

**In The
Supreme Court of the United States**

GREGORY HOUSTON HOLT
a/k/a ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, *ET AL.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

JOINT APPENDIX

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**Petition For Certiorari Filed Sept. 27, 2013
Certiorari Granted March 3, 2014**

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**Relevant Docket Entries for the
U.S. District Court
Eastern District of Arkansas (Pine Bluff)
CIVIL DOCKET FOR CASE #: 5:11-cv-00164-BSM**

Plaintiff

Gregory Holt

ADC #129616

(Abdul Maalik Muhammad)

V.

Defendant

Ray Hobbs

Director, Arkansas Department of Correction

Date Filed No. Docket Text

- | | | |
|------------|---|---|
| 06/28/2011 | 1 | MOTION for Leave to Proceed in forma pauperis by Gregory Holt (pag)(copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011) |
| 06/28/2011 | 2 | COMPLAINT with Jury Demand against All Defendants filed by Gregory Holt(pag) (copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011) |
| 06/28/2011 | 3 | MOTION for Preliminary Injunction and Temporary Restraining Order by Gregory Holt (pag)(copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011) |

- 06/28/2011 4 BRIEF IN SUPPORT re 3 Motion for Preliminary Injunction and for TRO filed by Gregory Holt. (pag)(copy mailed) (docket text modified on 6/29/2011 to correct plaintiff's name) (bfw). (Entered: 06/29/2011)
- 07/06/2011 7 PROPOSED FINDINGS AND RECOMMENDATIONS recommending 3 Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order be DENIED. Objections to R&R due no later than 14 days from the date of this Recommendation. Signed by Magistrate Judge Joe J. Volpe on 7/6/2011. (srw) (Entered: 07/06/2011)
- 07/14/2011 10 OBJECTION to 7 Report and Recommendations by Gregory Holt (pag)(copy mailed) (Entered: 07/14/2011)
- 07/21/2011 12 MOTION to Amend/Correct 2 Complaint by Gregory Holt (pag)(copy mailed) (Entered: 07/21/2011)
- 07/21/2011 13 EXHIBITS filed by Gregory Holt to 2 Complaint (pag)(copy mailed) (Entered: 07/21/2011)
- 07/27/2011 16 Letter from Robert Hawk (pag)(copy mailed) (Entered: 07/28/2011)
- 08/03/2011 17 MOTION for Leave to Proceed in forma pauperis by Gregory Holt (pag)(copy mailed) (Entered: 08/03/2011)

- 08/09/2011 20 ORDER granting 17 Plaintiff's Application to Proceed Without Prepayment of Fees; denying as moot 11 Plaintiff's Motion for Extension of Time; directing monthly payments be made from Plaintiff's institutional account for the statutory filing fee of \$350; directing the Clerk of the Court to send a copy of this Order to the Warden of the Cummins Unit and appropriate ADC offices; and finding service is not appropriate at this time. Signed by Magistrate Judge Joe J. Volpe on 8/9/2011. (srw) (Entered: 08/09/2011)
- 09/01/2011 24 DECLARATION of Vernell Conley, by Gregory Holt. (kdr) (Entered: 09/02/2011)
- 09/01/2011 25 DECLARATION of Carlos Gutierrez, by Gregory Holt. (kdr) (Entered: 09/02/2011)
- 10/18/2011 28 ORDER rejecting Magistrate Judge Joe J. Volpe's proposed findings and recommended partial disposition; granting 3 Plaintiff's Motion for Preliminary Injunction and TRO; and remanding the case to Judge Volpe to hold a temporary injunction hearing and permit defendants to present evidence showing that the Arkansas Department of Correction's beard grooming policy, which restricts Holt's First Amendment right to observe his religion, is the least

restrictive means of achieving the security goals sought by the policy. Signed by Judge Brian S. Miller on 10/18/11. (hph) (Entered: 10/18/2011)

- 10/19/2011 30 ORDER granting 12 Plaintiff's Motion to Amend/Correct; granting 27 Plaintiff's Second Motion for Copies; and directing the Clerk of the Court to mail to Plaintiff a copy of the docket sheet and all orders that have been entered in this case. Signed by Magistrate Judge Joe J. Volpe on 10/19/11. (hph) (Entered: 10/19/2011)
- 11/01/2011 36 Letter from Gregory Holt (pag)(copy mailed) (Entered: 11/03/2011)
- 11/02/2011 33 ORDER granting 22 Plaintiff's Motion for Service; directing the Clerk of the Court to prepare summons for Defendants Hobbs, Lay, Tate, Robertson, Richardson, and May, directing the U.S. Marshal to serve a copy of the 2 Complaint, 32 Amended Complaint, and summons on Defendants without prepayment of fees and costs or security therefore. Signed by Magistrate Judge Joe J. Volpe on 11/2/2011. (srw) (Entered: 11/02/2011)
- 11/28/2011 46 ANSWER to 2 Complaint by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate.(Cryer, Christine) (Entered: 11/28/2011)

- 11/29/2011 47 RESPONSE to Motion re 37
MOTION for Hearing filed by Ray
Hobbs, Gaylon Lay, Larry May, M
Richardson, V R Robertson, D W
Tate. (Cryer, Christine) (Entered:
11/29/2011)
- 11/29/2011 48 RESPONSE to Motion re 3 MOTION
for Preliminary Injunction MOTION
for Temporary Restraining Order
filed by Ray Hobbs, Gaylon Lay,
Larry May, M Richardson, V R Rob-
ertson, D W Tate. (Cryer, Christine)
(Entered: 11/29/2011)
- 12/07/2011 57 RESPONSE re 46 Answer to Com-
plaint by Gregory Holt (pag)(copy
mailed) (Entered: 12/08/2011)
- 12/07/2011 58 REPLY to Response to 3 MOTION for
Preliminary Injunction MOTION for
Temporary Restraining Order filed
by Gregory Holt. (pag)(copy mailed)
(Entered: 12/08/2011)
- 12/19/2011 68 DECLARATION of Inmate filed by
Gregory Holt. (pag)(copy mailed)
(Entered: 12/20/2011)
- 01/04/2012 73 (This is a TEXT ENTRY ONLY.
There is no pdf document associated
with this entry.) CLERK'S MINUTE
ENTRY for proceedings held before
Magistrate Judge Joe J. Volpe: Tem-
porary Injunction Hearing held on
1/4/2012. After hearing testimony
from the parties and the admittance
of Defendants' exhibits 1-2, the

hearing concluded. The Court is taking the case under advisement and a recommended disposition will be entered as soon as possible. (Plaintiff: Pro Se; Defense Counsel: Christine Cyer [sic]) (ECRO Stacy Williams) (srw) (Entered: 01/04/2012)

- 01/04/2012 74 Exhibit and Witness List (srw) (Entered: 01/04/2012)
- 01/10/2012 79 Letter from Clerk returning exhibits to Attorney Christine Cryer, counsel for Ray Hobbs and other Defendants, of the Temporary Injunction Hearing held on 1/4/21012 [sic]. (srw) (Entered: 01/10/2012)
- 01/27/2012 82 PROPOSED FINDINGS AND RECOMMENDATIONS recommending the 28 Court's Order granting Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order be VACATED; recommending 3 Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order be DENIED; recommending 2 Plaintiff's Complaint be DISMISSED with prejudice; recommending dismissal of this action constitute a "strike;" and recommending all pending motions be DENIED as moot Objections to R&R due no later than 14 days from the date of this recommendation. Signed by

Magistrate Judge Joe J. Volpe on
1/27/2012. (srw) (Entered: 01/27/2012)

- 02/02/2012 85 RECEIPT for Exhibits by Christine Cryer, counsel for all Defendants, from the temporary injunction hearing held on 1/4/2012. (srw) (Entered: 02/03/2012)
- 02/08/2012 86 OBJECTION to 82 Report and Recommendations by Gregory Holt (pag)(copy mailed) (Entered: 02/08/2012)
- 02/22/2012 88 DECLARATION of Paul Smisth submitted by Gregory Holt. (pag)(copy mailed) (Entered: 02/22/2012)
- 03/15/2012 91 EXHIBITS filed by Gregory Holt to 86 Objection to Report and Recommendations. (pag)(copy mailed) (Entered: 03/15/2012)
- 03/23/2012 93 ORDER adopting proposed findings and recommended disposition; dismissing Holt's complaint with prejudice; dismissal [sic] of this action constitutes a "strike" for purposes of 28 U.S.C. § 1915(g); denying 89 Holt's motion for an emergency hearing; and denying all remaining motion as moot. Signed by Judge Brian S. Miller on 3/23/12. (hph) (Entered: 03/23/2012)
- 03/23/2012 94 JUDGMENT: Consistent with the order entered today, this case is hereby dismissed with prejudice and

the relief sought is denied. Signed by Judge Brian S. Miller on 3/23/12. (hph) (Entered: 03/23/2012)

03/27/2012 96 MOTION for Re-Hearing, or in the alternative, Motion for Stay of Order Pending Appeal filed by Gregory Holt (pag)(copy mailed) Modified on 4/9/2012 to correct typographical error(pag). (Entered: 03/27/2012)

04/19/2012 99 ORDER granting 96 Motion for Hearing; granting 98 Motion for Extension of Time. The 3/23/12 Order is stayed pending appeal and Holt has up to and including 14 days from the date of this order to file a notice of appeal. Signed by Judge Brian S. Miller on 4/19/12. (hph) (ORDER IS VACATED PER 136 ORDER). (Entered: 04/19/2012)

06/21/2012 108 MOTION for Order For Review and Application For Permissionn [sic] to File Brief by Gregory Holt (dac) (Entered: 06/21/2012)

07/05/2012 109 RESPONSE in Opposition re 108 MOTION for Order filed by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate. (Attachments: # 1 Exhibit AD Seg documents)(Cryer, Christine) (Entered: 07/05/2012)

07/10/2012 110 REPLY to Response to Motion re 108 MOTION for Review and Application for Permission to file Brief filed by

Gregory Holt. (dac) (Entered:
07/10/2012)

- 09/13/2012 115 ORDER granting 107 Plaintiff Gregory Holt's motion for leave to appeal in forma pauperis; denying as moot 108 Holt's motion for order; and, denying 111 Holt's motion for relief. Signed by Chief Judge Brian S. Miller on 9/13/2012. (kdr) (Entered: 09/13/2012)
- 06/12/2013 130 MOTION to Vacate 99 Order on Motion for Hearing, Order on Motion for Extension of Time to File Response/Reply, by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate (Cryer, Christine) (Entered: 06/12/2013)
- 06/12/2013 131 BRIEF IN SUPPORT re 130 Motion to Vacate filed by Ray Hobbs, Gaylon Lay, Larry May, M Richardson, V R Robertson, D W Tate. (Cryer, Christine) (Entered: 06/12/2013)
- 06/17/2013 132 RESPONSE to 130 MOTION to Vacate 99 Order on Motion for Hearing, Order on Motion for Extension of Time to File Response/Reply filed by Gregory Holt. (tjb) (Entered: 06/17/2013)
- 07/24/2013 133 MANDATE of USCA in accordance with the opinion and judgment of 06/12/2013 as to 101 Notice of Appeal filed by Gregory Holt. (mcz) (Entered: 07/24/2013)

- 07/25/2013 134 MOTION to Continue Injunction Pending Further Appellate Remedies, by Gregory Holt (mcz) (Entered: 07/25/2013)
- 09/16/2013 136 ORDER granting 130 Defendants' motion to suspend; denying 134 Holt's motion to continue the injunction; and vacating 99 the April 19, 2012 Order. Signed by Chief Judge Brian S. Miller on 9/16/2013. (kdr) (Entered: 09/16/2013)
- 09/25/2013 137 MOTION for Reconsideration of 136 Order and MOTION to Expedite by Gregory Holt (tjb) (Entered: 09/25/2013)
- 09/26/2013 138 (This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.) ORDER denying 137 Motion for Reconsideration; denying 137 Motion to Expedite. Signed by Chief Judge Brian S. Miller on 9/26/13. (sgw) (Entered: 09/26/2013)
- 10/15/2013 139 Letter from USCA Clerk: The Petition for Writ of Certiorari has been filed with the Supreme Court re: USCA No. 12-3185. (mcz) (Entered: 10/16/2013)
- 11/20/2013 140 MOTION to Continue Injunctive Relief Pending Petition for Certiorari, by Gregory Holt. (kdr) (Entered: 11/20/2013)

11/21/2013 141 ORDER denying 140 Holt's motion to reinstate injunctive relief for lack of jurisdiction as the matter is currently pending certiorari before the United States Supreme Court. Signed by Chief Judge Brian S. Miller on 11/21/2013. (kdr) (Entered: 11/21/2013)

11/25/2013 142 TRANSCRIPT of Hearing on Motion for Temporary Injunction Proceedings held on January 4, 2012, before Magistrate Judge Joe J. Volpe. Court Recorder – Stacy Williams, Transcription Service – Robin Warbritton. Transcript may be viewed only at the public terminals in the Clerk's office. Copies of transcript are only available through the Official Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. DEADLINES: Notice of Intent to Request Redaction due 12/5/2013. Redaction Request due 12/16/2013. Redacted Transcript Deadline set for 12/26/2013. Release of Transcript Restriction set for 2/24/2014. (plm) (Entered: 11/25/2013)

01/07/2014 143 EXHIBITS by Gregory Holt. (kdr) (Entered: 01/07/2014)

**Relevant Docket Entries for the
Eighth Circuit Court of Appeals**

Gregory Houston Holt,
also known as Abdul Maalik Muhammad

Plaintiff-Appellant

v.

Ray Hobbs, Director, Arkansas Department of
Correction; Gaylon Lay, Warden, Cummins Unit,
ADC; D W Tate, Captain, Cummins Unit, Arkansas
Department of Correction; V. R. Robertson, Major,
Cummins Unit, Arkansas Department of Correction;
M. Richardson, Sgt., Cummins Unit, Arkansas
Department of Correction; Larry May, Chief Deputy
Director, Arkansas Department of Correction

Defendants-Appellees

* * *

10/05/2012 MOTION for Transcript at Public Ex-
pense, filed by Appellant Mr. Gregory
Houston Holt, w/service 10/03/2012.
[3961417] [12-3185] (LAB)

10/15/2012 JUDGE ORDER: [3961417-2] The mo-
tion for transcript at government ex-
pense has been considered by the court
and is denied. – . Adp Oct 2012
[3963588] [12-3185] (DMS)

* * *

10/25/2012 **BRIEF FILED** – APPELLANT BRIEF
filed by Mr. Gregory Houston Holt;
w/service by USCA8 on 10/29/2012,
FIVE Copies; Length: 18 pages. **Brief of
Ray Hobbs, Gaylon Lay, Larry May,**

**M. Richardson, V. R. Robertson and
D W Tate due on 11/26/2012** [3968879]
[12-3185] – [Edited 10/30/2012 by SRD]
(DMW)

* * *

12/11/2012 APPELLEE brief of Ray Hobbs, Gaylon Lay, Mr. Larry May, M. Richardson, V. R. Robertson and D W Tate submitted for review. The time for filing the subsequent brief does not begin to run until the brief has been approved and filed. [3983388] [12-3185] (CAC)

12/11/2012 **ADDENDUM** of APPELLEE FILED by Appellees Ray Hobbs, et al.. w/service 12/10/2012 [3983389] [12-3185] (LMT)

12/11/2012 **BRIEF FILED** – APPELLEE BRIEF filed by Ray Hobbs, et al. w/service 12/10/2012, Length: 4414 words **10 COPIES OF PAPER BRIEFS FROM Ray Hobbs due 12/17/2012 WITH revised certificate of service for paper briefs.** [3983468] [12-3185] (Edited to reflect no reply brief due date set at this time. Deadline to be established upon filing of paper appellee brief) – [Edited 12/12/2012 by LMT] (LMT)

* * *

12/26/2012 **BRIEF FILED** – APPELLANT REPLY BRIEF filed by Mr. Gregory Houston Holt. w/service 12/21/2012; 5 copies by USCA-8., Length: 19 pages. [3990349] [12-3185] (MDS)

01/10/2013 RECORD FILED – MISC. RECORD, Location STL, Comments: 1 envelope containing 1 CD of Hearing held on 1/14/2012 [Return to the District Court at end of case], Source Location: USDC / EA [3993152] [12-3185] (STL)

* * *

03/07/2013 **BRIEF FILED-** “SUPPLEMENT TO BRIEF,” filed by Pro Se Appellant Mr. Gregory Houston Holt; w/service by USCA8 on 03/07/2013, Length: 2 pages. [4012349] [12-3185] (DMW)

06/06/2013 CASE SUBMITTED Screening Case Submission before Judges Kermit E. Bye, Morris S. Arnold, Bobby E. Shepherd in St. Louis [4043125] [12-3185] (DMW)

06/12/2013 PER CURIAM OPINION FILED – THE COURT: Kermit E. Bye, Morris S. Arnold and Bobby E. Shepherd. – (UNPUBLISHED) – [4044433] [12-3185] (DMW)

06/12/2013 **JUDGMENT FILED** – The judgment of the Originating Court is AFFIRMED in accordance with the opinion. – Scrg Spring 2013 – [4044435] [12-3185] (DMW)

06/25/2013 PETITION for enbanc [sic] rehearing and also for rehearing by panel filed by Pro Se Appellant Mr. Gregory Houston Holt; w/service by USCA8 on 06/26/2013. [4049083] [12-3185] (DMW)

- 07/17/2013 JUDGE ORDER: [4049083-2] The petition for en banc [sic] rehearing, filed by Appellant Mr. Gregory Houston Holt, is denied. The petition for panel rehearing is also denied [4049083-3]. – Scrg Spring 2013 [4055622] [12-3185] (DMW)
- 07/24/2013 MANDATE ISSUED. [4057869] [12-3185] (DMW)
- 07/26/2013 MOTION to recall the mandate and stay the mandate pending petition for certiorari, filed by Pro Se Appellant Mr. Gregory Houston Holt; w/service by USCA8 on 07/29/2013. [4059118] [12-3185] (DMW)
- 08/01/2013 JUDGE ORDER: [4059118-2] The motion to recall the mandate and to stay the mandate, filed by Appellant Mr. Gregory Houston Holt, has been considered by the court and is denied. – Scrg Spring 2013 [4060949] [12-3185] (DMW)
- * * *
- 10/10/2013 U.S. Supreme Court Notice of cert filed in the Supreme Court on 09/27/2013, case No. 13-6827 [4085782] [12-3185] (SRD)
- 11/14/2013 SUPREME COURT order filed – other. Order filed on 11/14/2013 in case No.13-6827. [4097011] [12-3185] (DMW)
-

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt #129616 Complaint
(Abdul Maalik Muhammad), (Filed Jun. 28, 2011)
Plaintiff

vs. Civil Action No.
5:11CV00164

Ray Hobbs, in his official
capacity as Director of the
Arkansas Department of
Correction and Gaylon Lay,
in his official capacity as
Warden of the Cummins Unit,
Defendants

I. Jurisdiction and Venue

- (1) This is a civil action authorized by 42 U.S.C. Section 2000cc to redress deprivation of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Court has jurisdiction under 28 U.S.C. Section 2283 & 2284 and Rule 65 of the Federal Rules of Civil Procedure.
- (2) The Eastern District of Arkansas, Pine Bluff Division is an appropriate venue under 28 U.S.C. Section 1391(b)(2) because it is where the events giving rise to the claim occurred.

II. Plaintiffs

- (3) Plaintiff, Gregory Houston Holt (aka Abdul Maalik Muhammad) is and was at all times mentioned herein a prisoner of the State of Arkansas in the custody of the Arkansas Department of correction. He is currently confined in the Cummins Unit, in Grady, Arkansas.

III. Defendants

- (4) Defendant, Ray Hobbs is the Director of the State of Arkansas Department of Corrections. He is legally responsible for the overall operation of the Department and each institution under its jurisdiction, including the Cummins Unit.
- (5) Defendant, Gaylon Lay, is the Warden of the Cummins Unit. He is legally responsible for the operation of Cummins Unit and for the welfare of all the inmates in that prison.
- (6) Each defendant is sued in his official capacity.

III(a). Facts

- (7) Most of the facts in this case are described in detail in Plaintiff's *Application For Preliminary Injunction and Temporary Restraining Order*. The gist of it is this: The Arkansas Department of Correction has a grooming policy that requires all inmates, regardless of religious belief or practice, to shave with the only exception being that one (1) can wear a mustache that does not extend past the corners of the mouth. The

reasons given for this policy is that inmates will not be able to hide weapons or contraband in facial hair.

- (8) Plaintiff is a devout fundamentalist Muslim who follows the Salaf and the Sunnah of the Prophet Muhammad (saws), in which it is stated that one (1) of the characteristics of al-fitrah (the natural way) is that one clip the mustaches short and leave the beard *as it is* (emphasis mine) [Sahih Al-Bukhari, Hadith 7/5893]
- (9) The Arkansas Department of Correction practices what is referred to as progressive disciplinary action. That is, once a disciplinary is given, if an inmate refuses to comply with an order to shave, he is given multiple disciplinaries, some as many as several *in one day*. Plaintiff has been subjected to these measures repeatedly until he shaved. He was warned as recently as June 9 that if he persisted in the growing of a $\frac{1}{2}$ inch beard that he would be subjected to those penalties yet again.
- (10) Plaintiff is not advocating the unrestricted growth of facial hair. The State does have a legitimate governmental interest in maintaining security for inmates and staff alike and in the staunching of the flow of contraband. Further, the Religious Land Use and Institutionalized Persons Act (RLUIPA) provides that the state must use the “least restrictive means” in allowing religious practice. A $\frac{1}{2}$ inch beard would serve that purpose. There is no legitimate reason why this would be a problem, in that it would be difficult, if not impossible, to hide

weapons or contraband in a beard of that size. Further, case law exists that would buttress Plaintiff's claims. In *Mayweathers vs. Terhune* (328 F.Supp.2d 1086), the Ninth Circuit ruled that a 1/2 inch beard would serve a legitimate governmental objective in being able to identify inmates in the event of an escape. In that case, the California Department of Corrections (CDC) argued that it was necessary to order inmates to shave so that should they escape, they could not alter their appearance by shaving beards. The Plaintiffs in that case were devout Muslims who were subjected to progressive penalties for refusing to shave. The Court ruled that a 1/2 inch beard would satisfy the State's interests balanced with the inmates' right to practice their religion in the least restrictive means possible. This case is persuasive authority and should be applied in the instant case given that the facts are almost identical to each other in most respects.

