

WEDNESDAY, AUGUST 31, 2005, 9:00 A.M.

THE COURT: This is 2001 CR 71 Austin versus Wilkinson. The case is before the Court today for a hearing on certain motions filed by the parties. I believe there are certain plaintiff representatives, and I would ask the officers if you want to bring the two representatives in, we're going to proceed.

Does the plaintiff wish to make any opening statement? Do you wish to make an opening statement? Why don't you go ahead and proceed.

MR. LOBEL: Your Honor, this motion addresses the basic proposition affirmed now by this Court, the Court of Appeals and the Supreme Court that when prisoners are placed in conditions that represent an atypical and significant hardship they must first be accorded an individualized hearing consistent with due process before they can be so placed.

The defendants here plan to transfer en mass the prisoners on Death Row without according them any individualized hearing to OSP. The question really in this case then represents --

THE COURT: Remind me. How many?

MR. LOBEL: It is about 200 all together. Some of them will not be transferred because of mental illness reasons. I think the plan is somewhere between 170 and 180.

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1 MR. LANDIS: That's fair.

2 THE COURT: Okay.

3 MR. LOBEL: And they are not planning to give them
4 any individualized hearing. This is just ^ by fiat they
5 are planning to transfer them to OSP and therefore it would
6 violate what this Court, the Court of Appeals, and the
7 Supreme Court has held are required if there is an atypical
8 and significant hardship.

9 Now, as you know, this Court has already held that
10 all prisoners held at OSP including not only Level 5 but the
11 level four Bs and the Level 4-As have been transferred to
12 OSP in atypical and significant hardship even though with
13 respect to the 4-As the out of cell time and the privilege
14 levels that those people were promised are equal to or
15 greater than the privilege level and the out of cell time
16 that they are now promising to the Death Row inmates coming
17 from Mansfield.

18 We believe that this Court's prior rulings at
19 minimum raise the presumption that anybody transferred to --

20 THE COURT: Help me remember. The 4-As, I had
21 some recollection that that decision was largely made upon
22 the fact that they consented to it.

23 MR. LOBEL: Exactly, Your Honor.

24 THE COURT: As opposed to, you know, there were
25 certain precautionary matters with regard to insuring that

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1 the consent was knowing and voluntarily.

2 MR. LOBEL: That's correct.

3 THE COURT: But did I ever make a determination
4 that the conditions they were held under were atypical?

5 MR. LOBEL: Yes, you did, Your Honor. If you want
6 to have it in my briefcase, I can -- but in that order, in
7 that ruling that you made, you said both the Level 4-Bs and
8 the Level 4-As despite the fact that the Level 4-As were
9 promised five hours a day out of cell time and all these
10 privileges were still being held in atypical and significant
11 hardship and therefore absent the waiver, they would have
12 had to have been accorded individualized hearings. The only
13 thing that obviated the need for the hearings were the fact
14 that they had voluntarily waived that.

15 If you hadn't decided that there wasn't an
16 atypical and significant hardship they could have been sent
17 without the waiver, but you said the waiver was required
18 because it was still an atypical and significant hardship
19 and there is really almost no difference between the
20 conditions that the 4-As are being -- were promised that
21 they were going to be held in, in fact, those promises have
22 not quite been eventuated but at the hearing two years ago
23 you made that determination based on what the privilege
24 level they said was going to occur.

25 THE COURT: Is the amount of out of cell time the
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1 same, that is being recommended for the Death Row inmates?

2 Is that approximately the same as the 4?

3 MR. LOBEL: Approximately the same for what was
4 recommended for the 4-As. We'll hear testimony today that
5 in fact the 4-As are not getting that out of cell time, but
6 it is about what they -- the chart that was in evidence said
7 would be given to the 4-As.

8 THE COURT: What about -- are they all being -- is
9 the recommendation that the Death Row inmates all be fed in
10 their cells?

11 MR. LOBEL: No. I think the 4-As are not fed in
12 their cells, and the Death Row, the recommendation is that
13 the Death Row inmates would not be fed in their own cells,
14 at least some of the meals.

15 THE COURT: Okay.

16 MR. LOBEL: But -- so in any event, the first
17 point we have is this is almost identical to the 4-A
18 situation, which you have already held constitutes an
19 atypical and significant hardship in which people can't be
20 transferred into OSP without either waiving their rights or
21 being accorded a hearing.

22 In this case, however, there are some other
23 factors besides the general architecture at OSP, the system
24 of restraints that you have already held to constitute an
25 atypical and significant hardship, which are particular to
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1 the people at Death Row.

2 The first is, these folks have a compelling need
3 for adequate legal facilities to meet with their lawyers, to
4 have confidential conversations with their lawyers, and we
5 will present evidence today that they don't have that at
6 OSP.

7 Now, for everybody that may be held at OSP that
8 might raise a constitutional violation, but we don't have to
9 reach that today because the only question here is whether
10 for people who are under the particular legal disability of
11 being condemned to death, whether they have -- whether it is
12 an atypical and significant hardship in combination with all
13 the other conditions at OSP, to take them from the place
14 where they have adequate facilities for meeting with their
15 lawyers in confidence, in private conditions, and send them
16 to a place where those adequate facilities do not exist.

17 When my co-counsel, Staughton Lynd, and I were
18 discussing this, we said this is a case in a sense of taking
19 a person who has a disability and putting them into
20 segregation, which may or may not represent an atypical and
21 significant hardship absent the disability, but when you add
22 on the disability, if you don't have adequate facilities to
23 accommodate that disability, it clearly -- if you take
24 somebody in a wheelchair and put them into a segregation
25 facility and you don't have the ramps, the accouterments

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1 which they require, that ought to be an atypical and
2 significant hardship, and the Ninth Circuit has held in a
3 case is ^ Sarono versus Francis 345 F 10 third, 271, 2003,
4 Ninth Circuit case. We think this is a similar situation in
5 that here people don't have a physical disability but they
6 have a legal disability and the lack of adequate facilities
7 for legal representation at OSP I think is a significant
8 factor which contributes to the already atypical and
9 significant hardship that exists there.

10 The other factor which we want you to focus on
11 today is that over 20 percent of the people on Death Row are
12 in what's known as an honor block, and that honor block has
13 significant privileges and liberties which they cannot
14 possibly recreate at OSP.

15 For example, that honor block has has a large,
16 very very large recreation yard with handball courts, basket
17 ball courts, a running track, indoor Jim, ping pong table,
18 laundry room where they do their own laundry, the folks in
19 the honor block, which you can only get on by having
20 excellent behavior for over three years have significant
21 liberties, which even under their plan, there is no
22 possibility way they can recreate at OSP.

23 Whatever the situation is for everybody at Death
24 Row and our position is that it is Alan atypical and
25 significant hardship to move anybody from Mansfield to OSP

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1 certainly the honor block, representing over 20 percent of
2 the prisoners, is without question an aat this point and
3 significant hardship.

4 A couple of last points, Your Honor.

5 First is that we are litigating this based on what
6 they say they are going to do. They won't change the legal
7 visiting rooms, they won't change the architecture, they
8 can't do anything for the honor block but what they say they
9 are going to do is very unlikely to happen.

10 We are going to present evidence of the past
11 practice of what they said they were going to do with
12 respect to Level 4, what they said they were going to do in
13 the past, and it hasn't happened, and if you just look at
14 the calculations they have made, in some cases, like the
15 recreation, where you know from our hearing six months ago
16 that they had trouble just according the recreation times
17 that they said they were going to for the level fours and
18 the fives, to add almost 200 new people in there and say a
19 that they are going to give them the amount of recreation
20 time they say they are going to do seems impossible.

21 It may be that they can do it but on the face of
22 it seems impossible.

23 The justification for this is not security. There
24 is no claim by the defendants that they have to do this for
25 security reasons. The justification is economic, and the

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1 total economic justification consists of one page, hastily
2 written, apparently, which sets forth the savings that they
3 are going to make.

4 Any CEO presenting this in a courtroom would be
5 embarrassed, and if they were held to account by
6 shareholders or directors for these calculations, it is
7 incredibly shoddy.

8 On the face of it, I don't understand how you are
9 going to take people and move them from one facility to the
10 most expensive facility in the State and save money. They
11 claim it is because they are overstaffed at OSP. Well, the
12 answer ought to be lay off the people at OSP. In any event,
13 I think that is one thing this Court should explore.

14 Finally this is not just an abstract issue that
15 they are raising of atypical and significant hardship. We
16 will present evidence of the severe trauma that many
17 prisoners at Mansfield are going through, knowing that there
18 is this plan afoot to send them to OSP.

19 This is again not simply an abstract question of
20 whether these conditions make an atypical and significant
21 hardship and it is not like the situation of 4-As where you
22 have people volunteering. Here people far from volunteering
23 are being sent to Oakwood, sent to psychiatric facilities
24 because of the trauma they are facing. There have been
25 suicide attempts. One successful suicide at Mansfield, all

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1 subsequent to the initiation of this plan.

2 So this is a very serious problem that we're
3 facing. In some it is an ill conceived plan. It is causing
4 tremendous trauma. And it violates the basic principles
5 affirmed now by each of the courts that have heard this that
6 when you have an atypical and significant hardship you have
7 to give the people an individualized hearing to determine
8 where whether they warrant placement in such a hardship.
9 Thank you, Your Honor.

10 THE COURT: Mr. Landis.

11 MR. LANDIS: Your Honor, it is not the
12 architecture it is the operation. This is a very secure
13 facility, it is a facility that is very appropriate for
14 Death Row.

15 We have looked around the country as to where
16 Death Rows were held and they are very typically held in the
17 most secure place that the State provides.

18 That was true at Lucasville until this move to
19 Mansfield in recent history. It was done in '95. It hasn't
20 been to Mansfield for its entire life. It is the manner in
21 which you run the operation once you get it within the
22 architecture.

23 The ironic thing is that the more secure the
24 architecture, the more that you have the ability to allow
25 inmates to be out of cell and to be secure and out and

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1 getting more programming.

2 OSP is a good deal for these inmates. That's not
3 the standard hear but that's the proof.

4 THE COURT: What's the -- how is this going to
5 differ from the 4-A privileges?

6 MR. LANDIS: Your Honor, the 4-As are all
7 voluntary tears --

8 THE COURT: I guess in terms of whether it is
9 atypical.

10 MR. LANDIS: I appreciate that Your Honor.

11 THE COURT: Counsel for the plaintiff says that
12 the conditions are nearly identical to those that the 4-A
13 have.

14 MR. LANDIS: They are similar. They are not
15 identical. They will be more favorable for Death Row.
16 Death Row will have more property, will have more
17 programming, will be out of cell approximately the same
18 amount of time, and I have to add this, Your Honor. The
19 decision that you make concerning 4-As and whether that was
20 atypical and significant was before the guidance from the
21 U.S. Supreme Court. The U.S. Supreme Court said by any
22 measure the level fives had atypical and significant
23 hardship, and they went through the list of conditions --

24 THE COURT: I thought you didn't appeal that.

25 MR. LANDIS: I agree. I agree. The Supreme Court

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1 decided it anyway.

2 THE COURT: Okay. That is the answer. The
3 beginning of the argument was all about atypical and
4 significant. It was not something that had been appealed --

5 THE COURT: Was there a Court of Appeals ruling on
6 the 4-As? Help me recall, is there a Court of Appeals, did
7 the Court of Appeals consider the 4-As?

8 MR. LANDIS: They have not Your Honor, that's not
9 been considered. But what I do is look at the Supreme Court
10 decision in which it says that the thing that tipped the
11 balance for them even for the fives, even for 23 hours
12 lockup every day, even for no physical contact, they said
13 well, by any measure, this is going to be atypical and
14 significant because of two factors. One is you lose parole
15 opportunity when you are Level 5, that is not an issue with
16 Death Row. The other one was it is an indefinite stay, they
17 said, at Ohio State Penetentiary based upon what they saw in
18 the record. That is not true here. We know when they are
19 leaving. And because of that, you don't have an atypical
20 and significant hardship in the manner in which this Court's
21 order returns did on mandate. The comparison to make is not
22 with the ruling on 4-As it is the ruling on 5s that went to
23 the U.S. Supreme Court.

24 The comparison to make is not with 4-As it is with
25 what Death Row has now at Mansfield, it is the conditions of

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1 Death Row in other places.

2 THE COURT: How is it going to vary from the
3 conditions that are currently at Mansfield?

4 MR. LANDIS: It is going to be better for them as
5 far as out of cell time goes.

6 Right now, according to post order, the general
7 population Death Row inmate is to get out of cell one hour
8 per day for recreation, for five days in a week.

9 THE COURT: And what is the recommendation at OSP.

10 MR. LANDIS: The out of cell time will be 35 hours
11 per week.

12 THE COURT: How else is it going to differ from
13 the current conditions.

14 MR. LANDIS: They will be out of cell 30 more
15 hours per week than they are at Mansfield for a general
16 population Death Row inmate at Mansfield. They will also
17 eat together and this is a key. The idea of being isolated
18 from human contact as it is for level fives and
19 appropriately for levels fives is not being contemplated for
20 Death Row. They are going to eat lunch and dinner together
21 every day and be out of cell 35 hours per day ^ means
22 week --

23 THE COURT: You mean -- not 35 hours per day, that
24 is kind of hard to accomplish.

25 MR. LANDIS: Thank you, Your Honor. I'm glad you

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1 are listening. 35 hours per week and they also get to eat
2 together.

3 Right now, Death Row eats in cell.

4 We have a four minute video Your Honor that shows
5 conditions there an conditions here and I would like to play
6 it for you now and tell you what it says. And that is
7 really of the entire opening. If I may have some
8 assistance. The tape is already in.

9 THE COURT: Okay.

10 MR. LANDIS: What you are going to see first is
11 the outdoor recreation available for Death Row at Mansfield
12 and then the recreation outside for OSP. I warned him
13 before he walked away I was going to do this.

14 THE COURT: It's in the VCR? It is on pause.
15 This tape has been provided to the plaintiff, for the
16 record. ^ videotape played ^ .

17
18 MR. LOBEL: Your Honor, on opening they can do
19 whatever they want. We don't make much of this tape. There
20 is all sorts of inaccuracies.

21 THE COURT: Okay. 124 this is let row at
22 Mansfield, you can see how low the ceiling is and the manner
23 in which they have to choose. You have a choice between
24 bricks and bricks.

25 The next shot you will see is outdoor recreation

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1 at the Ohio State penitentiary in the area available to the
2 Death Row inmates once they move. This was built thanks to
3 the stipulation in this case.

4 They come down by elevator into this recreation
5 area.

6 This is the typical general population pod in
7 Mansfield. In order to provide an indoor recreation area
8 you have chain link fence all the way around the inside of a
9 much smaller pod than is available at the Ohio State
10 Penitentiary, which you see now. This will be an indoor
11 recreation area for the Death Row inmates and this is where
12 their indoor recreation will be. This entire inside of the
13 pod.

14 This is the walk. Right now you go through Arab
15 bit pole kind of to get to the six different ranges for
16 Death Row at Mansfield, there are no video cameras, this is
17 the introduction as you walk the other way. This is also
18 how you get to visitation, which we are showing you now.
19 This is visitation, family-type visitation at Mansfield for
20 Death Row.

21 That's the holding cell. And this is the area in
22 which the inmate goes.

23 The conversations is through telephone and that
24 window is not open.

25 This is the visitation area at the Ohio State

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1 Penetentiary. This is actually shot during the depositions
 2 of one of the inmates. That's the attorney visitation area.
 3 That attorney visitation area has been there since 1999. It
 4 has been used by the folks at this counsel table since 1999
 5 without a complaint. There are eight Death Row inmates
 6 there now that get all their attorney visitation where you
 7 saw. This is lunch and dinner for an inmate at Death Row at
 8 Mansfield. You just saw it.

9 It goes through a slot, they eat it by themselves.

10 This is demonstrative in that these are Level 4-As
 11 who are sitting down for their meal together. All the meals
 12 go to them. They sit where they want and they congregate.

13 This is the human interaction that will be added
 14 to the life of a Death Row inmate if this move occurs
 15 because the architecture is secure enough to allow this.

16 It is ironic that you will hear from Gene
 17 Woodford, who is the head of the corrections in California.
 18 She was a corrections officer and worked her way up to war
 19 deny of San Quentin, by statute in California, Death Row
 20 must be at San Quentin, San Quentin was built in 1852, 24
 21 years before Custer's last stand. Historically it is on the
 22 sixth floor of the old building, it has 68 cells, they now
 23 have 600 people on Death Row in California, she has been
 24 agitating to get Death Row a bigger place more secure
 25 location so they can get down for right now they are locked

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1 down all the time, right now the only time they get out is
 2 intermittently in cages outside. The inmates are so crowded
 3 that the inmates refuse visitation on alternate days so
 4 there is more room for those that do take visitation. She
 5 presently got the legislation to spend money to build a
 6 structure on San Quentin to house Death Row that structure
 7 will be a secure prison of the same type as OSP they are
 8 going to spend \$220 million in California to put their Death
 9 Row under conditions much like we are talking about doing
 10 and we save money doing it.

11 The idea that we can have an injunction from the
 12 plaintiff to enforce an order on conduct that hasn't yet
 13 occurred is not something that this Court should engage in.
 14 It is important for this department to save money somewhere
 15 there the biennial budget. The State budgets starts July 1.
 16 We have been marking time since July 1 to make this move, we
 17 safe 91 jobs. If we don't save them here we have to cut
 18 them someplace else. We have to cut security spots in some
 19 other prisons. As time goes on we will still have to do
 20 that because we have not saved that much money in the two
 21 year budget.

22 In addition Your Honor just so we know the balance
 23 of harms for this injunction, we have frozen transfers
 24 throughout the State. We want to have openings throughout
 25 the State to send people at Mansfield when we close Death

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1 Row there because we don't want to lay off people so as a
 2 result if somebody lived in Toledo but worked in Lebanon and
 3 they have a transfer request that that has all been frozen
 4 until we find out what happens.

5 So it is very important for us to get a decision
 6 on this. 4-A is not the example we need to look at. Your
 7 decision says similarly situated inmates. Is it atypical
 8 for a similarly situated inmate, one obvious comparison is
 9 what do they have at manuals field, what are they going to
 10 have there. The other one is what do other Death Rows do it
 11 is typically in the most secure location it can be. It is
 12 not at Lucasville now because of consideration for these
 13 inmates. Because you have somebody who is going to be put
 14 to death in the same location they live, you have an effect
 15 on the staff and on them that the department did not feel
 16 was helpful. And that is why it was sent to Mansfield in
 17 the first place and why it is not being sent back to
 18 Lucasville.

19 They closed a pod at OSP, they closed a block
 20 there. It is uninhabited, they did not cut staff, really in
 21 reference to the orders of this Court to assure that it was
 22 fully staffed at all times so the way that they save money
 23 is to send more inmates there.

24 Death Row is a completely discrete classification,
 25 it is in every state of the union except Missouri, it is not

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1 as if we are making a determination that this particular
 2 inmate is ready to go or needs something different. We are
 3 picking up an entire prison population and we need to move
 4 it where we need to move it. We have the authority to do
 5 that and it is not an atypical and significant hardship.

6 Having said that, could I have the document
 7 camera, please.

8 We do give -- we do give notice and an opportunity
 9 to be heard, this says, notice of interinstitutional
 10 transfer. This is handed to every inmate in Death Row.
 11 They are told that they can make a statement and send
 12 written objections by my finger here to the committee, and
 13 they will have a hearing.

