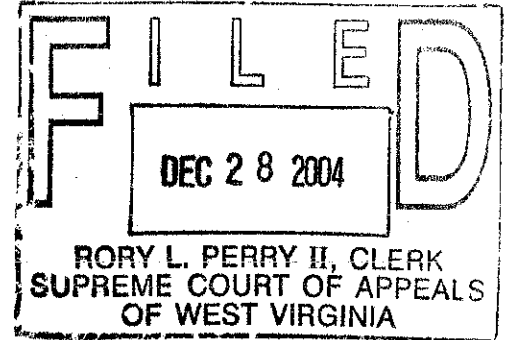


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA

RECORD NO. 32190

JOHN HEATH WHITE  
APPELLANT



Vs.

WILLIAM S. HAINES, Warden  
JERRY HAINEY, and  
JIM RUBENSTEIN,

APPELLEES

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APPELLANT'S BRIEF

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I.

**STATEMENT OF JURIDICITION**

The Circuit of Randolph County, West Virginia had jurisdiction pursuant to Rule 1, 81 and 82 of the West Virginia Rules of Civil Procedure as well as the West Virginia Code § 51-2-2 et seq. This Courts jurisdiction is invoked under Rule 1 of the West Virginia Rule of Appellate Procedure as well as the West Virginia Code § 58-5-1.

II.

**STATEMENT OF ISSUE FOR REVIEW**

Whether the Circuit Court below erred in dismissing the Appellants case for failure to exhaust administrative remedies and for "failure to state a claim upon which relief could be granted" in violation of the United States and West Virginia Constitution as well as statutory law and several court decisions.

III.

**STATEMENT OF THE CASE**

TheAppellant is currently in the care and custody of the West Virginia Division of Correction [herein DOC], and is currently being housed within the Northern Regional Jail & Correctional Facility [herein NRJ & CF]. The Appellant was housed at the Huttonsville Correctional Center [herein HCC] in the care and custody of the named defendants during all times of the current complaint he appeals.

William Haines was the Warden of HCC during the time of the Appellants complaint and was responsible for the management of HCC and the care and treatment as well as the safety of all inmates incarcerated within HCC. Jerry Hainey was the inmate movement coordinator at HCC during the appellants complaint, and was responsible for inmates safety and treatment at HCC. Jim Rubenstein is the Commissioner of DOC and is responsible for the management of all DOC facilities, which includes HCC, and for the care, safety and treatment of all inmates so incarcerated as well as the police of all employees employed within such DOC facilities.

On July 22, 2002 the Appellant filed a Complaint with the Circuit Court of Randolph County, West Virginia, pursuant to 42 U.S.C. § 1983 against the Appellees. In this complaint he explained the attack and rape he sustained on August 8, 2000 and the neglect of the Appellees in granting him proper treatment and or assistance after the attack. The Appellant alleged that the Appellees denied him proper protection from harm; proper help from administration; denial of statutory and/or constitutional rights; suffering of sever mental and physical trauma; and that the Appellees knowingly, willfully and deliberately abused their authority, and denied to do their jobs properly which did and is still causes the Appellant to suffer severe emotional distress and irreversible damage and harm.

The Appellees made and Answer with Affirmative Defenses, in which the Appellant made a response with objection on September

26, 2002. On August 12, 2002 the Appellant filed his requests for Production of Documents along with Interrogatories with no response. The Appellant contacted the Appellees on October 18, 2002 and December 20, 2002, requesting the Appellees to respond to the discovery requests, unfortunately these letters went unanswred. The Appellant then filed a Motion to Compel discovery on December 9, 2002 and another January 27, 2003, this went unanswered as well. The Appellant then wrote two seperate letters to the Clerk of Courts requesting judgement on his motions and a status of the case, these letters were mailed on August 26, 2003 and November 24, 2003.

After the last letter to the Clerk the Randolph County Circuit Court Judge, John Henning, entered an order on December 12, 2003 dismissing and removing the Appellants Complaint from the active docket for his failure to Exhaust Administrative Remedies and for "Failure to State a Claim Upon Which Relief Can Be Granted" pursuant to Rule 12(b)(6) or the West Virginia Rules of Civil Procedure.

The Appellant then filed the instant Appeal on April 5, 2004, which was granted at a regular term of this Court on November 17, 2004, it is the Order to dismiss that the Appellant now appeals to this Court.

#### IV.

#### STATEMENT FO THE FACTS

On August 8, 2000, the Appellant was attacked, sodomized and raped by approximately seven (7) or eight (8) inmates while being

housed on Dorm #2 of HCC, while he was taking a shower at approximately 7:15 p.m. After the attack the Appellant immediately got dressed and went to speak with Appellee Jerry Hainey.

The Appellant explained to Hainey what he had just sustained then Hainey informed the Appellant to walk up the north hallway of HCC with him to his office. Upon entering Hainey's office, Hainey began to laugh and told the Appellant that he would heal. When the Appellant begged him for help and to be permitted to move, he continued to laugh and stated that this was prison and stuff like that happened, he then went on to inform the Appellant that if he couldn't handle prison he shouldn't have committed a crime. Hainey went on to ridicule the Appellant telling him that he couldn't have gotten hurt to bad because he was gay anyway, then he told the Appellant to get out of his office because it was late and he was going home. This conversation took place approximately 8:30 p.m. on August 8, 2000.