- (11) A Declaration is attached to better inform the Court of the workings of the ADC on this matter. Exhibit "A"
- (12) Plaintiff would urge the Court to grant him a Temporary Restraining Order (TRO). In order to secure one, Plaintiff must show "irreparable injury, loss, or damage" in order to prevail on a Petition for a TRO. The "injury" does not have to mean *physical* damage to the Body. (*Lewis vs. Casey*, 518 U.S. 343, 1996). Plaintiff only has to show that the injury would be ongoing and imminent. In this case, should Plaintiff not shave, he would be subjected to multiple disciplinaries,

punitive isolation in a cell with temperatures daily in the high 90's, transfer to another penitentiary, and notations in his prison file that could affect ongoing appeals, clemency applications or future parole eligibility. In these respects, the harm is imminent and ongoing and the Court should therefore grant him a TRO.

- (13) Plaintiff would urge the Court to grant an injunction with no advance notice to the Defendants for the reasons stated in #12 and that Plaintiff would face retaliation and harassment.

IV. Exhaustion of Legal Remedies

- (14) Plaintiff, Gregory Holt, used the prisoner grievance procedure available at Cummins Unit to try and solve the problem. On 5-10-11, Plaintiff Gregory Holt presented the facts relating to this complaint. On 5-25-11 or thereabouts, Plaintiff Gregory Holt was sent a response saying that the grievance had been denied. On 5-26-11, he appealed the denial of the grievance to the Chief Deputy Director of the ADC, Larry May. A response was sent back to Plaintiff informing him that a response would be sent by July 8, 2011. Plaintiff would move for an injunction prior to the final response for the reasons stated in #12 & #13. A court is authorized to protect a Plaintiff and issue an injunction even if the administrative remedy process has not been exhausted. (*Jackson vs. District of Columbia*, 254 F.3d 262, 2001). Given the facts presented, Plaintiff is in need of this injunction without first exhausting all remedies. Exhibit "B"

- (15) As a final matter, Plaintiff is seeking In forma pauperis status. Plaintiff would ask this Court that he not be required to get verification from the financial officer of the institution due to the fact that should he do so, it would tip off the administration of his plans and would subject him to immediate retaliation.

V. Legal Claims

- (16) Plaintiff realleges and incorporates by reference Paragraphs 1-15.
- (17) The forcible shaving of the Plaintiff against his religious beliefs violated Plaintiff Gregory Holt's rights and constituted a chill on his rights of religious expression and belief and was not the least restrictive means available to him to practice that belief under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First Amendment to the United States Constitution. Further, refusal to allow him to grow a 1/2 inch beard also violated his rights to free practice of religion under the Act listed.
- (18) The plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the injunctive relief which plaintiff seeks.

VI. Prayer For Relief

- (19) Wherefore, plaintiff respectfully prays that this court enter judgment granting plaintiff:

- (a) A preliminary and permanent injunction ordering defendants Ray Hobbs and Gaylon Lay to: cease enforcement of the current grooming policy, allow the growing of $\frac{1}{2}$ inch beards, cease the use of progressive punitive measures against those who grow the beard both pending and in the future, expungment [sic] of past disciplinary records against those who refused to shave and banning the transfer for non-disciplinary reason those who seek redress in these matters.
- (b) A jury trial on all issues triable by jury.
- (c) Any additional relief this court deems just, proper, and equitable.

Respectfully submitted,

/s/ Gregory Holt

Gregory Holt #129616

Cummins Unit

P.O. Box 500

Grady, AR 71644-0500

Verification

I have read the foregoing complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Grady, Arkansas on June 15, 2011.

Gregory Holt

Plaintiff

Exhibit “A”

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt #129616
(AKA Adbul Maalik Muham-
mad),

Plaintiff

Declaration of
Robert Hawk
Civil Action No.

vs.

Ray Hobbs, in his official
capacity as Director of the
Arkansas Department of
Corrections, et al.,

Defendants

Robert Hawk hereby declares:

I have been incarcerated at the Cummins unit since 2003. Since May 6, 2011 I have been in Barracks 14 Cell 430 with Gregory Holt, the Plaintiff.

On June 9, 2011 I observed Correctional Sgt Richardson of the ADC Cummins Unit inform Gregory Holt that he needed to shave. Gregory Holt in turn informed Sgt Richardson that he had federal case law that supported his right to wear a 1/2 inch beard for Religious purposes and further that he, Gregory Holt, had an Administrative remedy pending in front of Larry May, the Chief Deputy Director of ADC. Sgt Richardson informed Gregory Holt that he, Richardson,

would talk to Captain D.W. Tate, a captain at the Cummins Unit, about Gregory Holt's objections.

On June 11 2011 Sgt Richardson returned to our cell and notified Gregory Holt that he, Sgt Richardson had discussed the matter with Captain Tate. Captain Tate had told Sgt Richardson that if Gregory Holt did not shave, then Sgt Richardson was to take disciplinary action against Gregory Holt. Also that if Sgt Richardson did not write up Gregory Holt then he Sgt Richardson would receive [sic] disciplinary action. When Gregory Holt informed Sgt Richardson that several "By the Book Lt.'s and Sgt.'s had seen Gregory Holt's facial hair and said nothing about it. Sgt Richardson stated to Mr. Holt that "they must not have wanted to do any paperwork" Mr. Holt initially refused the order but then eventually relented

In my eight years at the Cummins Unit I have seen numerous instances of people refusing to shave being placed in punitive isolation for this act. Also I have witnessed staff members deny inmates chow call, library, visitation, recreation and other such activities due to not being clean shaved.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed at Grady, Arkansas, on June 16, 2011.

Robert R Hawk
ADC. # 129886
6-16-11: Dated

Exhibit "B"

**ACKNOWLEDGEMENT OF
GRIEVANCE APPEAL
or REJECTION OF APPEAL**

TO: Inmate Holt, Gregory H. ADC #: 129616C
FROM: May, Larry D TITLE: Chief
 Deputy Director
RE: Receipt of Grievance CU-11- DATE: 06/01/2011
00966

Please be advised, the appeal of your grievance dated
 05/10/2011
was received in my office on this date 05/25/2011

**You will receive communication from this office
regarding this Grievance by 07/08/2011**

- ☐ The time allowed for appeal has expired
- ☐ The matter is non-grievable and does not involve retaliation:
 - ☐ (a) Parole and/or Release matter
 - ☐ (b) Transfer
 - ☐ (c) Job Assignment unrelated to medical restriction
 - ☐ (d) Disciplinary matter
 - ☐ (e) Matter beyond the Department's control and/or matter of State/Federal law
 - ☐ (f) Involves an anticipated event

- ☐ You did not send all the proper Attachments:
 - ☐ (a) Unit Level Grievance Form (Attachment 1)
 - ☐ (b) Warden's/Center Supervisor's Decision (Attachment III); or Health Services Response Attached (Attachment IV for Health Issues Only)
 - ☐ (c) Did not give reason for disagreement with Response on Attachment III or IV
 - ☐ (d) Did not complete Attachment III or IV with your name, ADC#, and/or date
 - ☐ (e) Unsanitary form(s) or documents received
 - ☐ (f) Other
-

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

GREGORY HOLT,
ADC # 129616

PLAINTIFF

v. 5:11-cv-00164-BSM-JJV

RAY HOBBS, Director,
Arkansas Department of
Correction; and GAYLON LAY,
Warden, Cummins Unit, Arkansas
Department of Correction

DEFENDANTS

**PROPOSED FINDINGS
AND RECOMMENDATIONS**

INSTRUCTIONS

(Filed Jul. 6, 2011)

The following recommended partial disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections

may result in a waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a new hearing for this purpose before either the District Judge or Magistrate Judge, you must, at the time you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence to be proffered at the new hearing (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.
3. The details of any testimony desired to be introduced at the new hearing in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the new hearing.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing. Mail your objections and “Statement of Necessity” to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

I. INTRODUCTION

Plaintiff, Gregory Holt, an inmate in the Arkansas Department of Correction Cummins Unit, filed a *pro se* Complaint (Doc. No. 2) pursuant to 42 U.S.C. § 1983, alleging Defendants are violating his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by requiring him to shave his beard. In conjunction with his Complaint, Plaintiff filed a Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3).

II. PRELIMINARY INJUNCTION

Plaintiff is a fundamentalist Muslim. (Doc. No. 3 at 1). The tenets of Plaintiff's religion prescribes that practitioners "trim the mustache and leave the beard as it is." (Doc. No. 4 at 1). According to Plaintiff, ADC's grooming policy prohibits inmates from wearing beards. (*Id.*). Failure to comply with the grooming policy will result in the inmate being subject to disciplinary action. (Doc. No. 3 at 2). Plaintiff has refused to comply with ADC's grooming policy and is currently under threat of further disciplinary action due to his insistence on maintaining a half-inch beard. (*Id.*). Plaintiff seeks to enjoin the enforcement of ADC's grooming policy and the issuance of disciplinaries against those who choose to grow a beard in violation of ADC's grooming policy.

III. ANALYSIS

In deciding whether to grant injunctive relief, the Court must consider the following factors: (1) the threat of irreparable harm to the movant; (2) the state of balance between the harm and the injury that granting the injunction will inflict on the other party litigants; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). No single factor is dispositive, but the movant must establish a threat of irreparable harm. *Id.* Without a finding of irreparable injury, a preliminary injunction should not be issued. *Randolph v. Rogers*, 170 F.3d 850, 856 (8th Cir. 1999). “The burden of proving that a preliminary injunction should be issued rests entirely with the movant.” *Goff v. Harper*, 60 F.3d 518, 520-21 (8th Cir. 1995). The Court in *Goff* also addressed the district court’s role in inmate applications for injunctive relief as follows: “[I]n the prison context, a request for injunctive relief must always be viewed with great caution because ‘judicial restraint is especially called for in dealing with the complex and intractable problems of prison administration’ . . . [t]he courts should not get involved unless either a constitutional violation has already occurred or the threat of such a violation is both real and immediate.” *Id.* (quoting *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982)).

In *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), a male inmate argued that ADC’s grooming policy prohibiting inmates from wearing uncut beards

violated RLUIPA. The United States Court of Appeals for the Eighth Circuit held that ADC's grooming policy does not violate RLUIPA. *Id.* at 906. The court specifically found that the ADC had a legitimate penological interest in prohibiting inmates from wearing uncut beards and that the prohibition was the least restrictive means available in furthering that interest. *Id.* at 907. In light of *Fegans*, this Court finds that Plaintiff has little likelihood of success on the merits and that his Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

IV. CONCLUSION

IT IS THEREFORE RECOMMENDED THAT:

1. Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

DATED this 6th day of July, 2011.

/s/ J. J. Volpe

JOE J. VOLPE
UNITED STATES
MAGISTRATE JUDGE

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt, #129616

Plaintiff

vs.

Civil Action No.
5:11-CV-00164-BSM-JVV [sic]

Ray Hobbs, et al.,

Defendants

Motion For Leave To Amend

(Filed Jul. 21, 2011)

Comes now the Plaintiff, pro se, and for his Motion states the following:

- (1) Plaintiff's suit currently has two (2) Defendants, Ray Hobbs and Gaylon Lay.
- (2) Based on recent events regarding matters pertinent to the case, Plaintiff seeks to amend his suit to include the following Defendants:
 - [A] Captain D.W. Tate, in his official capacity as Segregation Captain at the Cummins Unit
 - [B] Major V.R. Robertson, in his official capacity as Major at the Cummins Unit
 - [C] Sgt. M. Richardson, in his official capacity as Sergeant at the Cummins Unit
- (3) Plaintiff also seeks to add the following to the suit as Plaintiffs:

[A] the statement after Gregory Holt to include

“on behalf of himself and all others similarly situated.”

- (4) Plaintiff would also seek to add Larry May, in his official capacity as Chief Deputy Director of the Arkansas Department of Correction as a Defendant.

Wherefore, premises considered, Plaintiff prays that this Court grants his Motion.

Respectfully,

/s/ Gregory Holt

Gregory Holt #129616
Cummins Unit
P.O. Box 500
Grady, AR 71644-0500

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF ARKANSAS PINE BLUFF DIVISION**

GREGORY HOLT,
ADC #129616 **PLAINTIFF**
v. CASE NO. 5:11CV00164 BSM/JJV
RAY HOBBS, Director,
Arkansas Department of
Correction, et al. **DEFENDANTS**

ORDER

(Filed Oct. 18, 2011)

The proposed findings and recommended partial disposition [Doc. No. 7] submitted by United States Magistrate Judge Joe J. Volpe and the filed objections [Doc. No. 10] have been reviewed. After carefully considering these documents and making a *de novo* review of the record, it is concluded that the proposed findings and recommended partial disposition should be, and hereby are, rejected in their entirety in all respects. Defendants have not met their “burden of demonstrating that the grooming policy is the least restrictive means to achieve security as *applied to*” plaintiff Gregory Holt. *Fegans v. Norris*, 537 F.3d 897, 908-09 (8th Cir. 2008) (Melloy, J., dissenting).

IT IS THEREFORE ORDERED that:

1. Plaintiff’s motion for preliminary injunction and temporary restraining order [Doc. No. 3] is GRANTED.

2. The case is remanded to Judge Volpe to hold a temporary injunction hearing and permit defendants to present evidence showing that the Arkansas Department of Correction's beard grooming policy, which restricts Holt's First Amendment right to observe his religion, is the least restrictive means of achieving the security goals sought by the policy.

Dated this 18th day of October 2011.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

GREGORY HOLT,
ADC # 129616

PLAINTIFF

v. 5: 11-cv-00164-BSM-JJV

RAY HOBBS, Director,
Arkansas Department of Correction;
and GAYLON LAY, Warden,
Cummins Unit, Arkansas
Department of Correction

DEFENDANTS

ORDER

(Filed Oct. 19, 2011)

Plaintiff's Motion for Leave to Amend/Correct Complaint (Doc. No. 12) and Second Motion for Copies (Doc. No. 27) are GRANTED. The Clerk of the Court is directed to mail to Plaintiff a copy of the docket sheet and all orders that have been entered in this case.

IT IS SO ORDERED this 19th day of October, 2011.

/s/ J J Volpe

JOE J. VOLPE
UNITED STATES
MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF ARKANSAS PINE BLUFF DIVISION**

GREGORY HOLT

ADC # 129616

PLAINTIFF

vs NO. 5:11-CV-00164-BSM-JJV

**RAY HOBBS, LARRY MAY,
GAYLON LAY, DONALD TATE,
VERNON ROBERTSON,
MICHAEL RICHARDSON**

DEFENDANTS

ANSWER

(Filed Nov. 28, 2011)

Come now the ADC Defendants Ray Hobbs, Gaylon Lay, Donald Tate, Vernon Robertson, Michael Richardson, and Larry May, defendants, by and through their counsel, Attorney General Dustin McDaniel, and Assistant Attorney General Christine A. Cryer, and for their Answer to the Amended Complaint state the following:

1. Defendants deny jurisdiction as written in paragraph (1) of the Complaint and deny that the injunctive relief sought is appropriate.
2. Defendants deny venue is proper.
3. Defendants admit paragraph (3).

4. Defendants admit that Defendant Ray Hobbs is the Director of the ADC, but deny liability and all other allegations found in paragraph (4).

5. Defendants admit that Defendant Gaylon Lay is the Warden at the Cummins Unit, ADC, but deny liability and all other allegations found in paragraph (5).

6. Paragraph (6) of the Complaint speaks for itself. As to all persons Plaintiff sought to amend this suit to include as Defendants in his Motion for Leave to Amend (DE 12), Defendants state that all Defendants are correctly identified as employees of the ADC. Liability is denied as to each. To the extent that Plaintiff attempts to add unnamed plaintiffs or seek class certification in this action, Defendants deny and/or object.

7. Defendants state that the pleading referenced in paragraph (7) of the Complaint speaks for itself. Defendants admit that certain ADC policies pertain to inmate grooming and hygiene, but are without sufficient information to provide a response to the remaining allegations in paragraph (7) and, accordingly, deny the same.

8. Defendants are without sufficient information to provide a response to the allegations in paragraph (8) and, accordingly, deny the same.

9. Defendants deny paragraph (9) as it is written.

10. Defendants state that the case law and legislation cited in paragraph (10) speak for themselves. To the extent that Plaintiff asserts that the State legitimately regulates inmate grooming as part of its effort to ensure the security of all persons at ADC, Defendants admit the same. Defendants deny all other statements, allegations, characterizations, or conclusions of law found in paragraph (10).

11. Defendants deny the allegations in the Declaration attached to the Complaint as Exhibit A.

12. Defendants deny that a temporary restraining order (TRO) is warranted in this case, as requested in paragraph 12 of the Complaint.

13. Defendants deny that notice of Plaintiff's application for an injunction or TRO would result in retaliation or harassment, as requested in paragraph 13 of the Complaint.

14. Defendants state that all referenced grievances, exhibits, and/or case law speak for themselves. Defendants deny that Plaintiff exhausted all available remedies and deny that Plaintiff's allegations warrant waiver of any exhaustion requirements, as alleged in paragraph 14 of the Complaint.

15. Defendants deny Plaintiff's entitlement to IFP status, and deny allegations of a potential for retaliation as found in paragraph (15).

16. Defendants deny paragraph (16).

17. Defendants deny any allegations of Constitutional violations and all other allegations found in paragraph (17).

18. Defendants deny harm to the Plaintiff and deny all other allegations found in paragraph (18).

19. Defendants deny Plaintiff has stated a claim for which relief may be granted and deny that injunctive relief is appropriate. Defendants deny that Plaintiff is entitled to relief as prayed in paragraph (19).

20. Defendants deny each and every allegation not specifically admitted to herein.

AFFIRMATIVE DEFENSES

In addition to the averments pleaded above, Defendants affirmatively plead the following:

1. Affirmatively pleading, Defendants state that the Complaint fails to state a claim upon which relief can be granted.

2. Affirmatively pleading, Defendants state that this Court lacks subject matter jurisdiction over this action.

3. Affirmatively pleading, Defendants state that venue is not proper.

4. Affirmatively pleading, Defendants state that service of the Complaint was improper.

5. Affirmatively pleading, Defendants state that Plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel.

6. Affirmatively pleading, Defendants state that Plaintiff's claims are barred by the doctrine of laches.

7. Affirmatively pleading, Defendants state that Plaintiff's claims are time-barred by the applicable statute of limitations.

8. Affirmatively pleading, Defendants state that any claim for injunctive relief is barred by the Clean Hands doctrine.

9. Affirmatively pleading, Defendants state that they are entitled to sovereign immunity for any official capacity claims for money damages, should any future amendments seek monetary relief.

10. Affirmatively pleading, Defendants state that they are entitled to qualified immunity for any individual capacity claims for money damages, should any future amendments seek monetary relief.

11. Affirmatively pleading, Defendants state that *respondeat superior* is not a permissible theory for recovery in § 1983 actions

12. Affirmatively pleading, Defendants state that Plaintiff failed to exhaust all administrative remedies pursuant the Prison Litigation Reform Act.

13. Defendants reserve the right to file an amended answer or any other appropriate pleading

and to allege any additional affirmative defenses that might be available to them.

WHEREFORE, Defendants Ray Hobbs, Gaylon Lay, Donald Tate, Vernon Robertson, Michael Richardson and Larry May, respectfully request Plaintiff's Complaint be dismissed, with prejudice, and for any and all other just and proper relief to which they may be entitled be granted.

Respectfully submitted,

DUSTIN MCDANIEL

Attorney General

By: /s/ Christine A. Cryer
Arkansas Bar No. 2001082
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Phone: (501) 683-0958
Fax: (501) 682-2591
chrisline.cryer@arkansasag.gov

[Certificate Of Service Omitted In Printing]

United States District Court
Eastern District of Arkansas
Pine Bluff Division

Gregory Holt #129616 et. al.,	Plaintiffs
vs.	Case No.
Ray Hobbs, et. al.,	5:11CV164-BSM-JJV
	Defendants

Reply to Defendants' Response To Complaint

(Filed Dec. 7, 2011)

Comes now the Plaintiff, Gregory Holt, and for his Motion or Reply states the following:

- (1) The Arkansas Department of Correction receives federal funding as do all Department of Corrections and the Religious Land Use and Institutionalized Persons Act (RLUIPA) covers this, placing the matter squarely within this Court's jurisdiction. Further, Section 1331 and 1343(a)(3) of 28 United States Code confers jurisdiction on the Court and Sections 2283 and 2284 of the same Title confers jurisdiction on the Court to grant injunctive relief as well as Rule 65 of the Federal Rules of Civil Procedure.
- (2) Venue has already been established, given that since Plaintiff is housed in Lincoln County, the Pine Bluff Division is the appropriate venue.
- (3) Defendants have failed to show how Ray Hobbs is immune to liability and how he is

not responsible for the operation of the ADC and each institution under its jurisdiction.

- (4) Defendants have failed to show how Gaylon Lay is not responsible for the operation of the Cummins Unit or that he is not responsible for the welfare of the inmates housed there.
- (5) Defendants have failed to show how they are not liable as to the allegations made in the Complaint. A Motion is pending in this Court seeking to add several individuals as Plaintiffs (Doc. 4[illegible]) The Court has already entered an Order on October 19, granting Plaintiff class certification (Doc. 30) The Defendants have failed to state or show their specific objections to Plaintiffs being added or class certification.
- (6) Plaintiff is unsure whether Defendants are disputing that the ADC has a grooming policy requiring inmates to shave everything but a mustache that cannot extend past the corners of the mouth, so Plaintiff points to the ADC Handbook on page 8 under "Grooming Policy" which states just that.
- (7) Plaintiff refers back to the Hadith that he quoted in the Complaint regarding a Muslim's obligation to grow his lihyat (beard) in response to the Defendant's point 8.
- (8) Plaintiff can provide proof that the ADC practices progressive penalties by the disciplinaries that he received in this case. (See also Exhibit "A")

- (9) Defendants have failed to show that a $\frac{1}{2}$ inch beard would compromise the security interests of the ADC in that it would be nearly impossible to hide anything in a beard of that length, and the supporting case law Plaintiff relied on is sufficient to establish the veracity of his claim.
- (10) The Declaration that was filed supports Plaintiff's claims as well as the additional Declarations that were filed. They show a pattern of how the ADC uses this oppressive policy to harass the inmate population.
- (11) Plaintiff met the burden of proof in order to secure a Temporary Restraining Order (TRO) in that the Court found that the ADC's grooming policy was not the least restrictive means to achieve security as applied to the Plaintiff, a TRO is a continuing necessity in order to prevent the Defendants from harassing the Plaintiff or subjecting him to the draconian penalties that the ADC imposes or to prevent the ADC from transferring him for non-disciplinary reasons, a tactic the ADC routinely uses to disrupt litigation efforts.
- (12) As an additional point to the one (1) above, Plaintiff would most certainly face retaliation if a TRO does not remain in effect. Plaintiff is being harassed even with the injunction in place, as has been documented in correspondence to the Court. Plaintiff has been effectively barred from eating breakfast due to the fact that the night shift refuses to

recognize the validity of the Court's order and clearly stated that the Order "is just an order" and doesn't say specifically that I don't have to shave. Further, Plaintiff's legal mail is being held or not delivered as well as some pieces of personal mail. Plaintiff asserts that some strengthening of the order is necessary in order to force compliance.