14 Now, Death Row is its own classification. They
 15 have been sentenced to death. It is not like you are moving
 16 from Level 4 to Level 5. They are going to be in Death Row.
 17 The issue that you find out here is I can't be with Jason
 18 rob, or I can't be with this inmate or I really need to be
 19 with this block of inmates. They have supported them. And
 20 that's what we are going to listen to.

21 This is the kind of due process that is required
 22 under who witness. ^ Hewitt is the case that was followed
 23 by the U.S. Supreme Court, not ^ Wolfe.

24 THE COURT: Is that just where they are housed at
 25 OSP or is there any ability if they are successful on this

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1 to avoid transfer to OSP.

2 MR. LANDIS: That's a good question. There is one
3 group that is not going to OSP and those that are determined
4 to be seriously mental ill and we are taking the seriously
5 mentally ill inmates and not sending them to OSP. We are
6 doing a screening with psychiatric professionals --

7 THE COURT: What about the others, though. The
8 objection that this notice allows, is it an objection
9 only -- what grounds could justify it and what would the
10 result be? In other words, the exam will you used, I can't
11 be with a certain person. If someone is successful on that,
12 will they still be shipped to OSP, albeit in a different pod
13 or a different area than the person they had problems with?

14 MR. LANDIS: That is true, unless through this
15 process, they convince the institution that they are
16 seriously mentally ill and it should be handled in that
17 matter.

18 THE COURT: Is that the only disqualifier?

19 MR. LANDIS: Yes. We have also used the phrase
20 psychologically vulnerable, a phrase less severe than
21 seriously mental ill but somebody that needs to be watched
22 and we have agreed to not send that type of inmate to OSP as
23 well but basically psychological reasons would be the manner
24 in which they would not be transferred to OSP. Otherwise,
25 it would give us a consideration as to where to place them.

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1 You have heard a lot about what we call extended
2 private Mansfield, there are only 36 spots for that. It is
3 Death Row 6. There are 6 different areas. One of them has
4 extended privileges. They actually don't have showers in
5 their cells, which is not -- that's a disadvantage to being
6 in six, they do get additional out of cell time, additional
7 congregate time. It is always full. There are more people
8 eligible to be there than we have spaces at Mansfield.

9 We have more spaces at OSP. We also have more
10 jobs at OSP. In California, for 600 Death Row inmates they
11 have about 30 jobs.

12 THE COURT: What type of work do they do?

13 MR. LANDIS: They do portering they clean.

14 THE COURT: Just on the Death Row pod or in other
15 pods.

16 MR. LANDIS: I believe they work just on the Death
17 Row pod.

18 THE COURT: Okay.

19 MR. LANDIS: We have 136 jobs slated for Death
20 Row. We only expect about 180 to move. So this is a big
21 deal for an inmate. They get paid. They get more money in
22 their commissary and the hardest thing to ask a person to do
23 is nothing. These folks will have something to do if they
24 move to OSP.

25 Your Honor, we think that the appropriate

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1 comparison is Mansfield Death Row, other Death Rows, the
 2 conditions that they are presently under. The 4-A ruling
 3 should not apply here. We have been educated by the U.S.
 4 Supreme Court since then and they made it clear that the
 5 determining factors were the lack of parole and the
 6 indefinite stay which does not apply to the Death Row
 7 population.

8 We believe that you will see evidence from four
 9 experts, actually, two operational and two mental health,
 10 that will be convincing to you. In addition to the person
 11 from California who will make those comparisons, you are
 12 going to hear from Vince Nathan. He is presently a special
 13 master in this district for corrections purposes, he has
 14 been a special master for judges throughout the United
 15 States, received an award from the ACLU.

16 He is not a defense guy by any definition. He has
 17 looked at this, things it will be a very positive thing for
 18 the inmates, we think so too. It is not the standard but
 19 this is a better deal for these inmates, and we think we
 20 ought to be allowed to try it and not be stopped before we
 21 get there. Thank you.

22 THE COURT: Would plaintiff call your first
 23 witness.

24 MR. LOBEL: Your Honor, I just have one other
 25 preliminary matter. As we discussed yesterday we made a

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1 motion to exclude the witness from California that
 2 Mr. Landis talks about. I don't know, we're prepared to
 3 argue that motion now, or we're prepared to owe.

4 THE COURT: What's the defense's position?

5 MR. LANDIS: Your Honor, we disclosed miss
 6 Woodford on the 27th of July with our other witnesses and we
 7 did not hear anything from plaintiff of any concern, and
 8 wrote a letter on August 12, sort of waving our arms around
 9 and saying you didn't say anything --

10 THE COURT: When was her report done.

11 MR. LANDIS: Her report was given to the other
 12 side on Friday and Your Honor I has even to tell you that
 13 the plaintiff, we have worked as adversaries but always as
 14 professionals and there was no complaint about the timing of
 15 the filing of the report.

16 THE COURT: Help me again, her name is?

17 MR. LANDIS: Say again.

18 THE COURT: What is her name?

19 MR. LANDIS: Jean Woodford. We are imposing on
 20 here Your Honor, she runs California. She has agreed to
 21 come out and tell you what she thinks and we set that up
 22 before we actually knew what she was going to say to tell
 23 you the truth.

24 THE COURT: I guess the problems they have and I
 25 think there is some support for the plaintiff's position is

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1 the fact that under Rule 26 you have not really given them
2 notice as to what she is going to testify to.

3 MR. LANDIS: Are you speaking of the level of the
4 detail in the report Your Honor.

5 THE COURT: Plus the fact that she testifies that
6 she is going to come out and look at the prison the day
7 before, presumptively today --

8 MR. LOBEL: Tomorrow.

9 MR. LANDIS: That's right, Your Honor.

10 MR. LOBEL: That's why I raise it now so we don't
11 have to impose on her. She is not leaving until tonight.

12 THE COURT: So the question is how can she give
13 notice. The requirement under Rule 26 is that the report
14 itself be a detailed report.

15 MR. LANDIS: Yes, Your Honor, she gave all her
16 opinions in the report that she is going to give and she had
17 available to her when she formed those reports a videotape
18 indicating the differences between the two. This is not new
19 information. When she goes there in person it is not new
20 information that goes into making up her opinion. It is
21 additional, either confirmatory -- we offered in this
22 letter, which was August 12, Your Honor, to allow a
23 deposition after the time that she reviews it, to allow
24 them, and they asked to walk through with her.

25 We have agreed to let them walk through with her

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1 if they choose to do that. She is here three days. She
2 comes to Ohio for one set of flights.

3 So she did do a report, the report was timely
4 given, it describes all the opinions. And --

5 THE COURT: I'm not sure that typical under Rule
6 26 is ninety days before trial.

7 MR. LANDIS: I appreciate that, Your Honor, and
8 that's why I raised my hand and said there was no objection
9 to the plaintiff as to the timing of the issuance of the
10 report I understand it was only Friday however they have not
11 complained about that. We offered to get them a report on
12 August 12. We've had conversations about that.

13 THE COURT: There is a difference between being
14 timely and not having a complaint.

15 MR. LANDIS: Fair enough but I guess I want to
16 designate what the complaints are. Your Honor, the
17 complaints are really in two categories. One is I don't
18 think the report has enough meat in it. That goes to
19 weight. The second one is --

20 THE COURT: I don't think it does. I don't know
21 how you can say weight with that. Rule 26 says that the
22 report needs to be fairly detailed.

23 MR. LOBEL: Complete is the word.

24 MR. LANDIS: Your Honor, what it says is it says
25 her opinions, it says the basis of the opinions. It has

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1 what she looked at, which includes a videotape of what she
2 is going to see anyway.

3 We've even had conversations, he'd say he doesn't
4 have an objection if she doesn't go there to look at the
5 place. Because it wouldn't be adding a basis to her opinion
6 or wouldn't be adding facts to her opinion, I don't think
7 that is a good objection because she has already seen the
8 place on video. We really didn't hear about this concern
9 about additional detail in the report. The report says it
10 is not an atypical and significant hardship based upon a
11 comparison between Death Row here and Death Row as I know
12 it.

13 I reviewed the tape, I have seen what Mansfield
14 looks like, I have seen what the plans are, I have seen all
15 the documents that indicate what the programming is at
16 Mansfield, what the programming is going to be at OSP and I
17 find that to be good correctional practice so she talked
18 about what she looked at, what her opinions are, she talked
19 about the basis of her opinion.

20 MR. LOBEL: Your Honor, just to reiterate. Our
21 objection, including the timing, but the key objection is
22 they think this walk through the important, we think it is
23 important that she actually see the place, be able to
24 testify about OSP and Mansfield, talk to the war deny, et
25 cetera, and she is doing that after she filed the report.

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1 So I have no idea what she is going to say once she goes and
2 sees OSP. And they said, well, you could take the
3 deposition Friday morning, right before she testifies? And
4 Court is closed Friday. We are not engaged in Court with
5 you on Friday morning is why I said that.

6 THE COURT: We're not closed. I have something
7 else.

8 MR. LANDIS: I know you are working, Your Honor.
9 We're not working in front of you.

10 MR. LOBEL: Which is what the rule is supposed to
11 prevent and also wouldn't help us very much.

12 But anyway, that is our first objection. The
13 other thing is her whole testimony, as Mr. Landis has said,
14 is that the move to OSP is not going to be very different
15 than what California is going to do. The Sixth Circuit in
16 an opinion which was not disturbed by the Supreme Court, the
17 Supreme Court said in any stretch of imagination, what Judge
18 Gwin did here on atypical and significant hardship was
19 correct under any test, they didn't decide what test you
20 should use, but the Sixth Circuit in an opinion which hasn't
21 been disturbed said it is emphatically not the test to
22 determine whether or not this prison comports with what
23 other high security prisons do around the country so if they
24 bring in somebody from Texas or Mississippi or California
25 saying they doing the same thing they are doing in Texas or

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1 California that's not the issue. The issue is is it
2 significantly than what is happening at Mansfield. And
3 therefore I think she is irrelevant.

4 THE COURT: Well, I'm going to limit her testimony
5 to the report.

6 MR. LANDIS: Very good Your Honor.

7 THE COURT: But what that means is there is no
8 sense for her to go to the prisons. So she didn't describe
9 the prisons, either Mansfield or the OSP prison in the
10 report. I think under Rule 26 she has an obligation to do
11 that.

12 So I'll let her testify generally as to what she
13 set out in the report but I won't allow testimony from items
14 she just gathers the day before the report.

15 So in terms of the logistics of the matter it is
16 probably just as advantageous for her to testify by way of
17 videoconferencing as to travel across the country.

18 MR. LANDIS: Thank you for your ruling. We'll
19 consider what is best for her and for the Court on that.

20 THE COURT: Just to set it out, there is the
21 requirement under Rule 26 that the reports be specific and
22 her report gives some generalized impressions and I would
23 find generally it look like she has experience and training
24 to afford opinion testimony.

25 Some of the matters she testifies are relevant to

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1 the case. But I think that it would be an unfair, in some
2 ways ambush to the plaintiffs to have her then support that
3 with specific testimony about certain items at OSP or
4 Mansfield when they have not been given a report that sets
5 out that level of detail.

6 So she potentially could give relevant testimony,
7 but because of the lateness and the lack of specificity in
8 the report, I won't allow her to testify as to matters she
9 observed in a trip the day before the testimony.

10 THE COURT: I understand.

11 MR. LANDIS: I understand Your Honor.

12 She had indicated some benefits at OSP that the
13 architecture would give in terms of giving secure
14 programming opportunities --

15 THE COURT: And I think she does say that.

16 MR. LANDIS: Yes she does.

17 THE COURT: And if she has seen the videotape she
18 may be able to use that as the basis for her testimony. But
19 I just am not going to allow her to supplement that with
20 additional evidence gathered only on the day before the
21 hearing.

22 MR. LANDIS: I understand, Your Honor. It was not
23 our intention to prejudice the other side. We disclosed her
24 a month ago, August 12. We let them know very specifically
25 what kind of witness she was. We offered to take some of

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1 the sting away, just for the record, we gave them the
 2 opportunity for a deposition after the tour, and also to
 3 walk through during the tour, which was a suggestion that
 4 plaintiff had made and I note that they have several people
 5 at counsel table that would be available to do that.

6 THE COURT: Okay.

7 MR. LANDIS: But we understand your ruling Your
 8 Honor.

9 MR. LOBEL: Thank you, Your Honor.

10 THE COURT: Would you call your first witness?

11 MR. LYND: Your Honor, if I may, one or two more
 12 procedural things.

13 First, the Court asked that the parties put on the
 14 record a stipulation that these proceedings would be
 15 understood to be merged with any possible proceedings on a
 16 permanent injunction, and I want to do that on behalf of
 17 plaintiffs and I understand that --

18 THE COURT: Do you make such a motion then? Do
 19 you move that the hearing on the preliminary injunction be
 20 consolidated with the hearing on the permanent injunction?

21 MR. LYND: I think we could make that motion
 22 jointly.

23 MR. LANDIS: Yes, Your Honor.

24 THE COURT: And do both sides consent to that.

25 MR. LYND: Yes.

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1 THE COURT: I'll order that the hearing on the
 2 preliminary injunction be merged with the hearing on the
 3 permanent injunction.

4 MR. LYND: Secondly Your Honor I would like to
 5 move for a separation of witnesses.

6 THE COURT: I'll grant that.

7 MR. LYND: Thank you.

8 Thirdly, Your Honor, the comment was made in
 9 opening that there has been no protest about the conditions
 10 of attorney/client visiting at OSP.

11 THE COURT: Well, that wasn't evidence. If you
 12 want to offer evidence, you can do it at the time you
 13 solicit witnesses.

14 MR. LYND: Very well.

15 MR. LANDIS: Your Honor, we have in the courtroom
 16 an expert and our understanding of the rules allows experts
 17 to stay in the courtroom notwithstanding --

18 THE COURT: Do you have any objection to that?

19 MR. LYND: May I have one moment, Your Honor?
 20 (Discussion had off the record.)

21 MR. LYND: Who is your expert?

22 MR. LANDIS: Vince Nathan.

23 MR. LYND: I agree.

24 THE COURT: Call your first witness.

25 MR. LYND: I would like to call Terry Collins as

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1 on cross-examination.

2 TERRY COLLINS, being first duly sworn, was examined
3 and testified as follows:

4 DIRECT EXAMINATION OF TERRY COLLINS

5 BY MR. LYND:

6 Q.

7 THE COURT: Please take a seat and tell us your
8 name and spell your last name for the court reporter.

9 THE WITNESS: Terry Collins. COLLINS.

10 THE COURT: Mr. Lynd.

11 BY MR. LYND:

12 Q. Good morning, Mr. Collins?

13 A. Good morning.

14 Q. I think this is the fourth time you have testified in
15 these proceedings, and I'm not going to go over your
16 experience yet again.

17 But I have two specific questions about your past
18 experience with the department of Rehabilitation &
19 Corrections.

20 The first is was there a time when you were war deny of
21 the southern Ohio correctional facility?

22 A. Yes, I was.

23 Q. And from when to when, Mr. Collins?

24 A. From December, 1993, to September, 1997.

25 Q. December, '93 to December, '97?

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1 A. September, '97.

2 Q. September, '97. And that includes the time, does it
3 not, when Death Row was moved from southern Ohio
4 correctional facility to ManCI?

5 A. That's correct.

6 Q. Was that time early in 1995?

7 A. I believe that time was February of 1995.

8 Q. So that you would have had more than a year's
9 experience with the conditions of Death Row at SOCF?

10 A. Death Row was there from 1993 when I arrived until they
11 departed in '95, yes.

12 Q. Now, my second question, Mr. Collins, has to do with
13 the fact that I believe since 2003, when you last testified,
14 there has been a change in your title and role within the
15 department.

16 A. That is correct.

17 Q. And what is that change?

18 A. I'm currently the assistant director of the department.

19 Q. And before that --

20 A. I was the deputy director of prisons.

21 Q. And am I right in thinking that discussions about
22 moving Death Row to OSP began at least a couple of years
23 ago, when you were deputy director of institutions?

24 A. That is correct.

25 Q. And since becoming assistant director of the

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1 department, you have been directly involved with the
 2 decision to make that transfer and have considered
 3 operational aspects of that placement as presented by the
 4 OSP warden?

5 A. That is correct.

6 Q. Now, when you became warden at SOCF in December, 1993,
 7 how many men were on Death Row, approximately?

8 A. I believe the number was approximately somewhere, 160,
 9 150, somewhere in that area but I'm not absolutely sure of
 10 the number.

11 Q. 150 to 170?

12 A. I would guess that, yes.

13 Q. And they were housed in K block at SOCF?

14 A. Correct.

15 Q. Single celled?

16 A. Correct.

17 Q. With regard to outside recreation, I understand that
 18 Death Row prisoners at SOCF had their own recreation yard
 19 next to K 4?

20 A. There was an outside recreation yard that was just for
 21 Death Row outside of the K 4 area, yes.

22 Q. And that recreation area had a basketball Court, a
 23 handball Court, dip and pullup bars, picnic tables, and
 24 plenty of room to jog and play football?

25 A. As I recall, and again this was a long time ago, when I

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1 got to Lucasville, there was many, many, many, many things
 2 going on in my direction of abilities and responsibilities
 3 as the warden of that prison was not directed specifically
 4 and solely to Death Row but was directed specifically to
 5 rebuild a prison that had underwent a major riot.

6 The yard that you characterize I believe did have a
 7 basketball goal. I don't know that it was a Court as I
 8 recall. I think the handball Court was probably a wall that
 9 there was a concrete or blacktop surface out in front of it
 10 that you used the wall of the building as a handball court.

11 I don't recall if there were picnics tables there. It
 12 was not a gigantic yard but it wasn't a small yard either.
 13 It certainly wasn't as big as the general recollection reand
 14 I guess yard at SOCF but it was a yard that was big enough
 15 that you could have tossed a football, shot some basketball,
 16 and I don't recall how many inmates were allowed out at that
 17 particular time when I was there.

18 Q. I have been told, Mr. Collins, that before the 1993
 19 uprising, Death Row prisoners would go out to that yard 40
 20 men at a time, wearing no restraints of any kind. Do you
 21 know whether that is the case?

22 MR. LANDIS: Your Honor, this is a small thing but
 23 it is important to my client. We object to the phrase
 24 uprising for the riot at Lucasville. People died. It is a
 25 phrase that Mr. Lynd prefers but I believe that it is

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1 prejudicial and miss leads the Court.

2 THE COURT: Although his questions are not
3 evidence. The evidence comes from the witness.

4 MR. LANDIS: Fair enough Your Honor.

5 THE COURT: So the witness is free to correct him
6 if the witness thinks it is appropriate but his questions
7 really are not evidence in the case.

8 MR. LANDIS: Thank you, Your Honor.

9 BY MR. LYND:

10 Q. My question was before the events of April, 1993,
11 Mr. Collins, wasn't it the case that Death Row prisoners
12 would go out to that yard near K 4, 40 men at a time,
13 wearing no restraints?

14 A. I don't believe that to be true, no.

15 Q. Even after April, 1993, during the period that you had
16 personal knowledge, wasn't it the case that Death Row
17 prisoners would go out to rec 20 at a time, restrained only
18 by handcuffs behind the back that were removed when they
19 reached the yard?

