BRIEF IN OPPOSITION

FILED WITH THE U.S. SUPREME COURT

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No. 99-131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ALEXANDER MICKLE, et al.

Petitioners,

v.

MICHAEL MOORE, et al.,

Respondents.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Approximately forty nine inmates confined in the South Carolina Department of Corrections (SCDC) filed individual lawsuits challenging their confinement in administrative segregation or "M" Custody on account of their membership in a group known as the Five Percenters. The Petitioners contend that their confinement is in contravention of the Free Exercise Clause of the First Amendment.[1]

The Five Percenters are an organization who have been identified by the Federal Bureau of Prisons as a "criminal group" that "operates behind a facade of cultural and religious rhetoric." Inmates belonging to the Five Percenters have been present within SCDC since at least 1992. Within SCDC, the Five Percenters have been a very assertive group of inmates who try to undermine prison authority and try to establish control over other inmates.

[1] The Petitioners also raised Eighth Amendment and Fourteenth Amendment claims which were dismissed by the district court. The Fourth Circuit Court of Appeals affirmed that ruling. Those claims have not been raised in the Petitioners' Petition for Writ of Certiorari.

They are rebellious and resistant to authority, and they aggressively recruit new members.

On or about June 16, 1995, Michael Moore, then the Director of the South Carolina Department of Corrections, designated the Five Percenters a Security Threat Group (STG). His decision was based on their history of violence within SCDC and other prison systems around the country. There were a number of documented prison disturbances and other violent acts perpetrated by Five Percenters within SCDC.

The Security Threat Group policy for SCDC sets out a procedure for "validating" or confirming an individual inmate as a member of a STG, which includes giving the inmate a hearing. Any inmate validated as a member of a STG is transferred to administrative segregation, pending reclassification into a heightened custody level in accordance with procedures outlined in SCDC Policy 1200.5. Confinement in the heightened custody level allows prison officials to maintain closer supervision of those inmates and reduces the inmates' opportunity to organize and conduct criminal activity. Prison security has improved since the Five Percenters have been designated a Security Threat Group and those inmates reclassified to a higher custody level.

In this action, the Petitioners have challenged the action taken by SCDC to designate these inmates a threat group and to reclassify them to a higher custody level. The district court granted summary judgment to the Respondents, concluding that the reclassification of the Petitioners to a higher custody level did not unconstitutionally impinge on their right to free exercise of their religious beliefs. The Petitioners appealed to the Fourth Circuit Court of Appeals, which affirmed. A subsequent petition for rehearing *en banc* was denied.

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit Court of Appeals was correct to apply the standard of review established in *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), in reviewing the constitutionality of the decision to reclassify Five Percenters to a higher custody level.

The Petitioners contend that the Fourth Circuit erred in applying the standard of review established in *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), in reviewing the constitutionality of the decision to reclassify Five Percenters to a higher custody level. The Petitioners maintain that the court should have applied the strict scrutiny test set forth in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

The Fourth Circuit, however, was correct in applying the *Turner* and *O'Lone* standard given the prison context. *O'Lone* clearly teaches that where prison regulations are challenged, the same standard is applicable regardless of whether the challenge is mounted under the First Amendment or any other constitutional provision. In the prison context, the proper standard to be applied is as follows: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably

related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Nonetheless, the Petitioners are procedurally barred from even raising this issue in this Court. In the district court, the Petitioners never argued that the *Turner* standard did not apply in this case. To the contrary, in their brief in opposition to the Respondents' motion for summary judgment, the Petitioners wrote: "Defendants' policy must be evaluated under the test enunciated in *Turner v. Safley* ..." Likewise, the Petitioners did not dispute or challenge the applicability of the *Turner* standard in the objections filed by the Petitioners to the magistrate judge's report and recommendation. Consequently, that issue was not properly preserved for appeal to either the Fourth Circuit or to this Court. *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.3d 841(4th Cir. 1985).