- (13) Plaintiff has exhausted his administrative remedies, as defined by ADC policy, and the PLRA.
- (14) The Court has already granted IFP status to the Plaintiff who has shown that he clearly is entitled to that.
- (15) Plaintiff has shown a viable, cognizable claim.
- (16) Defendants have failed to show how service of the Complaint was improper.
- (17) Plaintiff has shown irreparable harm as defined by case law and was enough to convince the Court to grant a TRO. Further, Plaintiff has shown how he and others would be harmed.
- (18) Plaintiff states that the issue of whether a $\frac{1}{2}$ inch beard would be a security threat has never been litigated in Arkansas.
- (19) Defendants have failed to show that the Plaintiff's claims are the result of laziness or purposeful delay and have not shown prejudice.

- (20) Defendants have failed to show that this action was brought in bad faith.
- (21) Plaintiff has not filed a 1983 action. Plaintiff can seek relief under the RLUIPA for deprivation of rights.
- (22) As stated previously, Plaintiff has exhausted his administrative remedies.
- (23) The Complaint falls well within the statute of limitations as defined in Title 28 U.S.C. Section 1658.
- (24) Defendants have failed to show that a 1/2 inch beard poses a security risk thereby leaving the allegations uncontroverted.

For the foregoing reasons, Plaintiff moves that the relief be requested by the Defendants be denied in all respects, that the injunction be continued, this case to proceed and for all other relief to which he may be entitled.

Respectfully submitted,

/s/ Gregory Holt
 Gregory Holt #129616
 (Abdul Maalik Muhammad)

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

GREGORY HOLT,	:	Docket No. 5:11-CV-
A.K.A. ABDUL MAALIK	:	00164-BSM
MUHAMMAD,	:	
	:	Little Rock, Arkansas
PLAINTIFF,	:	January 4, 2012
	:	
VS.	:	9:57 A.M.
	:	
RAY HOBBS, ET AL,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF HEARING ON MOTION
FOR TEMPORARY INJUNCTION
BEFORE THE HONORABLE JOE J. VOLPE
UNITED STATES MAGISTRATE JUDGE

[2] APPEARANCES:

For the Plaintiff:

Mr. Gregory Holt, Pro Se
A.K.A. Abdul Maalik Muhammad
ADC # 129616
Cummins Unit
Post Office Box 500
Grady, AR 71644-0500

For the Defendants:

Ms. Christine A. Cryer
Arkansas Attorney General's Office
Catlett-Prien Tower Building
323 Center Street

Suite 200
 Little Rock, AR 72201-2610

[3] INDEX

PRESIDING

DIRECT CROSS REDIRECT RECROSS OFFICIAL

WITNESS FOR PLAINTIFF:

Gregory Holt,
 a.k.a. 7 14
 Abdul Maalik Muhammad

WITNESSES FOR DEFENSE:

Gaylon Lay	32	45	63	63	61
Grant Harris	64	72	76,80	80	77

EXHIBITS: IDENTIFIED RECEIVED

Defense Exhibit No. 1	71	71
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[4] PROCEEDINGS

(Call to order of the Court.)

THE COURT: Good morning. We are here in the matter of *Gregory Holt also known as Abdul Malik* [sic] *Muhammad v. Ray Hobbs*, director of Arkansas Department of Correction, and others. This is case 5:11-CV-164. And we are here for a hearing on the motion for a temporary injunction filed by – do you go by Mr. Muhammad?

THE PLAINTIFF: Yes, sir.

THE COURT: All right. Filed by Mr. Muhammad in this case. Initially, I had looked at the motion and looked also at the Eighth Circuit precedent in *Fegans v. Norris*, and I thought that it should be denied. Judge Miller looked at it and sent it back to me. And having a second look at it, I think Judge Miller is right, that it requires an individual and particular analysis on the motion. So I was incorrect, and denied it based on not hearing any other facts than what was pled and comparing it to the case in *Fegans*. So I set it for a hearing, and here we are. And welcome. Thanks to our Arkansas Department of Correction transportation folks always getting everybody here on time, on target, we appreciate it so much.

And I guess it's your motion, Mr. Holt.

Ms. Cryer, will you tell me who is at the table with you? I see Mr. Hobbs, is that –

[5] MS. CRYER: Actually, Your Honor, Mr. Hobbs is not here. I have Warden Gaylon Lay from the Cummins Unit.

THE COURT: Okay. Warden.

MS. CRYER: I have Assistant Director Grant Harris with the Department of Correction. Mr. Hobbs is not here today.

THE COURT: And I'm sorry, I thought – I had recognized Mr. Lay – or Warden Lay from another hearing a while ago, it's been a while since I've seen you all. But, welcome, thank you.

Do you have any witnesses, Ms. Cryer?

MS. CRYER: Your Honor, I do have a number of other individuals who are here. I do not know whether they will be called to testify or not. But I can go ahead and identify them for the record if you would like for me to do so.

THE COURT: Sure. Why don't you do that, please.

MS. CRYER: Okay. We have Deputy Warden Andrea Weekly from the Cummins Unit. I'm sorry, I'm trying to sit down so you can see.

THE COURT: Sure. That will be fine. Thank you.

MS. CRYER: We have Chaplain Wilson Bates from the Cummins Unit.

THE COURT: Chaplain.

MS. CRYER: We have Chaplain John Wheeler, who is the head chaplain, am I –

[6] MR. WHEELER: Administrative.

MS. CRYER: Okay. Administrative for the Department of Correction. And we also have Chaplain Amin, who is the Islamic coordinator for the Department of Correction.

THE COURT: All right. Very good.

And, Mr. Muhammad, did you have any witnesses at this time or that you plan to present?

THE PLAINTIFF: No, sir.

THE COURT: All right. Well, very good. I mean, Mr. Muhammad, I've read your pleadings and your motion and, at this point in time, it's your obligation to kind of move forward, if you will, and tell me a little bit about your claim. Give me some facts on your request with the Department of Correction with regard to your exemption and just kind of lay some foundation. Ultimately, it's going to be, I believe, up to the defense to provide a reasonable basis for denying the exemption. But I want you to go ahead and lay out your facts for the record, if you would.

THE PLAINTIFF: Do you want me to come to the lectern or just –

THE COURT: It's whatever is your pleasure. You have a bunch of documents there. Do you need to refer to your documents?

THE PLAINTIFF: I have the ones – the main ones that I intend to refer to, I've already pulled them out of the file [7] along with some stuff from the Koran that details to help you get a better understanding of where I'm coming from on this particular motion here.

THE COURT: Well, why don't you come forward then, sir. If you want, why don't you come – you can have a seat here.

THE PLAINTIFF: Okay.

THE COURT: Since you're going to be a testifying witness, and I'll put you under oath as well.

GREGORY HOLT, A.K.A. ABDUL MAALIK MUHAMMAD, PLAINTIFF HEREIN, SWORN.

DIRECT EXAMINATION

BY THE COURT:

Q All right. Mr. Muhammad, tell me how old are you, sir?

A 36.

Q And where did you grow up?

A Little Rock.

Q And how long have you been incarcerated?

A This time, I've been locked up two years.

Q Two years. What kind of sentence are you serving?

A Life, plus 40.

Q And what was the conviction?

A Aggravated residential burglary and domestic battery, first degree.

Q Out of Pulaski County?

[8] A Yes, sir.

Q All right. And what unit are you presently in?

A Cummins Unit.

Q And tell me what led to the filing of your complaint and then your motion?

A As a – I'm what's called a Saliba's Muslim. Okay. I believe in following the Sabbath of the Prophet Muhammad, which is the way of the Prophet Sunnah, things of that nature. And one of the areas of the Sunnah that's addressed by the Prophet Muhammad, sallallahu alayhi wa sallam, or peace be upon him, is that one of the characteristics of a Muslim or Al-Fitra is to keep the mustaches short and leave the beard as it is. As I pointed out in my memorandum of law, I believe it's in this – in the complaint itself, I referred to a Hadith known as Sahih Al-Bukhari. Sahih Al-Bukhari is one of the leading collections of Hadith in the Muslim world. It's recognized as a sound Hadith, which is the sayings or the works or the practices the Prophet Muhammad, how he – how he did things, and it was narrated by companions who were with him or who were considered legitimate sources of information as it relates to the way the Prophet Muhammad did things. And then Sahih Al-Bukhari, Hadith 7 – or Volume 7, Hadith No. 5893, the Prophet Muhammad there laid out that there are several characteristics of Al-Fitra. Some of those characteristics are you shave the underarm hair, you shave the [9] pubic hair, you clip the nails, but you also clip mustaches short, leave the beard as it is.

When I came to the department of – Arkansas Department of Correction, I wasn't aware of what their grooming policy was until I came to Diagnostic. When I got to Diagnostic, I found that you could only have a mustache that does not extend past the corners of the mouth. At that point, I informed that – the correctional staff there that as a – as a devout Muslim, that it was my belief that you should grow your beard out. I was informed that if I didn't comply, I would be given – and shave, I would be given disciplinaries. I did receive several disciplinaries. And after I saw how the Department of Correction practices their penalties, which is called progressive penalties, which they can come and give one – one officer can give you an order to shave, and then if you refuse, he'll get you – write you a disciplinary, another officer can come right behind him, give you an order to shave, and if you refuse to shave, he can write you a disciplinary, and it can go on and on to the point that you're in the hole – in the hole a year, two years, three years. So, at that point, I saw really there was no way out but to go ahead, as much as I hated to, and to shave and violate my beliefs.

I was doing some legal research this past year, in 2011, on some cases from other circuits where the grooming policy had been challenged, and I came across one out of the Ninth [10] Circuit, the *Mayweathers* case, in which the Muslims in the Department of Correction in California sued over the very same thing that the ADC practices. In fact, the California Department of Correction practices some of

the exact same things that the Arkansas Department Correction does. In that particular case, the brothers there argued for a half inch beard. So what I did was, I went ahead and filed through the Administrative Remedy process at Cummins Unit, I filed a grievance asking for that the grooming policy be set aside and that I be given a religious exception exemption to the grooming policy.

Warden Lay – Warden Lay refused. His response was that it was the Department of Correction's policy that the reason that they don't allow you to grow any facial hair other than a mustache is because you could hide contraband or weapons in the facial hair. And my argument to that is that with a half inch beard, you can't hide anything at all in the facial hair. You can hide it more easily in the head hair. As you can you see here, I could easily hide a weapon of some kind in the head hair, but the Department of Correction doesn't require you to shave your head. Their policy on the head hair is that you can only grow the sideburns, they can't go past the middle of the earlobe, and it can't go past the middle of the nape of the neck. Other than that, they don't have a policy as to how thick it can be on the top. In fact, it is a common practice [11] at the Cummins Unit to transport weapons and contraband in the head hair. I know this for a fact.

So after the policy – after my grievance was denied all the way up to Mr. Larry May, I filed this action basing it on the *Mayweathers* case out of California.

The issue is, is whether or not a half inch beard would be able to be – you'd be able to hide anything in it. I am not pushing for an unrestricted beard growth. I am not challenging the hair – the head hair policy. All I'm asking is that I be allowed to grow a half inch beard based on my religious beliefs, because it would – it would contribute to the safety and good order of the institution, it would not be a threat to the institution because I've been walking in the hallways up until recently with a half inch beard on my face and there hasn't been any problems. I don't foresee any – I don't see how there could be any problems now with allowing me to continue to grow it at this rate, which is getting close to a half inch, and allow me to do that based on my religious beliefs.

Q What's the policy now, is it a quarter inch?

A They – the policy still is that they can only grow a mustache that cannot extend past the corners of the mouth. They allow for dermatological reasons, if you have a skin condition, they allow you to grow up to a quarter inch beard and then use the clippers to shave it after it gets – it gets [12] to a quarter inch length.

Now, my argument on that is, is that if – if a quarter inch beard does not pose a security threat, I don't understand how a half inch beard could.

One is for dermatological reasons. One is for religious reasons. But I don't understand how it could be a security threat, because you cannot hide anything in this, you can see everything on the face.

Q You have a beard. What's the current – how are you able to have a beard right now?

A I was allowed to based on the restraining order that – or the injunction that Judge Miller entered.

Q Okay.

A I made an agreement with Warner – Warden Warner and Major Robertson because they asked me how long are you going to let it grow, I said because I had asked for a half inch, I was going to keep at a half inch, and that's what I have strived to do at this point.

Q All right. All right. Do you have anything further? I mean, that pretty well lays out what I need to know. Do you have anything further to add?

A Well, there is one thing, because I know in the Muslim world, it is not – not every Muslim believes that it is a requirement that you grow the beard, and some Muslims believe that the Hadiths as it relates to the Prophet are only [13] advisory or something that you can choose to do if you want to. But I turn your attention in the Koran to Surah 4, Ayah 80, and in that particular Ayah, it says [indiscernible], he who obeys the messenger Muhammad, sallallahu alayhi wa sallam, has indeed obeyed Allah, but he who turns away, then we have not sent you Muhammad, sallallahu alayhi wa sallam, as a watcher over them. Which in that statement there, in that particular Ayah, it refers to the fact that something

that the Prophet Muhammad did, that Muslims should do, and if the Prophet Muhammad said to do it, if you don't do it, you're disobeying Muhammad and therefore you're disobeying Allah [indiscernible] Allah.

THE COURT: And I don't think there is any burden on you to prove under RLUIPA that – I mean, I don't think you have any burden of proving your religious needs, I don't think. Am I correct on that, Ms. Cryer? I think RLUIPA is pretty wide open, is it not?

MS. CRYER: It is, Your Honor, and because there is no mechanism for us to really challenge whether or not his belief is sincerely held, we're not standing here today challenging whether or not he believes, you know, in the various prophets or whether or not he follows the Koran.

THE COURT: Okay. And like I said, I don't think the law impedes that on him either. So that's fine, Mr. Muhammad, your point is well taken, but there's no burden on you to [14] prove that.

All right. Now I bet Ms. Cryer has some questions of you and I'll allow her to cross examine you unless you have anything further that you wanted to add.

THE PLAINTIFF: I don't at this point.

THE COURT: Okay. Thank you, sir.

MS. CRYER: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. CRYER:

Q Mr. Holt, I may jump around a little bit, and I apologize if I do. And I also apologize for calling you Mr. Holt if I'm to call you Mr. Muhammad. Okay. Let me ask – and again, I may skip around a little bit, the *Mayweathers* case that you are referring to is out of the Ninth Circuit case and was that a 2004 case?

A Yes, ma'am.

Q Okay. Now you entered the Department of Correction in July of 2010; is that correct?

A Yes, ma'am.

Q All right. Had you ever been incarcerated in the department of – Arkansas Department of Correction before that date?

A Not physically incarcerated. I had state time that was run concurrent with fed time.

Q All right. But this was your – July 2010 was your first [15] time actually entering the facilities of the Arkansas Department of Correction?

A Yes, ma'am.

Q All right. Now, let me ask, with regard to practicing your religious beliefs, there are other ways that you are entitled and allowed to practice your religion, correct?

A At Cummins Unit?

Q Yes.

A It's very limited.

Q Okay. You can pray, correct?

A I can pray.

Q Okay. You have a Koran, correct?

A Yes, ma'am.

Q Okay. And, in fact, you've had the Koran since you left the Diagnostic Unit and were transferred to the Cummins Unit in July of 2010, correct?

A Yes, ma'am.

Q Okay. You are allowed to request books or religious materials from various distributors, correct?

A No, ma'am.

Q Okay. You're not allowed to request books or materials at all from any type of distributor?

A I had to go through a grievance process just to get some books, because the chaplain tried to tell me that they didn't have any Islamic books and I wrote a grievance and a sergeant [16] went down there and came back with a big stack of Islamic books.

Q Okay. You were provided a mailing address of a distributor in New York by Chaplain Banks earlier this year, correct?

A For the purposes of getting a Koran, yes, ma'am.

Q Okay. You're able to request a pork free meal, correct?

A Yes.

Q Okay. You are able to observe the religious holidays that you choose, correct?

A That's correct.

Q Okay. You're able to participate in Ramadan?

A Yes, ma'am.

Q All right. You are able to or entitled to have a spiritual advisor, correct?

A Yes, but I don't get access to them.

Q Okay. You are – can you correspond with one if you have a spiritual advisor?

A I've attempted to. My correspondence is not answered.

Q Okay. You were able to seek a name change in the Pulaski County Circuit Court, correct?

A Yes, ma'am.

Q All right. And you are also in possession or have been in possession of a prayer rug, correct?

A Yes, ma'am.

[17] Q Okay. So, would you now agree with me that there are ways, other than observing whether or not you are going to shave your beard, that you are entitled and allowed to participate in various forms of adhering to and participating in your religion?

A That's correct, but I want to add – I want to add that those things alone – you have to do everything with a totality of the circumstances. If the Prophet Muhammad commanded that a Muslim is to clip his mustache short and leave the beard as it is, it is incumbent upon a Muslim to do that. If he fails to do that, it is my belief, and according to the Koran, that he is disobeying the Prophet Muhammad, sallallahu alayhi wa sallam, and he's also disobeying Allah [indiscernible] Allah.

Q Okay. You would agree with me that that is your interpretation, correct?

A No, that is not my interpretation. That's Hadith.

Q Okay.

A That – that is sound Hadith. That's why I put that in this complaint and keep referring to it is because of the fact that it is sound Hadith. The Hadith is important to follow because we are to emulate the Prophet Muhammad, sallallahu alayhi wa sallam, as much as possible. And if the Prophet Muhammad said to do it, we are to do it. The Hadith says so. The Hadith is sound. And I – and I try to strive to emulate [18] the Prophet.

Q How long have you been of the Muslim faith?

A Nine years, going on ten.

Q And when you were charged with the most recent crimes that you entered the Department of Correction for, were you a practicing Muslim?

A Yes, ma'am.

Q Okay. And I believe in your pleadings that you have acknowledged that the Arkansas Department of Correction has a legitimate penological interest with regard to having a grooming policy, correct?

A Yes.

Q Okay. You just disagree with whether or not it should apply to you and whether or not you should be limited with the length of your beard, correct?

A I'm going to put it like this to you, I want to be protected, too, because I'm an inmate in the Department of Correction. There are other – there are other ways that people hide weapons on them. The facial hair alone is – is not where people most of the time are going to hide weapons.

Q That's because they're not allowed to grow facial hair, correct?

A That's correct.

Q Okay.

A But they could hide them someplace else. They could hide [19] them on the clothes, you know, that type of thing. Having a half inch beard – having a half inch beard, again the issue is whether a half inch beard is going to cause a security concern in the Department of Correction. I have proven by walking the halls of Cummins Unit for almost three months with a half inch beard that there is no security concern. There has been no – been no issues, as far as I know, complaints, other than staff not liking the fact that I have a beard. Other than that, there has been nothing on my end for having done anything like that.

Q Okay. So your position is that because you have chosen not to hide any – or attempt to anything in your beard, that is not – it does not create a security concern?

A A half inch beard would not create a security concern. More than one court has ruled on that.

Q Where did you come up with the half inch requirement?

A From –

Q And I ask this because in your memorandum of law you say that your belief is that you should leave the beard as it is.

A That's correct.

Q So I'm trying to figure out how do you justify now coming up with a half inch beard? Is it because –

A As –

Q – of the Ninth Circuit case law?

A As – as the Prophet Muhammad again has stated in the [20] Hadith that for every travail there is two escapes, if – if you are in a position – if a Muslim in a position where the lesser of two evils are involved, it is permissible to go with the lesser of that evil. If the evil requires that you observe – to a certain extent if you are observing the – the – with your intention, which is called your niyyah, to grow the beard, if it is your intention to leave it uncut, then according to the Hadith, the 40 Hadith Qudsi, it states that – that if you intend to do a good deed, but don't do it, it's still credit to you as a good deed. So if I have – to a certain point here, have made an effort to comply with the dictates of the Prophet Muhammad, sallallahu alayhi wa sallam, then I have done what I'm supposed to do. And, yes, the half inch beard did – did come in to play in that Ninth Circuit case.

Q Okay. So you arrived at the half inch beard requirement based upon the Ninth Circuit case?

A Because it seemed reasonable, yes.

Q Okay. And I believe that you also just said that based upon your – based upon your beliefs, that if you try to do the right thing, but are not allowed to do it, that that's still acceptable, correct?

A That's correct.

Q Okay. So if you tried to grow a beard of any length, and the Department of Correction said no, as far as your religious [21] beliefs go you're still okay because you attempted to comply with that, but you were stopped by the laws of the Department of Correction?

A If it was under compulsion, to a certain extent, yes.

Q Okay. Now when you filed your motion for a temporary restraining order, you filed that in June of this year, correct?

A Yes, ma'am.

Q Okay. And you had not received a disciplinary for failing to comply with the grooming policy since the previous July, correct?

A That's correct.

Q All right. And at some point after you received those disciplinaries back in July of 2010, you acknowledged at one of those disciplinary hearings that you had been following other law, but that you acknowledged that you were now incarcerated in the Department of Correction, that you needed to follow the laws of the Department of Correction?

A That's what I stated at the time.

Q Okay. What changed? Between July of 2010 and June of 2011, what changed?

A Several things changed.

Q Okay.

A Do you want me to go into them?

Q Please.

[22] A Given the stuff that's happened in the Muslim world, the – the occupation of Afghanistan, Iraq, places like that, when I see brothers being murdered in those countries, when I see them dying for this type of stuff, at this point it – it comes – it makes me want to continue to try to follow the religion as much as possible, because there's brothers dying for this very thing over there. They're dying for these beliefs. And for me to sit over here because some prison administration thinks that, oh, well, you know, we don't think he should grow a beard because it's a security issue, never mind what his religious beliefs are, we're not going to try to accommodate his religious beliefs at all as it relates to his belief in growing the beard, at that point my – you know, I'm – I believe I have every right to challenge that. And that's what I've done.

Q You don't have any case law with you or anything showing that the *Fegans* case is no longer good law, do you?

A That it's no longer good law?

Q In the Eighth Circuit? Yes.

A Not that I'm aware of.

Q Okay.