The Appellant then submitted a written request on an HCC request form along with a handwritten request/complaint which he had notarized on August 9, 2000. The HCC request was turned into the Unit A/Dorm #2 Counselors Office, Hainey answered the request for protection and to be moved to a safe housing unit stating, "No not at this time." The handwritten notarized complaint/request went unanswered. (Exhibit A)

On August 30, 2000 the Appellant submitted a written Complaint/Request to Appellee William S. Haines, Warden along with copies of previously filed documents, this request/complaint

went without assistance as well. (Exhibit B)

On October 10, 2000 the appellant wrote to then Commissioner Paul Kirby along with all copies of previous complaint/requests. Unfortunately, this cry for help went unanswered as well.

Through this entire ordeal the Appellant was forced to remain on Dorm #2 with inmate Olin Gaskins, who was one of the ring leaders in the attack and one of his actual attackers. Hainey informed the Appellant that he would be alright because the ring leader was getting ready to go home on Parole and the others didn't live on Dorm #2.

In the instant case the Appellees failed to do what was necessary to protect the Appellant from the attack and rape that he sustained on the night of August 8, 2000. There was no officers housed on the dormitories, except for their hourly walk throughs, if they made them. Then after the attack the Appellees denied to do what was necessary to protect and offer the Appellant assistance, counseling or treatment. They ignored his requests for help and forced him to remain on the dorm with one of his rapist who was the ring leader and did in fact rape him twice on August 8, 2000 and attempted to in 1999 and once again approximately two weeks after the initial rape. (See Exhibit C Handwritten Affidavit of September 8, 2002.)

Since the attack of this Appellant on Dorm #2 of HCC there has been other attacks on other inmates without the Appellees doing anything to correct this problem, one the Appellant is aware of is the attack on inmate Michael Stover on September 1, 2003. (See Exhibit D) If the Appellees would have corrected

this problem in 1996 during the Nobles v. Gregoroy, Randolph County Circuit Court Case #83-C-244 when they was brought aware of these assault on other inmates and the lack of security on the dormitories then the attack and rape of this Appellant would have never occurred.

V.

ASSIGNMENT OF ERROR

1. The Circuit Court of Randolph County's dismissal of the Complaint "For Failure to Exhaust Administrative Remedies" was a violation of West Virginia Code § 25-1A-2(c), as well as the Eighth Amendment to the U.S. Constitution as well as Article 3, Section 10 of the West Virginia Constitution.
2. The Circuit Court of Randolph County's dismissal of the Complaint "For Failure To State a Claim Upon Which Relief Could be Granted" was a violation of West Rules of Civil Procedure Rule's 8(a) and (8)e as well as 8th Amendment to the U.S. Constitution as well as the West Virginia Constitution Article III, Section 5 & 10.
3. The Circuit Court of Radolph County's dismissal of the Complaint when it held the Appellant's Complaint to the stringent standards as it would have a represented plaintiff was a violation not only the 8th Amendment to the U.S. Constitution but as well as Article III, 10 of the West Virginia Constitution.

VI.

ARGUMENT

THE CIRCUIT COURT OF RANDOLPH COUNTY'S DISMISSAL OF THE COMPLAINT "FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES" AS A VIOLATION FO WEST VIRGINIA CODE § 25-1A-2(C), AS WELL AS THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AS WELL AS ARTICLE III, SECTION 10, OF THE WEST VIRIGNIA CONSTITUTION.

The Randolph County Circuit Court dismissed the Appellant's case stating that he failed to "Exhaust his administrative remedies," pursuant to the West Virginia Prisoner Litigation

Reforem Act, W.Va. Code § 25-1A-1, et seq. (2000).

The Appellant would contend that he was attacked and raped on August 8, 2000, West Virginia Code § 25-1A-1 et seq, was not enacted until March 1, 2000. Since this law was not enacted until approximately five (5) months prior to his attack he was not aware of the exhaustion of administrative remedies at that time pursuant to the West Virginia Prisoner Litigation Reform Act, because the code books was not updated at that time, nor was there any notification from the administration within HCC concerning the grievance procedure.

The Appellant does however contend that he did in fact follow the rules and regulation as provided to him upon him entering HCC which is found in the HUTTONSVILLE CORRECTIONAL CENTER RULES AND REGULATIONS, booklet, page 37-38, section XVI. (Exhibit E).

On August 8, 2000, immediately after the attack and rape he sustained, the Appellant went immediately to Appellee Jerry Hainey, who was the only administrator in the building at that time. He verbally spoke with Hainey and explained the situation and the attack. Hainey ignored the Appellants cry for help and told him to get out of his office it was late. (See Exhibit C)

The following day August 9, 2000 the Appellant wrote a request for protection and to be provided help on an HCC request form, Hainey answered stating, "No not at this time." The same day the Appellant submitted an handwritten and notarized

Complaint/request explaining what had occurred the night before. Unfortunately, this complaint/request went unanswered. (See Exhibit A).

On August 30, 2000 the Appellant submitted a complaint/request to Appellee William S. Haines, Warden with copies of all previous documents submitted. When this went unanswered the Appellant mailed a letter to the commissioners office on October 10, 2000. Unfortunately, this was ignored as well. (See Exhibit B).

Pursuant to Policy Directive 335.00, the Appellant did file a G-1 grievance to his then Unit Manager Carolyn Meade on September 7, 2000, along with this G-1 he attached copies of the letters he wrote to Hainey and Haines. (See Exhibit F) This G-1 went unanswered so he submitted a G-2 Grievance form to the Warden with all attachments of previously filed forms on September 18, 2000. (See Exhibit G). The Plaintiff may have gotten an answer denying relief requested on this, however he lost several documents during shake downs at HCC and transfers between facilities. Needless to say he filed an Appeal/letter to the Commissioners office because he was denied any assistance from HCC Administration on October 10, 2000.