20 A. I don't recall the number that went out. The ranges
21 were 20 cells to a range, so it is possible, but to be
22 absolute certain that it did occur, I can't say that that
23 did occur, so I don't know that that in fact is true.

24 Q. Now, when you were SOCF warden, as I believe you will
25 recall, you stated in deposition even prisoners in

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1 administrative control and disciplinary control were offered
2 outdoor rec at least five hours a week. Isn't that so?

3 A. That is correct.

4 Q. And even those Death Row prisoners whose privileges
5 were most restricted, the so-called level C Death Row
6 prisoners, also had at least five hours of outdoor
7 recreation a week. Isn't that so?

8 A. Let me back up just a second here.

9 When you refer to outdoor rec, I'm assuming that you
10 mean outside, sun shine, fresh air. When I first got to
11 Lucasville in December of '93, in fact I don't believe there
12 was any outdoor recreation at that particular facility.
13 Particularly for those individuals who were in
14 administrative control, local control, at that time it would
15 have been J block. Lucasville L side basically a little
16 over one-half of the prison was totally destroyed and was
17 not in operation. K side had Death Row, K-5 through 8 were
18 general population blocks who may have been outside on the
19 rec yard but I think that was even very very limited at that
20 particular time.

21 The people in administrative control, which is a
22 special management population of those who created problems
23 throughout the system and would have been transferred to
24 Lucasville, got some out of cell recreation. When I first
25 got to Lucasville, as I recall, that out of cell recreation

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1 was on the range because while I was at Lucasville part of
 2 the reconstruction of that particular prison, we built
 3 outdoor recreation areas as a result of a ruling from judge
 4 speaking he will's Court in Cincinnati, so eventually, those
 5 were in use, in fact there was two areas built, one that was
 6 a total outdoor and one we called an indoor-outdoor but I
 7 don't know that outdoor recreation for AC inmates was
 8 actually outdoors. I think it was on the range, which would
 9 have been out of the cell but maybe not outdoors.

10 Q. Let me rephrase my question in language that you may
 11 recall.

12 This is referring to inmates in administrative control
 13 on page 46 of your deposition transcript. "I believe they
 14 didn't get any outdoor recreation when I first arrived at
 15 SOCF and I base that on while I was there, we constructed
 16 outdoor recreation areas for those individuals who were in
 17 administrative control and eventually, yes, those
 18 individuals did get the opportunity for one hour of outdoor
 19 recreation five times a week" correct?

20 A. I think that's what I just testified to in Court.

21 Q. I thought you said something about indoor rather than
 22 outdoor?

23 A. I said when I first got to Lucasville, what was
 24 considered to be recreation was actually indoors on the
 25 range but out of cell. Eventually, we built outdoor

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1 recreation areas and eventually people did get outside
 2 recreation, outside meaning outside of the building.

3 Q. Thank you.

4 And then to repeat, since we were speaking about
 5 administrative control among Death Row prisoners, even those
 6 whose behavior called for the highest level of restriction,
 7 also received five hours of outdoor recreation a week.
 8 Correct?

9 A. I don't recall the Death Row specifically as to the
 10 recreation they got. The outdoor recreation areas, I don't
 11 remember when they were finished, and I'm not sure that the
 12 Death Row inmates were still there when those were finished
 13 so I don't think they would have went in that, but I don't
 14 recall whether or not they were allowed outside into the (
 15 open area that we used for Death Row recreation.

16 Q. Well, let me refer you, Mr. Collins, to Plaintiff's
 17 exhibit for identification 1.

18 Now, this was a document that we considered at your
 19 deposition. It has a number of pages, and the page I'm
 20 going to put on the screen is page four of Plaintiff's
 21 Exhibit 1, and ask you to look at the first paragraph, level
 22 C inmates are permitted only what local control or
 23 administrative control inmates are permitted.

24 Would you agree that it would appear that if
 25 administrative control and local control inmates had five

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1 days of outdoor rec, that was also true of Level C inmates
2 on Death Row?

3 A. Mr. Lynd, I can't say that. I don't know where this
4 document -- I don't know the total document. I don't know
5 whether this was preor post riot. I don't know the date on
6 the document, I don't know who signed the document so for me
7 to make a qualified answer to that I would need to see the
8 entire document so I understood what the actual document was
9 rather than one page of it.

10 Q. There is a problem with multi-page documents and I
11 wonder if the Court would permit a set of the exhibits to be
12 given to Mr. Collins?

13 THE COURT: Yes.

14 BY MR. LYND:

15 Q. We are referring to Exhibit 1, Mr. Collins.

16 A. I have that document. Could I take a second to look at
17 it, please?

18 Q. Yes, and I think you will find on the fifth page, both
19 the date and the signatures of some prison administrators.

20 A. This entire document does refer to Death Row. It
21 appears to be dated January the 2nd, 1992 --

22 Q. Correct?

23 A. -- which would be pre-riot, a year plus before the
24 riot. It is a five-page document, it was signed by what
25 appears to be or at least in title were unit manager and

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1 deputy warden of programs, it was not signed by the warden,
2 who at that time was warden Tate, so specifically referring
3 to page four, yes, page four does say that level C inmates
4 would be permitted the same recreational opportunities as
5 those in administrative control and local control but
6 qualify that with I assume this was official document, the
7 warden didn't sign it so I don't know that it was actually
8 in practice or not in practice and also note that it was
9 more than a year prior to the riot.

10 Q. And with regard to level A inmates, the inmates who
11 were most privileged within Death Row, refer to page three,
12 Mr. Collins, and look at the second paragraph.

13 Does it appear to you that in contrast to the five
14 hours for level C prisoners on Death Row, level A prisoners,
15 the most privileged had seven and a half hours of outside
16 recreation per week, weather permitting?

17 A. That's what this document says. I don't know that that
18 in fact occurred.

19 Q. Indoors, Death Row prisoners at SOCF used the general
20 population indoor gym for recreation, did they not?

21 A. Pre-or post riot?

22 Q. At the time you were there?

23 A. At the time I was there? I don't recall that they did,
24 but I can't be certain.

25 Q. And I assume that the Death Row basketball league at

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1 SOCF may have been a thing of the past by the time you
2 became warden?

3 A. I don't recall a Death Row basketball league, no.

4 Q. With regard to visits, Mr. Collins, it is my
5 understanding that full contact visits for all Death Row
6 prisoners had been planned to begin almost at the same time
7 that the unfortunate events of April, 1993 occurred.

8 Is that your understanding?

9 A. If I understand your question, that full contact
10 visiting was being considered at SOCF prior to the riot for
11 the Death Row inmates?

12 Q. Exactly?

13 A. Today is the first I've ever heard of that.

14 Q. Have SOCF prisoners and their attorneys did have
15 contact visits, correct?

16 A. We had attorney rooms at SOCF that were open, they had
17 glass fronts, there was a table there's chairs on the both
18 sides of the table, officers would view the attorney visits
19 from outside, looking through the glass enclosed window. So
20 I assume you could term that as a contact visit.

21 Q. The doors of those rooms could be closed?

22 A. Correct.

23 Q. The officers outside the glass could see but could not
24 hear.

25 A. Well, I know they could see. I assume that if they

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1 could hear, it would only have been muffled hearing. I

2 don't think the rooms were sound proof, no.

3 Q. And if the attorney requested it, officers would remove
4 handcuffs so that the prisoners hands were free?

5 A. I don't specifically recall that, no.

6 Q. With regard to the access of Death Row prisoners at
7 SOCF, to legal materials, do you have any knowledge of a
8 lawsuit filed by Death Row prisoners about this?

9 A. About access to legal materials?

10 Q. Yes.

11 A. No, sir.

12 Q. Was it true at the time you were warden that two Death
13 Row prisoners, Mr. Glen Benner and Mr. Donald Williams,
14 served as paralegals to obtain legal materials for their
15 colleagues?

16 A. I have no way of recalling that.

17 Q. Now, let's return if we may to Plaintiff's Exhibit 1,
18 which has the title, does it not, Mr. Collins, "Security
19 Level Classification Outline reclassification committee and
20 Death Row inmates unit 7 class if I case system."

21 A. That's what it is titled, yes.

22 Q. Would you agree that this document appears to set forth
23 a security classification system for Death Row prisoners as
24 of January, 1992?

25 A. I believe what actually this document presents is a

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1 custody supervision determination of various levels, A, B
 2 and C, not necessarily security. Security level typically
 3 is defined by hardness of facility, architectural structure,
 4 fences, those type things, whereas supervision level is
 5 typically eyeball contact and you increase supervision level
 6 by privileges and eventually by getting more privileges
 7 changed or security level, so I believe that this document
 8 in my mind, not nothing the purpose behind it was written or
 9 approved appears to me to be more how people were going to
 10 be defined in custody supervision levels.

11 Q. It does say, does it not, at the bottom of the first
 12 page, "all levels, A, B, and C are maximum Level 4."
 13 Correct?

14 A. It certainly does say that, but I would always add and
 15 I added this many times in my deposition that Death Row has
 16 always been considered to be its own classification. Death
 17 Row inmates are handled much differently than any other
 18 inmates that is received in our department. The fact that
 19 Lucasville in 1992 and probably when I was there in '93 and
 20 probably when they left in '95 and probably in '97 were
 21 referred to as maximum Level 4 probably wouldn't be uncommon
 22 because that was considered to be at that particular time
 23 our highest level of security.

24 Because they were in those facilities they probably
 25 called them that.

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1 However, when a Death Row inmate is received in this
 2 state, and taken to the reception center, no security
 3 document is completed on them at that time. They are given
 4 a number, they are fingerprinted and typically within a
 5 matter of hours transferred to wherever the director has
 6 designated Death Row be.

7 So when they get there, regardless of what you call
 8 them, the fact that they are on Death Row, they can't leave
 9 Death Row. You can do security reviews, you can do
 10 supervision reviews, you can do classification instruments
 11 all day long, but that won't change where they go because
 12 there is Death Row and Death Row is assigned a particular
 13 area.

14 Q. But Mr. Collins, what your department called maximum
 15 Level 4 in this document in the caption immediately
 16 preceding the sentence we've been considering is the
 17 security level, correct?

18 A. That is correct. They did at that time call that a
 19 security level.

20 Q. And there is no reference in this document to such a
 21 thing as a DR or a 0-D security classification is there?

22 A. I believe that was changed somewhere around 2001, maybe
 23 2002. Or shortly thereafter.

24 Q. And within the maximum Level 4 security level, there
 25 were what I believe you referred to in July as custody

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1 levels for the Death Row prisoners designated A, B and C,
2 correct?

3 A. Yes, and that's so defined on page one of that same
4 document. The first paragraph says three main custody
5 classificatoins, level A, level B and level C.

6 Q. And then on page two, if I'm not mistaken -- sorry, on
7 page one -- we are told what it is that Level A, Level B,
8 and Level C signify, are we not, and without taking the time
9 to read every word, Mr. Collins, in general, Level C would
10 have been the group with behavior problems; level B would
11 have been an intermediate group, and level A is inmates who
12 have demonstrated through their behavior that they should be
13 given more privileges.

14 Correct?

15 A. That's an accurate characterization, yes.

16 Q. And judging from the exhibit that we have been
17 considering, at that time, January 1992, all Death Row
18 prisoners received an annual security review, right?

19 A. That's what this document said, yes.

20 Q. Now, there is a second exhibit, Plaintiff's Exhibit for
21 identification 2, which we can put on the screen very nearly
22 in its entirety.

23 Can you identify this document?

24 A. This is a document that I wrote February the 11th, 1994
25 entitled "change in mission" at Lucasville.

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1 Q. You wrote this in your capacity as warden?

2 A. Correct.

3 Q. And you state, do you not, at the beginning of the
4 second paragraph, Mr. Collins, "every inmate at Lucasville
5 will be screened and evaluated to determine whether he must
6 remain at maximum security."

7 A. Yes, I do say that and also in that same paragraph, the
8 very last sentence says inmates who remain at SOCF will have
9 an opportunity to earn their way out, and I put that in
10 quotes, by demonstrating appropriate behavior.

11 As you questioned me in my deposition, my use of the
12 word "all" in February of 1994 I think has been taken
13 extremely literal. The fact that I said "all" and didn't
14 put in parentheses not including Death Row inmates may have
15 been at that particular time a fallacy on my part.

16 However, this particular memo that you have introduced
17 to me and did at my deposition would have been strictly
18 related to those individuals who would have been in
19 population and been eligible to earn their way from
20 Lucasville, meaning they could have been reduced in security
21 and been sent to a Level 3 prison, what we called closed
22 security prison at that time.

23 Death Row inmates regardless of how good they would
24 have been could not have earned their way out of SOCF.

25 This particular document was written less than 60 days

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1 into my appointment at SOCF and particularly because one of
 2 the main issues about the riot and one of the 21 points of
 3 the agreement was the fact that inmates at SOCF who were in
 4 population were not being moved even though the institution
 5 might have said they should have been, they were getting
 6 overridden and were not being allowed to move, so regardless
 7 of how good your behavior was, you ended up there.

8 This was a memo to the inmates to say that that process
 9 was changing and would change along the way and you could
 10 earn your way out and if you did proper things then you
 11 could reduce from maximum security to closed security, what
 12 we called it at that time.

13 Q. Isn't it true, Mr. Collins, that prisoners on Death Row
 14 at SOCF did receive security classifications in this same
 15 period of time?

16 A. Yes, sir, that is correct. They did receive annual
 17 security classification reviews, and as I said at my
 18 deposition, that was eventually changed, probably sometime
 19 in 2001-2002, and basically because of the reasons I just
 20 stated before this Court, that regardless of how many
 21 security reviews or supervision classification reviews we
 22 did, nothing is going to change because Death Row is Death
 23 Row and that sentence is a group of individuals who are
 24 separate from our classification system.

25 Apparently they did, and you showed me documents at

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1 deposition of security instruments on a couple of different
 2 people so they probably did them, probably did them when I
 3 was the warden as luck atville but we made a determination
 4 sometime in 2001, 2002, maybe even 2003, why do them, it
 5 would have been a waste of paper and staff time to do them
 6 because nothing could change in reference to movement to
 7 another prison.

8 Q. If you know, Mr. Collins, when Death Row was
 9 transferred from SOCF to ManCI early in 1995, how long had
 10 Death Row existed at SOCF?

11 A. When I first went to the southern Ohio correctional
 12 facility in 1977, which was my entry level position, Death
 13 Row was at Lucasville at that particular time. I assumed it
 14 was probably moved there sometime in its opening, which
 15 would have been sometime in '72, I believe, when they closed
 16 the Ohio State Penetentiary.

17 In 1977, when I arrived at Lucasville, as my initial
 18 assignment there was Death Row there. I believe it was 1978
 19 or '79 that the death penalty in the State of Ohio was ruled
 20 unconstitutional and all the inmates were released from
 21 Death Row, so Death Row ceased to exist at that time and I
 22 believe it was sometime in early '80s, I left there in 1980,
 23 it was after I left there and sometime thereafter in the
 24 early '80s the death penalty in the State of Ohio was
 25 reinstated, so Death Row would have started there again

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1 whenever that would have been, sometime in '82, '83 I think
2 it was.

3 Q. So that, let's take '83, '82 as the date from which
4 there has been continuously a Death Row in Ohio, and I think
5 we can agree that such a Death Row existed at Lucasville
6 before the transfer to ManCI for approximately 15 years?

7 A. I would agree with that.

8 Q. And then Death Row moved to ManCI, prisoners sentenced
9 to death have been housed there continuously for now about
10 ten and a half years?

11 THE COURT: Housed where? ManCI?

12 MR. LYND: At ManCI.

13 THE COURT: Okay.

14 A. Death row has been housed there than. Inmates
15 sentenced to death may be housed in other areas if their
16 actions on Death Row were more than the security that Death
17 Row could handle, would be housed elsewhere, which is within
18 the administrative regulations of the department.

19 There could also be somebody that was moved to CMC
20 because of medical, but the actual assignment of Death Row
21 is Mansfield and has been since '95. You're correct.

22 Q. But when you speak of prisoners whose conduct as
23 perceived by the department required that they be housed
24 elsewhere, that would include prisoners felt to constitute a
25 sufficient security risk that they had to be reclassified

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1 Level 5 and housed at the Ohio State Penetentiary?

2 A. Yes, it would be cases that were proven that needed to
3 be housed at Level 5, yes.

4 Q. And just to make that a little more concrete, that has
5 included certain individuals involved in the event at
6 Lucasville in April, 1993?

7 A. Yes, that would be correct.

8 Q. It is included certain individuals alleged to have been
9 involved in events at ManCI in DR 4 in September, 1997?

10 A. If you are referring to the riot on Death Row, in, I
11 believe that was '97, that would be correct, yes.

12 Q. And it would include, would it not, two prisoners on
13 Death Row who attempted an escape in February, 2005, were
14 reclassified Level 5 and transferred to OSP?

15 A. I don't know that they have arrived at OSP. I know
16 they were looking at Level 5 classification on those two
17 individuals, but I don't know that they are actually at OSP
18 now.

19 MR. LYND: I think the warden and I can stipulate
20 that they have arrived.

21 BY MR. LYND:

22 Q. And each of those persons, Mr. Collins, reclassified
23 Level 5 on the basis of his supposed misconduct while
24 incarcerated received an individual security review before
25 reclassification and transfer, isn't that so?

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1 A. If they were being placed into a Level 5
2 classification, which is part of our normal classification
3 process, which goes from Level I through Level 5, if they
4 were being placed in Level 5, which would be a major change
5 from their existing classification and for Death Row, again,
6 was its own classification, was not and has not been in the
7 Level I through five system, yes, they would have received a
8 hearing to go into the Level 5 status.

9 Q. Plaintiff's Exhibit for identification 3, Mr. Collins,
10 is the department's roster of Death Row inmates as of August
11 3, 2005, and I offer it only for the proposition stated in
12 the introductory paragraph that as of August 3, 2005, there
13 were a total of 197 inmates on Death Row in Ohio, 196 men
14 and 1 woman. Is that correct in your understanding?

15 A. This is a document that appears to come off our web
16 site so I assume that list would be correct. I don't know
17 the actual number at that date or today.

18 Q. And just to clarify, the woman would be at Marysville?

19 A. Correct.

20 Q. And the 196 would include the five to ten persons
21 sentenced to death who are now at SOP, or not?

22 A. I don't know. I would have to look at that. I would
23 assume they probably did because I believe this is -- would
24 be a list of individuals who are under the custody of the
25 department who are sentenced to death.

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1 Q. That's my understanding as well. So that the actual
2 number of male Death Row prisoners at ManCI as of the
3 beginning of August might have been, let's say, 190. Close
4 to that.

5 A. Again, I don't know the exact number that were there.
6 Or there today.

7 Q. Now, it is true, is it not, Mr. Collins, that after the
8 transfer of death sentence prisoners from SOCF to ManCI they
9 continued for a number of years to receive annual security
10 classification reviews?

11 A. As I said earlier in my testimony, at Mansfield, they
12 were receiving those. I think you showed me a document in
13 my deposition, it was in 1997, that someone was getting a
14 security review. So I would say they did. I think that
15 stopped in 2001, 2002, maybe it was 2003.

16 Q. And just to solidify the point, I'm going to show you a
17 series of documents, not all of which I had at the time of
18 your deposition.