A My – but what I would like to point out again is that the problem with the *Fegans* case was that Michael Fegans argued for unrestricted beard and hair growth. I am only arguing for a half inch beard because that right there is – is still [23] contributious to the security and good order of the institution. There is no problem with a – somebody growing a half inch beard. In fact, in some other cases, the courts have ruled that – that the – that correction personnel can exercise common sense and visual inspection to determine whether or not there is a – a weapon or any type of – any type of contraband there, that they're trained to do this.

And also, the issue is, is that since it's been argued that having a beard can help alter your identity should you try to escape, I would be willing to go so far as to say that – that the Department of Correction can practice what other, like the New York Department of Correction does, when they come in, they – you take a clean shaven photo, and then they allow the – they allow them to grow I believe in New York it's a one inch beard, they take another photo of them at that point, and that way they have them for comparison purposes. And, in fact, there – it's been stated in some of these cases that – that the issue of the weapons is not something that's that big of an issue as far as putting it in the beards, that they're using – they can hide them anywhere else on the body.

Q They can also hide them – if allowed to wear a beard, they can also hide them in a beard?

A If they allow the beard to grow unrestricted. You cannot hide anything – again, Ms. Cryer, you cannot hide anything in this beard. You can't stand there and tell me you can hide [24] something there.

Q You might not be able to, Mr. Muhammad, but other inmates might be able to if they were allowed to grow a half inch beard?

A A half inch beard, this – this right here is getting close to a half inch beard. You can't even barely hide a razorblade in it, Ms. Cryer.

Q Well, actually, let's talk about that for just a little bit. When is the last time that you received a haircut?

A When is the last time I received a haircut?

Q Yes, sir.

A The last time I got in the barber chair was about three weeks ago.

Q How did that go?

A I went down there to get the beard within compliance of what I said I would wear a half inch beard on, because it was getting a little scraggly, so I was getting in the chair to have it trimmed up, and the barber tried to shave it nearly all the way off.

Q What happened then?

A After he was told twice not to do it.

Q What happened then?

A At that point, I informed – I informed Warden Warner and Major Robertson that – that I had a problem with the man and that he couldn't come around me anymore.

[25] Q What exactly did you say with regard to you have a problem with him?

A I said I was at war with him.

Q Okay. What does that mean to say that you're at war with him?

A I have – I have an issue with him, but I – I went on to explain to Captain Tate when he asked me what I meant by that and I wrote down in the witness statement that I did not intend that as a threat, that was not a threat, it was spoken in the heat of anger, I was upset at my beard being shaved off – nearly all the way off after I told the man three times that I had a court order allowing me to grow a half inch beard, to trim it down to a half inch, and he tried to shave the whole thing off.

Q So you don't want to be shaved or cut by that barber again, correct?

A That's correct.

Q What happens if the next barber tries to cut your beard below where you want it to be, are you going to be at war with that barber as well?

A I would be upset with him, but I have to – I have to – I have to temper my viewpoints at times because I do hold very stringent beliefs when it comes

to the beard situation. When it comes to this religion, I hold it very, very seriously.

Q So I guess my question is are you going to threaten the [26] next barber that cuts your hair or your beard in a way that you're not happy with?

A There was no threat there. As I said, I did not intend it as a threat, I did not threaten that man. All I said was I was at war with him. You can take those choice of words to mean how you want to because –

Q Did you mean that you thought he was a friendly, swell guy and that that's why you were saying you were at war with him?

A All I said was – and the reason that I had an issue with him was because he tried to cut my beard off after I told him twice not to.

Q And again, that – the barber was an inmate, correct?

A Yes, ma'am.

Q Not an officer?

A Right.

Q Okay.

A I would point out that the officer that was on duty that day took me down there to the barber chair and told the barber – told the barber this man needs a shave. And I told him when he started getting the clippers out, I told the man cut my beard down to a

half inch length, I have a court order that says I can do so. And instead, he goes and takes nearly the whole thing off.

Q Again, the inmate does, not the officer, correct?

A That's correct.

[27] MS. CRYER: Okay. Your Honor, I don't believe at this time I have any more questions of Mr. Muhammad.

THE COURT: All right. Sir, you may stand down. Thank you.

THE PLAINTIFF: All right.

(Witness stands down.)

THE COURT: Sir, did you have any other evidence that you wanted to present at this time? Because now what I believe should happen is I believe that it's the defendants' burden to show that – well, essentially, answer the question of whether security can be achieved while not substantially burdening your – is it impossible for them to achieve security without substantially burdening your free exercise of religion, so, I mean –

THE PLAINTIFF: There is one other thing, Your Honor, I would like to bring out. I made an effort before we came here today to deal with this issue about whether an injunction was necessary or not. I wrote a letter to Ms. Cryer and informed her that I

would be willing to stay in ad seg, to stay in administrative segregation, and as long as I'm allowed to grow that half inch beard, you know, I – you know, I wouldn't be walking the hallways, I wouldn't be doing anything like that, so, therefore, it wouldn't be an issue out in the population, if that was that their position. I offered to try to negotiate that. But I heard nothing back, so I thought I [28] would let you know that – that I did try to do that.

I would also point out to you that even though there has been a restraining order in place, that I've still been subjected to harassment on the part of ADC staff at various times. In fact, being locked up in ad seg under investigation on the grounds that Major Robertson stated that I had been in the law library and had typed a order up on the law library computer. When I told him that the order was valid, he tried to state that I had forged Judge Miller's signature. Even though I was let out of the segregation several hours later, after it was determined that the order was in fact valid. Going down the hallway – I even had to go and ask Warden Warner for assistance because I would carry the order in my pocket because certain shifts weren't notified that the order was in effect and that I was allowed to wear the beard, so officers and people in positions of authority would try to harass me and threaten to lock me up for having the beard and would say they didn't care what the order said, they didn't care that – if it came from a federal judge or not, this was the Department of Correction, this wasn't the feds. So I had to go again

to Warden Warner and asked to – for him to re – to put another memorandum out to tell these people to leave me alone because it's a valid order. I couldn't even go to breakfast in the morning times because I was being harassed by staff in the hallways. So I thought I would – I was bringing [29] it out to you that – you know, that an injunction really is needed on this. It really is, because of the fact that, as you can see, this beard right here – this beard right here, you can't hide anything in it. It is – it is a – it is a belief of mine that you should grow it out, the state would not be harmed by – by you continuing that injunction. If the injunction only applies to me and not the rest of the ADC, again, I don't – I don't see how there would be a problem in that regard either, because if I'm the only one that's allowed to – that's allowed to do this, then I don't see that there's going to be 16,000 inmates walking around the ADC with half inch beards on their faces.

THE COURT: Well, let's let the defense proceed. You're getting a little bit ahead, you're kind of making your argument in closing. And so, let me hold off on that.

And on the ad seg, wasn't that proposed by the *Fegans* – in that case, was that the – I thought it was proposed as an alternative in *Fegans* and the Eighth Circuit rejected that as unduly burdensome on the ADC.

MS. CRYER: I was going to say, Your Honor, I would like to respond to what Mr. Muhammad

said and it also may be necessary that I question him a little bit further based upon what he has just testified to.

With regard to the ad seg, I mean, Mr. – first of all, Mr. Muhammad placed himself, requested to be placed in ad [30] seg. It was not a matter of the Department of Correction placing him there. He did send a letter. I did receive it last Friday. Due to the holidays, he has not received a response back for what we consider to be a settlement offer.

I think that based upon other cases that have been decided recently in the Eighth Circuit with regard to housing someone in ad seg for an unlimited amount of time, I don't believe the Department of Correction – that that's something that they could seriously consider doing without facing potential lawsuits of Mr. Muhammad being housed indefinitely in administrative segregation. So I don't think that's a fair –

THE COURT: It was proposed in *Fegans*. I know I've read that. It was proposed in *Fegans* and the Eighth Circuit has rejected that because it says:

“This option, like the others proposed by *Fegans*, would allow accommodation of religious observances to override other significant state interests, we agree with the district court that AD 98-04 withstands scrutiny under RLUIPA.”

So, I mean, that was proposed before and the Eighth Circuit, they rejected that over the objection of the defense.

[31] But your point is well taken, Mr. Muhammad, and again, I want to – I think, you know, if we can – the issue here, you know, really is so closely related to the merits of the case, and that's not why we're here to ultimately have a disposition of the case. But, I mean, to me, and ultimately it boils down to whether or not the – whether or not we can have the ADC meeting their security objectives without substantially burdening your religious freedom. I mean, that's it in a nutshell. And so it really is incumbent on them – the way it works, Mr. Muhammad is that they have to ante up now, they have to say we can't do it, we can't allow you to grow this beard because of whatever the reasons are. I know what the reasons were in *Fegans*. I'm interested to hear what the reasons are now. And then we'll just have to, you know, see what happens. I mean, I'm going to hear from them right now. But I want to stay focused on that line of thinking here, because that, to me, is the critical part of this, what are the security concerns that they have. And again, you know, Mr. Muhammad, the law, as you know – I mean, you've obviously read these cases – but, you know, in general, the law is very much restrictive on me getting involved in prison administration. Okay. And frankly, I mean, that's – you know, they don't get involved in the judging business and I don't get involved in the prison administration business. Okay. And there's a

reason for [32] that. You know, I'd be a lousy prison administrator. And they have the experience and the knowledge, and, you know, I'm sure a lot of times you disagree with the way they do things, but the bottom line is they're the ones trained in doing that and I'm not entitled to, under the law, to meddle in prison administration unless it somehow infringes on your constitutional rights. And so, I'm – what I'm trying to say here is the thrust of this has to be on what are the security concerns, can they achieve concerns and still allow you to grow a half inch beard or not? And so, that's really where I'm focusing. Okay?

And I don't know, you know, what the answer is, but we haven't heard from Ms. Cryer and her folks. So let's hear what they have to say. And you'll have every opportunity to cross examine them and build your record. And then we'll see where the chips fall. Okay?

THE PLAINTIFF: Okay.

MS. CRYER: Thank you, Your Honor. I'd like to call Warden Gaylon Lay.

GAYLON LAY, DEFENDANTS' WITNESS,
SWORN.

DIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Lay, would you state your full name for the record, please?

A Rex Gaylon Lay.

[33] Q And where are you currently employed, Mr. Lay?

A Arkansas Department of Correction, Cummins Unit.

Q And how long have you been the warden at the Cummins Unit?

A Going on nine years.

Q And just to make sure, you are aware today that we are here with regard to inmate – I'm going to call him Gregory Holt, because I believe that that's the pleading that the name was filed under, but he's also going by the name – last name Muhammad?

A Yes.

Q That we are here with regard to his request to ask this Court to allow him to be able to grow a one half inch beard; is that your understanding?

A Yes, ma'am.

Q Okay. Mr. Lay, let me just start off by asking you do you have any problems or concerns with inmate Holt or inmate Muhammad being allowed to grow a one half inch beard?

A I do. Yes, ma'am.

Q Okay. Would you please explain to the Court what some of your concerns are?

A My concerns revolve around security. A person can quickly alter their appearance if they're allowed to grow a beard, they escape while they're out on a court run or from a facility or whatever, and immediately shave. They alter their appearance. There are some differences, for example, if you [34] look at Mr. Muhammad's beard, his is rather thin on the sides and kind of thick around here, he may or may not be able to hide something as simple as a homemade dart, I'll just use that for an example, we have over the years found some of those at another facility, but other people, individuals, are different, the next guy may have a half inch beard that's full and – full face. I mean, there are just a large number of variances in different people when it comes to facial hair.

Also, you're – I don't know how you would – I don't know how you would manage that if people were allowed to grow a half inch beard. Okay. How are you going to measure that on a consistent basis? How are you going to keep down conflict?

At the current time, the only person I'm aware of, out of over 15,000 inmates, that has a legal order to grow a beard – now, there are some medicals for a quarter inch beard – but to grow a half inch beard is inmate Holt. And as you can see from his own correspondence, he's already threatened the barber over the manner that he cut his hair. Can you imagine trying to manage that for 15,000 people?

Q Okay. Well, even if we're not talking about other inmates, let's discuss inmate Holt. How often are inmates allowed to go and to get a haircut and a shave?

A Weekly, at least.

Q Okay. Let's say –

A If they're in general population, they are actually issued [35] a razor. They keep it in their personal property.

Q All right. And what about Mr. Holt or Mr. Muhammad who has placed himself in administrative segregation?

A Weekly.

Q Okay. What if any time during that week, let's say, Mr. Muhammad chooses to go every two weeks or every three weeks to the barber, do you have any concern as to how that shaving process or that is going to go based upon past experience with Mr. Holt and what happened with the barber earlier this – earlier – or last month, in December?

A Well, certainly, I do. I mean, if – if Mr. Holt sits in a barber chair and says I want a half inch trim, which would be in compliance with the order he currently has, I guess, how is that barber going to determine, okay, you know, this is exactly a half inch, it's a little longer, a little shorter? Even if it's exactly what he ordered, are they going to be in agreement

over that? And you've seen the result and the documentation of what occurred that one time.

Q And, to your knowledge, what was the documentation and what did occur with Mr. Holt and the barber in December of 2011?

A According to the inmate barber and the officer that was there, Mr. Holt asked if he could go to the barber chair, as the officer was making his rounds for haircuts, and get a trim. And the officer took him to the barber chair, as he did [36] everybody else that requested it on the wing. And when the guy – when he sat down, according to the inmate barber, he never told him anything about a particular length or anything until after he had shaved him with the clippers, and he said then Mr. Holt acted as if he was angry, objected, said, you know, I'm supposed to be able to keep a half inch beard. And the barber said I wouldn't have had a problem with that, or I would have at least asked staff if that was the case, had he mentioned it. But the inmate said he never mentioned that until after the fact.

Q When an inmate is receiving a haircut or a shave from an inmate barber, is security staff located inside that area or around that area?

A In segregation, yes, the officer escorts him there and stays in the vicinity until he escorts him back to the cell.

Q How far – you just said stays in the vicinity, what is the vicinity?

A Within three or four feet.

Q Okay. Would you have any concern with security needing to be present or even additional security needing to be present every time inmate Holt goes to the barber chair?

A After this particular incident, yes.

Q Okay. Any concerns about inmate Holt being around the inmate barber that gave him, for better words, the wrong cut of the beard last month?

[37] A Certainly. I mean, the statements that he made were obviously a threat. We perceived them in that way and have taken precautions not to allow that barber around inmate Holt again.

Q Okay. Can you do that every time inmate Holt has a disagreement with a barber, can you just switch barbers out?

A No, ma'am, I think eventually I'd run out of barbers if I tried to satisfy what Mr. Holt wants or Mr. Muhammad.

Q And again, with regard to the length of the beard that he is requesting, how would you monitor or how could your unit or the department, for that matter, monitor how long exactly his beard is each and every day?

A I'm not sure. Someone would have to show me how to do that.

Q Okay.

A I mean, you could start, I guess, with a particular clipper guard that's a particular length, but depending on the individual, in two, three days, how frequent is he going to have to trim that and how are we going to know that? You see them going down the hallway, but you obviously can't stop and pull a tape measure on everybody's beard, I wouldn't think.

Q Let me ask with – Mr. Holt mentioned something about not being able to hide contraband in his beard. Do you know, have you observed whether or not inmate Holt has attempted to put anything in his beard to see if it would stay or if it would [38] fall out?

A I have not, no, ma'am.

Q Are there any forms of contraband that you, as the warden, would be concerned about possibly being placed in a beard that was a half inch long?

A Certainly. And again, depending on the individual, some individuals would have more ability to hide something than others, depending on how their facial hair grows, the thickness of it, et cetera, and that sort of thing.

Q What types of things?

A Anything from razor blades to drugs to homemade darts. I mean, there are a wide variety of things. Those are just what I think of off the cuff. Inmates are pretty creative and they have 24 hours a day to think about things like that.

Q Okay. Well, what about Mr. Holt's statement that he can't hide anything in his beard – I don't know how else to ask this – but is that good enough for you?

A No, ma'am, I don't believe – I don't believe it would be.

Q Does that provide you with comfort knowing that Mr. Holt is not going to hide anything at any time or attempt to hide anything at any time in his beard?

A It does not, no.

Q And is that opinion based on – what is that opinion based on?

A Based on experiences and – and experiences in dealing [39] with inmates over the last 36 years.

Q And with regard to an inmate changing his appearance, can an inmate change his appearance other than shaving or growing a beard?

A I suppose. I suppose they could shave their head, but that's just one more avenue that you've added to the possibilities.

Q And I believe you heard Mr. Holt's testimony that he knows for a fact that inmates hide a lot of contraband in their hair on top of their head?

A Yes, ma'am, I heard that.

Q Are you concerned as the warden at the Cummins Unit about contraband being passed along from inmate to inmate at your unit?

A Certainly, I am. I mean, we spend an astronomical number of hours conducting searches, housing area searches, random individual inmate searches, all sorts of things. And still, occasionally, you're going to find contraband.

Q Over the years, and I'm going to use the year 2006, and I'm picking that year because that was the year that Judge Moody issued his ruling in the *Michael Fegans* case, from 2006 to the present time, based upon your knowledge and experience, has the amount of contraband that inmates have been caught with or discovered with at the Cummins Unit, has that decreased at all?

[40] A No, ma'am. As a matter of fact, it has increased. The population and the type of inmates we seem to be getting from society now are more violent, they're younger, there are just a gambit of things that make them different than the population we were used to dealing with in the 70s and 80s.

Q And what if you – what if you have an inmate who is allowed to do something special, that he is allowed to do something that other inmates are not allowed to do, such as grow a beard, even if it's a restricted length beard, but is allowed to grow a beard, do you have any security concerns for the safety of that inmate?

A It could possibly make him a target of other inmates. Yes, ma'am.

Q And, Warden, let me ask, the current policy of the Department of Correction, the Court made reference to the policy 98-04 earlier with regard to the policy that was in the *Michael Fegans* case, to your knowledge, is that the same policy that applies today with regard to the grooming policy?

A Yes, ma'am, that's not changed to my knowledge since –

Q Does the – sorry.

A – that time. I'm sorry.

Q Does the grooming policy make any allowances for any type of religious exemptions?

A No, ma'am.

Q Okay. As warden of your unit, have you personally done [41] anything or have you instructed anyone to prevent inmate Muhammad from having religious articles or materials with him that he feels are important in order to facilitate his religious studies?

A No, ma'am. There was one thing that occurred, an individual tried to send him a Koran through the mail, and we searched the inmate's property and – and discovered that he had three in his possession currently, and it's against policy for it to come from an individual, he would have to order it

from a bookstore or a business that provides that type of literature.

Q What happened to the Koran that was sent to you from the outside individual?

A We mailed it back to the individual that sent it.

Q Okay. And was that based upon your desire for inmate Holt or inmate Muhammad not to have a Koran to study with?

A No, ma'am. As a matter of fact, that's why we searched him, was to make sure that he did have one before we denied it, and we, of course, would have had the chaplain guide him in the correct way to get one. We still would not have been allowed to let him have the one that came from an individual.

Q Why can you not allow him to have something that came from an individual?

A People offer them, we get all kinds of things in the mail that shouldn't come in a correctional institution, that are [42] concealed in mail, books, religious materials, different things.

Q Do you allow or does your unit allow inmates to request certain religious materials from distributors that are accepted and approved by the department?

A Yes, ma'am, and they can work through the chaplaincy's office and gain access to those addresses and places that are available.

Q Okay. And again, with regard to administrative segregation, inmate Holt mentioned that he would be willing to stay in ad seg, do you have any understanding or knowledge as to why inmate Holt is currently in administrative segregation or was in administrative segregation?

A He had chosen –

THE PLAINTIFF: Objection. I object to that because the person who could testify to that is here. So it would be hearsay from what he's saying.

THE COURT: Well, at this type of hearing, I think hearsay is allowable under the Rules, so I'm going to allow it. And then if you want to call the other witness, if there's any – if there is any question of – well, let's hear what he has to say. I mean, if there's a question of whether or not it's accurate or not, you can call the witness, because that's your hearsay objection, it's based on accuracy.

THE WITNESS: He's in segregation this last time [43] because he requested to be there in writing.

BY MS. CRYER:

Q Okay. And Mr. Holt testified a few moments ago that he was being harassed by officials at the Department of Correction with regard to the order saying that he could grow a half inch beard. Mr. Lay, have you done anything to harass inmate Holt with regard to his order not being allowed to – or to allow him to have the half inch beard?

A No, ma'am, I have not, nor have I instructed anyone else to.

Q How did you learn about the order that inmate Holt had that would allow him to have a half inch beard?

A I received a call. I was actually off, I think on vacation. I received a call from the duty person. I don't remember if it was Mr. Warner or Major Robertson. But Major Robertson had stopped inmate Holt in the hallway because he was out of compliance with the grooming policy and was going to write him a disciplinary. And inmate Holt presented the order that he had from the court. And, of course, being corrections folks, we were a little bit suspicious about its authentic – about it being legitimate, because normally anything the court issues, we get, at least, a copy of. And normally, we'd get it before the inmate, I would think, usually. So that seemed extremely unusual. And I think the major did place him on investigation, and then after it was [44] authenticated, released him from segregation.

Q Do you know what time period it was that inmate Holt was kept in segregation or on investigative status?

A It was released the same day.

Q Okay.

A I don't know if it was an hour, two hours, or three hours.

Q Okay. Is that how you first became aware that there was an order allowing inmate Holt –

A Yes, ma'am, that was the first –

Q – to grow a beard?

A – first I'd heard about it.

Q Okay. And I believe Mr. Holt testified earlier about how if he was not in compliance with the grooming policy, that he faced the possibility of being issued a disciplinary for being out of compliance with the grooming policy?

A Yes, ma'am, that's correct, as was any other inmate.

Q Is being out of compliance with the grooming policy the only infraction or rule violation at the Department of Correction that an inmate can be issued a disciplinary for?

A No, ma'am. There are numerous. As a matter of fact, Mr. Holt directly reflects that. I mean, he's had some for threatening folks, I think, and some various things.

MS. CRYER: Your Honor, I believe at this time that's all the questions that I have of Warden Lay.

THE COURT: Thank you, ma'am.

[45] Mr. Muhammad, you may ask.

CROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Good morning, Warden.

A Morning.

Q Get back to something that you were saying when you first started out. The reason I'm in ad seg is not because of the fact that I requested it, is it, Warden?

A Yes, I believe it is. I believe we have a written statement to that effect.

Q In fact, I was assigned by the classification by Warden Warner, was I not, regarding a disciplinary I had received, written by Warden Weekly; is that correct?

A Not –

Q Were you not aware of that?

A Not this time. If I remember correctly, you've been out of segregation and back since that disciplinary. Is that not correct?

Q That's correct.

A Okay. This time, based on your request.

Q And did I also not, two days later after that, ask to be returned back to population and stated the issue that I had had been resolved and I wanted to go back to population; were you aware of that?