As can be observed by Exhibits A; B; E; F; and G the Appellant did in fact do everything necessary to exhaust all his administrative remedies. As can be seen from the complaints/requests dated August 9, 2000 to Hainey as well as August 30, 2000 Complaint/Request to Warden Haines, these

documents was evidently merely just placed in the Appellants Institutional file because he received copies from them from Andrea Dernberger, Paralegal on July 18, 2003 at the NRJ & CF. It is sad that the appellees chose only to place these documents in his file but did nothing to help him, so as can be seen from these exhibits the Appellees were made aware of the incident.

Pursuant to W.Va. Code § 25-1A-2(b), "the commissioner of the DOC and the executive director of the regional jail authority are authorized to establish administrative procedures for processing inmate complaints concerning food quality, health care, non-violent non sexual conduct of employees or contractors of the DOC or regional jail authority, loss of privileges and other general complaints about daily living conditions which do not seriously concern an inmates physical health or security...

Pursuant to W.Va. Code § 25-1A-2(c)"...notwithstanding any other provision of this Code, no inmate shall be prevented from filing an appeal of his or her conviction or bring a civil or criminal action alleging past, current or imminent physical or sexual abuse; if such a civil or criminal action is ultimately dismissed by a judge as frivolous then the inmate shall pay the filing costs associated with the civil or criminal action provided for in this article.

The Appellant contends that he should not have had to follow Policy directive 335.00 and file grievances when he went to Appellee Hainey and verbally told him what had happened to him. Your Appellant should have been afforded the opportunity to be escorted to the medical unit of HCC, and interviewed by the West

Virginia State Police so that a criminal report could have been filed. The Appellee's should have definitely afforded the Appellant protection from any further harm instead of placing him back in the same living unit where he was forced to suffer ridicule and harrasemtn from other inmates including the ring leader of his attack and rape.

Unfortunately, the Appellees ignored the Appellants cries for help concerning the rape and torture he sustained on August 8, 2000, which is a common practice at HCC, and has been since 1983 and before. (See Exhibits D; H; I). As can be seen from all these incidents and may more even though the Appellant requested assistance none was forthcoming.

The Appellees actions show that they were deliberately indiefferent and negligent to the appellants physical health and security. It is obvious that the Appellees knew of their wrongs because they were addressed in the case of Nobles v. Gregory, Case # 83-C-244, Circuit Court of Randolph County, West Virginia. As the Appellant has stated his incident is not a secluded incident, it has happened to several inmates in the past, which included rapes and sometimes only beatings, however the most recent which is similar to the Appellants situation occurred on September 1, 2003 on Dorm #2, at HCC to inmate Michael V. Stover #27010. (See Exhibit D).

The Appellant would agree with the Circuit Court decision if he was only complaining of food quality, health care or any other complaint about daily living conditions, then he should be held

to the stringent standards of the WVPLRA, W.Va. Code § 25-1A-2. Unfortunately, the instant case deal with the most inhumane abuse that no person should be forced to suffer. The Appellant was forced to sustain the torture of rape at the hands of other inmates on August 8, 2000, then when he attempted to get help from HCC and DOC officials they ignored his crys for help. This Appellant did in fact exhaust more administrative remedies then he should have been required of him, especially under the circumstances. Attacks and/or rapes happen more than is reported within HCC because inmates know that their cries for help go ignored and they are forced to remain amongst the wolves without any assistance, so it is easier to ignore and/or just continuously accept the abuse from other, because it gets worse when you report it and it is ignored.

In the instant case the Circuit Court of Randolph County erred for dismissing the appellants complaint for failure to exhaust administrative remedies. The appellant should have never had to go as far as submitting his complaint in writing when he verbally told the administration of his attack, however he did, so the attached documents should suffice for exhaustion of any administrative remedies.

THE CIRCUIT COURT OF RANDOLPH COUNTY'S DISMISSAL OF THE COMPLAINT "FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED" WAS A VIOLATION OF WEST VIRGINIA RULES OF CIVIL PROCEDURE RULE'S 8(a) and 8(e) AS WELL AS THE 8th AMENDMENT TO THE U.S. CONSTITUTION AS WELL AS THE WEST VIRGINIA CONSTITUTION ARTICLE III, SECTION 5 & 10.

The Circuit Court dismissed the Complaint because it ruled "he has not stated a claim upon which relief can be granted."

The Court went on to rule that, "The Plaintiff brings this action under 42 U.S.C. §1983. Complaints filed under 42 U.S.C. § 1983 must specifically outline the individual actions committed by each defendant which supposedly violated the plaintiff's constitutional rights...."

State Courts have jurisdiction to hear claims based on federal civil statutes. Virtually every state has expressly or by implication opened it's Court's to §1983 actions and there are no state Courts systems that refuse to hear § 1983 action. Howlett v. Rose, 496 U.S. 356, 378 N. 20, 110 S.Ct. 2430 (1980). Your Appellant would admit that he is not trained in the law, and was acting pro se, with limited and outdated legal research at his current place of incarceration, however he is of the belief that he has in fact stated several constitutional violation under § 1983 especially since the Appellees failed to provide reasonable safety for the Appellant in violation of the Eighth Amendment to the United States Constitution. The Appellant can also allege the tort of negligence. The Court had jurisdiction over the Appellant's claim of violation of federal constitutional rights under 42 U.S.C. §§1331(a) adn 1343 and supplemental jurisdiction over the Appellant's state law tort claim under 28 U.S.C. § 1367. If the Appellant wrongly brought this action pursuant to 42 U.S.C. § 1983, because of his ignorance of the law, then he should still be permitted to proceed with his complaint pursuant to W.Va. Code § 51-2-2 and Rule 82 of the West Virginia Rules of Civil Procedure.