19 These are Plaintiff's 4-A through 4-F.

20 4-A is entitled "notification of
21 classification/reclassification hearing." It is apparently
22 for a Death Row prisoners named Post. It is stated that the
23 purpose of the hearing is level review.

24 Would this seem to you, again, another document
25 suggesting that security classification was ongoing at

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1 ManCI?

2 A. It is a notice of classification/reclassification
3 hearing. I assume they were looking at it for a level
4 review, which I assume was the A, B, C level.

5 Q. And since this document, Plaintiff's Exhibit for
6 identification 4-A is dated March 27 and apparently issued
7 at ManCI, that would be consistent, would it not, with your
8 statement that the transfer took place the month before, in
9 February?

10 A. This document is dated March 27 of 1995, so it would
11 have been roughly a month after the inmate were received at
12 Mansfield from SOCF.

13 Q. The next document in the series, Plaintiff's Exhibit
14 for identification 4-B, is a three-page document which you
15 reviewed at the time of your deposition and I think we
16 agreed that this document entitled supervision review form
17 does appear to reflect a security classification on Death
18 Row at ManCI in the year 1997?

19 A. I would agree to that, yes.

20 Q. Plaintiff's Exhibit 4-C is a decision of the chief
21 inspector on a grievance appeal involving the late Ronald
22 Combs, and I want to call your attention to the next to last
23 full paragraph?

24 THE COURT: Just to be clear, that is Ronald
25 Combs, C-o-m-b-s.

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1 MR. LYND: C-o-m-b-s, correct.

2 BY MR. LYND:

3 Q. The second sentence of the next to last paragraph
4 states "I have reviewed the policy that existed during the
5 time of your complaint. Security level classification
6 outline reclassification committee and Death Row inmates
7 unit policy classification system."

8 And interestingly, if we look back at the first page of
9 Plaintiff's Exhibit 1, that is the title, is it not, of
10 Plaintiff's Exhibit for identification 1, the five page
11 security policy at SOCF dated January of '92?

12 A. Well, I'm trying to follow on this document from the
13 chief inspector grievance appeal, I was trying to figure out
14 where you were reading on that. You said something about --

15 Q. I beg your pardon?

16 A. I still have not found that on the document.

17 Q. Sorry?

18 A. So could you refer me to that?

19 Q. I could and it is a little difficult to show the entire
20 document on the screen.

21 I am referring to the second sentence of the next to
22 last paragraph. "I have reviewed the policy that existed
23 during the time of your complaint."

24 A. That's correct. I was also trying to read the rest of
25 the paragraph to make sure what that one particular sentence

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1 said would be taken in --

2 Q. My question was simply that she gives the title of a
3 document -- yes, she, Jorgensen ^ Martinez, she gives the
4 title, and if you look back at the first page of Plaintiff's
5 Exhibit for identification 1 it seems that she is talking
6 about the same document. At least they have the same title.

7 THE COURT: You need to ask a question. I don't
8 know that that's a question.

9 BY MR. LYND:

10 Q. Do the two documents have the same title?

11 A. No.

12 Q. Because the first document refers to unit seven. But
13 with that exception, do they seem to have the same title?

14 A. No.

15 Q. How do they differ, Mr. Collins?

16 A. The words that she has bold in her grievance appeal
17 specifically state "security level classification outline
18 reclassification committee and Death Row inmates unit policy
19 classification system" was the entire, what she bolded.

20 Q. Right?

21 A. The document you are referring me to, which was your
22 Exhibit 1, is entitled "security level classification
23 outline, reclassification committee on Death Row inmates,
24 unit 7 classification system".

25 So I can't assume that that was the same because they

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1 are not titled the same. She talks about a unit policy here
2 which says nothing about this. The policy you referred me
3 to from 1992 being a one pre-riot policy, two, was also a
4 Lucasville policy; what she is referring to in 1998
5 apparently had to be a Mansfield policy, so it would not
6 have been the same document.

7 Q. Although a reader of both documents might well have
8 concluded that this policy governed classification for the
9 five-year period 1992-97, might one not?

10 A. I would not agree with that, no.

11 Q. Let's take a look, Mr. Collins, at Plaintiff's Exhibit
12 for identification for D.

13 THE COURT: Mr. Collins, can you tap the lower
14 right hand of the screen to clear those marks? Tap the
15 lower right hand corner. There you go.

16 THE WITNESS: Thank you.

17 BY MR. LYND:

18 Q. This document is entitled "reclassification committee
19 appeal"?

20 THE COURT: Which exhibit is this?

21 MR. LYND: This is 4-D as in David, Your Honor.

22 BY MR. LYND:

23 Q. It appears to be filed by a Greg Esparza. If we read
24 his words under "reasons" he does appear to be a Death Row
25 inmate, does he not?

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1 A. Yes.

2 Q. And the comment at the bottom of the document by a
3 Mr. Rid will, who identifies himself as managing officer, is
4 "while on Death Row, inmates will remain at maximum security
5 classification." Correct?

6 A. That's what it says, yes. That's not Mr. Rid will's
7 signature. It was signed by someone else. There is
8 initials after his signature so I'm assuming it was not his
9 signature but that's what the document says, yes? Do you
10 think we can conclude from this document, Mr. Collins ^
11 that as of the year 2000 prisoners on Death Row were still
12 considered to be classified maximum security level.

13 A. Yes, I would agree that that's what they were called,
14 yes.

15 Q. Exhibit 4-E is a supervision review form similar to 4-B
16 that we looked at at your deposition. The date here is
17 September, 2000. Again, the prisoner involved appears to be
18 Ronald Post but I want to show you the second page of this
19 exhibit, Mr. Collins, and direct your attention to the block
20 that says override of review score is recommended. Do you
21 see the place I mean?

22 A. Yes.

23 Q. And someone has written in that block, DR inmates are
24 max. Correct?

25 A. Yes, in 2000 they did write that, yes.

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1 Q. Would you understand that to mean Death Row inmates are
2 classified maximum security?

3 A. No. I understand that that's what they called them,
4 but they were not part of the classification system. They
5 have their own classification system. They were held in a
6 maximum security setting, yes. But their classification by
7 our own system was not max. Were they called that? I have
8 agreed to that a thousand times.

9 Q. Good. And the first individual signing that exhibit as
10 chair person appears to be Greg Morrow?

11 A. That's what it appears, yes.

12 Q. Do you know who Greg Morrow is?

13 A. I believe he is a case manager at Mansfield's Death Row
14 unit.

15 Q. And finally, Plaintiff's Exhibit for identification
16 4-F, once again, a reclassification committee appeal filed
17 by Ronald Post in September, 2000, and my interest,
18 Mr. Collins, is for one last time, the comment at the bottom
19 of the page "an inmate on Death Row is maintained as a
20 maximum status inmate."

21 And on this exhibit, that is Mr. Rid will's signature,
22 isn't it?

23 A. It appears as such, yes. May I comment to the
24 question?

25 MR. LYND: It's up to the Court.

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1 THE COURT: Sure. Go ahead.

2 THE WITNESS: It does -- that's what it does say
3 but I think also, what is kind of interesting, if you read
4 the top part of that, the Ronald post's appeal actually kind
5 of goes to the whole reason as to why it was useless to do
6 these because he is saying I can't afford to be given the
7 opportunity to lower my status because of the sentence that
8 he holds is basically what he is saying so it kind of goes
9 to the whole argument that I have said along my deposition
10 and the reason why we changed that in whenever it was, 2001,
11 2002, 2003, why do these, because nothing can happen. The
12 inmate the is sentenced to death. You can't go to any other
13 place other than Death Row until that sentence is changed by
14 the Court.

15 BY MR. LYND:

16 Q. But at any rate, Mr. Collins, we can conclude, can we
17 not, that Death Row prisoners were part of a security
18 classification system at least from January, 1992 through
19 September, 2000?

20 A. No. We can conclude at least from my interpretation
21 that they were called maximum security. Did that mean that
22 they fell under the actual classification documents of
23 maximum security? Did we actually use those documents?
24 Yes, but the fact remained then and the fact remains today
25 that regardless of what they are called, they still have to

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1 sit on Death Row, because Death Row is its own
2 classification regardless of how good they may or may not be
3 will not change by filling out a piece of paper for
4 reduction in supervision or security.

5 Q. But nowhere in these documents or in this time period
6 have we found any reference to a classification or status
7 known as DR or O-D. Isn't that true?

8 A. You are absolutely correct and as I have testified to
9 many times both here this morning and in my deposition, they
10 did call them that. We changed our inmate control system
11 when we started using technology and tracking people, that's
12 when they started using the DRO I think it was and now it is
13 just called DR but I reiterate again, they were their own
14 classification system.

15 Q. But even in the last five years, the period 2000 to
16 2005, the department has continued to distinguish between
17 the security risk posed by different individuals among the
18 prisoners on Death Row at ManCI, isn't that so?

19 A. Could you repeat your question? I'm not sure I
20 understand your question.

21 Q. You have indicated that these formal security reviews
22 stopped perhaps around 2000. That's the last document I
23 have. My question is between then and now, as a matter of
24 facts, has there not been an ad hoc or defacto system of
25 distinguishing between the security risk posed by different

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1 groups of prisoners on Death Row?

2 A. There has been a level system of custody supervision on
3 Death Row that I assume you are speaking to what has been
4 referred to this morning as extended privilege. General
5 population or an isolation status. So yes, there has been a
6 custody supervision stratification system if you want to
7 call it that, in Death Row.

8 Q. And there are six separate housing units on Death Row
9 at ManCI are there not?

10 A. That is correct.

11 Q. And four of them, DR 1 through DR 4, are for general
12 population Death Row inmates?

13 A. Yes.

14 Q. One, DR 5, is a special management unit for persons who
15 have had behavior problems, new arrivals at Death Row, or
16 individuals close to their execution date. Isn't that so?

17 A. Correct.

18 Q. And a third housing area at ManCI housing between 30
19 and 40 prisoners and known as DR-6 is the extended privilege
20 housing area.

21 A. That is correct. I believe there is 36 inmates in that
22 particular status.

23 Q. And the recreation yard used by prisoners housed in
24 DR-6 is 21,216 square feet.

25 A. I think I certified that in my deposition in an

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1 interrogatory. As I said then, I didn't go measure it but
2 somebody did, and is it bigger than the other one? I would
3 agree to that, yes.

4 Q. Something like -- let's see. I'm not sure I'm going to
5 venture the dimensions of the field.

6 21,000 square feet. And that is an area that houses a
7 basket ball Court, a separate handball Court and a running
8 track?

9 A. I was just at Mansfield less than 30 days ago and I
10 have been in two or three different prisons since then so I
11 am trying to visualize what I seen when I walked through the
12 Death Row blocks in the recreation yards at Mansfield, I
13 believe that's correct.

14 A. Mr. Collins there is a large grassy area with a track
15 running around it --

16 Q. That's correct?

17 Q. And set off at one hand a separate handball court?

18 A. That's correct.

19 Q. By contrast the largest recreation yard at OSP is 1100
20 square feet, correct?

21 A. I don't know. I assume that somebody measured those
22 and said that, so I'm not going to disagree with the square
23 footage of those, no.

24 Q. So if those figures are correct, the outdoor recreation
25 area presently used by DR-6 prisoners at ManCI is

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1 approximately 20 times larger than the largest outdoor
 2 recreation area at OSP. Not so?
 3 A. I wouldn't disagree with your characterization that it
 4 was larger. I think also we have to consider the fact that
 5 one, even though it may be larger, I think you have to look
 6 at the opportunity to get into that particular space.

7 The size of the space may not necessarily mean that
 8 that space is better, worse or equal. It is the opportunity
 9 to get into that particular space.

10 Q. Let's talk about --

11 A. And the number of times per week that they get into
 12 that space.

13 Q. Let's talk about opportunity.

14 Isn't it true that at every housing area at ManCI,
 15 including DR 5, the most restrictive, access to outside rec
 16 just requires horizontal movement through one or two
 17 intervening doors?

18 A. That would be correct.

19 Q. Whereas at OSP, without exception, outdoor rec requires
 20 prisoners and perhaps officers to ride up and down in an
 21 elevator?

22 A. That was the remake design of those recreation areas.
 23 Yes, it does require that.

24 Q. And if Death Row is moved to OSP, you don't plan any
 25 enlargement of the existing recreational areas at OSP?

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1 A. None are planned, no, sir.

2 Q. And you don't plan any increase in the number of
 3 recreational areas at OSP?

4 A. I don't see the need to do that.

5 Q. And you don't plan any change in the mode of transport
 6 whereby prisoners access outdoor rec in an elevator?

7 A. Well, I can't absolutely say that there is no planned
 8 change because until we are actually there, correctional
 9 realities tell me in 28-plus, almost 29 years of experience,
 10 tells me that when you change things that typically after
 11 you make the change you are looking to modify that change.

12 So I can't sit here today and say there won't be change
 13 as to how they get to recreation because it may require a
 14 change after we starting doing it.

15 Q. But in your financial calculations, Mr. Collins, you
 16 have estimated physical renovations at less than a hundred
 17 thousand dollars. Isn't that so?

18 A. That's correct; I did.

19 Q. Now, going back to DR-6, the extended privilege area at
 20 ManCI, every housing area at ManCI has a conference room
 21 with a door that closes for contact visits between clients
 22 and attorneys.

23 Isn't that true?

24 A. That's correct.

25 Q. And DR-6 has two such conference rooms.

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1 A. I don't know whether that's true or not, but if you say
2 there is two there, I'm not going to argue with that.

3 Q. And each of these rooms also has a wall plug so that if
4 the attorney or the client requests a confidential telephone
5 call, the prisoner can step into that same conference room,
6 a telephone can be plugged into the wall, and there can be a
7 confidential telephone call.

8 Isn't that true?

9 A. I'm not going to disagree. I have not seen it occur
10 but I wouldn't say it couldn't occur.

11 Q. And none of the existing facilities at the Ohio State
12 penitentiary provide for contact visits between attorneys
13 and clients.

14 A. That's an accurate statement, yes.

15 Q. And no change in the attorney visiting booths is
16 planned nor has money been allocated for any such change?

17 A. I'm not sure change is required. My concern is can
18 inmates see their attorneys and be with their attorneys and
19 is there space for that to happen. That's the issue that I
20 have to deal with.

21 Q. And my question was no change is planned in the
22 existing attorney visiting booths at OSP?

23 A. I can't testify truthfully to say that no change is
24 planned. Of course the warden and his staff will have to
25 determine that, but from my perspective, I don't know that a

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1 change is planned that would make the visiting the same as
2 it is at Mansfield, I don't know that to be true but I'm not
3 saying that there might not be some changes as we move
4 forward to this. I don't know that.

5 Q. Mr. Collins, I'm not asking you to have a crystal ball
6 in your pocket. My question comes down to this. The
7 contact visits between clients and attorneys that have been
8 continuously possible for more than 20 years on Death Row at
9 SOCF and then at ManCI will no longer be possible at OSP?

10 A. That is correct, but they will still have the
11 opportunity to meet with their attorneys as often as
12 necessary.

13 Q. Now, DR-6, the extended privilege area at ManCI, also
14 has a small library right in the pod. Isn't that true?

15 A. That's correct.

16 Q. As a matter of fact, DR prisoners at ManCI are able to
17 order books from the public library. Isn't that so?

18 A. I believe that's a standard all across our department,
19 that inmates can order books from the State library.

20 Q. All 36 prisoners in DR-6 have jobs. Correct?

21 A. I don't know that to be true. I would assume they do,
22 but I don't know that to be true.

23 Q. To the extent that it is true, or that any prisoner has
24 a job, that of course gives the prisoner more money,
25 significantly more money to spend at commissary.

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1 A. That would be true.

2 Q. I think you said at deposition that you were not sure
3 how many washing machines the prisoners in DR-6 had. On
4 your recent visit, did you notice that they did have some?

5 A. No, I didn't count them on my recent visit either.

6 Q. Must we not conclude, Mr. Collins, that at least for
7 those 36 prisoners in DR-6, a transfer to OSP would be a
8 transfer to significantly more burden some and restrictive
9 conditions of confinement?

10 A. I don't necessary are arrestly agree with that
11 characterization. I'm not going to sit here and say that
12 those individuals, those 36 inmates out of the roughly 190
13 inmates that are on Death Row, that they may not suffer some
14 loss of privilege by going to OSP.

15 What I can say is that for the greater whole of that
16 190, those individuals in DR 1 through 4 will receive
17 increased privileges over what they have now, so the greater
18 aggregate of the whole would say that more inmates will
19 receive more privileges than what currently exist for them
20 at Mansfield.

21 Q. Well, first of all, all prisoners on Death Row would
22 lose the opportunity for contact visits with attorneys.
23 Correct?

24 A. I'm not going to disagree with the fact they would lose
25 a contact visit with their attorney. The key thing to me is

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1 can they visit with their attorney.

2 Q. And as to the 36 prisoners in DR-6, they are all there
3 because of their good behavior, are they not?

4 A. That's one of the qualifying criteria to be placed
5 there, but as I walk through the cell blocks of Death Row
6 and spoke with many inmates when I was there on my last
7 visit, there are several other inmates who in their -- in
8 their claim, and of course I didn't check records, claim
9 they should also have those same opportunities to have those
10 same privileges that those 36 have.

11 Q. I think that's an important point on which we might
12 agree.

13 That the number of prisoners on Death Row at ManCI
14 whose conduct might justify confinement in conditions like
15 the conditions in DR-6 may very well be significantly
16 greater than the 36 persons actually housed there.

17 A. Well, we do agree to that, and hopefully we can agree
18 that of that group that can't get to Death Row 6 when they
19 get to OSP would receive greater privileges which would
20 therefore help them out and relief what they believe is not
21 proper to them because they don't get some of those
22 privileges.

23 Q. I'm glad we agree on my proposition and I'm afraid we
24 can't on yours.

25 But how about this one, Mr. Collins? That the 36

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1 prisoners on DR-6 at ManCI are those whose transfer to OSP
2 as security risks would have least justification?

3 A. We're not transferring anybody that is a Death Row
4 inmate who would not be reclassified into a Level 5 status
5 because of what they did. We're not moving those
6 individuals because they did something wrong or because we
7 are saying that they are security problems.

8 Q. As a matter of fact, the decision to move Death Row to
9 OSP was based wholly on financial, not security reasons.

10 Correct?

11 A. Yes.

12 Q. And considering Death Row at ManCI as a whole, Death
13 Row inmates have always been inmates who didn't get in
14 trouble. Isn't that so?

15 A. Not all Death Row inmates, no.

16 Q. I'm just repeating the expression you used in
17 deposition, that considering the group as a whole, they have
18 been a relatively peaceful group?

19 A. I think at my deposition, I said most inmates on Death
20 Row have not created problems from my experience, both as a
21 warden and as regional and deputy director and assistant
22 director.

23 Q. What you said exactly was "the majority of inmates on
24 Death Row have not been a security problem."

25 A. That's basically not -- what I said then is what I had

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1 this morning.

2 Q. And for the small number of death sentenced individuals
3 whose security issues are greater than can be handled on
4 Death Row, previously you used administrative control and
5 you have in the last few years used transfer to Level 5 at
6 OSP.

7 A. That is correct. Administrative regulations in
8 reference to inmates sentenced under Death Row, 5129-12
9 talks about those inmates sentenced to death will be placed
10 on Death Row but if their security is to the point that they
11 cannot be handled there they would be placed at a higher
12 security level which at that time years ago was called
13 administrative control and is now called Level 5, I guess.

