and, under the West Virginia Rules of Civil Procedure, the plaintiff is required to file a reply to a defendant's answer only if the circuit court exercises its authority under Rule 7(a) to order one. We believe, in cases of qualified or statutory immunity, court ordered replies and motions for a more definite statement under Rule 12(e) can speed the judicial process. Therefore, the trial court should first demand that a plaintiff file "a short and plain statement of his complaint, a [statement] that rests on more than conclusion[s] alone." *Schultea v. Wood*, 47 F.3d [1427,] [ ] 1433 [5th Cir. 1995]. Next, the court may, on its own discretion, insist that the plaintiff file a reply tailored to an answer pleading the defense of statutory or qualified immunity. The court's discretion not to order such a reply ought to be narrow; where the defendant demonstrates that greater detail might assist an early resolution of the dispute, the order to reply should be made. Of course, if the individual circumstances of the case indicate that the plaintiff has pleaded his or her best case, there is no need to order more detailed pleadings. If the information contained in the pleadings is sufficient to justify the case proceeding further, the early motion to dismiss should be denied.

Hutchison v. City of Huntington, 198 W. Va. 139, 149-50, 479 S.E.2d 649, 659-60 (1996) (emphasis added).

The issue of qualified immunity has repeatedly come before this Court. As a result, the Court has set forth the following analysis for lower courts to consider in determining the applicability of qualified immunity:

> [w]henever a defendant raises the issue of qualified immunity in a motion to dismiss, the circuit court must look to our qualified immunity body of law and follow the steps this Court expressly has outlined to make the determination of whether qualified immunity applies under the specific circumstances of that particular case. Specifically, these steps include whether: (1) a state agency or employee is involved; (2) there is an insurance contract waiving the defense of qualified immunity; (3) the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 *et seq.* would apply; (4) the matter involves discretionary judgments, decisions, and/or actions; (5) the acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive; and (6) the State employee was acting within his/her scope of employment. *See generally A.B.*, 234 W. Va. 492, 766 S.E.2d 751.

In the instant case, the circuit court was required to engage in an examination of the amended complaint, using the appropriate heightened pleading standard, to determine whether Robbins sufficiently alleged that the Defendants had committed discretionary governmental acts of omissions in violation of clearly established law of which a reasonable person would have known or whether they had engaged in conduct that was otherwise fraudulent, malicious or oppressive. As clearly evidenced by its final order, it did just that. The circuit court went to great lengths to set out the acts or omissions alleged by Robbins that supported his claim of a violation of his clearly established constitutional rights. [JA 208-219.] The circuit court specifically concluded that Robbins had sufficiently plead facts that established the deliberate indifference and negligence of the defendants that led to Robbins brutal sexual assault at the hands of inmates housed in PHRJ. Specifically, that Robbins sufficiently plead that Defendants: (1) were aware of threats made against [Robbins] which necessitated moving him throughout the corrections facility several times before leaving him exposed and vulnerable to physical attack; (2) placed him in an unsecured cell; (3) permitted known violent felons entry into his cell; (4) allowing violent felons to roam around the "A" pod despite it being a lock-down pod: (5) failed to supervise felons roaming around the pod; (6) failed to observe that [Robbins] was paraded around from cell to cell being offered as a sex slave; and (7) failed to monitor [Robbins] condition at any point until he was discharged. Robbins Amended Complaint further alleges that: (1) that Defendants displayed deliberate indifference when they ignored the physical and sexual assault at the hands of other inmates; and (2) that Defendants were aware of the substantial risk of harm when he was known to be incarcerated as a sexual offender. [JA 082.] These clearly articulated allegations are to be taken as true at this stage of the proceedings. Although Defendants may disagree with these factual assertions, any disagreement creates a genuine issue of material fact that mandates denial of not

only a motion to dismiss, but additionally, a finding of qualified immunity. *See Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002) (holding that deliberate indifference and qualified immunity inquiries "effectively collapse into one" and that '[i]f there are genuine issues of material fact concerning" a defendant's deliberate indifference, the "defendant may not avoid trial on the grounds of qualified immunity").

The circuit court further clearly articulated this Court's jurisprudence as it relates to a qualified immunity determination, especially at a 12(b)(6) stage of the proceedings. In doing so, the circuit court correctly held that the Defendants were not entitled to qualified immunity. It did so, not flagrantly or without ample consideration, but in a well-reasoned legal analysis after careful consideration of the pleadings before the circuit court.