In West Virginia it is well known that, "In general a motion under subdivision (b)(6) of this rule to dismiss the complaint "for failure to state a claim upon which relief can be granted" corresponds to the demurrer under the old practice, but the test is less stringent because the requirement of stating a claim is simplified under Rule 8(a) and e(1). Thus a declaration which was demurrable under the old practice may often be sound when challenged under the new system. Neal v. Huntington Publishing Co., 159 W.Va. 556, 223 S.E.2d 792 (1976).

Pursuant to Rule 8(a) of the West Virginia Rules of Civil Procedure, "A pleading which sets forth a claim for relief, whether an original claim, counter claim, cross-claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several types may be demanded. Every such pleading shall be accompanied by a completed civil case information statement in form prescribed by the Supreme Court of Appeals."

Rule 8(e) states, "Each averment or a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required."

This is the rules that the Appellant followed when he prepared and submitted his Complaint to the Circuit Court. He attached a civil Case Information Sheet; He then provided a short and Plain statement of his complaint; He then place a demand for judgment. Each of his averments was short, simple concise and

direct as required by Rules of Civil Procedure. (See Exhibit J).

In West Virginia a motion to dismiss for failure to state claim is viewed with disfavor, particularly inactions to recover for personal injuries. Chapman v. Kan. Transf. Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

The motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. Mandolidis v. Elkins Indus. Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978) modified on other grounds, Handley v. Union Carbide Corp., 804 F.2d 265 (4th Cir. 1986); Warner v. Kittle, 167 W.Va. 719, 280 S.E.2d 276 (1981); Strickland v. Kittle, 168 W.Va. 147, 287 S.E.2d 148 (1981).

West Virginia Courts must recognize, "for purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations are to be taken as true." John W. Lodge Distrib. Co v. Texaco, Inc., 161 W.Va. 603, 245 S.E.2d 157 (1978); Mandolidis v. Elkins Indus. Inc. 161 W.Va. 695, 246 S.E.2d 907 (1978), modified on other grounds, Handley v. Union Carbide Corp., 804 F.2d 265 (4th Cir. 1986).

It is further known in West Virginia that, "the trial court, in appraising the sufficiency of a complaint on a motion under subdivision (b)(6) of this rule, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Owen v. Board of Educ., 190 W.Va. 677, 441 S.E.2d 398 (1994); Holbrook v. Holbrook, 196 W.Va. 720, 474 S.E.2d 900 (1996)

In the instant case the Appellees neglected to have proper supervision on the dormitories between the hours of 6:00 a.m. and 10:00 p.m. If the Appellant was lucky the Correctional Staff within HCC made a walk through the dorms which lasted approximately five (5) minutes a dorm on an hourly basis, if the big yard was open or if there was not enough staff on duty then they went sometimes without walking through for four (4) hours at a time.

The Appellant was attacked by approximately eight (8) other inmates on August 8, 2000, he was held, sodomized and raped while in the shower on Dorm # 2. (See Affidavit C) Only one of the Appellants attackers and rapist, inmate Olin Gaskins, lived on Dorm #2. The other rapist and attackers lived in other parts of the building and had to be let through a locked door to get onto Dorm #2 to participate in the attack and/or rape of the Appellant.

The Appellant then immediately after the attack and rape attempted to get help from the administration. He verbally spoke with Appellee Jerry Hainey, who only made fun of him and forced him to return to the same living unit the incident occurred. The next day August 9, 2000, the Appellant wrote a request to Hainey on an HCC Request form (Exhibit A). The Respondent in that request was crying for help because of the trauma of the attack and rape, unfortunatley Hainey negligently answered by stating, "No not at this time." The same day the Appellant submitted a notarized complaint/request explaining to Hainey what happened, with no assistance.

On August 30, 2000 the plaintiff, after he did not receive any assistance from his unit team and/or Hainey he wrote a notarized complaint to the Warden Appellee William S. Haines. With this Complaint/request he attached all copies of previous correspondence, unfortunately, no help was in sight. (Exhibit B).

When the Appellant made contact and gave statements to the Appellees concerning the attack and violent rape that he sustained he did establish a claim of deliberate indifference and negligence. The Circuit Court evidently alleges that the Appellees conduct did not violate the Eighth Amendment to the U.S. Constitution because the deprivation alleged was not sufficient because he did not outline each violation.

A claim that is based upon a failure to prevent harm, an inmate must first show that he is incarcerated under conditions posing substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 831-834, 114 S.C.t. 1970, 1976-1977. See also Helling v. McKinney, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). In the instant case the Appellant was incarcerated and forced to remain in the same housing unit, in a bed directly across from one of his rapists, and was forced to live in dormitories without any supervision between the hours of 6:00 a.m. and 10:00 p.m. Additionally, other inmates in the appellants dormitory harrassed him over the attack and attempted to get sexual favors. The Appellant was also labled as a "snitch" and/or "rat" for his attempts to get help after he suffered the rape. He was subject to repeated incidents of harassment including the destruction and theft of his personal property, feces and urine being placed in

his bed and shoes. The Appellant even had cold and hot water thrown on him when he did have a chance to get to sleep. The Appellant on numerous occasions attempted to be moved to a safer living environment or even another institution, sadly, these cries for help went unanswered.

Clearly, the Appellant was incarcerated under conditions posing a substantial risk of serious harm, thus, the evidence supports a finding that there was in fact an objective sufficiently serious, threat to his safety.

The second component of an Eighth Amendment claim is subjective and requires the defendants to have had a sufficient culpable state of mind-- "[i]n prison condition cases that state of mind is one of deliberate indifference to inmate health or safety." Id., a prison official is deliberate indifferent "if he knows that inmates face substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. at 847. An inmate need not show that a prison official acted or failed to act, it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. Farmer, 511 U.S. at 842.