A After you were placed there this time? Are we speaking of [46] the time that you're there now?

Q After I requested it, yes.

A No, I'm not aware of you requesting to go back to population.

Q So you're not aware – you're not aware then that there was an objection to my going back to population by one of the defendants in the case; were you aware of that?

A No. No, I was not.

Q Okay. Now, on the issue of the barbers, how do you choose who is designated a barber and who works as a barber at Cummins Unit?

A Classification Committee selects them. As they come through classification, we try to place people in areas where they have job skills. If a guy comes through and says he's been a barber somewhere, particularly if he's a licensed barber, you don't run across many licensed barbers, but you do run across some people that have cut hair and had experience in that area, then they would be considered for that job.

Q Now, would the two barbers that you have come in to ad seg or 14/16 Barracks in the east building, are – are both of those trained barbers?

A I couldn't testify to their training without talking to the individual and looking at their institutional file. I do know that the last barber that was in

that area has been promoted to the free line barber and cuts staff hair.

[47] Q So the barber that – that you discussed, that we discussed in here, that I’ve had the issue with regarding a beard trim, you don’t know whether he’s a trained barber or just – just somebody that the classification said, okay, he says I want to be a barber, I want to be a barber?

A I think I answered it, but I’ll answer it again. I couldn’t testify to that without talking to the individual or looking at his institutional file.

Q Now I want to ask you about the situation where you stated that you – you talked to the barber in question, the one who shaved – nearly shaved my beard all the way off, you talked to him and he told you that I never requested or said anything about a half inch beard until after the fact; is that what you’re saying?

A That’s what he told me, yes, during the interview.

Q Now, would you – would that – could it be a possibility that based on the situation and based on the information that you had, knowing about this court order, that when this barber was confronted with this – because there was a grievance written, was there not, by me?

A I don’t remember – I don’t remember if it was a grievance or just a written complaint, but, yes,

that's how I became aware of it, was something that was received from you.

Q Now, is it possible the barber lied?

A Sure, that's a possibility.

[48] Q So just because the barber said I didn't say anything, doesn't mean that I didn't say anything, correct?

A Well, the officer, I believe, kind of corroborated what the barber said, and that he didn't hear you say anything about that to the inmate barber. I talked to – I talked to every individual that was in that area after receiving your mail.

Q Did you – when you talked to the officer, do you remember which officer it was?

A I don't remember his name right offhand, no.

Q Did he state that – did he tell you where he was at during this whole – during this whole episode at all?

A He said he was in a close vicinity – close proximity, three, four, five feet, somewhere in that horseshoe there – or that area where they cut hair, not the horseshoe, but I think it was in one of the day rooms if I remember correctly.

Q So if you hear – let me ask you this. If you hear two inmates into a conflict, especially one in handcuffs and one not, one has got access to sharp weapons, the other one doesn't, if you hear – that if

an officer hears two inmates in a conflict, wouldn't it be the officer's duty to remove – to separate those two inmates so that the conflict is squashed?

A Well, I believe that's what occurred. You were taken back to your cell immediately following the incident, were you not?

[49] Q Yes. Were you aware of – or let me ask you this. Were the COs that were back there in the east building, were they made aware at all that there was a court order in place regarding me and that I was not to be bothered regarding the beard at all?

A I know the captain and the major knew that. I hope they passed that information on to the correctional staff. I have to believe they did, as no one has written you a disciplinary for being out of compliance with the grooming policy.

Q Okay. Now you mentioned about inmate identification as it relates to beards; is that correct?

A Yes.

Q You're concerned that if inmates were allowed to grow half inch beards in the ADC that they will be able to alter their appearance and – should they escape or anything like that?

A Certainly.

Q Wasn't there an escape recently at Cummins Unit, sir?

A Yes, a couple of years ago.

Q And those inmates that escaped were actually dressed like officers, were actually in compliance, like officers would wear, with their – with their facial hair neatly trimmed, no beard and that type of stuff, would that be not – would that not be accurate?

A That's correct. Yes, they were dressed as officers.

Q So a beard alone is not going to cause somebody to be able [50] to necessarily alter their appearance, the lack of it, or to have one, in the event they want to escape, they can alter it some other way, right?

A Well, certainly, there are many ways you can alter your appearance, I guess, but a beard being one of the easiest and quickest.

Q Okay. And you mentioned about the – your concern about weapons being hidden in the facial hair, I believe you mentioned darts, I believe you mentioned razor blades, things of nature; is that correct?

A Yes.

Q Would it be safe to say that the weapons that you have found during shakedowns in Cummins Unit, the times that you have found them, are either – or have they ever been on somebody's face at all?

A No, because we have a grooming policy. They don't have beards.

Q Okay. So – so the weapons are other places, correct? They're on their clothes, in their rack, wherever, they can hide them any number of places in other than just the beard, correct?

A We find contraband various places, yes.

Q Okay. So just having a beard alone is not going to – is not going to cause a great increase in the flow of contraband, is it?

[51] A It'd cause a great increase in the number of places to hide it.

Q So you would say then that – that even though there's the clothes, the socks, the shoes, the boots, things of that nature, the coats, any number of clothings that you all issue at Cummins, people hide stuff in there regularly, correct?

A They have, yes.

Q So, again, a beard is not going to be necessarily the – the preferred choice of hiding things, wouldn't you say?

A Well, now, that depends. You know, inmates are pretty creative, as I stated earlier. They watch staff, watch how they monitor things, watch what staff do. And after watching a particular staff person on a post for a period of time, that's how they figure out how to beat that staff person, about what they are checking and what they're not checking, what they may not be comfortable with checking. I don't know how many correctional officers would be comfortable

with running their hand through a man's beard. I don't know. You know, but I really don't think that that would benefit the overall goal and mission of corrections to have to do that.

Q Now, you have other ways to identify inmates, don't you?

A Such as?

Q Do you not – is it not policy – is it not policy of the Department of Correction to issue inmates IDs that they wear around their neck and also put their name and their ID number [52] on their clothes; is that correct?

A Yes, they carry an ID badge. That's correct.

Q So, and they also have their name and ADC number on the back of their – the front and back of their clothes; is that correct?

A Yes.

Q So you can – you can identify – the purpose of that is so that you can more readily identify those inmates in the case of an officer having a contact with them, correct?

A We put a name and a number on the clothing hoping that they'll continue to wear the ones that are issued to them and not trade them out, but, no, that's not – that's not a very good method of identifying anyone, no.

Q So what happens if they're caught wearing clothes they're not supposed – that are not issued to them?

A Will get a disciplinary, unless for some legitimate reason their clothes were not back from the laundry or something.

Q And you issue – you issue ID cards; is that correct?

A That's correct. Yes.

Q And the reason that you issue cards, such as these right here, is so that you can again readily identify inmates in the department – in your unit, would that be correct?

A Well, yes, if we issue the ID badge though of you without a beard, and then three months later you grow a beard, then you've altered your appearance from that ID badge.

[53] Q So let me ask you this, how –

A And vice-versa.

Q – how many years have you been – again, did you say you've been a warden?

A I've been a warden at the Cummins Unit for nine and at the Delta Regional Unit for five.

Q Okay. And you're aware – are you in contact with other Department of Corrections around the

country; do you ever have any contact with them at all?

A Yes, occasionally, through training, we do through the American Correctional Association and other avenues.

Q So if other prisons, major prisons, such as New York, California, places like that, if they're able to do this very same thing that I'm proposing, why would it be so hard for Cummins Unit to do the same thing?

A You know, I suppose maybe that's an individual preference in those states. I can't tell you for what reason they've elected or chosen to go that route. I do know that many, many of those institutions are very different from Cummins and from the mission, and I'll give you one good example, is the majority of those institutions that you're referring to are cell block housing units where everything is one or two man cells practically. The Cummins Unit has a lot of open bay barracks that house up to 35 to 45 individual inmates, it's as high as 50 in some instances. So, yeah, that's just one of [54] many scenarios that are a lot different from our mission and the way we're designed as opposed to maybe somewhere you're talking about in California or – or New York. I'm not aware of very many states out there, for example, that operate an agricultural program like we do in Arkansas. The Cummins Unit is attached to a 17,000 acre farm. There are a lot of people come and go in and out of the confines of that fence performing that

work and those duties. So we're certainly a lot different. So I don't know why, you know, their preference would be to go that route, but, I mean, that's their preference obviously, or maybe law in that particular circuit, I don't know.

Q But if they're able to do it without problems and they – they seem to be able to be getting along fine, what would be the problem with the Department of Correction allowing somebody to grow a half inch beard?

A The problem would be the reasons that I've stated. And I certainly would like to talk to some of those administrators and see if they didn't voice some of the same concerns even though they do allow that.

Q Now, you were saying there's how many – how many inmates, rough estimate, are in the Department of Correction as we speak right now?

A Excess of 15,000. It may be up closer to 17,000 currently.

[55] Q Now, of those 15,000 inmates, would it be fair to say that not everybody can grow a beard, right?

A Right now, no one can except yourself and those that have a medical script.

Q The question I'm asking you though is would it be fair to say that in the Department of Correction that should – should this Court or whoever in the future so find that we should be allowed to grow a

half inch beard, that not everybody in the ADC can grow beards; is that correct?

A Do you mean physically?

Q Physically grow beards.

THE COURT: I understand where you're going with that, Mr. Muhammad, but why don't we move on. I understand where you're going with that. I don't think it's very compelling on what you're trying to prove.

THE PLAINTIFF: Okay.

THE COURT: And equally, I didn't find it very compelling that having to manage 15,000 people with beards is at issue either, so.

THE PLAINTIFF: Okay.

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Would it be fair to say again that it would be easy to hide weapons or contraband in the head hair?

A Could you repeat the question?

Q I said would it be easy – would it be fair to say that it [56] would be easy to hide contraband in the head hair of an inmate in the Department of Correction?

A It would be as easy to hide it there as it is a beard, I suppose.

Q Okay. So if somebody has hair my length or a little longer on top, you could hide a razor blade in that, you could hide weapons and stuff up there, couldn't you?

A You could, yes.

Q Okay. Now, the issue of ID-ing inmates as far as with the beards, what would be the harm, okay, in allowing when somebody comes into the ADC, requiring them to have a clean shaven photo taken, and then when they grow it out to a half inch beard, taking another photo of them for comparison purposes?

A The problem is they may never grow a half inch beard until after they escape, just using that for one example, or they may come in with a beard, and if we're not allowed to require them to shave, they may immediately shave it after they escaped, or got in some area they're not supposed to be in, to alter their appearance.

Q Have you – has there been a whole lot of escapes from the Department of Correction because people were wearing beards?

A Not as of recent years, thank goodness. I do recall one back in the 70s or 80s where the individual grew a beard and blended in with homeless people in Houston, Texas, and I think [57] two or three years before they captured him, and that was to alter his appearance. Of course, that went the other way around, I think he left the ADC clean shaven and

grew the beard after he got out, and he was eventually apprehended, but.

Q So if – somebody could escape from Cummins then and get out and alter their appearance by growing a beard, right?

A Oh, certainly, if we don't apprehend them before they have time to do that.

Q Okay.

A But if you escape with a beard, and you shave it, then you have immediate means of altering your appearance, like right now.

Q So if – if other – other, again, I refer back to other institutions or other prison systems that allow this to happen, allow people to grow beards, and they're not seeming to have a problem with escapes, what would, again, the – you have – you still would have a problem with people wearing a half inch beard in the Department of Correction?

A Yes.

Q Regardless of other prison administrations doing the same thing and allowing it?

A I can't testify to the fact that they aren't having problems because of that, because I don't know what goes on nationally across the country. Again, I would like to talk to [58] some of those administrators and see what kind of problems that they have experienced because they for whatever

reason have chosen to go that route. But, yes, that would concern me greatly.

Q How long – how long – I know what the policy is regarding the head hair in the ADC. As far as the length on the top of the head hair, is there a specific length they can grow it to as long as it doesn't extend past the earlobe and the nape of the neck?

A There is. I believe that's outlined in the policy. I don't remember exactly what it is. I just know that it has to be off the collar and above the ears.

Q So if somebody has hair on top of their head, they could – they – you know, that they could hide something in there, right?

A Well, you could hide something in hair the length of yours or mine, but that's not excessive according to the policy.

Q So if it could be – my question then is, if that's the case, then why is the facial hair a target and the head hair is not?

A The facial hair just gives another avenue, just adds another place to hide contraband.

Q Okay. But you admit you could hide contraband pretty much anywhere though, right?

A They do hide it in a lot of different places, yes. I'm [59] sure you're familiar with that.

Q Okay. Let me see here. Would a half inch beard – would a half inch beard, for officers being able to identify the length of it, would it be fair to say that you can tell when a beard is getting past a half inch?

A Well, I believe that would change from individual to individual. What you might think just at a glance is a half inch, I may not think is a half inch, or the next person may not think is a half inch. Anyway, how are you going to gauge that?

Q So you wouldn't – so you're telling me that you couldn't – your officers wouldn't be able to look at somebody and be able to tell whether their beard is a half inch or longer and be able to tell them you need to go trim that down because it's getting past regulation?

A You could give an – you could give an approximate look at someone's appearance and say maybe that person is out of compliance, maybe they're beyond the half inch, but then that person is in disagreement, says, well, I'm a half inch or less, and they file a grievance, and then you go through all those steps to handle that. I mean, do you actually call the person in and measure the beard or, you know, how are you going to deal with that on a regular basis?

Q Okay. As far as the Koran that you said was sent in by the individual, in fact that individual was an attorney, [60] wasn't it?

A That's correct.

Q Okay.

A Our policy mandates that it come from a bookstore or a supplier, not from an attorney, an individual.

Q Okay. And you also stated that the first time you heard about the order was when Major Robertson or somebody had called you and told you that I had this court order; is that right?

A Yes, I don't remember if it was Major Robertson or Mr. Warner, but one of the two.

Q And you don't remember – you don't remember admonishing Major Robertson and telling him that the order – that if it was a valid order, he needed to – he needed to let me out immediately, do you remember saying that?

A Well, that's a possibility. I do remember telling the major that that would be highly unusual for an inmate to have an injunction of some sort that we didn't have a copy of or hadn't been informed of through the courts or through legal counsel or somehow.

THE PLAINTIFF: Okay. I think that's all I have.

THE COURT: Thank you, sir.

Do you have any follow up questions of the warden?

MS. CRYER: I don't think I do, Your Honor.

THE COURT: I have a couple. Can you tell me, how do [61] you manage the folks that have the medical script quarter inch beard?

THE WITNESS: We stop them in the hallway, Your Honor, and ask them to present a script if they're not in compliance with the grooming policy, and if it appears to be outside the quarter inch – a quarter inch is pretty much close to what you get using a clipper without a guard, if you just – I don't know – if you just try to shave with a clipper, for example, rather than a razor, that's pretty much what you get. They're pretty close.

THE COURT: Do you know about what percentage of the population has that?

THE WITNESS: No, sir, it's not a very high percentage, you don't run into it with every other inmate, you know, when you're in the hallway, but you do see it.

THE COURT: And with regard to the hair length, Ms. Cryer, do you know – does somebody know, can somebody speak, is there actually a – I know you said you didn't have – you thought it was in the policy, but you didn't know for sure, I'd like to know what the policy actually is, is there a length per se or is just to the collar, like you said, I mean?

MS. CRYER: If you will give me just a minute, I'll look for the policy, because I think I brought a copy.

[62] THE COURT: Okay. And you don't have to look that up right now, I mean, I – if somebody could speak to that, I'd like to know what the actual policy is, because my next question then is, have you actually had people hiding contraband in their hair?

THE WITNESS: I can recall one coming into segregation back when I was a uniformed officer with a marijuana joint in his hair, yes, sir.

THE COURT: Okay. But anything recent?

THE WITNESS: Not recently, no, sir.

THE COURT: All right. And then that also brought me to another question is you've obviously been a warden for 14 – 13 years or going on 14?

THE WITNESS: Yes, sir.

THE COURT: And how long have you been in the prison business?

THE WITNESS: 36 years and some odd months.

THE COURT: And you started out as a CO?

THE WITNESS: Yes, sir, at Cummins.

THE COURT: At Cummins. Last question, the Ninth Circuit case, it appears that they have a grooming policy and then the Ninth Circuit allowed this beard, half inch beard, have you had any sort of correspondence, any training, or anything based on

that, that the California officials have mentioned anything or come and spoken at any conference or [63] anything, have they talked about what the impact has been in their prison system?

THE WITNESS: No, sir, I haven't had an opportunity to visit with anyone about that. As a matter of fact, I wasn't aware of that case until this came up.

THE COURT: Got you. Okay. Thank you.

MS. CRYER: Your Honor, I think I have just one question.

REDIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Lay, are you responsible for creating the ADC policies with regard to grooming?

A No, ma'am. That would come from the Board of Corrections.

THE COURT: Any follow up?

THE PLAINTIFF: I have one.

THE COURT: Yes, sir.

RECROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q But you are responsible for enforcing it, correct?

A That's correct.

THE PLAINTIFF: Okay.

THE COURT: Warden, you may stand down. Thank you, sir.

THE WITNESS: Yes, sir.

(Witness stands down.)

[64] THE COURT: Your next witness?

MS. CRYER: Thank you, Your Honor. I know I'm going to have one more. That's going to be Grant Harris.

THE COURT: All right.

GRANT HARRIS, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Harris, would you state your full name for the record, please?

A My name is Grant Edward Harris.

Q And, Mr. Harris, where are you currently employed?

A I'm currently employed with the Arkansas Department of Correction. I am an Assistant Director of Institutions.

Q And prior to being the Assistant Director of Institutions, what was your position with the Department of Correction?

A I was the warden of the Varner Unit, which encompassed the ad seg Supermax, for a little over six years.

Q Prior to being the assistant director, how long in total were you a warden for the Department of Correction?

A Approximately 18 years.

Q And when did you first begin working at the department?

A I began my career at Tucker Unit in 1979, and at that point there were only three facilities within the state of Arkansas.

Q Okay. Mr. Harris, you've been present in the courtroom [65] for the testimony of both inmate Muhammad, as well as Warden Lay; is that correct?

A Yes, ma'am, that is correct.

Q Okay. And did you hear Warden Lay's comments or concerns with regard to contraband?

A I did.

Q Okay. Let me just ask this, and we can kind of circumvent some of my questions, was there anything with regard to Warden Lay's testimony that you disagreed with?

A No, ma'am, there's nothing that I would disagree with. In fact, I would like to really amplify on one point, if I may.

Q Sure.

A If it please the Court? You know, certainly weapons are a concern when it comes to facial hair, but I think one thing that we really need to touch on this morning is what we've been experiencing as an agency within the last few years, and that's the introduction of cell phones which are coming into our institutions. Last year alone, we probably confiscated in excess of a thousand cell phones at all institutions. What's unique about a contraband cell phone is that our phone system records conversations and this is how we gain intelligence, with the exception of legal or attorney calls, those calls are not recorded. So we use the recorded calls as a means of gaining intelligence to see who is trying to smuggle in what within the different institutions or who is dropping something [66] off.

When I was the warden at Supermax, I guess what was amazing to me is just as we had closed one avenue of receiving contraband and weapons and drugs within the institution, another one would open

up. The cell phone was the means of making that avenue happen. I remember one particular situation, we never identified the visitor, but due to the shape of the package, the visitor would go into the restroom, it was in a body cavity, would actually flush the marijuana, the rock cocaine, black tar heroin, down the commode, it was tightly wrapped in cellophane and duct tape. The trusty, who was outside the fence, who was working the sewer pond, who was, you know scraping, getting everything up, was actually fishing that out, he was carrying it back to maintenance, he was breaking it down, he was bringing it in the back door of our kitchen. And believe it or not, the inmates in the main kitchen were working it, again repackaged, in the food, taking it down the hall to Supermax to ad seg. What was amazing about this is they may not necessarily try to move a whole cell phone or a large amount at one time, they moved maybe it was something that was just a piece of that object, and actually put it together. So when you get to the dining facility in the Supermax, you've got another group of inmates that are on the serving line, and they know maybe that Sergeant Stanley, who works Cell Block 6 all the time, starts [67] out on Tier 3, and he feeds from left to right. Well, he's actually counting the number of cells and counting the number of trays, and he's concealing that contraband or that weapon in that particular tray to get to that inmate. And from there, it can exchange hands. I just took the liberty of bringing one small thing that you may not consider to be a weapon, but certainly it is given the gravity of what can be introduced into the institutions. It's

something as small as a SIMS card. And this is it. And certainly, this can be concealed just about anywhere, as well as a beard. And this is what makes the whole thing magic, this is what makes it work. And I have seen phones altered in so many different ways without battery packs, where they've taken AA batteries and wrapped them up to charge and work the phone, pieces of phones that have been walked down the hall in flip flops that have been put together later on in an ad seg, in general population. It's amazing how creative you could get. Something this simple can be responsible for the introduction of drugs or weapons into any institution. And I just felt like I needed to miss – miss that point, because at this point I don't know that we've really addressed that.

Q Okay. Let me – let's get back to the concern that – or the request that inmate Muhammad has, and that's the request to have a one half inch beard.

A Sure.

[68] Q Do you have any concerns now as a former warden, current assistant director of the Department of Correction, that something such as the SIMS card that you brought with you today could be confiscated – or could be hidden in a beard?

A That could be the piece of the phone that makes it all work. Certainly. As well as the needle off of a syringe and the diabetic inmate that's in ad seg that acts like he's putting the cartridge or the base of the syringe in the sharps container, pulls it back out, that maybe the syringe got broke off before it was

placed in the sharps container, well, he passes that to the guy that's got the needle in the next cell. I mean – I mean, the possibilities are flammable, really.

Q And again, there has been testimony today with regard to all the various different places that you – that an inmate can hide or conceal contraband. Do you disagree with any of the testimony today with regard to the different various places that inmates can conceal contraband?

A No, ma'am.

Q Does that alleviate your concern with regard to an inmate who is requesting to grow a half inch beard?

A I'm very concerned about a half inch beard.

Q Okay. Are you responsible for preparing or for changing any of the Arkansas Department of Correction policies?

A I'm a member of the policy committee itself. There's a number of members, including our lead staff attorney, who is [69] actually the chair of the committee, so I do have direct input into the policy and change, yes, ma'am.

Q Okay. The Court inquired earlier with regard to the department's policy on grooming. Did you actually bring a copy of the grooming policy with you?

A I did. I have that in front of me.

Q Okay. What is the policy number?

A The actual policy is a – it's an Administrative Directive, and the number is 98-04, and it deals with the reference to the Administrative Regulation of personal cleanliness and grooming for inmates.