Rather than accept the final order in its entirety, Defendants' cherry pick portions of the order to imply that the circuit court applied the heightened pleading "in passing" or it was applied "capriciously." [Pet. Brief p. 12-13.] This argument does little to invoke a justifiable legal issue with the analysis, but rather it is a veiled attempt to reverse a ruling it simply disagrees with. The Defendants sought after application of a Rule 12(b)(6) pleading standard is well beyond "heightened," and is a distortion of this Court's jurisprudence. The Defendants seek to impose an impossible burden upon Robbins, and all other aggrieved complainants in matters involving public officials, to preliminary plead subjective intent, without the benefit of reasonable inferences and without the benefit of discovery. Robbins' allegations are not frivolous, his allegations are not meritless, and his allegations are not intended to harass or humiliate. Robbins' allegations are substantial and specific, and invoke the very heart of constitutional guarantees to be free from cruel and unusual punishment. Indeed, as Robbins sufficiently plead, Defendants actions were

fraudulent, malicious or oppressive in reckless disregard for Robbins clearly established rights. [JA 085.]

The circuit court correctly determined that Robbins had plead sufficient factual and legal allegations that the Defendants acts, or omission were in violation of clearly established constitutional rights of which a reasonable person would have known or were otherwise fraudulent, malicious or oppressive. Accordingly, the circuit court's *Order Denying Defendants' Motion to Dismiss* should he affirmed and permitted to proceed accordingly.

B. The circuit court correctly denied Defendants' request for qualified immunity.

The Defendants have continuously asserted through unverified pleadings that they "were performing [their] job duties in a manner that did not violate clearly established constitutional or statutory rights of which a reasonable person would have known. [JA 052.] This assertion is simply without any basis in fact or law. The Defendants have further asserted that Robbins has failed to plead sufficient and particular facts to allege a clearly established constitutional right; or that, the Defendants violated those clearly established rights. Once again, this assertion is simply without any basis in fact or law. Thus, despite Defendants erroneous assertions they are not entitled to qualified immunity at this premature stage of the proceedings, and they are not entitled to a dismissal pursuant Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

In moving this Court for reversal of the circuit court order and essentially a dismissal pursuant to Rule 12(b)(6), the Defendants are essentially asking this Court to avoid all necessary fact finding to further develop Defendants' culpability [objective or subjective] based upon the merits of their actions. To entertain Defendants' request would completely undermine the long judicial and public policy to decide cases upon the merits. Defendants' request transforms qualified immunity from a shield for public officials from meritless claims to a figurative impenetrable

forcefield that no litigant will ever overcome. In essence, to mandate that litigants in proceedings involving constitutional claims are required to plead the public officials' subjective beliefs without any benefit of reasonable inference or discovery serves only to protect the unlawful conduct of public officials from being held accountable for their actions [no matter how reckless or outrageous]. *See Hutchinson v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996) ("[q]ualified immunity... is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials; ... Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action of damages.")

As the circuit court correctly held, to determine if the Defendants are entitled to qualified immunity, a two-step inquiry is necessary. "First, a court should decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right.' *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct. *Id.* "To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege an abstract right has been violated. Instead, the plaintiff must make a "particularized showing" that a 'reasonable official would understand that what he is doing violated that right' or that 'in light of preexisting law the unlawfulness' of the action was 'apparent.'" *Anderson v. Creighton*, 482 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Hutchinson v. City of Huntington*, 198 W.Va. 139, 149 n.11, 479 S.E.2d 649, 659 n.11 (1996). In short, the clearly established right analysis has been stated as follows: [whether] "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *City of Saint Albans v. Botkins*, 229 W.Va. 393, 400, 719 S.E.2d 863, 870 (2011). In the instant

case, the Plaintiff has plead sufficient facts to defeat a Rule 12(b)(6) dismissal based upon qualified immunity grounds.