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Id.

The Supreme Court in Farmer further noted that:

While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him [citation omitted] he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inference of risk that he strongly suspected to exist (as when a prison official is aware of high probability of fact indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation; or when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease.)

Farmer, 511 U.S. at 843, Fn. 8.

In the present case there is evidence that the defendant were aware of the potential risk of harm to the Appellant. There had been several previous attacks and/or assaults and the administration continued to allow the dormitories to go unsupervised between the hours of 6:00 a.m. and 10:00 p.m., and they should have know that if they permitted other inmates to enter the living unit where they did not reside there was a potential of danger. The Appellant and other inmates have been subjected to attacks and/or rapes by other inmates, due perhaps to the fact that during the largest portion of the day, correctional officers only check the dorms sometimes on a predictable hourly basis. Correctional Officers were not readily available adjacent to the dormitories or on the dormitoris and could not respond when the Appellant began shouting or when the noise indicating that the attack was taking place. The same situation took place in the case of Noble v. Gregory, Case # 83-C-244, Randolph County Circuit Court, except there was not staff present on the dorm during the night time hours.

No changes in the pattern or mode of supervision have been made despite knowledge of the attacks. For example inmate Tim Forrester was hospitalized for one week following a sexual attack and beating in the dorm and inmate Daniel Fisher was attacked on two separate occasions, each time his first night on a new dorm. This was the inmates who suffered and was tortured back in 1983, which was part of the Nobles case back in 1983. The assaults and rapes continue, so the Appellees are well aware of what goes on within a dormitory and the potentially dangerous situation they place on inmates safety and well being.

Clearly, there are material issues of fact as to whether the defendants were in fact aware of the Appellants circumstances and the likelihood that his safety was at risk. As noted above, the Appellant may prove the Appellees knowledge by circumstantial evidence. Farmern, 511 U.S. at 842. In the instant case it is obvious that the appellant was at risk, because he was in fact attacked and raped and then he informed Appellant Hainey the very same night. It is also evident that an individual such as the Appellant would be a target of retribution by other prisoners once it was known that he was providing information on his attackers and was attempting to receive help from the administration of the prison. The Appellees in this case, long time corrections management professionals, simply cannot plead naivete in this respect despite their assertions that they are not involved in the day-to-day housing assignments of inmates. The Appelles threw Mr. White to the sharks and now throw up their

hands in mock surprise that he was the target of an attack, rape and retribution.

Furthermore, to the extent that the Appellees imply that they responded reasonably to a known risk and thus, did not "disregard an excessive risk to inmate health or safety," Farmer, 511 U.S. at 837, 114 S.Ct. 1970, the fact will illustrate the contrary. Even after the appellant was attacked, Hainey continued to pressure the Appellant into returning to the same dorm despite his many attempts to seek protection from his fellow inmates and at least one of his rapists, who was haunting him from the bed directly across from his. Only after the appellant was held and almost forced again into a sexual act with rapist Olin Gaskin, while taking another shower, at approximately 10:00 a.m. After that incident the Appellant packed his personal property and carried it into the hallway and refused to return back to dorm #2, that is when the prison administration decided that the Appellant was indeed in danger, and moved him onto another housing unit. The very fact that the Appellant informed his unit team, Hainey, Haines and the Commissioner's office of the attack and rape he endured (See exhibits), despite these repeated attempts to be placed in a safe environment, which began approximately forty-five (45) minutes after the attack on August 8, 2000, and his many attempts in writing, is, in itself, substantial evidence of the Appellees' disregard for the excessive risk to the Appellant's safety.

The Appellant further contends that he has stated a claim upon which relief could be granted because of the Appellee's

denial to protect the Appellant and other inmates from the protection of harm which is a constitutional violation. The failure to guarantee reasonable protection from the threat of assaults, sexual or otherwise, violates inmates' rights under Article III, Section 5 and 10 of the West Virginia Constitution. The dorms at HCC are largely unsupervised during the major portions of the day (between 6:00 a.m. and 10:00 p.m.) with only an hourly check of a couple of minutes in duration if there is officers to spare from the halls. This leaves inmates to fend for themselves against assaults.

The Fourth Circuit Court of Appeals has held that prison officials can violate prisoners' constitutional rights by not providing adequate protection against inmate assault or violence. Woodhous v. Commonwealth of Virginia, 487 F.2d 889 (4th Cir. 1973); Harrah v. Leverette, 271 S.E.2d 322, 328 (1980).

The Woodhous analysis was applied in Dawson v. Kendrick, 527 F.Supp. 1252, 1289 (S.D. W.Va. 1981), where the district court held that conditions at the Mercer County Jail amounted to extensive violations of the inmates' constitutional rights, including the right to reasonable protection from harm. The Court found that the "systematic inadequacy of supervision at the jail places the prisoners in reasonable fear for their safety and well-being." Id., at 1290. Moreover, there was "an historical failure on the part of the defendants to exercise reasonable care to alleviate the pervasive risk of harm which exists." Id. This right has been widely recognized by other courts. See, e.g., Gullett v. Potts, 654 F.2d 1007 (5th Cir. 1981); Leanardo

v. Moran, 611 F.2d 397 (1st Cir. 1979); Cline v. U.S. Dept. of Justice, 525 F.Supp. 825 (W.D. Tex 1981); Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980).

Prison officials are under a duty to provide inmates with reasonable protection from threat of violence. However, it is only where violence and terror are a way of life that such conditions would rise to constitutional proportions. Occasional and isolated attacks by one prisoner upon another alone does not constitute cruel and unusual punishment. Penn v. Oliver, 351 F.Supp. 1292 (D.C. Va. 1972). However, this does relieve the incarcerating body of the duty of providing adequate safeguards in the system for all inmates.