Q And in looking at the policy, would you please refer to the part that makes reference to the length of hair that an inmate may have?

A It's probably the closest thing to that, it states:

“Inmate's hair must be worn loose, clean, and neatly combed, no extreme styles are permitted, including but not limited to corn rows, braids, dread locks, mohawks, et cetera. The hair of a male inmate must be cut so as to be above the ear, with sideburns no lower than the middle of the earlobe, and no longer in the back [70] than the middle of the nape of the neck.”

It also talks about the aspect of the medical script for a dermatological problem as well.

Q I asked Warden Lay earlier if he had any concerns, not even just with regard to inmate Muhammad, but any inmate that is allowed to do something that other inmates are not allowed to do.

A That's the last thing that you would want to happen in an institution. As Warden Lay pointed out earlier, you know, certainly it can make them a target with some of the inmates in the population, but it could also try to – it could also elevate his status and

make him even possibly even more sought after by other inmates who are looking for a leader and who want to follow.

Q Does that cause any concerns to you as a member of the security staff or security team with the department?

A Certainly, it does. If you're in the business of recruiting or anything like that, it all – that all has a bearing on that.

Q And again, I know that Warden Lay was able to testify with regard to his concerns at the Cummins Unit where he is currently the warden. Do you have any concerns department-wide with regard to whether or not an inmate or possibly other inmates were allowed to wear the half inch beard?

[71] A I have that concern for us as an entire department, at every institution.

Q Are you aware of what other states are doing, how they run their facilities, or what types of rules that they have?

A No, ma'am, not specifically. I'm really not.

MS. CRYER: Your Honor, I think that's all the questions that I have of Mr. Harris.

THE COURT: Do you want to make the grooming policy a part of the record?

MS. CRYER: I would, Your Honor.

THE COURT: All right. Any objection? I don't know that it would be a viable objection, but you can make an objection for the record.

THE PLAINTIFF: No objection.

THE COURT: Okay. Why don't we make that – if you need that back, we can make a copy and give that –

THE WITNESS: That's fine, Your Honor.

THE COURT: Okay.

MS. CRYER: And if I'm not mistaken, Your Honor, I believe Mr. Muhammad may have attached a copy of the policy, the 98-04, to one of his pleadings. I'm not positive that he has, but for some reason I was thinking that he had previously.

THE COURT: Okay. Well, I'll make it a part of the record here, we'll call it Defense Exhibit 1.

[72] MS. CRYER: Thank you, Your Honor.

(Defense Exhibit No. 1 identified and received.)

THE COURT: Do you have questions of the director here?

THE PLAINTIFF: Just a few.

CROSS EXAMINATION

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q I just have a few questions for you.

A Sure.

Q You made the statement about the – the AD 98-04, correct, regarding the policy for the head hair?

A Yes, I did.

Q In that policy, it doesn't state any type – any particular length on the head, does it?

A No, it does not.

Q Okay. And also, in this case, this particular case we're talking about now, have you been made aware of any – any attempts at targeting me, because I was walking around in the halls at Cummins Unit with a beard, by other inmates?

A No, I have not.

Q And you haven't been made aware of any other – of any information come to your attention about anybody trying to seek me out as a leader because I had a half inch beard on my face, or have you been made aware of anything like that?

A No, I have not.

[73] Q Okay. Again, you brought out the thing about the SIMS – the SIM card, I believe. It's – again, there's more ways to move contraband in a prison, I reiterate in a prison, than just the facial hair, correct?

A Yes, that's correct.

Q And you are also aware that in any given institution, that there are officers that will move contraband for inmates and routinely do so?

A I don't know about routinely, but we have dirty staff as well as dirty inmates.

Q So if an inmate wanted contraband or weapons moved, instead of putting it in facial hair, they could give it to a CO that they paid some money to, or they'd have a homeboy on the street that they could use that to get it – to move it around and get it within the institution, correct?

A That would be a possibility.

Q And, in fact, officers do that, right?

A There are some staff.

Q Okay. I believe – let's see here.

THE PLAINTIFF: Can I have just a minute, Your Honor?

THE COURT: You may.

BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q Now, as far as the issue of inmates wearing beards in the Department of Corrections, would it be, again, I ask you, fair to say that not every inmate in the Department of Correction [74] is going to grow a beard – is going to grow a beard?

A I really don't know. I don't think I can answer that.

Q Or whether they can or not, you don't – you don't have an answer one way or the other?

A I really don't.

Q Okay. As far as prisoner identification goes with respect to – because I know that's an issue – again, you all have ID cards that are issued to inmates to readily identify them by staff, correct?

A That's correct.

Q Okay. So if a – if someone, let's say, for example, should the grooming policy be changed to allow a half inch beard, would – would it be a problem to require inmates coming into the Department of Correction to be clean shaven with their first photo taken, and after a half inch beard has grown, retake another photo for comparison purposes?

A Well, I think Warden Lay answered that when you asked him that same question earlier. But again, what you have to consider is the aspect of that beard being used to conceal weapon – weapons or contraband, to have that contraband introduced into a facility.

Q Now you've mentioned about a quarter inch beard, some stuff has been made about that, about the quarter inch beard. Is it not a fact that some people grow a quarter inch beard thicker than others do?

[75] A You know, again, I – I’m not really sure how to respond to that. Everybody – everybody’s facial hair is different in that regard.

Q But the ADC specifically has a policy governing a quarter inch beard for dermatological or skin condition, correct?

A Yes, that’s correct.

Q So I ask you, sir, how then is a quarter inch beard for dermatological reasons not a security threat given – again, given that it’s been stated that people can grow different – a half inch beard can be one way on one person, different on another, where a quarter inch beard would be the same way, explain to me how that is not a security threat, but a half inch beard is?

A A half inch is longer than a quarter inch.

Q But again, the question is how is one if – if the Court – if your policy is to stop the moving of contraband and weapons in the facility, and your main objection is that the facial hair is the conduit to do so, to move it around the facility or whatever, then explain to me how a quarter inch beard is going to be any different than a half inch beard.

A The last time I probably walked one of my institutions was before the holidays. The quarter inch beards, you know, primarily, you can still see the skin.

Q And you’re saying a half inch beard, you wouldn’t be able to do that?

[76] A I don’t think so, no.

Q But again, a quarter inch beard, again people can grow at different lengths, right?

A Sure, everybody's hair is different.

Q And a quarter inch beard can have – one person can have a quarter inch beard that's thick, the next person can be one that sees the skin; would that be an accurate statement?

A I didn't hear the last part. I'm sorry.

Q I said a quarter inch beard, someone growing – one person growing a quarter inch beard might grow it thicker than somebody else, where you can see the skin on him, but you can't see it on the other person. Would that –

A I suppose that's possible, sure.

Q So they could hide contraband in that, too, right?

A That's a possibility. But again, the quarter inch is – beards that I've seen, the skin is showing.

THE PLAINTIFF: Okay. That's all I have.

THE COURT: Redirect?

MS. CRYER: I think I just have one.

REDIRECT EXAMINATION

BY MS. CRYER:

Q So, Mr. Harris, if you have inmates throughout the department that are allowed to grow one half

inch beards, and presumably some can grow thicker beards than the other, how – how, as part of the department, do you monitor the thickness [77] or what could possibly be in some of the beards, but not in other beards?

A That's almost an impossible task, you know, when you're dealing with that large of a population. And again, it's just another avenue for contraband and weapons.

Q Is it your –

A I don't – I don't know how you would do that.

Q Okay. Is it your testimony today that inmates who could possibly grow half inch beards, that's the only way that they would be able to carry or pass contraband to one another?

A Through the half inch beard?

Q Yes.

A There's many ways, ma'am.

Q Okay. The half inch beard is not just the only one?

A No, ma'am, it is not, not by a long shot.

MS. CRYER: Okay. That's all I have, Your Honor.

THE COURT: Mr. Harris, you heard the questions I asked of the warden. Do you remember those?

THE WITNESS: I do. Probably the last one, if I could go in that order, Your Honor, I haven't heard anything, any consequences or – or feedback on since what happened in California, and I'm trying to recall anything negative or positive about their grooming change, but I don't know that I can recall the first question, Your Honor.

THE COURT: Well, and you've answered it with the [78] policy here. You know, the other line of question was kind of were you aware of any – in your experience, aware of any contraband being hidden in hair?

THE WITNESS: Oh, yes, sir.

THE COURT: You are?

THE WITNESS: Yes, sir.

THE COURT: Okay. Anything recent?

THE WITNESS: No, sir, not recent, not in the two years since I've made the transition to assistant director.

THE COURT: All right. And how long have you been in the prison business?

THE WITNESS: 32 years last November.

THE COURT: And did you also start out in the CO – as a CO or –

THE WITNESS: Yes, sir, I actually worked my way up through the ladder. Corrections is my life. It's the only job I've ever held.

THE COURT: I asked my lawyer to get me a ruler. You held the SIM card up, and I thought for record purposes –

THE WITNESS: Oh, sure.

THE COURT: – can I see it and –

THE WITNESS: You can.

THE COURT: – let me get some dimensions on the SIM card.

THE WITNESS: Yes, sir.

[79] THE COURT: It looks like it's an AT&T SIM card here. And it is – it looks like it's 3/8ths inch long ways and just under 3/8ths of an inch width ways, so it's a pretty small device. I don't know if anybody has any questions that the SIM card I hold up, do you – I mean, those are the measurements I made. I think they're pretty accurate. It would be 7/16ths width – I'm sorry, that can't be right. That would be 9/32nds.

MS. CRYER: Your Honor, I don't know if it would be helpful to make a copy, to place the SIM card on a photocopier and make a copy of it –

THE COURT: We can do that if you would like to.

MS. CRYER: – for the record. I think I would, if that would be acceptable.

THE COURT: Okay. Sure. It's 9/32nds width. Looks like 13/32nds length. But we'll do that at a break, if you don't mind for us to borrow this?

THE WITNESS: No, sir.

THE COURT: We'll photocopy it on the – with the ruler.

MS. CRYER: Thank you.

THE COURT: All right. Any other follow up?

MS. CRYER: I do.

THE COURT: You may. Feel free to.

MS. CRYER: I have actually just a couple. And I [80] apologize, Your Honor, because I know I said that I did not –

THE COURT: It's not a problem at all.

MS. CRYER: – have any additional ones for him.

FURTHER REDIRECT EXAMINATION

BY MS. CRYER:

Q Mr. Harris, let me ask, do you have any concern with regard to the safety of the officers who

might be required to check what's inside an inmate's beard?

A Well, certainly, you do. I mean, from the standpoint of syringe needles, the safety razors that are issued, you know, they break up – some break up better than others, even a small – the smallest piece of a razor and getting – getting a wound from that, getting a cut, those are all concerns.

Q And again, do you have the same concern with regard to the safety of officers if they are checking for contraband inside an inmate's hair?

A Certainly, I do.

Q Does the concern amplify or increase if the officer now has multiple places on the head that they are to search, not just one?

A Yes, that's a concern, certainly.

MS. CRYER: Okay. Your Honor, that's all I have.

THE COURT: Any follow up?

THE PLAINTIFF: Yes, I do. I've got a couple.

RECROSS EXAMINATION

[81] BY MR. HOLT A.K.A. MR. MUHAMMAD:

Q You allow inmates in the Department of Correction to grow a mustache, right?

A Yes, that's correct, as long as it doesn't drop below the corners of the mouth, as it's outlined in the policy.

Q Is it not a fact that some people grow thicker mustaches than others?

A Probably so, yes.

Q Could you not hide that SIM card right there in a mustache just as easily as you could a beard?

A It's possible, sure.

Q So, and then, let me ask you about this here, the – about officers reaching in the beard of being exposed to sharp objects or things of that nature, you're worried about security issues regarding that, correct?

A I'm worried about the safety of the staff as well as the inmate population.

Q But an inmate – an inmate in population could actually – would be – could actually conceal weapons on their person, be more of a threat than somebody having something in their beard, wouldn't you say?

A No.

Q Be more likely to conceal on their person instead of their facial hair, right?

A Not necessarily, no.

[82] Q You don't believe that?

A No.

Q So other institutions that do this, that these officers are doing this at other institutions, especially the one in California, these officers are actually doing that, what do you say to that?

A I'd say I've never been impressed with the California system.

Q But if they're able to do it, then you – the Department of Correction could do it just as easily, right?

A No, I wouldn't agree with that. You know, again, from the standpoint – and I want to make sure that I key in on this – is that you're talking about the safety and the security of the institution, and what our primary mission is, and what we're trying to prevent from coming into our institutions, and that's weapons, that's guns, that's meth, that's crack, and it goes on and on.

Q But a lot of that stuff is brought in via your officers, aren't they, sir?

A And so much of that is also brought in by inmate visitors.

Q That's correct, too, I would agree with you on that. But there's many different ways for it to come in, other than just put it in the facial hair?

A Yes, we've addressed that question already.

Q And the – really, the issue about the facial hair is not [83] really about security, is it?

A Certainly, it's about security.

Q So would you have your – the officers at these institutions that are – that are harassing inmates going down the hallway for some stubble on their face, the stubble does not represent a security threat, does it, sir?

A I don't know about your allegation of harassment.

THE PLAINTIFF: Okay. That's all I have.

THE COURT: Anything further?

MS. CRYER: No, Your Honor.

THE COURT: You may stand down, sir. Thank you.

THE WITNESS: Thank you.

(Witness stands down.)

THE COURT: Do you have anything further, Ms. Cryer?

MS. CRYER: Your Honor, I don't believe so. I have several witnesses that would be here that could testify with regard to the Islamic religion and what is required and not required, and I really don't think that that is a central focus of the hearing today. And I do have Deputy Warden Weekly that is here. She is in security, although she was really brought

here just with regard to a disciplinary that inmate Holt was issued and was complaining about or had raised in one of his motions. But because he really hasn't gone into that today, I don't think there's really any need to put her on the stand. And I think her security concerns would just [84] overlap what Mr. Lay and Mr. Harris's concerns have been.

So, a long way to say, no, sir, I don't believe I have any other witnesses.

THE COURT: All right. Thank you, ma'am.

Do you have anything further, Mr. Muhammad, that you wanted to present?

THE PLAINTIFF: No, sir.

THE COURT: What I'd like to do is I'd like to take a brief recess and put my thoughts together. And, you know, I'll have a written ruling, but I'd like to make a preliminary finding, just that's how I try to do my business, I try to let people know when they walk out of the courtroom kind of what I'm thinking, so later I don't issue a written ruling and pull the rug out from under you.

Ms. Cryer?

MS. CRYER: I was just going to ask for permission, Your Honor, to make a brief closing argument, if I may?

THE COURT: You may. You may. And so may you, Mr. Muhammad.

MS. CRYER: Do you want to let Mr. —

THE COURT: Well, you know, it's kind of your burden, Ms. Cryer, I think, so if you want to go first. Well, there again, yeah, it makes no difference, but I'll let you all speak, and if at the end of each turn if there is something burning on your mind, I'll let you have a rebuttal. How about [85] that?

MS. CRYER: Okay. Thank you, Your Honor. I will be brief.

Your Honor, the current grooming policy of the Arkansas Department of Correction is Administrative Directive 98-04. It is the same policy that was valid and in place in the *Michael Fegans* case that was decided by Judge Moody back in 2006 and affirmed by the Eighth Circuit in 2008. There is not anything that has changed since the findings in *Fegans*. The grooming policy has not been found to be unconstitutional. If I'm not mistaken, I don't even believe that Mr. Holt is arguing that the policy itself is unconstitutional. He just says that there should be an exception made to him because he wants to be able to grow a half inch beard.

I find that Mr. Holt or Mr. Muhammad's testimony is in a way contradictory in and of itself. In his pleading, he indicates that it is his religious belief that he not be required to trim his beard at all. And yet based upon a 2004 Ninth Circuit decision, Mr. Holt therefore says, well, I'm willing then to consider it and to compromise.

Well, if his position is that he shouldn't have to cut it, then that should be his position, he doesn't have to cut it. What he's doing is saying that I'm agreeing to cut it half an inch, that the – that the entity that he prays to will see that he has tried to follow the laws, has done the [86] best that he can, and even if he was being restricted from doing so, it's still going to be okay.

The defendants' position would be that the same applies for even if he is required to comply with the Department of Correction's grooming policy and to completely shave his beard.

And the law that he cites to is a 2004 decision. The counsel for inmate *Fegans* in 2006 argued Ninth Circuit, as well. And while their religious beliefs were different, Michael Fegans was a follower of the House of Yahweh, Mr. Holt is a follower of the Islamic faith, essentially, Your Honor, not to compare the two religions, but essentially it's the same argument, take the religious nature out of the name of what you're going to call the religion and it's the same religion, it's the same argument. Nothing has happened between the 2006 decision in *Fegans* continuing forward to 2012 today.

The testimony that was offered by both Mr. Lay and Mr. Harris was that the carrying of contraband and the issue and concerns of contraband has increased from 2006 forward through today. So it's not a matter of the department is not concerned or no longer concerned about – about the security and the

contraband, they simply see the – making the allowance for a half inch beard is yet one more avenue in which an inmate, whether it's Mr. Holt or whether any other [87] inmate in the Department of Correction, could possibly carry in contraband.

They seemed – or they – it appears that Mr. Holt has offered to say or is implying that he won't try to hide contraband in his beard. And unfortunately, an inmate making that statement, who is serving a life sentence, who really doesn't – plus 40 years, who really doesn't have anything to lose, Your Honor, just isn't good enough. If the administration could take the word of every inmate, again, no particular disrespect to Mr. Holt, but that just can't happen. And the question becomes where do you stop? There has been an increase in the introduction of various other forms of contraband, and clearly, the department's concern is valid based upon those security reasons.

The testimony, Your Honor, has also been that inmate Holt has a number of other options and avenues and ways of exercising his religious beliefs. He's able to pray. He's able to possess a Koran. He's able to get a spiritual advisor. He's able to have a religious diet. He's able to acknowledge all of the religious holidays that he wants to. He's able to have a prayer rug. He could do all of these different things in practice of his religion. But to say that by not being allowed to have a half inch beard or else he can't – he can't practice his religion, falls flat on the other arguments that he's made, Your Honor.

[88] And I would respectfully say that the grooming policy has not been found unconstitutional. The *Fegans* case has not been overturned. We follow Eighth Circuit law. We are in the Eighth Circuit.

While Mr. Holt may try to bring in Ninth Circuit case law, essentially, Your Honor, been there, done that, nothing has changed. And, if anything, the evidence presented shows that there is more security concern in 2012 than there was in 2006. So we respectfully ask that the order that is currently in place with regard to the temporary restraining order be removed or lifted and that Mr. Holt be required to comply with the grooming policy.

Thank you.

THE COURT: Thank you, ma'am.

Mr. Muhammad?

THE PLAINTIFF: The issue here is about whether or not the Department of Correction's policy is the least restrictive means of allowing me to practice my religious beliefs.

While the Ninth Circuit – while the defendants here may knock the idea of bringing in Ninth Circuit law, it's still considered persuasive law in this case. The facts are the same. The policies are the same. The institutions there instituted these changes. Whether they've had problems or not, the defendants haven't been able to say one way or the [89] other.

We've heard that you can get contraband in the facility in any number of ways. In fact, they stated that from 2006 to 2012, that the increase in contra – they feel contraband has increased. Well, I would submit to Your Honor during 2006 to 2012, you were required to shave your beards. So that – that would – that falls.

And then the fact that if – if they're worrying about the grooming policy causing the flow of contraband into the prison, then what – what has been the issue for the past six years when there was a grooming policy that said you had to shave your beards?

In the *Mayweathers* case, and in others in the Ninth Circuit, as well as in New York, the same argument was made that the defendants have made here today. In each of those cases, the courts have ruled that that's not enough, that having a concern about a beard altering identity, hiding weapons, things of that nature, the courts have rejected it. It's even been appealed to the U.S. Supreme Court. The U.S. Supreme Court rejected review. And I believe that you, Your Honor, should take that seriously into consideration. And it's a recent case. It might be seven – six, seven years old, but it's still a persuasive law case.

On top of everything else, again, I reiterate *Michael Fegans* argued unrestricted hair growth, unrestricted beard [90] growth. I am not arguing that – that having unrestricted hair, unrestricted beard does not present a security threat, because it does.

What I am arguing is, is that a half inch beard – we can get all day into about SIM cards being hid, but we heard – we heard Mr. Harris say that you could hide one in a mustache. And there is people walking around there you see with thick mustaches that you could hide stuff in.

The bottom line is that should you allow this injunction to continue it would not affect the other inmates in the Department of Correction. It only affects me at this point, just like it has been. It's been established that even if other inmates were allowed to grow beards, they couldn't state with a degree of certainty whether or not that people would grow beards or not. Some people can't grow beards. I'm sure you're aware of this. Some people physically can't grow beards. Some don't want to because of – because it itches their face and things of this nature. So they're not going to have to worry about 15 to 16 thousand inmates walking around with beards on their faces.

The issue here is whether this is a least restrictive means to practice my religion.

Regardless of whether I have a Koran, regardless of whether I have Sujud, the prayer rug, whether I have access to religious advisers, which is very rare at Cummins Unit, it still doesn't answer the question of whether or not imposing [91] the punitive sanctions on somebody at the risk of forcing somebody.

In the *Warsoldier v. Woodford* case, the court there rules that these type of restrictions, these type

of punitive sanctions cause somebody to have to – to choose between following what the state says they should do and following what the dictation of their religions say they should do and having to decide what they’re going to do in that situation.

In fact, it was even argued in the *Mayweathers* case that it’s either a issue of following Allah and the Sunnah or following what the state says. And the Ninth Circuit found, and so did the U.S. Supreme Court when they denied review, they found that – that this issue here, that having all of that was still was burdensome, that having – that forcing Muslims to shave their beards or whatever is – was burdensome on the practice of their religion. And the state has not – the state has not – has not held with that, has not answered it.

Whether or not people bring – bringing in weapons, contraband, or whatever, they’re going to do that. They’re going to do that. And I submit to you that a half inch beard is not going to cause any significant increase in the flow of weapons, or what have you, into the facility. It’s been established that corrections officers bring it in, it’s brought in through visitation. And at this point in time, at [92] visitation, you have to shave. So they’re not transporting it in a beard to get it out of the visitation room, they’re transporting it in there [sic] clothes or secreting it on their person in a body cavity somewhere. So I believe that argument shouldn’t hold water either, because if you’re going to hide a weapon on you, the facial hair, if it’s long, maybe, but again, a half inch beard, I mean,

come on, Your Honor, I mean, it's – it's preposterous, you know, to say that you have to – you have to cut this, but this up here, well, we don't really have a policy about that, about the length of it, it just has to be loose and neatly combed. You understand what I'm saying?