14 Q. Mr. Collins, with some fear and trembling, I would like
15 to ask you to look at the pages of Plaintiff's Exhibit for
16 identification 5.

17 These pages were produced in response to a request by
18 plaintiffs for records of use of force incidents on Death
19 Row at ManCI in rest sent years.

20 I confess that I find these documents in this form
21 difficult to understand, but what I get from it overall is
22 that we find, for example, Mr. White and Mr. Cooley, who
23 attempted to escape in February, 2005 and who have since
24 been reclassified Level 5 and transferred to OSP, we find a
25 Mr. .decks tear, whose offense, whatever it was, occurred

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1 when he was scheduled to be transferred. We find a
 2 Mr. Williams whose two altercations included one in January,
 3 2004 during a cell shake down and one in June, 2005, when he
 4 got into an argument with sergeant Scott.

5 And finally appraise near named DOAN who was ordered to
 6 clean up a spilled coffee.

7 And I'm not asking you to comment on the correctness of
 8 those particulars, but during the last two and a half years,
 9 which is the period covered by these records, when there
 10 were 190 prisoners, give or take, on ManCI's Death Row, are
 11 not these relatively few incidents reported in your own
 12 records consistent with the impression that Death Row at
 13 ManCI is a relatively peaceful part of the Ohio prison
 14 system?

15 A. If I'm looking at the exact document you're talking
 16 about, there was a name that you mentioned that I didn't
 17 see, and a lot of information that you mentioned that I
 18 didn't see, but --

19 Q. Let me clarify that I'm not asking you to comment on my
 20 summary. I don't consider that evidence.

21 My suggestion, though, this I think perhaps you can
 22 evaluate, is that if this is the total of use of force
 23 incident for 190 men on Death Row for the last two and a
 24 half years, it corroborates your previous testimony that
 25 this is a relatively peaceful part of the Ohio prison

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1 system, presenting relatively few security problems?

2 A. You could use our use of force reports as one factor in
 3 making that conclusion, yes.

4 Q. And if you know, wouldn't this general good behavior of
 5 Death Row prisoners have been one of the reasons that
 6 earlier this year, the ManCI administration proposed
 7 semi-contact visits for all Death Row prisoners in 2005?

8 A. Well, I'm not sure -- I'm sure this was part of that,
 9 out of a multitude of different things that had been
 10 created, yes.

11 Q. That was all I meant to ask?

12 A. Right.

13 Q. And early in February, 2005, the plan for semi-contact
 14 visiting on Death Row at ManCI was abruptly cancelled was it
 15 not?

16 A. It was stopped. I don't recall when, the month it was
 17 stopped.

18 Q. I am showing you Plaintiff's Exhibit for identification
 19 6, which appears to be a memorandum from warden Bradshaw to
 20 the effect that effective immediately, the Death Row contact
 21 visiting that was originally going to begin on February 14
 22 has now been cancelled.

23 Correct?

24 A. That's a correct memo, yes.

25 Q. And Mr. Collins, the reason that that privilege, that

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1 privilege about to come into being was taken away was that
 2 warden Bradshaw knew at that time of the idea of
 3 transferring Death Row to ManCI.

4 Isn't that true?

5 A. I don't know, did -- it would be true, the fact that
 6 warden Bradshaw would have known of our discussions about
 7 the potential move. That is true, because there was
 8 discussions previous to this date about that particular
 9 move.

10 As I recall, I think this was done because this was
 11 shortly after the security breach there in reference to
 12 inmates White and ^ Cooley attempting to escape, I think
 13 there was about the same time that that occurred so I'm
 14 assuming that the warden made a decision that because of
 15 that they needed to put a hold on things and maybe do shake
 16 downs.

17 I can't say what was on her mind but I'm assuming that
 18 that was probably what it was.

19 Q. Let me show you, Mr. Collins, what appears to be a
 20 letter from a Death Row prisoner named James Conway, number
 21 457-203 to warden Bradshaw in which he expresses a concern
 22 about the cancellation of contact visits.

23 Warden Bradshaw replace under date of June 23, she
 24 makes no reference to the attempted escape of white and
 25 Cooley. Instead, she says "while I appreciate your concerns,

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1 the decision to not implement contact visits was made when
 2 it was determined that DR was transferring. I am not going
 3 to hire a CO for the position when it is not going to be
 4 here."

5 A. That's what she wrote. I agree with that. I also said
 6 I wasn't exactly sure why she did it but I know that the
 7 escape was that particular -- the attempted escape was about
 8 that particular time.

9 Q. But this document does suggest that the reason was the
 10 proposed transfer, does it not?

11 A. Yes, that's what the document says. I don't disagree
 12 with that.

13 Q. And the contact visiting that would have begun in
 14 February, 2005, at ManCI, are you familiar with the
 15 arrangements for relatives to visit there?

16 A. Yes, sir. I was the one who pushed and approved for
 17 that to occur.

18 Q. Very well. Then let me describe that as best I can.

19 There are a series of vertical metal bars how much inches
 20 apart would you say?

21 A. I don't know the exact inches apart. My instructions
 22 to them were that I wanted some contact visiting on Death
 23 Row, and to come up with a plan. They developed a plan
 24 where they took out the solid glass window, I think they
 25 actually raised it so that it could come down because they

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1 use it for segregation-type visiting also but they would
 2 raise that and in place of that they put toe bars, the bars
 3 were wide enough to put your hands through, because I told
 4 them that I wanted where a visitor and the inmate that was
 5 being visited to hold hands, touch one another, could put
 6 their face up to the bars, kiss one another, which is common
 7 practice in the visiting room.

8 So I would suspect they were maybe six or eight inches.
 9 I'm not --

10 Q. Actually, if we get to see the video again, this
 11 precise arrangement is on the video and the only thing I
 12 would add to your description, Mr. Collins, is that as I
 13 understand it, the sheet of glass or plastic or whatever it
 14 is that covers the bars can be raised halfway and locked in
 15 place?

16 A. Yes, that's what I said. They had it so it would go up
 17 and down because they use that area sometimes for local
 18 control, which is non contact visits. They could drop it
 19 down and still maintain the non contact if need be.

20 Q. And that is what was going to be implemented at ManCI
 21 until February, 2005. Correct?

22 A. Correct.

23 Q. And incidentally, have you seen warden Houk's model for
 24 the semi-contact visiting that would be possible in six
 25 visiting booths at OSP if the transfer were approved?

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1 A. I don't recall seeing it in place because I have not
 2 been to the Ohio State Penetentiary in about three months
 3 and when I was there I was looking at other issues and
 4 wasn't looking at that particular issue. I don't recall,
 5 have we had discussions about it, have I said there would
 6 have to be contact visiting? Yes, I have done that. I
 7 don't recall seeing the model of how that would be done.

8 Q. I won't then ask you to compare which of these two
 9 arrangements, the semi-contact visiting at ManCI that was
 10 not carried out and the semi-contact visiting for SIKS
 11 booths at OSP that is projected I won't ask you to comment
 12 on which of these arrangements would make possible more
 13 contact.

14 Mr. Collins, the document that notified prisoners and
 15 plaintiff's counsel and the public of the proposed transfer
 16 of Death Row at ManCI to OSP said that for all prisoners on
 17 Death Row at ManCI there would be so-called mental health
 18 assessments. Correct?

19 A. I'm not sure which document you are referring to.

20 Q. Let's set documents aside, then. Isn't it true that a
 21 part of the transfer plan is for each Death Row prisoners at
 22 ManCI to have a mental assessment?

23 A. That is correct.

24 Q. Why are you doing that?

25 A. Well, to be quite honest, I didn't believe it was

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1 necessary, but in review of OSP and because we had agreed in
2 2000 or 2001 that we would not send seriously mental ill
3 inmates there, it was agreed that we would go ahead and
4 review each inmate.

5 Q. But Mr. Collins, if as I understand you to believe
6 conditions for Death Row prisoners at OSP would be superior
7 to their existing conditions at ManCI, then what needs
8 should there be to screen them for serious mental illness or
9 psychological vulnerability?

10 A. As I just said I didn't agree the fact that we do it,
11 other people did agree that we should do it and we did do it
12 I do agree that for the ago gait good of the whole number of
13 inmates going from Mansfield to OSP will be better than what
14 they have it now.

15 I also believe that those individuals who they are now
16 saying fall under the SOP two classification that eventually
17 they will be saying, gee whiz, I want to go to OSP myself.

18 Q. Do you think that an observer might conclude that your
19 conduct in screening people for mental illness before
20 sending them to OSP gives rise to an inference contradictory
21 to your rhetoric that it will be better for prisoners at
22 OSP?

23 A. I don't know what characterizations people will put on
24 anything.

25 Q. I see. Let's return to what you have consistently

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1 represented to be your sole reason for this transfer,
2 namely, economics.

3 Now, apart from a one page statement to you from two of
4 the regional directors, we have seen no detailed budget, no
5 specific cost benefit analysis, anything of the sort that
6 one might usually expect from achieve executive.

7 I don't expect you to agree to the end of that
8 sentence.

9 You have not given us more detailed financial
10 calculations than the exhibit that is Plaintiff's Exhibit
11 for identification 12. Correct? That's the only document
12 in the department showing the financial calculations made
13 for this proposed transfer.

14 A. Yes.

15 Q. So that there is no detailed budget as to the
16 renovations warden Houk might require to do even that which
17 he has explicitly promised.

18 A. There is no detailed budget to that. They have told me
19 the estimate, but I have not seen the detailed budget.

20 Q. There is no detailed budget for the costs of
21 transporting to OSP both prisoners and specific kinds of
22 equipment, such as indoor recreational equipment?

23 A. Those would be incidental costs.

24 Q. There is no detailed budget for the 126 jobs -- not
25 130-something -- 126 jobs that the department says it will

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1 create for Death Row prisoners at OSP?

2 A. Well, the fund for Death Row prisoners and prisoners of
3 the 44,300 plus inmates we have now, there is a line item
4 budget that we have that allows for prisoner compensation,
5 so it would be part of that. In that particular line flows
6 quite frequently because populations increase, decrease, by
7 weekly status, so we believe that there will be the money
8 there to do that if that is your question.

9 Q. There is no detailed calculation for the increased
10 travel and overtime costs of medical round trips from OSP to
11 Columbus as opposed to ManCI to Columbus?

12 A. One factor has been discussion about that. I think we
13 need to -- you need to hear the fact that, you know, I heard
14 the word "shoddy" this morning. All those type things.
15 There was much analysis done to the budget, the budget of
16 this department is roughly \$1.3 billion dollars, it is a
17 biennial budget we testify before the full house
18 committee, full SENATE committee, house appropriations
19 committee, we do split and singular meetings with many
20 Senators and representatives and numerous documents with the
21 legislative service commission on our budget. We prepare
22 documents about the budget as to the need in particular line
23 items when you look back at the budget for 05 and 06 --
24 excuse me, 06 and 07, you will see that we testified to the
25 house, to the senate that our budget as it was currently

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1 existing was going to cause us to have to reduce 2 to 300
2 positions, I think we actually said several hundred
3 positions, we equated that in other meetings to be 2 to 300.

4 So as we started talking about the Ohio State
5 Penetentiary and could we move Death Row there and could it
6 help us by doing that, at the particular time we were doing
7 all that analysis and it was a very careful analysis it
8 wasn't shoddy as has been referred to this morning there was
9 very careful analysis of that and it was found that we would
10 save 91 positions for our department the majority of our
11 budget, the operating budget of this department, the
12 majority of the money is in staffing costs. The majority of
13 positions we have of over 14,000 employees, more than
14 one-half of them are correctional officers.

15 So as we looked at the budget and knowing the fact that
16 in the past few years we have closed two particular prisons
17 the orient correctional institution in orient, Ohio, and
18 Lima correctional institution in Lima, Ohio, that this would
19 be a very tough budget and we are going to try to work
20 across the department to save positions and dollars rather
21 than close a particular prison.

22 That is why the Mansfield transfer would be the most
23 effective and efficient means for this department to
24 accomplish the needs of its budge now, when we sat down and
25 looked at the fact that there is staff going to be saved it

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1 is absolutely true that there will be staff saved and right
 2 now we believe those positions to be 91, that's what I have
 3 equated, that was given to me by the regional directors both
 4 for the north and south and that is what we know right now
 5 would be saved.

6 I also have to qualify that because I said earlier
 7 correctional reality says there may be changes. I testified
 8 to that in my deposition that there may be changes I'm not
 9 saying when we get there we may not have to add a position
 10 or two or three but 91 is what we believe now would be
 11 saved.

12 Why was that number important to us? That number was
 13 important to us from the standpoint that if we had to reduce
 14 300 positions, that if I reduce 91 then I have a third of
 15 the number that I need to reduce across the department.

16 Sue instead of having to reduce 300 now I only look at
 17 having to ratios 200. If I reduce 200 positions across the
 18 department with the fact that there is 30 prisons and if I
 19 throw Mansfield and OSP out of the mix I have 28 other
 20 prisons so if I get ten positions out of each of the prisons
 21 I will be down to, guess what, I will have a balanced
 22 budget. The budget for our department is no different than
 23 your personal budget. If there is not money there, then you
 24 can't buy what you need.

25 We have to pay our employees, and we have to have those

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1 employees.

2 Now, there was much assessment of what was done. You
 3 bring up issues about transportation of individuals from OSP
 4 to CMC. Well, that might cost us a little more but on the
 5 other hand it might not cost us as much because maybe there
 6 might be the chance that those individuals would stay at CMC
 7 overnight rather than being taken back the next day. Maybe
 8 some of the individual might be hubbed in, rather than that.
 9 So there are many things to be thought of of wasn't a shoddy
 10 process, something we thought about overnight to do or done
 11 on a whim there was a lot of process that went into that to
 12 try to meet this budget and I suspect the taxpayers of the
 13 State of Ohio would want us to make sure we meet that budget
 14 because we certainly can't go back to the general assembly
 15 and ask for more money.

16 Q. Mr. Collins, I don't believe I used the word shoddy. I
 17 think my question was whether in addition to the single page
 18 in Plaintiff's Exhibit 12, there were any other detailed
 19 written assessments of the costs and benefits of this
 20 transfer.

21 I understand the answer to be no.

22 A. The answer to that is no. This was the documents that
 23 I had. Have I had many, many many discussions with people
 24 about all the little idiosyncracies of that move, were they
 25 memorialized in paper, no, sir, they were not.

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1 THE COURT: What's the column CWI refer to?

2 THE WITNESS: Pardon?

3 THE COURT: The column WCI.

4 THE WITNESS: The plan, WCI is Warren correctional
5 institution. Because the decision was made to look at the
6 individuals that look at the SOP 2 cat gather, seriously
7 mental ill, we would try to house the individuals at Warren
8 correctional institution in Lebanon, Ohio.

9 BY MR. LYND:

10 Q. By the way, speaking of Warren, the pod you have in
11 mind for SMI and psychologically vulnerable has 34 cells,
12 isn't that correct?

13 A. I believe it has 34 cells. I can also tell you as I
14 sit here this morning, the numbers that I have given
15 yesterday, I'm not sure that that pod would be big enough so
16 I will probably have to reconsider where those individuals
17 may go.

18 Q. That was going to be my next question, because I'm
19 under the impression that Dr. Mets near in his report cites
20 Mr. Coffee, the head psychologist at ManCI to the effect
21 that there are now 41 prisoners under consideration for
22 meeting the exclusion criteria.

23 A. I don't know the number 41. I was told yesterday there
24 was 32 and they still had some reviews to do. They didn't
25 tell me how many other people would be -- would be

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1 considered but they told me yesterday 32 had been finalized,

2 I guess would be the word.

3 Q. Now, Mr. Collins, I am sure you understand that for
4 many persons, including plaintiff's counsel, the notion that
5 a transfer to the most expensive prison in the State would
6 save money is counter intuitive because as Plaintiff's
7 Exhibit 8-A and 8-B indicate, if one goes on the
8 department's web site, we find the daily cost per inmate at
9 OSP is \$167 and a daily cost per inmate at ManCI is \$58.

10 So that on the surface, it appears three times more
11 costly to house a prisoner at OSP than at ManCI but I take
12 it you feel those figures are misleading?

13 A. Those figures are accurate for if you look at that
14 particular prison. It is inaccurate to say OSP is the most
15 expensive prison because OSP doesn't have the largest a prop
16 pry and I guess dollars of any prison in the state.

17 But comparing the fact that the daily cost at a
18 particular prison would be how you would make your
19 assessment that you would or wouldn't be saving money would
20 certainly not be wise.

21 In fact, it is not an apples to apples comparison.
22 In fact, if you take the document that is here now and you
23 figure your average daily cost is figured by, as I testified
24 to in one of the four previous times I testified in this
25 Court, you take the number of dollars that is a appropriate

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1 rated at that institution, and you figure out the daily cost
 2 per inmate you divide by the number of inmates so yes, OSP
 3 is going to be high because OSP has a lot of dollars
 4 appropriated to it but a low number of inmates.

5 Mansfield as a matter of fact has more number
 6 appropriated to it than Ohio State Penitentiary has
 7 appropriated to it. If you take the same figures, the
 8 numbers that you have here on this page, and if you take
 9 that particular cost and you add 200 inmates to it and
 10 divide those numbers into that you will see a significant
 11 reduction in the annual cost per inmate and the daily cost
 12 per inmate at the Ohio State Penitentiary.

13 When you add more inmates into the total number of
 14 dollars you are dividing, those numbers will change.

15 Q. So to make a long story short, you feel that the best
 16 way to calculate savings is in terms of the number of jobs
 17 that can be eliminated?

18 A. Well, that's certainly true from a stand point that I
 19 testified to earlier that a majority of costs of this
 20 department is staffing costs.

21 If for example at OSP or Mansfield or any other prison
 22 in the State that you choose to take, and look at these
 23 particular numbers, if I move a hundred inmates into
 24 Mansfield today, they are not going to get a rePROEPGS of 58
 25 times a hundred for each one of those inmates because there

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1 is marginal costs that is also considered when you are
 2 making budgetary issues of what those inmates on a marginal
 3 basis would cost you as you place them into that particular
 4 prison.

5 Q. So let's try to work through the numbers together on
 6 the basis that you propose, Mr. Collins.

7 I assume we can agree that the capacity of the Supermax
 8 portion of the Ohio State Penitentiary is 504 prisoners?

9 A. I believe that to be correct.

10 Q. If you take a look at Plaintiff's Exhibit 9, it
 11 consists of two pages. I apologize that it is not a
 12 complete document, but this was the form in which we
 13 received it in discovery from the department years ago, and
 14 if you take a look on page two and go halfway down the left
 15 column to OSP, would it appear to you that the number of
 16 prisoners in the Supermax portion of OSP in February, 2000,
 17 assuming we can add institution and Death Row, was 478?

18 A. If you added those two columns together, yeah.

19 Q. And directing your attention to Exhibit 10, which is
 20 the monthly report that OSP makes to plaintiff's counsel as
 21 to the number of prisoners at OSP, I'm going to represent to
 22 you, Mr. Collins, rather than requiring you to add the
 23 pages, that as of the beginning of this month, the number of
 24 prisoners at the Supermax was 229, or we might say
 25 approximately 230. Does that sound reasonable in view of

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1 what you know? I'm not asking you to certify that exact
2 number.