In the instant case the Appellant was however attacked and raped and then ignored and denied assistance when he attempted to receive assistance, and besides this incident was not the only incident or was an isolated incident as can be observed by the Exhibits attached.

When the Honorable Judge Larry Starcher entered his final decision on February 25, 1985 for the Nobles case it was the expectation of the Court that once the systematic changes contemplated by that decision occur, the tensions which prompted the violence or threats of violence would dissipate. Unfortunately, this did not occur, it may have for a while, but what is sad it is worse today than ever before.

Your appellant is of the belief that if the Appellee's would not have left the dormitories unsupervised for such long period of time during the day, then he would not have been attacked and

raped. If the Circuit Court would have permitted the Appellant the chance to proceed he would have been able to prove Constitutional violations as well as negligence on the Appellee's part. The Appellant did in fact state several claims for which relief could have been granted, he was raped and was then not offered any protection from prison officials before or after the attack, then when he did get moved to another living unit, on his own demanding, he was harrassed and and illegally touched by a Case manager who continued to mock him because of the rape he sustained. This is definately a claim which relief could be granted. Rape of any kind is TORTURE, the infliction of severe physical and/or emotional pain as punishment and/or coercion. Because of this the Circuit Court should have permitted the Appellant to proceed with his case, instead of dismissing his Complaint and sitting on it for over a year, in which another inmate was attacked and sodomized on the same dorm. (See Exhibit D).

Because there are indeed clear and genuine issues of fact, the appellant should be permitted to collect more evidence through discovery and present his evidence to a jury so that they may decide credibility, weigh the evidence, and draw a legitimate inference from the facts, this case should not be shut down by the Circuit Court, so that this Appellant and other inmates will be forced to suffer. Because the Appellant in the instant case did in fact state a claim for which relief could be granted this Court should so ORDER in his favor.

THE CIRCUIT COURT OF RANDOLPH COUNTY'S DISMISSAL OF THE COMPLAINT WHEN IT HELD THE APPELLANT'S COMPLAINT TO THE STRINGENT STANDARDS AS IT WOULD HAVE A REPRESENTED PLAINTIFF WAS A VIOLATION NOT ONLY THE 8TH AMENDMENT TO THE U.S. CONSTITUTION BUT AS WELL AS ARTICLE III, SECTION 10 OF THE WEST VIRGINIA CONSTITUTION.

In the instant case the Circuit Court of Randolph County held the pro se Appellant's complaint to the same stringent standards as it would have a represented plaintiff. In doing so the Circuit Court did in fact violate the Appellant's 8th Amendment right to be free from cruel and unusual punishment, by permitting the Appellee's negligences and constitutional violations to stand without punishment and/or correction.

In the instant case the Appellant was attacked by several other inmates and held sodomized and raped. This attack was a result of the Appellee's lack of security in their prison, because most of the plaintiff's attackers did not reside on his living unit and had to be let through a locked door to gain entry to the dormitory. After the rape and attack the Appellant attempted to receive proper protection and assistance with none provided. He was forced to remain on the same living unit where the attack and rape took place with at least one of his rapists. While being forced to remain on the living unit he was harassed and abused by other inmates because of his attempts of receiving help from his attack.

If the Courts continue to ignore the complaints such as the one in the instant case, then attacks and rapes will continue to happen, such as they have for years, and continue to happen. (See Exhibits D, H, and I). The Court in the instant case denied the Appellant access to collect evidence through discovery, amend

his complaint to explain in more detail the torture he sustained, and the negligence of the Appellee's in this case. The Circuit Court chose to sit on the Appellant's complaint and motions for over a year, then when he wrote letters requesting the Court to rule on the motions, the Court chose to say, So what if he was raped, he is only an inmate, and chose the easy way out and let the Appellee's off the hook so they can continue to allow inmates to be attacked and/or raped, and dismissed this complaint.

In West Virginia it has been ruled by the 4th Circuit that, "Allegations, however inartfully pleaded, will not be dismissed unless it is proved beyond doubt that the plaintiff could prove no set of facts entitling him to relief." Norris v. Detrick, 918 F.Supp. 977 (N.D. W.Va. 1996), aff'd, 108 F.3d 1373 (4th Cir. 1997).

All Courts should construe pleadings more liberally for pro se parties than for represented parties. See, Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (Pleadings of a pro se litigant should be held to less stringent standards than those drafted by a lawyer). See also, Hughes v. Rowe, 449 U.S. 5, 9 (1980). This rule helps ensure that meritorious positions are recognized and that the litigant is afforded an opportunity to appear and be heard. The claims fo pro se parties should be given adequate consideration even if such parties fail to comply with technical procedural requirements and formalities. See, Kelley v. Secretary, U.S. Dept. of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987) "Leniency with respect to mere formalities should be

extended to a pro se party, but court may not similarly take a liberal view of jurisdictional requirements and set different rule for pro se litigants." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988), "Courts have a duty to ensure that a pro se litigant does not lose the right to a hearing on the merits of a claim as a result of ignorance or technical procedural requirements." See also, Brown v. Frey, 806 F.2d 801, 804 (8th Cir. 1986).

In the instant case the Appellant is not requesting the Court to take a liberal view of jurisdictional requirements and set a different rule for him. He did in fact follow proper W.Va. Rules of Civil Procedure when he filed his Complaint with the Circuit Court of Randolph County, where his rape took place at HCC, in Huttonsville, Randolph County. The Plaintiff is requesting the court to extend him a little leniency to mere formalities because he did in fact file the complaint the best he knew how, with no legal experience and/or training. The Circuit Court should have permitted the Appellant the right to a hearing to present evidence and request discovery so that the merits of this legitimate claim did not fall of deaf ears.