Plaintiff has provided ample factual allegations that he had a clearly established constitutional or statutory at the time of his injuries, and that, the Defendants violated those rights. A civil action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." *Gamble v. South Carolina Department of Corrections,* 2020 WL 5249223 *4 (U.S. Dist. Ct. South Carolina 2020) (citing *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff need only allege the following essential elements: (1) "that a right secured by Constitution or law of the United States was violated," and (2) "that the alleged violation was committed by a person acting under the color of state law." *Id.* (citing *West v. Adkins*, 487 U.S. 42, 48 (1988). Here, it cannot be disputed that the Defendant Blancarte and Defendant Whetzel were acting under the color of state law at the time of the alleged violation of Robbins Eight Amendment Constitutional right to be free from cruel and unusual punishment. Thus, this action is proper under § 1983 and the Defendants are proper parties.

When asserting an Eight Amendment claim, the Plaintiff is required to make two showings. First, he must show a "serious deprivation of his rights." *Gamble,* at *5. (citing *Danser v. Stansberry*, 772 F.3d 340, 346 (4th Cir. 2014). In order to reach this threshold, a Plaintiff must show that the "prison officials acts or omission [ ] result[s] in the denial of the minimal civilized measure of life's necessities." *Id.* (citing *Farmer v. Brennen*, 511 U.S. 825, 832 (1994)). This showing can be satisfied "in the form or serious or significant physical or emotional injury." *Id.* In the case at bar, Plaintiff has sufficiently alleged that the suffered serious or significant physical injury. Specifically, that in the early morning hours of July 22, 2018, Plaintiff was sexually

assaulted, sodomized, brutally beaten resulting in numerous ribs fractures and a broken orbital socket, threatened with a deadly weapon, and paraded around the pod after sustaining serious injuries to further humiliate and denigrate him. Further, Plaintiff was forced to drink the urine of other inmates and forced to consume human feces. To say that such an assault resulted in "serious or significant physical injury" is an understatement. Accordingly, Robbins has set forth sufficient facts in the Complaint to meet a showing of serious or significant physical injury, and thus, establish a viable claim to defeat Defendants' Motion to Dismiss.

Second, to set forth a sufficient claim under the Eight Amendment, Plaintiff must show that the Defendants had a sufficient culpable state of mind. In essence, that the Defendants acted intentionally or with "deliberate indifference" to Robbins' health or safety. *Gamble*, at *5 (citing *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). "Deliberate indifference" requires " 'more than mere negligence,' but 'less that acts or omission [done] for the very purpose of causing harm or with knowledge that harm will result." *Cox v. Quinn*, 828 F.3d 227, 236 (4th Cir. 2016) (*Makdessi v. Fields*, 789 F.3d 126, 132 (4th Cir. 2015). Whether a prison official acted with deliberate indifference is a question of fact that can be proven through direct or circumstantial evidence. *Id.; see also Farmer*, 511 U.S. at 842 (finding that the deliberate indifference inquiry is "a question of fact" that be proven through "inference from circumstantial evidence"). Direct evidence of actual knowledge is not required. *Farmer*, 511 U.S. at 842. The question is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health ... 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. Moreover, deliberately indifferent conduct can never be objectively reasonable for

purposes of qualified immunity. *See Cox*, at Fn. 4. (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002) (holding that deliberate indifference and qualified immunity inquiries "effectively collapse into one" and that '[i]f there are genuine issues of material fact concerning" a defendant's deliberate indifference, the "defendant may not avoid trial on the grounds of qualified immunity").

As the Defendants rightfully recognize, Robbins has plead more than sufficient facts that he was at risk of serious harm, yet they somehow argue that he has failed to plead sufficient facts that the Defendants were aware of this fact. Robbins has, however, sufficiently alleged sufficient and specific facts that: (1) he was a vulnerable inmate (registered sex offender); (2) that he was moved off a misdemeanor pod due to threats of bodily injury because of his status as a registered sex offender; (3) that he was moved to multiple locations for his safety (including an interview room for several hours); (4) that he was placed in a felony 'lock down" pod where prisoner movements were restricted twenty-three (23) hours per day; and (5) that all of this was clearly done for his own personal safety. *See Farmer v. Brennan*, 511 U.S. at 843, 114 S. Ct. at 1982 ("a prisoner can establish exposure to a sufficiently serious risk of harm "by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates."); *see also Lewis v. Siwicki*, 944 F.3d 427, 431–32 (2d Cir. 2019) (substantial risk of serious harm, depends not on the officials' perception of the risk of harm, but solely on whether the facts, or at least those genuinely in dispute on a motion for summary judgment, show that the risk of serious harm was substantial.)