3 A. Is the number that you are giving strictly solely those
4 that would be considered what I refer to as the main
5 compound, the Level 4, Level 5 and not the camp.

6 Q. The big house?

7 A. Okay. I don't refer to it as the big house, but the
8 main compound.

9 Q. Yes. There is approximately 230. Is that consistent
10 with your understanding?

11 A. Yes.

12 Q. So that whether we compare the present number of
13 prisoners with the capacity of 504 or with the maximum
14 number of inmates ever held at OSP, which was approximately
15 480, we can conclude that the Supermax portion of the Ohio
16 State Penetentiary is presently a little less than half
17 full?

18 A. I won't disagree with that characterization.

19 Q. Or in the alternative, a little more than half empty.

20 A. I guess however you want to refer to it.

21 Q. And the numbers -- and again I'm taking advantage of
22 you because you have no way to add them up, but let me
23 represent to you that it is accurate or very close to
24 accurate to say that of the 229 prisoners at -- what did you
25 call it, the main compound as of the beginning of August, 20

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1 were on level 5 B and 24 on level 5 A for a total of 44
2 level 5 prisoners.

3 Is that consistent with your understanding?

4 A. Yes.

5 Q. And I assume you would also agree that the Supermax was
6 originally intended to hold only high maximum security or
7 Level 5 prisoners?

8 A. You mean when it was originally built? Is that the
9 question?

10 Q. Yes?

11 A. I think that was the original intent of the building,
12 yes.

13 Q. So that at present, since there are only 44 Level 5
14 prisoners at the Supermax we can say that less than 10
15 percent of the cells in the Supermax portion of OSP house
16 the high maximum security prisoners for whom the prison was
17 originally intended?

18 A. I think that would be an accurate characterization of
19 the facts in reference to the high security Level 5 inmates
20 and we are in the process of being -- changing and having
21 multiple missions at that particular prison.

22 Q. I understand. Plaintiff's Exhibit for identification
23 11 is a seniority list of correction officers at the
24 Supermax and again, I represent to you that after deducting
25 the people who are resigned or disabled or whatever that are

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1 indicated in handwritten notations, the number of security
2 officers at the Supermax at present appears to be
3 approximately 245?

4 A. I didn't count them. I assumed that your number is
5 correct.

6 Q. If there are 230 prisoners being guarded, and 245
7 officers guarding them, that suggests a little over one
8 officer for every OSP prisoner. Is that correct?

9 A. I guess you could say that yes.

10 Q. Now, in contrast at ManCI, not counting the handful of
11 prisoners that have been transferred to OSP there are
12 approximately 190 prisoners. Correct? I think you said
13 that before.

14 A. Right.

15 Q. And according to Exhibit 12, which is the memo to you
16 from your regional directors, there are about 104
17 correctional officers presently on ManCI's Death Row.

18 A. Correct.

19 Q. So that at OSP you have 245 officers guarding 230
20 prisoners, and at ManCI you have 104 officers guarding 190
21 prisoners. Correct?

22 A. Yeah.

23 Q. Now, when OSP opened it was fully staffed with staff in
24 all cell blocks, correct?

25 A. That is correct.

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1 Q. And about the same number of staff continued to be
2 employed at OSP, despite the fact that the number of
3 prisoners has decreased by more than half.

4 A. That's correct. When we closed the cell block at the
5 Ohio State Penetentiary I did not remove the staff from that
6 particular prison. I admitted in my deposition and I have
7 admitted to several other people that I was weak I should
8 have I didn't have if I had to do it over again I would have
9 but the fact remains that I didn't do it. The fact remains
10 I didn't do it because that particular prison I wasn't sure
11 from day one to the next day whether or not I was going to
12 open a block, close a block or what was occurring as I said
13 in my deposition the institution was in a state of turmoil
14 from the fact they were not really sure what was happening
15 with the prison but the fact remains when that prison was
16 opened it was full. It was fully staffed with correctional
17 officers. It remains to have that number of authorized
18 correctional officers and staff to that particular prison
19 today. Have they used those staff on other posts? Yes,
20 sir, they have.

21 Exactly my point from, I think where you were going was
22 the fact that because of the architectural design of the
23 building, because of the newness of the building because of
24 the lines of sight --

25 Q. Mr. Collins, I hate to cut you off?

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1 A. I would like to try to answer the we.

2 THE COURT: Why don't you try to finish it but I
3 want to move this on.

4 MR. LYND: I understand. I want to do that.

5 A. That I have a number in the ^ reduction in the number
6 of people but I can still safely and securely handle those
7 people.

8 Q. The funding that was given to the prison when it was
9 opened remains the same today?

10 A. Correct.

11 Q. The exact same funding authorization exists at OSP as
12 they had when the place opened, even though it is only half
13 full.

14 A. Correct.

15 Q. You budget 65,000 dollars for every staff position.

16 A. That's what we consider to be average when we consider
17 the grand total of positions, yes.

18 Q. Are you aware that defendant's expert Vincent Nathan
19 uses a figure of \$60,000?

20 A. Yes, I believe there may than was given the 60 thousand
21 dollar because I think it was asked about correctional
22 officers. When I did my analysis and we do budgetary review
23 we look at 6 \$5,000 per position that includes fringe
24 benefits for each employees, there may be secretaries that
25 make less than that, make be psychologists that make more

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1 than, may be corrections officers that use less than that,
2 captains that use more than that, we use 65 as the number we
3 consider for round budgetary purposes, yes.

4 Q. And in regard to the staff that you say you weakly
5 failed to reduce, you characterize them in your deposition
6 as fluff, did you not?

7 A. What I characterized that in my deposition was that
8 that they had taken those staff and created extra positions
9 which I considered to be fluff in the prison because of the
10 fact that they would not have had those positions if I had
11 taken the staff and that they can use those staff to bring
12 back and place into the proper positions that was given when
13 the prison was opened.

14 Q. Now, Exhibit 12 shows that you would add eight officers
15 at OSP to care for the approximately 170 transferees from
16 ManCI as well as one licensed practical nurse. Correct?

17 A. We were adding eight officers for some additional
18 positions that the warden indicated he needed, I believe in
19 reference to the recreational -- program area.

20 Q. I understand. But no additional medical staff, other
21 than one licensed practical nurse --

22 A. That's correct, and I testified in my deposition that
23 the fuss he will team would be there, and that they may very
24 well say that there may be need for other staff. I
25 testified to that.

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1 Q. No additional mental health staff for 170 men sentenced
2 to death, transferring from ManCI?

3 A. That's correct.

4 Q. And as you said a moment ago, eight correctional
5 officers.

6 Now, I asked you at deposition about alternatives you
7 might have considered, and the first one I want to ask you
8 about is, that as this Court determined in 2003, there are a
9 number of prisoners at the maximum security prison in
10 Lucasville SOCF who have indicated that they wanted to come
11 to OSP and the Court held that if they made a substantially
12 voluntarily waiver that they might indeed be transferred
13 into OSP's situation of atypical and significant hardship.

14 I understand from defendant's discovery, Mr. Collins,
15 that there are presently 172 prisoners at SOCF still on the
16 list of those who wish voluntarily to transfer to OSP, and
17 it catches one's attention that that number is almost
18 precisely the same as the number of prisoners you propose to
19 transfer from Death Row, and so I ask you, why not 172
20 people who want to come from SOCF rather than the same
21 number of persons, many of whom at least don't want to come
22 from Death Row at ManCI?

23 A. Well, it doesn't have anything to do with the number of
24 inmates that want to go or not want to go. It has to do
25 with the number of positions it would save. If I move 172

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1 inmate out of Lucasville I save very few staff positions
2 which is the ultimate goal of what I am trying to do is
3 reach my budgetary items.

4 If I closed more cell blocks and I had closed at SOCF
5 and took those staff I would gain; if I closed another three
6 or four cells blocks there I will only gain 20, and I have
7 not figured out all the gains but a cell block there doesn't
8 have near the number of staff members they do at Mansfield.

9 Q. So multiplying the 91 jobs that you calculate you will
10 save by the transfer from ManCI by your number of 65,000, as
11 I understand it, you arrive at a savings of closer to six
12 than five million, maybe 5.8, 5.9 million dollars?

13 A. My calculation, 65,000 times 91 was roughly 5.9 million
14 dollars. I stated publicly in the paper that we would save
15 millions of dollars and I still know that we will save
16 millions of dollars by making this move.

17 Q. Whereas if you calculated the 172, if you transfer the
18 172 from SOCF, as I understand it, your calculation is you
19 would save money; indeed you would save millions of dollars
20 but only two or three million dollars.

21 A. I don't even think it would be that much, and maybe I
22 was shoddy in not preparing a particular statistic on this
23 but if I move the inmates out of Lucasville and reduce the
24 small number of officers that there are were there and I
25 leave all the officers at Mansfield that I currently have I

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1 will have to pay all those officers.

2 So there is no way it is going to come to
3 multi-millions of dollars that would exist in that
4 particular number.

5 THE COURT: How many could you reduce reduce
6 southern Ohio if you move the 172? How many officers?

7 THE WITNESS: It would probably be in the area of
8 30 to 40.

9 BY MR. LYND:

10 Q. Let me ask you about a third option, Mr. Collins, which
11 would be to reduce the number of correctional staff at OSP
12 to correspond with the actual number of prisoners who are
13 presently there, since OSP is less than half full, why not
14 just cut the number of correctional officers in half to
15 about 123?

16 A. That is an option I could do. But I don't believe,
17 one, that that would make the savings if I kept the blocks
18 as they currently exist. I think the numbers there may be
19 in the 20s, particular positions that could be used.

20 But I think you also have to look at the little bigger
21 picture of things here. Yeah, it's dollars for us but it's
22 also effective and fish see in the operation of a particular
23 prison. If I take all the inmates out of Lucasville and
24 bring them to OSP, OSP was not built to be a prison for
25 general day to day max prison operations. There is not the

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1 number of jobs that you have at Lucasville. So all of those
2 things have to be considered as you are making the very
3 calculated risk of what you do here. There is a bigger
4 picture than just saying well it is easy to move inmates
5 from Lucasville to OSP because they want to go there. There
6 is more to it than that.

7 Q. Well, my question had to do with simply reducing staff
8 at OSP but you said something interesting. You spoke of OSP
9 not being built to have a regular maximum security prison in
10 that institution, but isn't that precisely what you are
11 telling us, that when Death Row moves there, it will be a
12 regular maximum security prison with enhanced privileges?

13 A. No, sir. No way have I said that it would be a maximum
14 security prison I have not connotated that, not
15 characterized no way would it be a maximum security prison,
16 absolutely, positively not.

17 Q. It would still be a Supermax?

18 A. It would still be the Ohio State Penetentiary. And it
19 would have a multi-mission. Part of the mission would be
20 Death Row.

21 Q. Back to my question, Mr. Collins. Instead of
22 destroying a stable situation on Death Row at ManCI, why not
23 simply eliminate the fluff from the OSP correctional staff
24 by cutting that number in two and I have tried to do your
25 calculation for that option --

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1 THE COURT: Why don't you let him answer the
2 question. Why don't you just cut the staff at OSP by half.

3 THE WITNESS: As I testified earlier Your Honor if
4 I cut the staff from the block that's currently there, I
5 think that's around 20 some officers, so the theory that I
6 could totally cut the staff in half at OSP would not be
7 true. It could not occur that you would take that number
8 and cut it totally in half because you only have half the
9 inmates there.

10 BY MR. LYND:

11 Q. But Mr. Collins, let me show you how much wiggle room
12 you have. If you did cut the staff in half, from 245 to
13 123, you would eliminate something like 122 jobs which times
14 65,000 equals 7 million nine hundred and something thousand.

15 In other words, if you did it that way, you could TUT
16 the staff by somewhat less than half, to accommodate the
17 special needs that you suggest in an unspecified way, and
18 still save as much money as by tearing up Death Row and
19 moving those men to Youngstown.

20 Q. Your calculations are inaccurate because you have not
21 figured in the fact that you can't walk into the Ohio State
22 Penitentiary and say, well, you got 240 officers, I'm going
23 to make that 123. You have to figure in the number of posts
24 that's in that particular prison, you have to figure in
25 relief factor for those particular posts so it I not just a

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1 matter of walking in and saying you can cut half the
2 numbers. You have to look at what the posts are, what posts
3 are going to be left and all that and I have did that. I
4 looked at that. When we closed the cell block, and I didn't
5 take those people and as I said earlier that would be around
6 20 some people but there are still posts that have to be
7 operated, shifts that have to Court other things that have
8 to occur in that prison to it would not be logical to cut
9 the staff by half.

10 Q. Mr. Collins, Judge Gwin held in 2002 that the highest
11 level of security and as a result considered inmates for
12 placement at the OSP who do not need its level of
13 restrictions. Isn't that exactly what you are doing again,
14 just as you did in 1998?

15 A. No, sir, it is not.

16 Q. Isn't it true that with less than 50 Level 5 prisoners
17 now at OSP, you could create a high maximum security block
18 at any one of a number of other prisons. You could close
19 OSP and create something like the old J 1 at SOCF, at
20 Toledo, or a variety of places?

21 A. I don't believe that would be in the best interests of
22 our department, to provide effective, efficient operations
23 for our system.

24 Q. Mr. Collins, do you consider five days of outdoor
25 recreation a week a mandatory minimum for every prisoner at

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1 the Ohio State Penetentiary?

2 A. Yes, sir, I do.

3 Q. I ask you if you believed it was possible, and you
4 answered I don't believe it will happen. Is that still I
5 don't remember answer?

6 A. I don't say, that's not what I answered if you look at
7 the, I believe they cat it the eradication sheet. What I
8 answered was that I know it was going to happen, and I think
9 that was on Page 48, sentence 9 and I put in the eradication
10 that there was two words missing there that changed the
11 total concept of what I said.

12 I do believe it will happen. I have spoken at length
13 with the warden about it happening. I will expect it to
14 happen. And have in fact went to OSP on purpose one time
15 just to look and see and it found it wasn't happening and I
16 wasn't very happening that it wasn't happening and the
17 warden and his deputies were told that, they have shown me
18 and I have told them that I will require as per the policy
19 of this department that there be five one-hour periods of
20 opportunity of recreation on a weekly basis, that week being
21 Sunday morning midnight to Saturday midnight of the
22 following week in their planning to do from like 7:30 in the
23 morning until 9:30, 10:30 at night, and I think you have to
24 keep in mind the opportunity for that doesn't mean that
25 everybody is going to go outside and recollection reate.

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1 I think statistical data showed us over the years that
2 probably around, somewhere, depending on the time of the
3 year, anywhere from 40 to 60 percent. But yes, I have said
4 and I will require and I will watch that there be five hours
5 of opportunity of recreation a week.

6 THE COURT: How much more do you have?

7 MR. LYND: Just one line of questions, Your Honor,
8 and I will be done.

9 BY MR. LYND:

10 Q. Mr. Collins, one of the reasons you didn't seek to cut
11 staff at OSP was because OSP has been in such a turmoil for
12 the past few years. The whole unsettled turmoil of this
13 particular prison. Correct?

14 A. I did testify to that in my deposition. I testified to
15 that earlier this morning, that I didn't take those staff
16 because it was in turmoil. I didn't know from one day to
17 one week or the weeks whether a block would open or not
18 open, whether it would close, whether you move people in and
19 move people out and yes I did leave it open an that's what I
20 meant by the term "turmoil."

21 Q. I want to ask you whether you are aware of the series
22 of interracial assaults that took place at OSP in spring,
23 2004 and 2005, causing OSP administration in early June to
24 limit congregate recreation to prisoners on Levels 5-A and
25 4-B.

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1 A. Yes.

2 Q. Is that prohibition still in place?

3 A. I don't know that it is still in place as we speak. I
4 know the institution and the warden was looking at it and
5 make ago determination of when and how they could go back to
6 that congregate rec.

7 Q. Are you aware that there have been four suicide
8 attempts at OSP in July and August?

9 A. No, I'm not aware of that number, no.

10 Q. Are you aware that there has been a serious incident of
11 an assault on a prisoner by a guard and a later assault on
12 that prisoner by other guards?

13 A. I'm not -- I have not heard of that incident but I'm
14 sure if that incident is alleged to have occurred that the
15 Ohio State Ohio way patrol would be investigating that
16 incident.

17 Q. My question is just this, Mr. Collins. On Plaintiff's
18 Exhibit for identification 14, there have been set forth
19 what is not evidence, what is a set of informed allegations
20 about the incidents of violence that I have described to you
21 and we'll have testimony later about them, but assuming that
22 there have been interracial assaults so serious that the
23 warden has found it necessary to prohibit congregate
24 recreation for two-thirds of the prisoners, assuming that
25 there have been a series of thankfully unsuccessful suicide

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1 attempts, assuming that there has been some tension between
2 guards and prisoners, resulting in violence, what sense does
3 it make to tear up a stable situation at ManCI and put 170
4 prisoners already under a high level of stress in that
5 prison?

6 A. I don't agree with all your assumptions and I believe
7 it is the best move for the effective and efficient
8 operation of this death, to move Death Row to the Ohio State
9 Penetentiary.

10 MR. LYND: Your Honor, permit me just a bare
11 minimum of concluding questions about --

12 THE COURT: You have about two minutes. I want to
13 get this witness over.

14 MR. LYND: Two minutes. Very good.

15 BY MR. LYND:

16 Q. Mr. Collins, I direct your attention to Plaintiff's
17 Exhibit for identification 16. That is a form created by
18 the department, is it not?

19 A. Correct.

20 Q. That form is used when a prisoner on Level 4-B at SOCF
21 transfers to Level 4-B at OSP. Correct?

22 A. Correct.

23 Q. It is a lateral transfer without a change in security
24 classification, correct?

25 A. It's a lateral transfer without change in security or

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1 supervision classification from 4-B but is not a lateral
 2 transfer in the aspect of privileges because there is a
 3 difference between 4-B operational procedures at Lucasville
 4 and 4-B operational procedures at OSP and that was the
 5 reason why this particular document was made.

6 Q. I understand that. But before the 4-B at SOCF remains
 7 a 4-B when he arrives at OSP correct?

8 A. That is correct that does happen.

9 Q. And if that transfer is desired by the department and
 10 the prisoners does not want it, it is involuntary, the
 11 prisoner has a right to a hearing as to whether his conduct
 12 requires the transfer.

13 A. Well, in fact, the document you are speaking to and the
 14 transfers you're talking about, the inmates at Lucasville
 15 who want to go to OSP as 4-Bs it is not a decision about
 16 whether -- if they say they want to go, then if they meet
 17 the other criteria they can go. If they say they don't want
 18 to go, they wouldn't be transferred in the first place
 19 because of the loss of privileges that occur at OSP in
 20 reference to the same 4-B classification at SOCF.

21 Q. But on its face, the document indicates that an
 22 individual who does not wish a transfer will have a hearing.
 23 Isn't that true?

24 A. I have not read the document over. I suspect, because
 25 this document is also for inmates that are leaving OSP going

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1 back to SOCF, because it is used at both prisons, there was
 2 probably a hearing of somebody who had volunteered to come
 3 to OSP who then later said, if he said I want to go back he
 4 would have went back. If he would have said I don't want to
 5 go back would have had a hearing as to why they were wanting
 6 to send him back to SOCF so I assume that's why that was put
 7 in there.