It is generally inappropriate for a court to dismiss an inadequate pleading by pro se plaintiff's merely because the Court cannot determine from the face of the pleading whether the complaint has merit, as it did in the instant case. This is evidenced by the Appellant's original complaint if reviewed. He explained in the complaint that he was attacked, raped and

sodomized by other inmates who had to be let through a locked door to get to the Appellant's living unit, there was no security on the dorms the biggest part of the day and he explained the negligence of the Appellee's before and after the attack. Any complaint of this nature should be taken serious and be granted merit be the Court especially when the administration at HCC and DOC usually ignores these types of complaints at their level. (See exhibits C, D, H, I and J.)

Instead of doing what the Circuit Court did in this case, it should have inquired into the basis of the action to determine whether the complaint that appeared to be meritless might be amended to raise a non-frivolous or otherwise arguably meritorious claim. In this case the appellant explained that he was raped and then denied protection and assistance, this should have sufficed for a meritorious claim.

Courts have great discretion in how to make this inquiry, use of certain techniques is often helpful and sometimes required. See e.g., Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994), "where section 1983 complaints legal basis was not "indisputably meritless" and facts alleged were not "fantastic or delusional," district court abused its discretion by dismissing the complaint without using either a hearing or a questionnaire to determine whether prisoner could have presented a nonfrivolous claim."

In many Courts, information about the basis of an inartfully drawn complaint is gathered in a hearing. The hearing, called a

"Spears Hearing" after the case Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985), is, "in the manner of a motion for more definite statement." That is, it is not intended to resolve matters in dispute, but to determine whether a prisoner who had filed an inadequate pleading can allege facts sufficient to make out a colorable claim. However, the hearing can also provide an opportunity to encourage informal resolution of the matter by parties and therefore obviate the need for a judicial disposition. The Spears, hearing approach has been recognized by the Supreme Court and adopted by many Courts. See, e.g. Neitzke v. Williams, 490 U.S. 319 (1989); Reeves v. Collin, 14 F.3d 8 (5th Cir. 1994); Perryman v. Bless, No: 86-5528, 1987 WL 36958, at \*1 (6th Cir. April 24, 1987).

For these reasons the Appellant is of the belief that the Circuit Court should not have held his complaint to the same stringent standards as a represented party and he should be permitted to proceed with discovery and the prosecution of this case.

#### C O N C L U S I O N

Due to the Appellee's obvious violation and negligence the Appellant has suffered an attack and rape with no assistance from administration of HCC or DOC. The Appellant has suffered the loss of personal property after the attacks and because of the attack and rape he has suffered severe physical and mental abuse

and torture in which after the attacks he was placed on Xanax for his nerves and now is forced to take psychotropic medication the remainder of his life for the moods swings and depression. (See Exhibit K). The Appellant also suffers severe nightmares and suffers a sleep disorder along with stomach and intestinal problems in which he was treated for while at Mt.Olive Correctional Complex after the attack and rape. (See Exhibits L and M).

The Plaintiff attempted to receive help from the Appellee's without any results. This Appellant and any other inmate without lawyers to carry their most serious problems to a Judge, they are dependant on prison administrators and supervisors to protect them.

Meaningful investigation of their complaints and requests for help is essential to replacinng judicial oversight with internal monitoring and management.

In the instant case the Appellee's have neglected the duties as prison administrators and chooses to ignore inmates crys for assistance, places them in danger without the proper security in place and refuses assistance after a severe incident occurs such as the rape the Appellant sustained. This has been going on for year within HCC and continues to happen. (See Exhibits D, H, I)

If the Courts permit such abuses and manipulations by the Appellee's to continue then the will be handing them a blank check to continue this action in the future, causing other inmates to suffer the same as the Appellant has been tortured.

The Appellee's negligence in permitting the rape and then not providing any assistance is just as abusive as the rape itself. Hainey's belief that the Appellant was gay any way so it couldn't have hurt to bad and that he would heal, was improper and proves that the prison officials does not care. Rape of any kind is TORTURE, the infliction of severe and/or emotional pain as punishment and/or coercion. Rape is less an act of sex; it is more an act of violence, domination and especially humiliation. Long after the body has healed, the emotions remain traumatized and stigmatized. Latest research indicates severe trauma such as sexual assault can lead to permant brain damage.

Everyone in society is a potential victim of rape. Even a police officer on duty, Richard Beck, was raped and his true story aried on television.

Rape is a major life crisis and feelings of disbelief, terror, and vulnerability usually follow. The survivor is usually left feeling numb emotionally. Shame, guilt, depression, claustrophobia often overwhelm the victim. Suppression or blocking out the experience is often common and the survivor has the appearance of being outwardly calm.

Other emotional problems caused by the rape at some time or other are sexual dysfunction, inability to express emotions clearly, memory loss, dependency, negativity, fear of intimacy, sleep disorder, feeling of powerlessness, and clinging to the past. In the instant case, your appellant was placed on Zanax for the remainder of his time at HCC. (See Exhibit K) He was

then placed on Lithium and now takes 1500 mg of Valporic Acid (Deprocote) for manic depression/mood swings. He has suffered sleep disorders and still does at times. (See Exhibits L and M) The Appellant has never before suffered depression, mood swings or has been treated by a psychiatrist in the past prior to the attack and rape he suffered.

At an early stage, the survivor needs a support group b||e only when he or she is ready. Talking or at least writing about the experience often helps the survivor cope with the brutalization by preventing the emotions from becoming blocked or distorted. Above all, the rape survivor--only when ready--needs to be heard, understood, believed, and accepted. In the instant case the Appellant attempted to receive help from the administration of HCC and DOC, and the only thing that he was told by Appellee Hainey was that he was gay anyway, he would heel and forced him to return to the dormitory where the rape had took place with inmate Olin Gaskin's one of the leaders and rapist's in the attack.