So I'm asking you take all this into consideration and look at it for what it really is, for what this policy really is about. And I would ask you to continue the injunction as it applies to me, as it applies to me at this point, allow me to continue to grow a half inch beard. And whether I'm an inmate or not, I'm still a man, I'm still a Muslim, and these people have not shown that I've been deceptive in any way, and when I give my word as a Muslim, I fear Allah that much to tell you that I'm not going to do stuff like this. I may have a life sentence, but I do have something to lose. I do have something to lose because all of my appeals, Your Honor, haven't run out yet. I could still face freedom. You understand what I'm saying? And I'm not [93] trying to jeopardize that with some – with some foolishness such as this. I'm doing this for my religious beliefs.

And the fact is nobody disputes that they're sincere. That's something else you must weigh, the sincerity of that belief. And I've given you – I've given you Sunnah, I've given you Hadith, there is no question that a Muslim is to trim the mustaches short and leave the beard as it is.

Now, Ms. Cryer over here made reference to the fact, well, I said that I would – that I believe that the

beard should remain uncut. As I pointed out to you once before when I was on the stand, the Hadith says that if you intend to do a good deed and you don't do it, it's still credit to you as a good deed. The fact of the matter is, is that I have made an effort to comply with certain tenets of the religion as it relates to the beard, and to do so, and to do that, I've been willing to compromise. I've been willing to compromise as far as the length goes. You understand what I'm saying? But I'm still following the Sunnah of the Prophet Muhammad, sallallahu alayhi wa sallam, and it stands uncontroverted because the defendants have not chosen to answer it.

And I ask that you allow the injunction to remain in place.

THE COURT: Thank you, sir.

Rebuttal?

MS. CRYER: I do, Your Honor. I'm going to start [94] with the last one. Inmate Holt says that he has stated for us, and that it is cited throughout his religion, that if you intend to do a good deed, but that you're not able to, that it's okay. That's exactly the argument that we have made today, Your Honor.

Mr. Holt says that he intends to do the good deed by trying to let his beard grow. The Department of Correction says no, he should not be allowed to do it. According to his own reasoning that he just got finished explaining to this Court, that should be okay, according to his religion and according to everything

that he's stated today, according to him, that should be okay.

Mr. Holt said that the growing the half inch beard only applies to him and if the Court is allow – to allow the temporary restraining order to continue with the order, that it would only apply to him. I refer the Court to docket entry number 44, which was filed on November 17th, 2011 by inmate Holt, in which it is his second motion for leave to amend, in which he is seeking to add a number of other inmates into – into the case. So, clearly, he's not seeking for this order or for anything in this case to simply involve just him.

He makes reference, Your Honor, and argues the *Mayweathers* case out of the Ninth Circuit. Your Honor, in looking at page six of 11 of that case, it states that:

“Defendants assert that the [95] grooming regulations are necessary to identify inmates for the purpose of preventing escapes and controlling movement within the prison. Defendants also submit that the beard of any length changes the appearance of a prisoner and compromises the process of identifying inmates or escapes and that officers need to quickly identify inmates to prevent assaults, riots, or disturbances.”

I don't believe, Your Honor, that the *Mayweathers* case addressed anything with regard to contraband and the possible carrying and continuing on of contraband being passed from one inmate to another, from it being passed down the hall, as well as the

security concerns, even the health concerns with regard to the officers who may have to check it. There is absolutely no dispute that unfortunately contraband does exist within any prison setting.

I do think that it's reasonable for the defendants to at some point have to say – or for the department to say at some point we have to stop here, we have to limit what can be done. Inmate Holt wants a half inch beard. What's next? [96] Another inmate comes in and says I need a one inch beard. Another one comes in and says that I need a half and a – a one and a half inch beard.

And, Your Honor, I know that inmate Holt has made reference to a violation of the policy and that he could catch a disciplinary for not complying with the policy. That's correct, Your Honor, he can, but that's also true for any rule violation within the Department of Correction. It is not simply restricted to the grooming policy.

And lastly, inmate Holt made reference, too, that he is not deceptive, that he has not tried to deceive anyone. Well, Your Honor, he may not as of this point – in his one and a half years within the department, he may not have tried to or have deceived anyone that we're aware of. However, Mr. Holt's own behavior with regard to just recently the behavior that he exhibited towards the inmate barber who cut the hair, according to him, too short, which inmate Holt said that they were then at war, and yet he said that can be interpreted in many different ways, I'm not

sure how else to determine or decipher the phrase “at war.” So while he may not be deceptive, he clearly is showing tendencies, for a better phrase, not being able to get along with others. That does create security concerns throughout the department and it will continue to create security concerns throughout his incarceration with the Department of Correction.

[97] THE COURT: Response, Mr. Muhammad?

THE PLAINTIFF: Again, I refer back to the decision in *Mayweathers* that the defendants just finished referring to. They may not have – we don’t exactly know all the reasons the California Department of Correction had for having the grooming policy. The main one here that was addressed was about altering your appearance in the event of an escape.

And if you look at page six of that particular decision, under the compelling interest, least restrictive – least restrictive means, the district court in that case, and they cited some other cases that dealt with it out of different circuits, the Second Circuit, District of Arizona, and things of that nature, they were arguing in this case, and in fact the defendants have argued here today about altering appearances. They have gotten up here and said that, that they were concerned about this type of thing. So I go back to this, and which if I may, Your Honor, read – read here what was said in this – in this order handed down by the Ninth Circuit, and it says that:

“Defendants’ rationale that an inmate with a beard can more easily alter his appearance after he escapes is not persuasive. Common sense and experience recognizes that a prisoner may not [98] only shave, but alter his appearance in any number of ways to evade authorities after escape. Moreover, while it is plausible that altering a six inch beard or cutting very long hair may assist an escapee to elude capture, I must agree with Judge Strand that shaving a half inch beard likely cannot.”

And then it cites *Luckette v. Lewis*, and which it said:

“Prison officials do not meet their burden of demonstrating a compelling interest for not allowing a short, kempt beard.”

In *Fromer v. Scully*, they also cite this case, as well:

“It is certainly not irrational to believe that a full beard, which may well extend for significant lengths sideways from the cheeks as well as downwards from the chin, may impede identification more than a one inch beard.”

[99] And as Magistrate Judge Moulds concluded:

“When it comes to changing ones appearance through the growth or removal of hair, this court finds that not all beards are equal.”

You understand what I'm saying? And this here, he specifically addresses some of their concerns that they got up on that stand and told you today, altering appearances. It's – I don't want to be in any way disrespectful to these men, but at times it sounds like they're changing horses in midstream because, at first, their first argument was, throughout the Administrative Remedy process, that hiding weapons or contraband in the facial hair is the reason – the reason that inmates are not allowed to grow their beards in the Department of Correction. Now we're hearing stuff about altering appearances. Now we're hearing –

THE COURT: Well, Mr. Muhammad, I didn't perceive that. I perceived that to be a two pronged approach on what they said it was. It was both of those reasons, which, I mean, it frankly is a problem for you, Mr. Muhammad, because that's what the *Fegans* court analyzed. I mean, I understand the Ninth Circuit rejects the alteration of appearance point, but, you know, *Fegans* partially hangs its hat on that issue. So, I mean, I don't – I've got to study up on it a little bit more here in a minute, but it seems to me that *Fegans* says [100] it's – it's the risk of contraband and it's the risk of being able to alter your appearance should you escape. I mean, like I say, I understand that's what the California court in the Ninth Circuit have held, but, you know, that's in contradiction to what the Eighth Circuit has held. The Eighth Circuit is more persuasive in this court.

THE PLAINTIFF: I understand that. What I'm saying is this, when it's all said and done, the fact that requiring people to cut their beards is not going to dramatically alter the flow of contraband into the prison. It's not going to. They even said the past six years it's been coming in an increase in it. Having a beard is not going to cause that increase any more than what it already is.

And you heard testimony that a quarter inch beard can be grown the same way, it can be some on one – one, on one person, and different on another. The same for a half inch beard. If one can be, they both can be.

You heard testimony that a thick mustache could hide some contraband in it, but they're not required to shave the mustache off. What I'm saying is, if – if we're going – for consistency's sake here, I mean, let's look at it for – for what it is.

THE COURT: This is supposed to be rebuttal, I want you to stick to – if you've got anything else, you've made an argument already and you're kind of going back to making [101] another argument. It's –

THE PLAINTIFF: I understand, Your Honor.

THE COURT: Okay. I hear your points, Mr. Muhammad, and they're good ones. And so I've got to go and get my thoughts together and let you know where I'm coming from.

THE PLAINTIFF: There is one other argument I want to address that Ms. Cryer made. She

made the comment regarding the fact that about the – the injunction applying just to me at this point. First off, the Court hasn't ruled on class certification. It had –

THE COURT: Let me speak to that right now, Mr. Muhammad, because it seems to me that these are individual – and again, that was a mistake I made, was, you know, these are individual cases, and I think the court in *Fegans* requires me to individually look at the cases. I mean, the testimony may be exactly the same, but it may not be. And so, my reading of *Fegans* and my preparation for coming out here today leads me to conclude that, you know, it would be improper to let defendants [sic] add on to your case. Your case is a particular case and I think the analysis has to be on each particular claim. So I think that those defendants [sic] are going to have to file their own cases. And I understand that, you know, some of them may be similarly situated, some of them may not be. I think that was the argument in response, was that they may not be. But I think that they're going to have [102] to file them independently.

Yes, ma'am?

MS. CRYER: You just said defendants. I wanted to make sure –

THE COURT: I'm sorry. Plaintiffs.

MS. CRYER: – we're talking about –

THE COURT: I'm sorry. Yes, ma'am.

MS. CRYER: I just wanted to make sure.
Thank you.

THE COURT: Plaintiffs.

MS. CRYER: Thank you.

THE COURT: So I'm pretty sure I'm going to have to deny your request for these additional defendants [sic] to come in, because I think they're going to have to plead their own cases and we're going to have to look at them individually, because that's – that's how I read *Fegans*, and the law, you know, the RLUIPA is a case by case analysis, and it's – again, it kicks the burden back to the defense to say here are our legitimate penological aims here, and then, you know, again, as you point out, is that the least restrictive means to the ends that they're trying to achieve.

THE PLAINTIFF: I would say then that the only – the major difference between myself and *Fegans* is, again, I'm not arguing an unrestricted hair growth, unrestricted beard growth. I can understand where the state would have a security concern with that. I agree with that.

[103] We're talking about a half inch beard. And that's – that's what I –

THE COURT: And I hear your point loud and clear and it's a good one.

THE PLAINTIFF: Thank you, sir.

THE COURT: All right. Well, if you all will give me just a few minutes and I will come back with just some preliminary findings. And then, obviously, you know, the way it works is whatever ruling I make, it goes to Judge Miller for his adoption or rejection, and then you all would have a chance to, you know, respond to my ruling, and then he ultimately gets the say so, and then you would have a right to appeal his ruling.

Yes, sir?

THE PLAINTIFF: Can I ask you one question?

THE COURT: You may. You all be seated, please. Please have a seat.

THE PLAINTIFF: Depending on how you rule, if this is – if this is a recommendation to send to Judge Miller, correct, what would be the binding ramifications of it at this – at this point in time, if it's up to Judge Miller to accept or reject, and he would have the ultimate say, what would be the binding, at this point in time, between now and when he makes a ruling on it, where would that stand? That's all I'm asking.

[104] THE COURT: Well, I'll address that, Mr. Muhammad. I'll address that. All right?

THE PLAINTIFF: Okay. Okay.

THE COURT: All right. You all rest easy, please, I'll be back in a few minutes.

(Recess.)

AFTER RECESS

THE COURT: All right. We're back on the record.

And Mr. Muhammad, Ms. Cryer, you know I did a lot of research before coming out here because I think this is a pretty – pretty close call in this case and I think the case law right now as it stands is, you know, somewhat in a state of flux with specific regard to beards, with what happened in the Ninth Circuit and then this Eighth Circuit case with the dissent from Judge Melloy makes it pretty interesting.

But for today, I'm to consider four factors. One, the threat of irreparable harm to you, Mr. Muhammad, if I don't grant your request for an injunction. The state of balance between the harm and the injury that granting injunction will inflict on the other party litigants. The probability that you will succeed on your merits. And the public interest. So those are the four factors for the immediate issue.

You know, Mr. Muhammad, I don't think it would be irreparable harm to you if you were forced to comply with the [105] grooming procedure until you were ultimately to win, if you're able to do so, so I think that probably favors the defense. Although I do understand – you know, your religious principles are not lost on me, and the issues that you've raised; however, as you stated yourself, and you admit that, you know, the fact that you're willing to try to do right by your religious principles, you still get credit for that. And certainly, you have done a lot. You've

been very effective in this case. And today, you know, your arguments are right on point and, you know, you have – you have done great things in order to achieve your ends on being able to grow your facial hair. So you should, obviously, get big credit for that in your religion, because you have done a good job.

In the state of harm and the injury in granting what, in granting it – what granting injunction could inflict on the other party litigants, and then I think that also goes with the probability of succeeding on the merits, and that's where I really think the – the issue lies, or the most important part of this case is, are those two factors. And it ultimately has to do with the concepts of safety, security, good order and discipline. The fact that I am obligated to, by Supreme Court law, and the other precedent out there, to give deference to prison officials in running prisons, and the fact that the *Fegans* case is from the Eighth Circuit and is very, very closely on point, and you've done a good job, Mr. [106] Muhammad, of distinguishing the fact that you want the half inch, that *Fegans* was arguing for a more – more freedom in growing his beard, but the principles are still the same. The principles are, as I said, deference to the prison officials if they're able to state legitimate penological needs. And I think they have done so. And I think they've done so, and I think that when you look at *Fegans* with the facts in this case, and ultimately, the analysis that the Eighth Circuit, the majority, used in order to come to the conclusion that they did, it's really – I'm really constricted by that – by that holding. Okay.

Mr. Muhammad, and the holding is that they're able to come in, they're able to articulate reasonable security issues. You know, albeit looking at you and your beard, and as your Ninth Circuit case says that not all beards are alike, or maybe that was a district court case, you know, I look at your particular circumstance and I say, you know, it's almost preposterous to think that you could hide contraband in your beard, but there's a bigger picture here, and I think that the law is that they get deference, and if they're able to articulate that there is a concern, and even the *Fegans* case says it doesn't have to be that the concern has actually materialized. Okay? It's a – it's a concern based on their experience and their knowledge, which is pretty particular, and in this case here we've got more than 60 years of prison experience, starting from the ground, all the way to [107] the top.

And so, I do give – I do give credit to their testimony. I was impressed by Mr. Harris with the SIM card and I do – I'm very aware of the issue of cell phones and the fact that the SIM card is a very important piece of the puzzle when talking about smuggling in cell phones and SIM cards into prison. And it's a very – a very well made point that I think I have to consider strongly in their favor.

The good order and discipline. You know, again, I'm not in the prison administration business. They've articulated legitimate reasons to state that it is actually necessary to have this grooming policy.

And also, Mr. Muhammad, you know, you bring up the point, and it's a good one, that is it the least restrictive means. And *Fegans* squarely addresses the – it's the exact same testimony, it's the exact same analysis, and so while you make a really good argument, Mr. Muhammad, I – I am very much constrained by the holding in *Fegans*. I think that I would be, you know, not doing my job if I didn't apply *Fegans* as persuasive authority that tells me exactly what I have to do in this case. And I could look to the Ninth Circuit case because, you know, the Ninth Circuit case goes your way, and it comes up with a very different conclusion, but that's not my job; my job is I've got to hold with the Eighth Circuit. And until they say otherwise, I'm constricted by that holding. [108] All right.

And again, I mean, not that I – I'm not trying to say here that I am in disagreement with the holding in *Fegans*, because I do believe, again, as I came out here straight out and said that, you know, I find myself in a very difficult position in a case like this because, you know, it is not my expertise and I am not in a good – I'm not a good person to be asked to get involved in prison administration, and so I do agree that the defense here has brought up legitimate points, they are well taken.

And let me also say that one of the other points on *Fegans* was the – the being able to alter your appearance should you escape. And that's why I asked you, Mr. Muhammad, I felt like what they said was that it's not just the one point, the smuggling

contraband, it's both points. And I think that is an important point. While the court in California rejected that, I disagree with that. I think that that is a very legitimate concern and it's been well articulated by the defense.

And so, I'm going to find that based on those two factors in *Fegans* that the likelihood that you could win this case on its merits, given that precedent, it's unlikely, and, therefore, I should deny your motion for injunctive relief at this time.

Now, you asked a point, Mr. Muhammad, and I want to [109] address it, you know, where does that – basically, where does that leave you today? What I will order is that nothing change from what's already occurred. What I will do is I will, as quickly as possible, enter a written order saying what I've just said. And it will go up to Judge Miller. You will have an opportunity, Mr. Muhammad, to object to anything I say in writing. And we'll give you instructions – you know how it works. And, Ms. Cryer, you can also object or supplement or whatever you want to do. And then Judge Miller will have the ultimate say so in how he wants to proceed, because ultimately he has this case, and as it proceeds, you know, and he may reject my conclusions and you may be in good business – in good stead with your injunction for the future. But those are my findings, Mr. Muhammad, and I will enter a written order saying so. All right.

Yes, sir?

THE PLAINTIFF: There's one thing I wanted to address. As part of that injunction, it stated that in my petition – because this is something that's become a real issue with me there at the penitentiary, at Cummins Unit, that – that the defendants be banned or barred from transferring me to another institution in retaliation for this litigation. It's a common tactic ADC uses to disrupt litigation. You understand what I'm saying? And I'm asking that that be entered – that that be – that that part still be specified [110] in the order, because that was part of Judge Miller's –

THE COURT: I'm going to just say whatever Judge Miller has ordered remains in effect and will remain in effect because he has the ultimate say so, so I don't know what's in that order. But, Ms. Cryer, do you want to speak to that? I mean –

MS. CRYER: Your Honor, I was just going to say, I mean, we will – we will comply with whatever the order says. My understanding is the order refers to the department, not just to the Cummins Unit. I don't think there's – I'm not aware of any talk or anything about transferring Mr. Holt to another institution. I don't see how that helps us to do that. The case doesn't go away if he's transferred and currently there is a pending – there's an order still in effect, so. And I – yeah.

THE COURT: Yeah. Like I said, whatever Judge Miller previously ordered remains in effect. I'll enter my order, like I said, as quickly as possible to

get this thing resolved for some finality, at least for now. All right. Any other points, Mr. Muhammad?

THE PLAINTIFF: No, sir.

THE COURT: All right. Ms. Cryer, anything?

MS. CRYER: No, Your Honor.

THE COURT: All right. Well, we'll be adjourned. Thank you all.

[111] THE PLAINTIFF: Thank you.

MS. CRYER: Thank you.

(Adjournment at 12:46 p.m.)

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

GREGORY HOLT, ADC # 129616 PLAINTIFF
a/k/a ABDUL MAALIK MUHAMMAD

v. 5:11-cv-00164-BSM-JJV

RAY HOBBS, Director, Arkansas
Department of Correction; *et al.* DEFENDANTS

**PROPOSED FINDINGS
AND RECOMMENDATIONS**

INSTRUCTIONS

(Filed Jan. 27, 2012)

The following recommended disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in a waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a new hearing for this purpose before either the District Judge or Magistrate Judge, you must, at the time you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence to be proffered at the new hearing (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.
3. The details of any testimony desired to be introduced at the new hearing in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the new hearing.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing. Mail your objections and “Statement of Necessity” to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

I. INTRODUCTION

Gregory Holt, also known as Abdul Maalik Muhammad, filed a *pro se* Complaint (Doc. No. 2) pursuant to 42 U.S.C. § 1983, alleging that the Arkansas Department of Correction (ADC) grooming policy violates his constitutional rights and the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹ Mr. Muhammad is a Salafi Muslim who seeks to grow a beard in observance of his religion but in contravention to the ADC grooming policy. (Doc. No. 2.)

The undersigned magistrate judge previously recommended denial (Doc. No. 7) of Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) in light of the holding in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) (Melloy, J., dissenting). Presiding District Judge Brian S. Miller, however, rejected those findings, granted

¹ The Religious Land Use and Institutionalized Persons Act (RLUIPA), which will be discussed further in Section IV, provides that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1.

Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, and remanded the matter to the undersigned to hold a hearing.

On January 4, 2012, the Court held a hearing on the Motion for Preliminary Injunction and Temporary Restraining Order. After hearing testimony of two ADC officials concerning the specific rationale for the ADC grooming policy, this Court finds that the principles in *Fegans* apply and respectfully recommends that the Order granting Plaintiff's Motion (Doc. No. 28) be vacated and Plaintiff's Motion (Doc. No. 3) be DENIED. Furthermore, because one of the factors the Court considered in adjudication of Plaintiff's Motion was "the probability that the movant will succeed on the merits," this Court also finds that Mr. Muhammad's Complaint (Doc. No. 2) should be DISMISSED for failure to state a claim upon which relief may be granted.

II. FACTS

The ADC's grooming policy states:

- B. Inmates' hair must be worn loose, clean, and neatly combed. No extreme styles are permitted, including but not limited to corn rows, braids, dread locks, Mohawks, etc. The hair of male inmates must be cut so as to be above the ear, with sideburns no lower than the middle of the ear lobe and no longer in the back than the middle of the nape of the neck.

Female inmates may wear their hair no longer than shoulder length.

...

- D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSF 207 upon demand.

Administrative Directive 98-04 (“AD 98-04”). The purpose of the policy is “to provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons.” (*Id.*) An inmate’s failure to comply with the grooming policy is grounds for disciplinary action. (*Id.*)

Mr. Muhammad offered a compromise and requested permission to maintain a one-half-inch beard in observance of his religion. Defendants rejected Mr. Muhammad’s offer and argued that the grooming policy is necessary to alleviate security concerns.

III. PRELIMINARY INJUNCTION

A. Standard

In deciding whether to grant injunctive relief, the Court must consider the following factors: (1) the

threat of irreparable harm to the movant; (2) the state of balance between the harm and the injury that granting the injunction will inflict on the other party litigants; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). No single factor is dispositive, but the movant must establish a threat of irreparable harm. *Id.* Without a finding of irreparable injury, a preliminary injunction should not be issued. *Randolph v. Rogers*, 170 F.3d 850, 856 (8th Cir. 1999). “The burden of proving that a preliminary injunction should be issued rests entirely with the movant.” *Goff v. Harper*, 60 F.3d 518, 520-21 (8th Cir. 1995). The court in *Goff* also addressed the district court’s role in inmate applications for injunctive relief as follows: “[I]n the prison context, a request for injunctive relief must always be viewed with great caution because ‘judicial restraint is especially called for in dealing with the complex and intractable problems of prison administration’ . . . [t]he courts should not get involved unless either a constitutional violation has already occurred or the threat of such a violation is both real and immediate.” *Id.* (quoting *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982)).