8 Q. And my last exhibit for my last 17 seconds is
 9 Plaintiff's Exhibit for identification 17, which indicates,
 10 does it not, Mr. Collins, that a prisoner on Death Row who
 11 doesn't want to go can ask for a hearing, correct?

12 A. And does say if you object to the hearing you can file
 13 a written objection to the committee at Mansfield, yes, it
 14 does say that.

15 Q. And in connection with this proposed transfer a
 16 prisoner who objected to the transfer might or might not be
 17 allowed a hearing, correct?

18 A. That's correct.

19 Q. That would be a discretionary decision by staff?

20 A. Correct.

21 MR. LYND: I have no further questions.

22 THE COURT: We'll recess. We'll reconvene about
 23 12:45. I have some things over the lunch hour so it may be
 24 a bit after that, but be back here by 12:45.

25

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1 AUGUST 31, 2005, 2:31 P.M.
 2 THE COURT: We reconvene this afternoon. Would
 3 the plaintiffs call your next witness.
 4 MR. LYND: Michael Bengé.
 5 THE COURT: Mr. Bengé, can you state your name?
 6 THE WITNESS: Yes. Michael Bengé.
 7 THE COURT: And spell your last name?
 8 THE WITNESS: BENGE.
 9 THE COURT: Would you raise your right hand?
 10 MICHAEL BENGE, being first duly sworn, was examined
 11 and testified as follows:
 12 DIRECT EXAMINATION OF MICHAEL BENGE,
 13 THE WITNESS: I would a firm if that's okay. Do
 14 you so affirm.
 15 THE WITNESS: I affirm.
 16 BY MR. LYND:
 17 Q. While we are waiting let me ask you, can you see me?
 18 A. No, I cannot. All I see is a gray screen.
 19 MR. LYND: Your Honor, in view of the technical
 20 difficulties that we're having with Mr. Bengé, I would like
 21 respectfully to suggest that the remaining four prisoner
 22 witnesses be physically transported tomorrow.
 23 THE COURT: I'll deny that but I would ask the
 24 State to make an effort to get the issue corrected. I think
 25 it is less important whether he can see you as long as he

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1 cue hear the question than it is that the fact finder be
 2 able to see him and I can see Mr. Bengé. Why don't you go
 3 on with your examination.
 4 MR. LYND: Very well.
 5 THE COURT: And if you can pull the microphone
 6 closer, I think he would be able to hear better as well,
 7 okay?
 8 Can you hear me, Mr. Bengé?
 9 A. Yes, I can.
 10 Q. Good.
 11 A. I hear you.
 12 Q. Mr. Bengé, are you a named plaintiff in this matter?
 13 A. Yes, I am.
 14 Q. Have you testified in previous hearings?
 15 A. Yes, I have. Two, I believe.
 16 Q. And briefly to recapitulate your history, when were you
 17 placed on Death Row?
 18 A. Approximately June of 1993, I believe it was.
 19 Q. At what prison was that?
 20 A. At Lucasville.
 21 Q. And did it come about that you were later transferred
 22 to another prison?
 23 A. Yes. It was about 1995, I believe it was November, I
 24 think it was, we transferred up member to Mansfield
 25 correctional institution.

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1 Q. And from Mansfield correctional institution, were you
2 transferred to another prison?

3 A. Yes. I believe it was May 15 of 1998 I was transferred
4 to Ohio State Penetentiary.

5 Q. And did it then come about that you were transferred
6 back from the Ohio State Penetentiary to Mansfield?

7 A. Yes. That occurred, I believe it was 2003, in
8 February, I believe it was.

9 Q. Thank you. While you were at SOCF, where were you
10 housed?

11 A. I was housed in K-3 for approximately six months until
12 I made A class. Then I was moved to K-4 and A class to
13 another pod.

14 Q. And what was the A class that you have just mentioned?

15 A. I guess it would be considered an extended privileges.
16 A larger outdoor rec yard, you get to go out with 20 guys,
17 no cuffs on. Before I got down there, there was actually
18 guys going to the basketball gym, 40 guys at a time with no
19 cuffs. It was just a higher level of privileges than the B
20 or C levels.

21 Q. So do I understand you to say that as a level A Death
22 Row prisoner at SOCF, you had access to outdoor recreation?

23 A. Yes. We had a large outdoor rec yard. It had about a
24 half dice was death ball Court, full size handball, picnic
25 table, dip bars to exercise on, pullup bars. You could run

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1 or jog around the yard. It was a fairly large size yard.

2 Q. And even at the time you came after the April, 1993
3 events, in what way did prisoners go from Death Row to their
4 recreation yard?

5 A. They would cuff up a whole wring, 20 guys at a time,
6 just cuffs behind your back you walk out to the recollection
7 yard once the gate is should they would remove all the cuffs
8 and we were out there for like two and a half to three
9 hours, I believe it was.

10 Q. I see. During the time that you were at SOCF, were
11 Death Row prisoners ever put in the general population hole?

12 A. I witnessed several throwout the couple years I was
13 down there go to the hole for various reasons. Some went
14 for just a bad recollection, some went for signing a
15 petition, others went for throwing water on other inmates.
16 Disrespect towards officers. I mean, just various reasons
17 they would be sent to the population hole.

18 Q. And do you recall the name of any particular Death Row
19 prisoners at SOCF who was put in administrative control?

20 A. I believe there was several. I know for sure one was
21 an older guy, Bradley, I'm not sure of his first name. He
22 was in AC for like four or five years. I believe there was
23 a guy Lewis Williams. He is sentence been executed. I want
24 to say there was a couple more but I can't come up with
25 their names at this moment.

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1 Q. Thank you. Now, before Death Row was transferred to
2 ManCI in 1995, did any ODRC staff come from ManCI and talk
3 to you about the transfer?

4 A. Yes, sir. There was a fairly large size group that
5 consisted of, I think it was two unit managers one of them
6 was Tommy sheets, we had a couple guards, one was Greg month
7 row, who is now our case worker down here. There was a
8 deposit deward even, I think it was Ernie Williams. Who was
9 the other? Do you remember his name? There was a sergeant
10 Shaw came down and a couple other COs I'm not sure of their
11 names.

12 Q. And when these staff members came from ManCI to SOCF,
13 where did you have contact with them?

14 A. They came on the range. We was in our cells in K 4.
15 They walked down a couple ranges talking to device, some
16 guys they recognized so they actually stopped and talked to
17 them more gave us Alan idea of what to expect when we moved
18 up here.

19 Q. And what did they tell you you could expect when you
20 moved to ManCI?

21 A. They told us several things, we was going to have an
22 outside recreation yard similar to what we had at
23 Lucasville. They told us we would have OPI jobs working in
24 the glove factory, that didn't have happen. We were
25 supposed to have contact visits that never happened. We

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1 were supposed to be able to walk to the commissary back and
2 forth like general population inmates but none of that never
3 occurred.

4 Q. And just so I understood what you told me, Mr. Bengé,
5 there was a promise or a projection of a large outdoor rec
6 yard, is that correct?

7 A. That's correct.

8 Q. And there was --

9 A. Yes. In regards to that --

10 Q. Go ahead.

11 A. Go ahead. In regards to the outside rec yard I
12 actually found some paperwork on it at one time and found
13 out the money was actually allocated for the yard but it got
14 spent for something else and more or less had institution
15 told me well, we'll say these things, and life changes, and
16 that's just too bad more or less is what was told to me.

17 Q. And did you also say that there was some talk about
18 jobs in an OPI glove factory?

19 A. Yes, that's correct.

20 Q. And finally, were you told before you moved to ManCI in
21 1995 that there would be contact visits with family and
22 relatives?

23 A. That was one of the main things that we stressed on
24 going down there. That is what was related to us.

25 Q. Now, showing you, Mr. Bengé, I guess I can show you

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1 something --

2 MR. LOBEL: He can't see it.

3 MR. LYND: He can't see it. That's correct.

4 BY MR. LYND:

5 Q. Do you have a document available to you called

6 Plaintiff's Exhibit 18, which is a so-called inmate profile

7 of yourself?

8 A. Yes, I see it.

9 Q. And does that document indicate halfway down the right
10 hand column what your security level was at the time you
11 were sent to OSP?

12 A. It states I was maximum security.

13 Q. Thank you. Now, while you were at OSP, was there a
14 change in your security classification?

15 A. Yes. About two or three months before I came back to
16 Mansfield.

17 Q. While you were at OSP, I assume you were level five,
18 high maximum security, is that correct?

19 A. That's correct.

20 Q. And then there was a change in that just before you
21 came back to Mansfield, is that correct?

22 A. Yes of the I was reduced to Level 4. Yes. I was
23 reduced to Level 4.

24 Q. And do you have a one-page document available to you
25 called Plaintiff's Exhibit 19?

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1 A. Yes, I have it.

2 Q. And does that appear to show, Mr. Bengel, that in
3 December of 2002, a Mr. William he will a bee approved your
4 reclassification to Level 4-B?

5 A. Yes, that's correct.

6 Q. Did anyone ever tell you that your classification or
7 status was not Level 5 or Level 4, but DR?

8 A. No. I mean, I never heard of that phrase at that time.

9 Q. And so to the best of your knowledge, what was your
10 security classification at the time you returned to Death
11 Row at ManCI?

12 A. I was Level 4 up there but when I got back down here I
13 was maximum security again.

14 Q. But it was either Level 4 or maximum; it was no longer
15 Level 5?

16 A. Right. That's right.

17 Q. As you look back at your stay of almost five years at
18 OSP, how would you compare OSP with Death Row at ManCI?

19 A. I mean, there is no comparison. It is a totally
20 different environment.

21 Up there, it is like a hostile environment. Down here
22 it is more relaxed.

23 I guess I don't know how else to put it. The people
24 down here are nicer. It's not as tense as it is up there.

25 Q. When you were at OSP, did you ever consider suicide?

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1 A. Well, as a matter of fact there were several times. I
 2 mean, there was probably very few weeks that actually went
 3 by that that thought didn't cross my mind probably to the
 4 point even at times I probably tried to rationalize it would
 5 be better off for anybody everybody in my situation if I
 6 would just go ahead and get rid of myself.

7 Q. When you returned to ManCI in 2003, what pod on Death
 8 Row were you first housed in?

9 A. I went to the DR 5 pod which is, I guess it is the high
 10 max pod I guess for Death Row.

11 Q. It is the most restrict tiff of the six Death Row pods?

12 A. By far.

13 Q. And I want you now to compare what you experienced
 14 during the five years at OSP and what you experienced during
 15 the time you were in DR five after you came back to ManCI
 16 and let me ask you first, was there a difference in how
 17 rapidly you could access legal materials?

18 A. Well, there was a big difference by far. On the legal
 19 aspect, now, the legal service is right outside DR 5 door
 20 almost you could send a kite out in the morning you could
 21 get books back within a couple hours and you could do that
 22 two or three hours a day. If you had a good rapport with
 23 the legal clerk out there you could get an inlimited supply
 24 of books as long as you turned them back in in a day's
 25 period so you could probably get 15, 20 books a day easily

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1 long as you turned the others back in. Now, up there at --

2 Q. Now, this is a description, Mr. Benge, of your access
 3 to legal materials while housed in DR 5 at ManCI, correct?

4 A. That's correct.

5 Q. And how had it been at OSP?

6 A. Well, you had to kite the paralegal up there, there was
 7 two of them at that time. Now, it still took some time,
 8 within three, four, five days to get your books. A lot of
 9 times there was only one servicing the whole pry OSP and
 10 that really took about, that could take a week's time on
 11 some orders and a lot of time you didn't get your books
 12 within a two-week period.

13 Q. If you know were prisoners in DR 5 permitted to share
 14 legal materials with each other?

15 A. Yes. That's always been that way on Death Row since I
 16 came down, even at Lucasville.

17 Q. But was it true at OSP?

18 A. You can't share nothing up at OSP. I mean for one
 19 thing it is physically --

20 Q. Pardon?

21 A. For one thing it is physically impossible to share
 22 anything once you are assigned a cell up there.

23 Q. ^ inside a cell up there?

24 Q. Was there a difference between DR 5, the most
 25 restrictive unit at ManCI, and OSP with regard to access to

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1 the telephone?

2 A. Yes. Well, I mean, you had your choice in DR 5 there
3 you could come out through your rec period you could go to
4 the phone booth, they will lock you in the cage, you could
5 stand there for the whole rec period and use the phone if
6 you want to then use your shower and lock back up if that's
7 your choice.

8 Q. And how was it at OSP?

9 A. As I recall you only got to use the phone once a week,
10 I believe it was. Even on Level 4.

11 Q. And you may have answered this already, Mr. Bengé, but
12 still restricting your comparison just between DR five and
13 OSP, was there a difference in the overall atmosphere?

14 A. There was no question about that. Even up at SOP on
15 Level 4 you still had to extend your hand out the chute with
16 the back of your hands together. They placed the cuffs on
17 you. Then when the door opened it was still a hands on
18 escort to the recollection cage, the shower, wherever you
19 was going, like down here when I came back in 2003, I didn't
20 know how to act down here. The slots stayed open at times,
21 they come to cuff me up and time sticking my hands out the
22 cuff port and they are looking at me like I'm some idiot and
23 once they open the door up and I still just kind of am brain
24 washed, I didn't know where to go. I kind of stood there
25 waiting to go led around, like a dog.

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1 Q. If you remember, during your five years at OSP, how
2 many visits did you have from your attorneys?

3 A. I think there was actually only two visits. I think I
4 had a visit from an assistant attorney I think she just
5 mainly come up here to see about my well being but actual
6 visits I think it was only two.

7 Q. Where do your relatives live, Mr. Bengé?

8 A. Down around the Cincinnati area.

9 Q. What relatives do you have there?

10 A. My mother, my stepfather, I have two sisters, I got one
11 sister in Kentucky, I have two children. An uncle. I have
12 numerous relatives down in can I Kentucky.

13 Q. And have any or all of those folks visited you during
14 your imprisonment?

15 A. At OSP, no. There was only my mom, my step dad, my
16 uncle. I think it was two sisters and my children. That's
17 the only ones that really come that far. Even then, my two
18 sisters, they was lucky to get up to see me once a year, if
19 my mom and dad hadn't been retired I probably wouldn't even
20 have seen them as much as I did.

21 Q. Directing your attention, Mr. Bengé, to a letter from
22 attorney Steven Farrell of the Public Defender's office,
23 which is marked as Plaintiff's Exhibit 20 but also has a
24 marker on it because it was used at a previous hearing, can
25 you identify this document?

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1 A. Yes. I have it right here.

2 Q. What is it?

3 A. A letter to Reginald Wilkinson from my attorney,
4 Stephen Farrell. It was in regards to my being sent to Ohio
5 State Penetentiary it basically stated the attorney reviewed
6 the record from the 1997 disturbance here at Mansfield and
7 after reviewing the record he saw I was pretty much not
8 involved to the extent that they claim I was and he was
9 asking I be sent back down to Mansfield.

10 Q. Directing your attention Mr. Bengé to the second page
11 of that exhibit, about halfway down the page, is there a
12 concern expressed in that letter about the difficulty of
13 your relatives in the Cincinnati area visiting you at OSP?

14 A. Yes, there is. Particularly now, my step dad, he has
15 Alzheimer's, and it is almost impossible for my mom to drive
16 that far by herself so she has to bring my uncle along or
17 somebody else to help with the drive and then there is
18 additional like expense for them to stay overnight, and
19 food, so it was a major burden on them, driving that far.

20 Q. And if I could ask you to look at Plaintiff's Exhibit
21 21, this appears to be an E-Mail to whom it may concern from
22 a Juanita BABb. BABB. Can you tell us who Juanita BAB is?

23 A. She is my mother.

24 Q. And she also also expressed concern, I think in point
25 number six of her E-Mail, about the problems there would be

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1 for your family in visiting you if you were transferred back
2 to OSP --

3 MR. HOLLOWAY: Objection, hearsay.

4 A. Like I previously stated my dad has the Alzheimer's and
5 even at OSP with the two person visiting limit whoever is
6 picking up cannot stay in the parking lot for any length of
7 time, in other words they are told to leave, they are
8 loitering, so it creates a hard problem when you are trying
9 to pick somebody and wait for them.

10 THE COURT: I'll sustain the objection. I think
11 it is hearsay.

12 MR. LYND: I see.

13 BY MR. LYND:

14 Q. Has anyone from OSP visited Death Row during the last
15 few months, any staff from OSP?

16 A. There has been several people, several administration
17 officials down here.

18 Q. Do you remember any of the particular persons?

19 A. No. There was a unit manager administrator, Mr. James;
20 deputy warden of operations, Mr. Recommencic, there was a
21 lady called Mrs. Johnson, I guess she would be the unit
22 manager up there.

23 Actually, the ward even was down here, Mr. Houk, he was
24 here a few times. There was another guy, Mr. RIZ a tar, he
25 is over at the department of recreation at OSP. That's the

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1 only once I'm aware of that were down here.

2 Q. And what if anything did they tell you about the
3 possibility of contact visits or semi-contact visits at OSP?

4 A. Well, the first couple times they talked about it.
5 Then the last couple times they came down they had a picture
6 of a hole with a plexiglass window about the size of a food
7 slot and that's what they were proposing to give us for
8 contact visits or semi-contact.

9 Q. Now, Mr. Benge, were you also aware that earlier this
10 year, there was a plan to create semi-contact visits at
11 ManCI?

12 A. Yes. Yes, I was.

13 Q. And were you aware of what was going to be done
14 physically to make that possible?

15 A. Well, I mean, it was already -- everything was ready to
16 go, and right after that attempted escape in February, I
17 believe it was, it just got yanked off the table
18 indefinitely. I mean, as far as physical contact.

19 Q. What was it -- excuse me again for interrupting.
20 What was it that the warden was intending to do to the
21 ManCI visiting booths to create semi-contact visits?

22 A. Well, like I say, everything was already in place and
23 it still is in place. The booths is about three foot wide,
24 there is a window about probably four foot tall. The whole
25 bottom half of the window would be raised up. There were

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1 bars, horizontal bars -- vertical bars placed in the
2 opening and you could reach through and hug your people,
3 kiss, hold hand. I mean, as far as semi-contact you could
4 not get more close to being full contact than that was going
5 to be.

6 Q. Comparing the picture you saw of semi-contact visits
7 that would exist at ManCI -- I beg your pardon, at OSP if
8 Death Row were to be transferred, and what you understood to
9 be the plan for semi-contact visits at ManCI earlier this
10 year, which arrangement would have given you more contact
11 with your advisors?

12 A. There is no question here at Mansfield there would have
13 been the most opportunity for us to have decent contact
14 visits. Besides the food slot hole up there they were
15 proposing at Youngstown, it is big enough to hold hands, but
16 other than that, I'm not even sure that you could get down
17 and stick your face in there and give your loved one a kiss
18 or not. I don't even know if that would be possible.

19 Q. Were there any other subjects that you discussed with
20 the advisors from OSP?

21 A. I talked to Mr. Remeck and Mrs. Johnson, it was, about
22 the phone calls. They told they was going to let like five
23 guys out at a time for one hour period and stating the phone
24 calls up there we get a 15 minute limit. I told them sir
25 that is not enough time for five guys to make a phone call,

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1 then Mr. Remeck corrects himself and says they are going to
 2 let eight guys out at a time and I said that would
 3 exacerbate the problem as far as phone calls and him and
 4 Miss Johnson looked at each other that they had not thought
 5 about that before and admitted he has a good point and that
 6 was the end of that topic.