The psychological effects of prisoner rape can last a lifetime and often lead to substance abuse, domestic violence and much worse. Prisoner rape costs taxpayers dearly in recidivism, increased violent crime, and health care including disability pensions. The latest study by Dr. Cindy Struckman-Johnson (Univ. So. Dakota) indicates the rape rate of male prisoners to be from nine to twenty-two percent. With a national prison population of about two million in 2001, even at the lowest percentage, this means tens of thousands of male prisoners are raped daily.

Prisoner rape not only violates basic human rights but also the Eighth and Thirteenth Amendments to the U.S Constitution forbidding cruel and unusual punishment and slavery respectively. Those who make, interpret and enforces the law have long know about prisoner rape and few have tried to stop it. "You shut your mind to it , " Judge Vincent Femia of Maryland to the Washington Post in 1982. Others in the criminal justice system have used rape as a "management tool" to coerce suspects, as extra punihsmnt, to racially divide and concquer prisoners, create informers, etc. In the instant case, the appellant was an inmate representative who assisted inmates in filing grievances and letters and Complaints to the Courts. He is of the belief that his attack was permitted and/or just overlooked by staff within HCC, because most of his attackers did not live on the dormitory where the Appellant resided and the rape occurred. They had to be permitted entrance through a locked doorway from the hall so that they could enter access to the dormitory. This door has to be unlocked personally by a staff person, it is not electronically controlled.

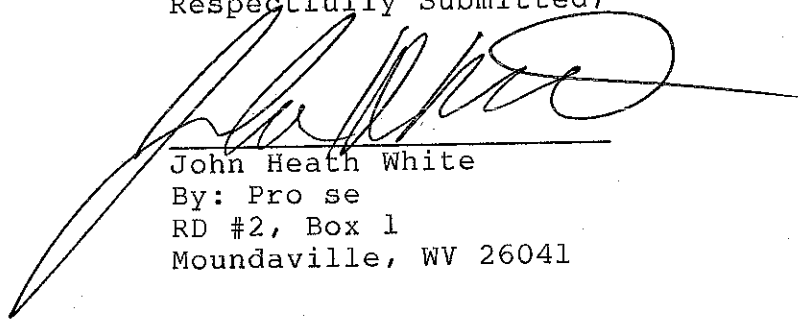
The Appellant has demonstrated sufficient physical injury to sustain a claim pursuant to § 1983 and a state tort action. Furthermore, the Appellant asserts that the appellee's conduct could certainly be described as being "repugnant to the conscience of mankind." Therefore, it would be obvious the the Circuit Courts order to dismiss the instant complaint was without merit. The Circuirt Court only granted the Appellees access to a

blank check so that they can continue to ignore inmates pleas for help and permit the attakcs and rapes to continue within their facility. If this Court permits the Circuit Courts decision to stand and does not return this case back to the Court for an immediate trial then it will be granting the Appellee's an even bigger check for them to continue to allow inmates need for assistance go unanswered which has been going on for years and continues to go on.

PRAYER FOR RELIEF

The Circuit Court's dismissal of the Appellant case violates both the U.S. and W.Va. Constitutions. It also is repugnant to the conscience of mankind. Based upon the forgoing arguments, the Appellant hereby requests that this Honorable Court remand this case to the Circuit Court of Randolph County for an immediate Scheduling Conference so that this case can be scheduled for trial. This Appellant requests any further relief that this Court deems just and proper.

Respectfully Submitted,



John Heath White  
By: Pro se  
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JOHN HEATH WHITE,  
Appellant,

Vs.

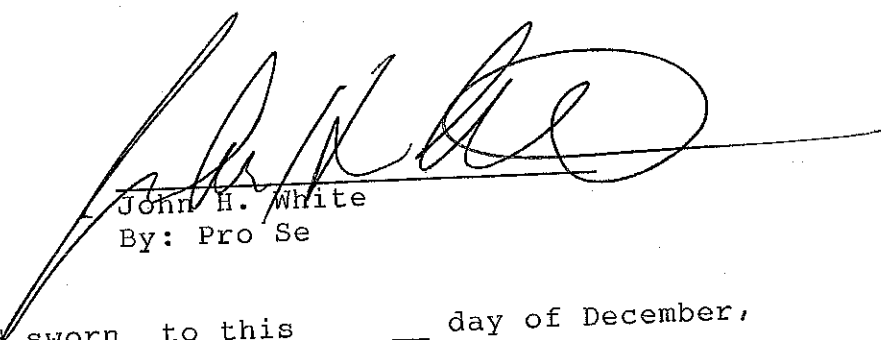
No: 32190

WILLIAM S. HAINES, Warden;  
JERRY HAINEY, and JIM RUBENSTEIN,  
Appellees

CERTIFICATE OF SERVICE

I, John Heath White, Appellant by pro se, do hereby certify that a true copy of the foregoing APPELLANT'S BRIEF, was served upon the Appellee's, by depositing a copy thereof, postage prepaid in the U.S. Mail, this \_\_\_\_\_ day of December, 2004, addressed as follows:

Charles Houdychell, Jr.  
Assistant Attorney General  
WV Division of Corrections  
112 California Ave.  
Bldg. 4, Rm 300  
Charleston, WV 25305

  
John H. White  
By: Pro Se

Taken, subscribed and sworn to this \_\_\_\_\_ day of December, 2004.

My Commission Expires: July 4, 2011.

  
Notary Public