Furthermore, Robbins has sufficiently plead sufficient and specific facts that: (1) the Defendants were in charge of and overseeing the felony "lock down" pod where he was assaulted; (2) that Defendant Whetzel knowingly unlocked the cell doors of multiple violent inmates (at their

request): (3) that Defendants allowed multiple violent inmates to enter Robbins locked cell while under their supervision (at their request); (4) that Robbins was paraded through a lock down pod by multiple violent inmates without intervention from the Defendants; and (5) that this violent assault allowed this to continue for a substantial period without any intervention by the Defendants. *Farmer,* 511 U.S. at 847, 114 S.Ct. 1970 (prison officials may be liable "by failing to take reasonable measures to abate" a known risk of serious harm.").

These facts taken as a whole, and granting Robbins all reasonable inferences, clearly and undeniably display a deliberate indifference by the Defendants acts or omissions to the health and safety of Robbins. See *Farmer v. Brennan*, 511 U.S. at 840, 114 S. Ct. at 1980 (Use of "deliberate," for example, arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental."). While the Eight Amendment does not impose a duty to ensure completely safety, it does mandate that officials "are not allowed to let the state of nature take its course." *See* Farmer 511 U.S. at 832, 844. Defendants did just that when they recklessly allowed inmates, required to be locked down twenty-three hours per day, to essentially assert complete control inside the felony lock down pod area and enter Robbins locked cell resulting in his sexual and physical assault.[3] *Farmer*, 511 U.S. at 836. ("deliberate indifference [lies] somewhere between the poles of negligence at one end and purpose or knowledge at the other, ... routinely equated deliberate indifference with recklessness.").

Essentially, the Defendants recklessly and with deliberate indifference abdicated their single greatest charge to protect and care for the inmates in their control to violent inmates who

[3] When viewing this information in a light most favorable to Plaintiff, it would be completely logical for this Court, or anyone for that matter, to draw a reasonable inference that any inmate forced to be locked down twenty-three hours per day is placed in that position because either he or she poses a risk to other inmates, or for his or her own safety from the hands of violent inmates. It would further be a reasonable inference that the "tower officer' was responsible for properly monitoring the inmates, and any violation of protocol, policy, or procedure, in a felony lock down pod.

were free to do as they so choose. This alone displays Defendants deliberate indifference to the health and safety of the inmates in their care and custody. Furthermore, pleading ignorance of Robbins sex offender status and his vulnerability at the hands of other inmates is unreasonable given his movement [by correctional personal] from a misdemeanor pod to a felony lock down pod for his own protection. A lock down pod where he was to be isolated (for his safety) twenty-three hours per day, and isolated entirely from other inmates. Notably, this requirement should have applied to all inmates housed in felony pod A-6. Yet, three violent inmates were permitted by Defendants to circumvent this requirement, so they could sexually and physically assault Robbins and parade him around the pod to show of their brazen assault. After sufficiently pleading all these facts, Defendants still maintain innocence, or ignorance, of the substantial risk of harm to Robbins, the impossibility of drawing a reasonable inference that their reckless and deliberately indifferent conduct resulted in such harm, and without shame, ask this Court to dismiss Robbins claims by essentially excusing their flagrant acts or omissions. The Defendants' argument further fails to consider the nuances of the subjective intent requirement; and further, the fact that it can be proven by the plethora of circumstantial evidence set forth in Robbins' Amended Complaint. *See Makdessi v. Fields*, 789 F.3d 126, 137–38 (4th Cir. 2015) (finding that the district court failed to appreciate nuances with respect to this component).

Accordingly, for the reasons stated herein, the Defendants are not entitled to an award of qualified immunity because their acts or omissions violated Robbins clear established constitutional right to be free from cruel and unusual punishment as guaranteed by the Eight Amendment to the Constitution of the United States. Thus, the well-reasoned order of the circuit court should be affirmed.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Damein Robbins respectfully request that this Court affirm the Hampshire County Circuit Court's *Order Denying Defendants' Motion to Dismiss* and remand this matter back to the circuit court with direction to allow this matter to proceed accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Daniel Kirkland, Esq., do hereby certify that I have served a true and accurate copy of the foregoing, ***Respondent's Brief***, by U.S. Mail, First Class, postage prepaid, and electronic mail, this 25th day of March 2022, on the following counsel of record:

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