B. Analysis

As stated above, no single factor is dispositive; however, in this instance the two most important factors are whether Mr. Muhammad will suffer irreparable harm and the probability that he will

succeed on the merits. During the hearing, Mr. Muhammad acknowledged that not all Muslims believe a man must maintain a beard. He also testified that followers of his faith get credit for attempting to follow the religious tenets. In light of Mr. Muhammad's hearing testimony, the Court finds that he will not suffer irreparable harm if forced to shave his beard in compliance with the ADC grooming policy.

Upon evaluating the balance between the harm to Mr. Muhammad and the injury that granting the injunction/temporary restraining order will cause the ADC, the Court finds that potential harm to the ADC outweighs any injury to Mr. Muhammad. During the hearing ADC officials expressed concerns regarding safety and security. Warden Gaylon Lay, Cummins Unit, testified that if an inmate was allowed to maintain a beard, the inmate could change his appearance during an escape. He posed the questions of how does one consistently determine on a day-to-day basis whether an inmate's beard is one-half-inch long and what if the inmate disagreed with the assessment of his beard.

Warden Lay also expressed concern about beards being used as a means to facilitate the introduction of contraband into the inmate population. According to Warden Lay, a one-half-inch beard can conceal razor blades, drugs and homemade darts. He also expressed concern for the effect that giving one inmate preferential treatment would have on other inmates. He suggested that inmate could become a target of his fellow inmates.

The most compelling testimony came from ADC Assistant Director Grant Harris. He also explained that the mission of the ADC's grooming policy is to prevent the introduction of weapons and contraband into the prisons and that inmate facial hair poses a security risk. According to Harris, a needle from a syringe could be concealed in an inmate's beard. He was concerned that the officers charged with inspecting the inmates' beards might be wounded by needles or broken razors. He also echoed Warden Lays' concerns about giving an inmate preferential treatment. He stated that affording an inmate preferential treatment would either make the inmate a target or perhaps elevate the inmate's status to that of a leader.

Mr. Harris further testified that an emerging threat to security at the ADC was cellular telephones. The ADC telephone system helps minimize risk because it records all inmate calls with the exception of legal calls. But inmates try to circumvent the phone system by smuggling in cell telephones piece by piece and reassembling them. He stated that a cell phone could be used to facilitate the introduction of drugs and weapons into the inmate population. During his testimony, Mr. Harris produced a $\frac{3}{8}$ " x $\frac{3}{8}$ " subscriber identify module (SIM) card from a cell phone. He explained that the SIM card was the critical piece to the cell telephone and, due to its size, a SIM card could be easily concealed in an inmate's beard.

Although Plaintiff makes compelling arguments that an inmate could easily hide contraband in many places other than a one-half-inch beard, the prison officials are entitled to deference. *Gladson v. Iowa Dep't of Corrs.*, 551 F.3d 825, 831-32 (8th Cir. 2009.) And the safety and security concerns advanced by the ADC officials are reasonable – particularly the fact that an escaping inmate could quickly change his appearance by shaving off his beard. Regardless, the concerns expressed by the ADC officials are nearly identical to those embraced by the majority in *Fegans*, 537 F.3d 897.

During the bench trial in *Fegans*, former ADC Director Larry Norris expressed concern regarding the safety and security of inmates and staff. *Id.* at 906. He explained that the ADC prohibition on inmate facial hair “keeps [inmates] from being able to change their appearance,” and made it easier for law enforcement officials to track and identify an inmate following an escape. *Id.* at 906. He also said that “an uncut beard would make identification more difficult and would facilitate the smuggling of contraband. An uncut beard creates a better disguise for an escapee than a quarter-inch beard, because it conceals the contours of an inmate’s face.” *Fegans*, 537 F.3d at 907. The *Fegans* majority agreed that the ADC had a legitimate penological interest in prohibiting inmates from wearing uncut beards and that the prohibition was the least restrictive means available in furthering that interest. *Id.* at 907.

Mr. Muhammad urges the Court to disregard *Fegans* and instead follow the *Mayweathers v. Terhune* case from the Ninth Circuit. *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004). The Court, however, is mindful of the fact that it is bound by Eighth Circuit precedent. *See Hood v. U.S.*, 342 F.3d 861, 864 (8th Cir. 2003). Because the testimony in the present case is similar to that offered in *Fegans*, the Court finds that Plaintiff has little likelihood of success on the merits.

The public interest in this matter is negligible and does not favor either party. In sum, upon considering the four factors, the Court finds that Mr. Muhammad will not suffer any irreparable harm, the balance the harm and the injury to ADC weighs in favor of the ADC, and based on Eighth Circuit precedent there is little likelihood that Mr. Muhammad will succeed on the merits. The Court, therefore, finds that Mr. Muhammed's [sic] Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

IV. SCREENING

The Prison Litigation Reform Act requires federal courts to screen prisoner complaints seeking relief against a governmental entity, officer, or employee. 28 U.S.C. § 1915A(a). According to 28 U.S.C. § 1915(e)(2)(B) the court may dismiss a prisoner case at any time if the court determines that the prisoner's complaint is either frivolous or malicious, fails to

state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

Here, the Court has convened a hearing and has considered Mr. Muhammad's testimony during the hearing to be true, drawn appropriate inferences in his favor, and refrained from making any credibility determinations. In considering "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986), the Court finds dismissal is appropriate in this case as a matter of law.

A. Standard

The court must dismiss a complaint or portion thereof if the prisoner has raised claims that: (a) are legally frivolous or malicious; (b) fail to state a claim upon which relief may be granted; or (c) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). An action is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). An action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). In reviewing a *pro se* complaint under § 1915(e)(2)(B), the court must give the complaint the benefit of a

liberal construction. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The court must also weight all factual allegations in favor of the plaintiff, unless the facts alleged are clearly baseless. *Denton v. Hernandez*, 504 U.S. 25, 32 (1992); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). But regardless of whether a plaintiff is represented or appearing *pro se*, his “complaint must contain specific facts supporting its conclusions.” See *Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly* at 556. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. See *id.* Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility” of entitlement to relief. *Id.* at 557.

B. The Free Exercise Clause and RLUIPA

“It is well settled that a prison inmate retains those constitutional rights that are not inconsistent with his status as a prisoner or the legitimate penological objectives of the corrections system.” *Turner v. Safley*, 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)) (internal quotations omitted). The evaluation of penological

objectives in this context is “committed to the considered judgment of prison administrators.” *O’Lone v Shabazz*, 482 U.S. 342, 349 (1987); *Fegans*, 537 F.3d at 902. To ensure that courts afford appropriate deference to those judgments, courts review prison regulations alleged to infringe on constitutional rights under a “reasonableness test” that is less restrictive than ordinarily applied to alleged infringements of fundamental rights. *O’Lone*, 482 U.S. at 349; *Fegans*, 537 F.3d at 902.

A prison regulation or action is valid, even if it restricts a prisoner’s constitutional rights, if it is “reasonably related to legitimate penological interest.” *Gladson*, 551 F.3d at 832 (quoting *Turner*, 482 U.S. at 89). When determining whether a prison regulation or action is reasonably related to legitimate penological interests, the court considers the following factors: (1) whether there is a valid rational connection between the prison regulation and the government interest in justifying it; (2) whether there is an alternative means of exercising the right that remains open to prison inmates; (3) whether the accommodation will have a significant “ripple effect” on guards and other inmates and on the allocation of prison resources; and (4) whether there is an alternative that fully accommodates the prisoner at de minimis cost to valid penological interest. *Turner*, 482 U.S. at 90; *Gladson*, 551 F.3d at 831.

In 2000, Congress enacted RLUIPA to provide additional protection for institutionalized persons’ religious freedom. *Singson v. Norris*, 553 F.3d 660,

662 (8th Cir. 2009); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 987 (8th Cir. 2004). RLUIPA provides that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1. RLUIPA “defines ‘religious exercise’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs.’” *Van Wyhe v. Reisch*, 581 F.3d 639, 655-56 (8th Cir. 2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner’s religion. *Gladson*, 551 F.3d at 832.

A prisoner’s claim under RLUIPA is, instead, evaluated under a compelling interest standard. *Cutter*, 544 U.S. at 722; *Gladson*, 551 F.3d at 832; *Patel v. U. S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008). The United States Supreme Court has remarked that “context matters” in the application of this “compelling government interest” standard, and that RLUIPA does not “elevate accommodation of religious observances over an institution’s need to maintain order and safety.” *Cutter*, 544 U.S. at 722; *Fegans*, 537 F.3d at 902. While the government must meet a higher burden than the rational relationship

test applied in constitutional cases, the court still affords a significant amount of deference to the expertise of prison officials in evaluating whether they met that burden. *Gladson*, 551 F.3d at 832.

When faced with both a Free Exercise Claim and a RLUIPA claim, a court must as a threshold matter, inquire as to whether the prison has placed a “substantial burden” on the prisoner’s ability to practice his religion. *Van Wyhe*, 581 F.3d at 655; *Gladson*, 551 F.3d at 833; *Patel*, 515 F.3d at 813. If the court determines that a regulation imposes a substantial burden on a prisoner, the Court will then review the burden under reasonableness and compelling interest standards. *See Gladson*, 551 F.3d at 833; *Patel*, 515 F.3d at 813. To constitute a substantial burden, the policy or regulation

... must significantly inhibit or constrain conduct or expression that manifest some central tenet of a person’s individual religious beliefs; must meaningfully curtail a person’s ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person’s religion.

Van Wyhe, 581 F.3d at 656; *Gladson*, 551 F.3d at 833; *Patel*, 515 F.3d at 813. When the significance of a religious belief is not at issue, the same definition of “substantial burden” applies under the Free Exercise

Clause and RLUIPA.² *Gladson*, 551 F.3d at 832; *Patel*, 515 F.3d at 813. If the prisoner fails to put forth sufficient evidence that his ability to practice his religion has been substantially burdened, then the court need not apply the *Turner* test to the Free Exercise Claim and the strict scrutiny test to the RLUIPA claim. *Gladson*, 551 F.3d at 833.

C. Analysis

As discussed earlier in this disposition, the Defendants expressed numerous safety and security concerns during the January 4, 2012, hearing regarding why the ADC grooming policy prohibits inmates from maintaining facial hair. Prison safety and security are compelling government interests. *Singson*, 553 F.3d at 662. Mr. Muhammad acknowledges that the Defendants have a legitimate penological interest in maintaining the grooming policy. However, he argues that the ADC prohibition on facial hair is not the least restrictive means available to address those interests.

Mr. Muhammad points out that ADC grants a medical exemption to inmates with certain dermatological conditions, which allows for a one-quarter-inch

² It has been recognized that portions of the definition of “substantial burden” requiring religious beliefs to be a “central tenet” or “fundamental” may not apply to a RLUIPA claim. *Gladson*, 551 F.3d at 832-33. In the instant case, Defendants do not challenge the sincerity of Mr. Muhammad’s beliefs.

beard. Mr. Muhammad seeks a one-half-inch beard. And Mr. Muhammad does not assert “that the medical exemption would satisfy his religious beliefs.” See *Fegans*, 537 F.3d 906.

Mr. Muhammad also suggests that Defendants could follow the same procedures used by the New York Department of Correction, where a photo is taken of inmates with and without facial hair. When questioned about the harm in following the procedures used in New York, Warden Lay replied that an inmate might enter the ADC with a beard and maintain said beard until he escapes. He said, conversely, an inmate might also enter the ADC clean shaven only to grow a beard upon escape. “Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.” *Fegans*, 537 F.3d at 905 (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1556 n. 15 (8th Cir. 1996)).

In considering the pleadings and testimony in this matter, the Court finds that the ADC demonstrated a compelling penological interest in prohibiting Mr. Muhammad from maintaining a one-half-inch beard, and that this prohibition was the least restrictive means available in furthering that interest. The Court further finds that Mr. Muhammad’s ability to practice his religion has not been substantially

burdened. During the hearing he testified that he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.

Upon giving Mr. Muhammad full credit for his testimony, the Court finds that his claims fail as a matter of law. His Complaint (Doc. No. 2) should, therefore, be dismissed, pursuant to 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim on which relief may be granted.

V. CONCLUSION

IT IS, THEREFORE, RECOMMENDED THAT:

1. The Court's Order (Doc. No. 28) granting Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order should be VACATED.

2. Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order (Doc. No. 3) should be DENIED.

3. Plaintiff's Complaint (Doc. No. 2) should be DISMISSED with prejudice for failure to state a claim on which relief may be granted.

4. Dismissal of this action constitutes a “strike” for purposes of 28 U.S.C. § 1915(g).³

5. All pending motions should be DENIED as moot.

DATED this 27th day of January, 2012.

/s/ Joe J. Volpe
 JOE J. VOLPE
 UNITED STATES
 MAGISTRATE JUDGE

³ The PLRA provides: “In no event shall a prisoner bring a civil action or appeal a judgment in a civil action under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted. . . .”

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

GREGORY HOLT
(Abdul Maalik Muhammad)
ADC #129616 **PLAINTIFF**

v. CASE NO. 5:11CV00164 BSM

RAY HOBBS, Director,
Arkansas Department of
Correction, et al. **DEFENDANTS**

ORDER

(Filed Mar. 23, 2012)

The proposed findings and recommended disposition submitted by United States Magistrate Judge Joe J. Volpe [Doc. No. 82] and the filed objections [Doc. No. 86] have been reviewed. After carefully considering this document and making a *de novo* review of the record, it is concluded that the proposed findings and recommended disposition should be, and hereby are, approved and adopted in their entirety in all respects.

Holt's motion for an emergency hearing [Doc. No. 89] is denied. In his motion, Holt states that he has been placed in administrative segregation in retaliation for filing the present suit challenging the Arkansas Department of Correction's (ADC) grooming policy. Doc. No. 89 at ¶ 1. Holt admits that he was initially placed in administrative segregation upon

his own request. [Doc. No. 87] at ¶ 2. Holt also admits that upon his request to be released from administrative segregation, his request was denied based on actions he had taken in violation of ADC policy, including sending a threatening letter to a local police department. *Id.* at ¶ 3. *See* Doc. 84-1. “It is well established that prisoners have narrowly defined liberty interests, for imprisonment necessarily retracts many of the liberties of the free. Among the liberties which prisoners do not enjoy is choice of cells. Transfer within the prison, or to another prison, is within the discretion of prison officials.” *Lyon v. Farrier*, 727 F.2d 766, 768 (8th Cir. 1984). Therefore, Holt’s motion for an emergency hearing [Doc. No. 89] is denied.

IT IS THEREFORE ORDERED that:

1. Holt’s complaint [Doc. No. 2] be dismissed with prejudice for failure to state a claim on which relief can be granted.

2. Dismissal of this action constitutes a “strike” for purposes of 28 U.S.C. § 1915(g).

3. Holt’s motion for an emergency hearing [Doc. No. 89] is denied.

4. All remaining pending motions are denied as moot.

An appropriate judgment shall accompany this order.

IT IS SO ORDERED this 23rd day of March
2012.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

GREGORY HOLT
(Abdul Maalik Muhammad)
ADC #129616 **PLAINTIFF**

v. CASE NO. 5:11CV00164 BSM

RAY HOBBS, Director,
Arkansas Department of
Correction, et al. DEFENDANTS

JUDGMENT

Consistent with the order entered today, this case is hereby dismissed with prejudice and the relief sought is denied.

Dated this 23rd day of March 2012.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

GREGORY HOLT
(Abdul Maalik Muhammad)
ADC #129616 **PLAINTIFF**
v. CASE NO. 5:11CV00164 BSM
RAY HOBBS, Director,
Arkansas Department of
Correction et al. **DEFENDANTS**

ORDER

Defendant Gregory Holt's motion to stay execution [Doc. No. 96] of the March 23, 2012, order and his motion for an extension of time to file a notice of appeal [Doc. No. 98] are granted.

The free exercise of one's religious faith is fundamental and the First Amendment's guaranty of this freedom warrants the granting of the stay and extension. Accordingly, the March 23, 2012, order [Doc. No. 93] is stayed pending appeal and Holt has up to and including 14 days from the date of this order to file a notice of appeal.

IT IS SO ORDERED this 19th day of April 2012.

/s/ Brian S. Miller
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Eighth Circuit

No. 12-3185

Gregory Houston Holt, also known as
Abdul Maalik Muhammad

Plaintiff-Appellant

v.

Ray Hobbs, Director, Arkansas Department of
Correction; Gaylon Lay, Warden, Cummins Unit,
ADC; D W Tate, Captain, Cummins Unit, Arkansas
Department of Correction; V. R. Robertson, Major,
Cummins Unit, Arkansas Department of Correction;
M. Richardson, Sgt., Cummins Unit, Arkansas
Department of Correction; Larry May, Chief Deputy
Director, Arkansas Department of Correction

Defendants-Appellees

Appeal from United States District Court for the
Eastern District of Arkansas – Pine Bluff

Submitted: June 6, 2013

Filed: June 12, 2013

[Unpublished]

Before BYE, ARNOLD, and SHEPHERD, Circuit Judges.

PER CURIAM.

In this action challenging the Arkansas Department of Correction (ADC) grooming policy under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2), inmate Gregory Holt (also known as Abdul Maalik Muhammad) appeals the district court's¹ order dismissing his action after an evidentiary hearing.

In his complaint and motion for a preliminary injunction and temporary restraining order, Mr. Holt asserted that one of his fundamentalist Muslim beliefs was that he must grow a beard, but defendants substantially burdened his ability to practice his religion by enforcing ADC's grooming policy, which allowed trimmed mustaches but otherwise no facial hair, with quarter-inch beards permitted only for a diagnosed dermatological problem. Mr. Holt sought permission to maintain a half-inch beard as a compromise position, to balance his religious beliefs with ADC's security needs. The district court initially granted temporary injunctive relief. The court vacated its order and dismissed the complaint, however, after the hearing produced evidence that Mr. Holt had a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a

¹ The Honorable Brian S. Miller, Chief Judge, United States District Court for the Eastern District of Arkansas, adopting the report and recommendations of the Honorable Joe J. Volpe, United States Magistrate Judge for the Eastern District of Arkansas.

religious advisor, and he was allowed to maintain the required diet and observe religious holidays; that the grooming policy helped prevent inmates from concealing contraband, drugs, or weapons; that an inmate who grew a beard could change his appearance quickly by shaving; that affording special privileges to an individual inmate could result in his being targeted by other inmates; and that prison officials believed the grooming policy was necessary to further ADC's interest in prison security.

Following careful review, *see Johnson v. Bi-State Justice Ctr.*, 12 F.3d 133, 135 (8th Cir. 1993) (where judgment is granted after evidentiary hearing, standard is whether evidence presents sufficient disagreement to require submission to jury or is so one-sided that one party must prevail), we conclude that defendants met their burden under RLUIPA of establishing that ADC's grooming policy was the least restrictive means of furthering a compelling penological interest, *see Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008) (absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated, courts should ordinarily defer to their expert judgment in such matters), notwithstanding Mr. Holt's citation to cases indicating that prisons in other jurisdictions have been able to meet their security needs while allowing inmates to maintain facial hair, *see id.* at 905 (although prison policies from other jurisdictions provide some evidence as to feasibility of implementing less restrictive means of achieving prison safety and

security, it does not outweigh deference owed to expert judgment of prison officials who are more familiar with their own institutions).

Accordingly, we affirm, but we modify the judgment to reflect that the dismissal does not count as a “strike” for purposes of 28 U.S.C. § 1915(g).

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 12-3185

Gregory Houston Holt, also known as
Abdul Maalik Muhammad

Plaintiff-Appellant

v.

Ray Hobbs, Director, Arkansas Department of
Correction; Gaylon Lay, Warden, Cummins Unit,
ADC; D W Tate, Captain, Cummins Unit, Arkansas
Department of Correction; V. R. Robertson, Major,
Cummins Unit, Arkansas Department of Correction;
M . Richardson, Sgt., Cummins Unit, Arkansas
Department of Correction; Larry May, Chief Deputy
Director, Arkansas Department of Correction

Defendants-Appellees

Appeal from U .S. District Court for the Eastern
District of Arkansas – Pine Bluff (5:11-cv-00164-BSM)

JUDGMENT

This appeal from the United States District
Court was submitted on the record of the district
court and briefs of the parties.

After consideration, it is hereby ordered and
adjudged that the judgment of the district court in

this cause is affirmed in accordance with the opinion
of this Court.

June 12, 2013

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 12-3185

Gregory Houston Holt,
also known as Abdul Maalik Muhammad

Appellant

v.

Ray Hobbs, Director,
Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Pine Bluff
(5:11-cv-00164-BSM)

ORDER

The petition for rehearing en banc is denied. The
petition for rehearing by the panel is also denied.

July 17, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 12-3185

Gregory Houston Holt,
also known as Abdul Maalik Muhammad

Appellant

v.

Ray Hobbs, Director,
Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Pine Bluff
(5:11-cv-00164-BSM)

ORDER

The motion to recall the mandate and to stay the
mandate, filed by Appellant Mr. Gregory Houston
Holt, has been considered by the court and is denied.

August 01, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

134 S.Ct. 635

Supreme Court of the United States

Gregory Houston HOLT,
aka Abdul Maalik Muhammad, petitioner,
v.

Ray HOBBS, Director,
Arkansas Department of Correction, et al.

No. 13-6827 (13A374).

Nov. 14, 2013.

Application for an injunction submitted to Justice ALITO and by him referred to the Court granted pending disposition of applicant's petition for writ of certiorari. Respondents are enjoined from enforcing the Arkansas Department of Correction's grooming policy to the extent that it prohibits applicant from growing a one-half-inch beard in accordance with his religious beliefs. If the Court denies the petition for writ of certiorari, this order shall terminate automatically. If the Court grants the petition for writ of certiorari, this order shall terminate when the Court enters its judgment.

MONDAY, MARCH 3, 2014

CERTIORARI GRANTED

13-6827 HOLT, GREGORY H. V. HOBBS, DIR., AR
DOC, ET AL.

The motion of petitioner for leave to
proceed *in forma pauperis* and the petition
for a writ of certiorari are granted.

MONDAY, MARCH 3, 2014

ORDER IN PENDING CASE

13-6827 HOLT, GREGORY H. V. HOBBS, DIR., AR
DOC, ET AL.

The order granting the petition for a writ of certiorari is amended as follows: The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: “Whether the Arkansas Department of Correction’s grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U. S. C. §2000cc *et seq.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.”