Furthermore, the Petitioners' reliance on this Court's decision in *Cooper v. Pate*, 378 U.S. 546 (1964), is misplaced. The Petitioners argue that the Fourth Circuit should have been guided by *Cooper* rather than by *Turner* and *O'Lone*. The Petitioners make it seem as if *Cooper* is directly on point. However, in *Cooper*, this Court did not even address the merits of

the inmate's claim. Instead, in a one paragraph opinion, this Court reversed the dismissal of the inmate's complaint and ruled merely that the complaint stated a cause of action. The *Cooper* Court did not reverse the prison administrators' decision to keep the inmate in segregation. [2]

The Petitioners further take exception to the Fourth Circuit's application of the *Turner* and *O'Lone* standard. The Petitioners argue that the Fourth Circuit's application of the standard conflicts with that of other circuits, but the Petitioners' discussion of this issue does not support that contention. The Petitioners can point to no single case which reflects that the Fourth Circuit failed to properly apply the *Turner* and *O'Lone* standard.

The Petitioners maintain that they were reclassified to a higher security level because of their religious beliefs. That is not true. The Petitioners were reclassified because of the demonstrated propensity for violence, disruption and other anti-

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[2] It is noteworthy that *Cooper* was decided before *Turner* and *O'Lone*. On remand in *Cooper*, the Seventh Circuit did not apply the *Turner* and *O'Lone* standard, and accordingly, *Cooper* is distinguishable on that additional point. *See*, *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967).

social behavior by members of the Five Percenter group. SCDC is not concerned with any religious beliefs; it is concerned solely with the security of its institutions, inmates and employees.

If an inmate renounces his affiliation with a threat group, then he may become eligible, depending on other factors, to return to the general population. The SCDC policy does not require any inmate to renounce any religious beliefs. If an inmate does not wish to renounce his affiliation with the group, that remains his prerogative, but in the interests of security, that inmate must remain in a higher custody level. At all times, the inmates are entitled to maintain their religious beliefs but they are prohibited from acting in a violent or dangerous manner.

The reclassification of threat group members is not an exaggerated response, as the Petitioners contend. There are no easy alternatives available. As the Fourth Circuit aptly recognized, SCDC is not required to put these inmates back in the general population until an additional act of violence occurs. The First Amendment does not prevent prison administrators from being proactive rather than reactive. Importantly, the reclassification of the Five Percenters was not a response to an isolated incident. The record of violence from 1992 forward by

Five Percenters constitutes compelling evidence to support the SCDC Director's decision to implement this policy.

II. The Fourth Circuit Court of Appeals did not create a "prisoner exception" to Rule 56, FRCP.

The Petitioners erroneously contend that the Fourth Circuit has created a "prisoner exception" to Rule 56, FRCP. That was obviously not the intent nor the ultimate result of the Fourth Circuit's decision in this case.

Instead, the Fourth Circuit correctly explained that this Court has adopted a deferential standard of review for cases involving issues of prison administration. In *Turner v. Safley*, 482 U.S. 78 (1987), this Court held as follows:

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less

> restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

482 U.S. at 89. (Citations omitted). *See also, Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

In applying that deferential standard, the Fourth Circuit explained that judgments, opinions and even the understanding of a course of events that underlie a prison administrator's decision are always subject to attack or at least second-guessing. However, it is precisely that second-guessing in which the federal courts refuse to engage. *Turner* and other decisions clearly urge the lower courts to refrain from such conduct.

Consequently, the "command of judicial deference" does not mandate a "prisoner exception" to Rule 56, FRCP, as the Petitioners suggest. Instead, the deferential standard of review mandates that certain factual matters that may be in dispute are simply not material issues of dispute. It is not that the Fourth Circuit refused to draw certain inferences in the Petitioners' favor. Instead, under the *Turner* and *O'Lone* standard, the inferences that

the Petitioners sought to draw are simply not material to the proper application of the standard.

In sum, the Fourth Circuit correctly applied the *Turner* and *O'Lone* standard in this case. The court appropriately followed the holding in *O'Lone*, *supra*, where this Court writes:

> We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on ... difficult and sensitive matters of institutional administration" for the determinations of those charged with the formidable task of running a prison.

O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987). (Citation omitted). There is simply no issue raised in the Petitioner's Petition for Writ of Certiorari that warrants or even merits review by this Court.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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