7 Then I asked him about outdoor rec and I asked him if
 8 it was true that the guys there at Youngstown currently
 9 cannot get the two hours rec they are supposed to get now,
 10 he admitted that is a problem. I asked will that further
 11 exacerbate the problem if you bring all of us up there and
 12 he said he went sure about that and he had some things to
 13 work out.

14 Q. You say that was Mr. Remeck?

15 A. Yes, it was.

16 Q. I see. If you know, Mr. Benge, how often do guys in
 17 the hollow Death Row at ManCI get outdoor recreation?

18 A. I believe if you're in the hole it is five days a week.
 19 If you're over there living, like some guys are, they get it
 20 seven days a week.

21 Q. (How would you compare your sell at OSP during the
 22 five years you were there with your cell at ManCI?)

23 A. Probably, again, there is no comparison. At the cell
 24 at OSP I could touch the ceiling of the cell.

25 Q. You could touch what?

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1 A. I could touch is ceiling in the cell at OSP, I have to
 2 tip toe but I can still touch the ceilings. They are only
 3 about seven foot wide. They are fairly deep, but then you
 4 have the bed running across the back of the wall so that is
 5 what cuts down the space. But again there is no comparison.
 6 We have showers in our cells here. The ceiling is like ten
 7 foot tall. The window in my cell is about seven foot tall.
 8 It is big enough that I can actually get up and stand in it,
 9 although I have to hold myself up there but that's how big
 10 it is.

11 The window itself is probably about five inches wide
 12 but it flares out.

13 Q. Do I understand you to be saying that you experienced
 14 the cells at ManCI as having more space than the cells at
 15 OSP?

16 A. Without question. There is no comparison, again.

17 Q. Comparing the TV channels that you are able to access
 18 at ManCI with those that were available to you at OSP, which
 19 of the two situations has access to more TV channels?

20 A. Again, there is no question about it. Down here at
 21 ManCI it far outweighs what OSP offers. I think we have
 22 like 16, 17 channels here. There is two video channels. We
 23 have like a weather station. We have stations from
 24 Cleveland, Toledo, Columbus, Akron, and basically the
 25 Columbus channels they give you use throughout the State,

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1 around Cincinnati, so we get news throughout the State. It
2 affords people to be able to keep in touch with their home
3 town by having these numerous channels.

4 Q. I see. I would like to refer you, Mr. Bengel, to
5 Plaintiff's Exhibit for identification 22. I ask if you can
6 say what that document is.

7 A. My objection to the administrative transfer to the Ohio
8 State Penitentiary.

9 Q. I see. And was there a particular person at ManCI to
10 whom you attempted to submit that objection?

11 A. Well, at this time we were not able to submit that to
12 Mrs. Lone Wayne right, she is the unit manager administrator
13 we are not able to submit these until after.

14 Q. Did Mrs. Wayne right inform you that you were not
15 permitted to submit that objection?

16 A. That's correct. At this time. Yes.

17 Q. And as you understand it, Mr. Bengel, at what time would
18 you be able to submit your objection?

19 A. Not until we were served with the actual transfer
20 notice.

21 Q. Now, I notice that in Plaintiff's Exhibit for
22 identification 22 at the bottom of the first page and the
23 top of the second page, you say something about how you
24 reacted when you heard about the proposed transfer of Death
25 Row to OSP.

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1 Is that correct?

2 A. Yes, that's correct.

3 Q. How did you react?

4 A. Well, I mean, I guess I would categorize it as being on
5 the verge of a mental break down.

6 Q. And what happened?

7 A. Well, I mean, actually, it really actually started when
8 I was talking to some people from OSP and I had some crazy
9 thoughts go through my head and it was at that time that I
10 realized I better contact mental health and get some help.

11 Q. And what happened then?

12 A. Well, I was sent to Oakwood fairly quick. I was up
13 there for about, over three weeks.

14 Q. And is Oakwood part of the Ohio prison system, with a
15 special task or function?

16 A. It's part of the DRC. I believe it would be a
17 psychiatric hospital, I believe.

18 Q. I see. And if you know, during the time you were at
19 Oakwood or thereafter, were you diagnosed with any mental
20 health conditions?

21 A. I was diagnosed with post-traumatic stress syndrome
22 with some anxiety issues.

23 Q. After you returned from Oakwood to ManCI, did there
24 take place something in the nature of a mental health
25 assessment?

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1 A. Yes, there was. Although I was not aware it actually
2 occurred, but it did take place.

3 Q. What happened?

4 A. Well, actually, I saw a Dr. Mad deny, who is no longer
5 here at ManCI, I saw him actually to get my medications
6 changed and try to get some issues straightened out, and I
7 saw the doctor for probably half an hour and I was later
8 informed that that was my evaluation regarding transfer to
9 OSP.

10 Q. At the time you spoke with the doctor, did he tell you
11 that that was to be your mental health assessment for
12 purposes of evaluating the transfer?

13 A. I don't recall -- I don't recall anything being
14 mentioned about OSP or the transfer. Just my overall
15 anxiety on the issues about the overall transfer, that's
16 what I was discussing with him, but as far as there being an
17 evaluation in that regard no.

18 Q. And directing your attention to Plaintiff's Exhibit for
19 identification 23, 24, can you tell us what those are?

20 A. These were kites I sent to the mental health department
21 with various questions on there asking about what was going
22 on.

23 Q. About what?

24 A. Well, about the evaluation, and I was asking -- I was
25 asking wasn't I supposed to be present at this evaluation,

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1 and I was just more or less stating the fact that I only
2 seen the doctor one time, which was about a half hour, and
3 like I stated, it was only for the post-traumatic stress
4 issues that I was suffering from and to get my medication
5 change.

6 Q. So if I'm understanding you, Mr. Benge, and I don't
7 mean to put words in your mouth, you spoke to the
8 psychiatrist about your own mental health problems at the
9 time and later you were told that that had been your mental
10 health assessment. Is that correct?

11 A. That's correct. I had reservations about going through
12 the initially valuation with, I think it was Dr. Met singer.
13 At first I refused but I was second guessing myself later
14 on, I was trying to say about how I could go about talking
15 to this guy and that is when Mrs. Osgood, the mental
16 psychologist, that's what she informed me, that my mental
17 evaluation occurred when I saw Dr. Madden and she was
18 present at that evaluation.

19 Q. I see. Now, Mr. Benge, when you returned from Oakwood
20 to Death Row at ManCI, in what living area were you placed?

21 A. I was in DR 5 for about three days, I believe it was.

22 Q. And DR 5 is the most restrictive living area at ManCI?

23 A. Again, yes, that would be like the high max pod for
24 Death Row.

25 Q. And during those three days or so, did you have your

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1 personal property?

2 A. I didn't have nothing when I first walked in the door.

3 Well, I guess I had a state at all, I had sheets and

4 blankets, a couple small tubes of state tooth paste. That

5 was it.

6 Q. So what did you do?

7 A. Well, I sent a few notes down the way to a couple guys

8 I knew, and I got coffee and some food, some stationery,

9 pens, envelopes. Basically, whatever I needed, shower shoes

10 and soap. Stuff that I just needed to get by for the three

11 or four days that I was over there.

12 Q. And Mr. Benge on the basis of your five year experience

13 at OSP, if prisoners at OSP had attempted to give you the

14 same kinds of items, what would have happened?

15 A. Well, when we first got up there, now, we actually was

16 sharing some things, even though they didn't want us to do

17 it. I mean, they would come in and try to grab stuff off

18 the range we was fishing for, like soap or food items, in my

19 opinion, that's what brought about the steel plates being

20 put on the bottom of the doors and on the sides. A lot of

21 guys got tickets for situations like that, other didn't.

22 Q. If you had attempted to share at OSP the same items

23 that prisoners on DR 5 shared with you at ManCI, would those

24 items have been considered contraband at OSP?

25 A. Oh, there is no question. Like I say, if they could

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1 have ran in their and grabbed them fast enough they would

2 have ran in there and took them and wrote you a particular

3 once the steel plates were on the doors, it was physically

4 impossible to share anything like that.

5 Q. Do I understand you to be saying that at OSP, both the

6 prisoner giving such items and the prisoner receiving them

7 might have been subjected to discipline?

8 A. Most definitely. At the very least. At the very

9 least. At the very least they would have came and tore both

10 your cells up looking for whatever it was that you got.

11 Q. Finally, Mr. Benge, have you ever scene a ManCI Death

12 Row handbook, dated March, 2005?

13 A. No, sir, I have not. And I was just discussing with my

14 case manager here, there is no handbook for 2005.

15 Q. Do you know any other prisoner at OSP -- at ManCI who

16 has received a ManCI Death Row handbook dated March, 2005?

17 A. No, sir. I mean, like I previously stated, it doesn't

18 exist.

19 Q. Let me direct you, Mr. Benge, to Plaintiff's Exhibit

20 for identification 25. This appears to be the front and

21 back of a kite from someone named Apanovich to someone named

22 Mrs. Bar E.

23 Do you know who Apanovich is?

24 A. Yes, I do.

25 Q. Who is he?

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1 A. He is an inmate here on Death Row.

2 Q. Do you know who Mrs. Barry is?

3 A. Yes. She is the unit secretary on Death Row.

4 Q. The administrator of Death Row?

5 A. The unit secretary.

6 Q. And on the side of the second page of Plaintiff's

7 Exhibit 25, there appears to be a comment by Mrs. Barry in

8 response to Mr. Apanovich's request for the 2005 handbook.

9 Do you see that comment?

10 A. Yes, I do.

11 Q. What does Mrs. Barry say?

12 MR. HOLLOWAY: Objection. Hearsay.

13 THE COURT: Sustained.

14 A. She states 2000 is the latest one we have.

15 THE COURT: Sustained. It would be hearsay unless

16 there is some exception that you believe applies.

17 MR. LYND: I beg your pardon.

18 THE COURT: What would the exception to the

19 hearsay rule be?

20 MR. LYND: That it is a state representative and a

21 form used in the regular course of business by the

22 department.

23 THE COURT: Again, we're on the second page?

24 MR. LYND: Yes. Which is, Your Honor, the back of

25 the instrument that the prisoners used to communicate.

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1 THE COURT: I'll overrule the objection. I think

2 it is under 801 it would not be hearsay. It is a statement

3 made by a representative of a party in interest.

4 MR. LYND: Thank you, Your Honor. I have no other

5 questions of Mr. Bengé.

6 THE COURT: Cross-examine.

7 MR. HOLLOWAY: Yes, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. HOLLOWAY:

10 Q. Mr. Bengé, I'm Eric Holloway. How are you doing right

11 now?

12 A. Okay.

13 Q. I want to see if we can agree on one concept at the

14 very least. Is it fair to say that you would agree that if

15 you had the choice between being in your cell 23 hours a day

16 versus eight hours a day, you would want to be in your cell

17 only eight hours a day, correct?

18 A. Be in my cell only eight hours a day or out of the

19 cell?

20 Q. You would want to be out of your cell as much as

21 possible in any given day, correct?

22 A. Depending on where take took place, yes.

23 Q. So it is fair to say if you are given the opportunity

24 to go from, say, 14 mowers a week to 35 hours a week, you

25 would like the 35 hours out of your cell time or at least

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1 the opportunity for that, correct?

2 A. Yes. Again depending on where that took place, I
3 would.

4 Q. You talked a little bit about recreation that you
5 experienced at the southern Ohio correctional facility back
6 in 1992-93, is that correct?

7 A. From '93 to '95, yes.

8 Q. All right. It is fair to say while you were at the
9 southern Ohio correctional facility you were fed daily,
10 correct?

11 A. That's correct.

12 Q. And you were fed okayly at Mansfield correctional
13 institution, correct?

14 A. Yes, that would be correct, too.

15 Q. And while you were at the Ohio State penitentiary, you
16 were fed daily there as well, correct?

17 A. Yes.

18 Q. And it is true while you were at the southern Ohio
19 correctional facility you had prison issued clothing, right?

20 A. Yes.

21 Q. And you had prison issued clothing at the Mansfield
22 correctional institution Death Row, right?

23 A. That's correct.

24 Q. And you also had prison issued clothing at the Ohio
25 State Penitentiary, correct?

1 A. Yes.

2 Q. And at all three institutions sir you had the
3 privilege available to you of visitation with family and
4 loved ones, right?

5 A. That's correct.

6 Q. And at all three institutions SIRP you had the option
7 of visitation with your attorney of record. Is that
8 correct?

9 A. That's correct.

10 Q. And you had the opportunity at all three institutions
11 to meet with your clergy of record should you so choose,
12 correct?

13 A. Yes.

14 Q. And at all three institutions I believe you had access
15 to institutional programming such as anger management. Is
16 that correct?

17 A. I don't recall we had it at Lucasville. There was some
18 programming here a long time ago but it didn't last long.

19 Q. For example --

20 A. It wasn't available at OSP, I recall.

21 Q. For example, you participated in a GED program, is that
22 correct?

23 A. That's correct.

24 Q. Where was that, sir?

25 A. That took place at OSP.

1 Q. And all three institutionses, you have had access to
2 medical care, correct?

3 A. That's correct.

4 Q. At all three institutions you have had access to mental
5 health care, correct?

6 A. Well, I've had access to it. I chose to forego it at
7 OSP.

8 Q. And at all three institutions you had the ability to
9 possess writing materials.

10 A. That would be correct.

11 Q. And you could have reading materials in your cell at
12 all three institutions, correct?

13 A. Yes.

14 Q. And other than what you have told us in today's
15 testimony, that you have been diagnosed with post-traumatic
16 stress disorder and anxiety you have not been diagnosed to
17 your knowledge with any other mental health condition,
18 correct?

19 A. That's correct.

20 Q. And when you went from the southern Ohio correctional
21 facility Death Row to Mansfield Death Row, you didn't file a
22 lawsuit about that transfer, did you?

23 A. No, sir.

24 Q. As part of preparing for these proceedings today, is it
25 correct that you met with a mental health professional

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1 retained by plaintiff's counsel?

2 A. Yes, I did. Yes.

3 Q. And that gentleman is Dr. Kupers, is that correct?

4 A. I believe that to be recollect.

5 Q. And you met with him for about 30 minutes. Is that
6 correct?

7 A. 30, 45 minutes.

8 Q. Thank you. If you had a choice, sir, between eating
9 alone all the time or having the opportunity to eat with
10 other inmate, it is fair to say you would rather choose to
11 eat with other inmates, correct?

12 A. I guess that depends upon the inmates, the company, I
13 guess you would say.

14 THE COURT: I think we would all agree with that.

15 MR. HOLLOWAY: We'll stipulate, Your Honor.

16 BY MR. HOLLOWAY:

17 Q. And Mr. Bengé, you have been confined at the Ohio State
18 Penetentiary one time in your life, correct?

19 A. That's correct.

20 Q. And when you were there, sir, you were confined at
21 Level 5 status and Level 4 status for a brief period,
22 correct?

23 A. That's correct.

24 Q. And you are aware that the department of Rehabilitation
25 & Corrections has issued a chart comparing privileges that

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1 exist at Mansfield versus what's proposed to take place at
 2 OSP, right? You are aware of that chart?
 3 A. Yes, I have seen that. Right.
 4 Q. And it is correct to say that you have never
 5 experienced the conditions at OSP as planned for Death Row
 6 inmates. Is that correct?

7 A. That's correct.

8 MR. HOLLOWAY: I have no further questions Your
 9 Honor.

10 THE COURT: Is there any redirect?

11 REDIRECT EXAMINATION

12 BY MR. LYND:

13 Q. With regard to the comparison chart about which you
 14 were just asked, Mr. Bengé, do you recall those questions?

15 A. Yes.

16 Q. Did you consider what was said in that chart about
 17 conditions at Mansfield accurate?

18 A. In no way, shape or form.

19 Q. Can you give us one or two examples of statements made
 20 about conditions at Mansfield that you considered
 21 inaccurate?

22 A. Well, in the category of jobs, they left off numerous
 23 jobs, they left off the barber jobs, the recreation quarters,
 24 we have two Barb ears, two recreation important tears, two
 25 important tears that work on the range, legal typists, rec

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1 porter, ice porter, they left off numerous jobs.

2 TV channels, they don't enlist the channels we have
 3 here at Mansfield. The ones they have up there at
 4 Youngstown are all local channels, the biggest stories you
 5 see up there is about the ex Congressman James Trafficant
 6 going to Court. That's the main story up there in that
 7 little town.

8 MR. LYND: I have nothing further, Mr. Bengé.

9 THE COURT: Thank you. Would the plaintiff call
 10 your next witness?

11 MR. LYND: I think in six minutes, Your Honor, we
 12 will be prepared to call Dr. Terry Kupers.

13 THE COURT: Okay. We'll recess for a few minutes.
 14 (Recess from ^ to ^.)

15 THE COURT: Can you hear me?

16 THE WITNESS: I can, yes.

17 THE COURT: Would you raise your right hand?

18 THE WITNESS: I do.

19 THE COURT: Would you state your name and spell
 20 your last name.

21 THE WITNESS: Terry Kupers. KUPERS. MD and MSP.

22 THE COURT: Would you go ahead and proceed.

23 DIRECT EXAMINATION

24 BY MR. GILBERT:

25 Q. Good afternoon, Dr. Kupers, can you hear me well.

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1 Would you indicate what your present position is?

2 A. I am institute professor at the write institute in
3 Berkeley, California, and I have a private practice of
4 psychiatry in Oakland.

5 Q. And have you prepared a report in this particular case?

6 A. Yes, I have.

7 Q. And in that report, have you listed your qualifications
8 as an expert witness, in the area of --

9 A. Yes, I have.

10 Q. Okay. And in particular, what was your educational
11 background, briefly?

12 A. I received a Bachelor's degree in Stanford University
13 in psychology in 1964 with distinction. I received a
14 medical doctor degree, M.D. degree at UCLA School of
15 Medicine in 1968 and I was elect Todd the alpha omega alpha
16 horn society. I went to an internship at king state
17 downstate Medical Center in England and residency at
18 neuropsych at UCLA and Tavistock in London. I did social
19 community and psychiatry which at that time included
20 training in forensics in psychiatry and received a Master's
21 in social psychiatry.

22 Q. Dr. Kupers, can you provide us with a summary of your
23 work history in the area of psychiatry?

24 A. Yes. Since graduating and completing training I have
25 conducted at all times a part time private practice and I

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1 have worked in academia and public settings I have been the
2 co-director of the outpatient clinic at Martin Luther King
3 hospital and drew post-graduate medical school in south
4 central Los Angeles, the director of a partial hospital
5 program in Richmond, contra Costa county, I have worked for
6 the contra Costa and the Los Angeles county public mental
7 health services. I have consulted in the public sector ever
8 since at community agencies meanwhile, I have been
9 testifying as an expert in litigation, a large proportion of
10 which involves jail and prison conditions. The mental
11 health programs inside the correctional institutions. And
12 the faith of prisoners with serious mental illness.

13 Q. Have you written any publications regarding the area of
14 prison mental health issues?

15 A. Yes, I have. I have written dozens of professional
16 articles and book chapters. I have been the sole author of
17 a book, prison madness, the mental health crisis behind bars
18 and what we must do about it, which was published by JOZ E
19 bass and weighly in 1999. I am a co-editor and contributor
20 to a book, prison masculinities, which was published by
21 Temple University in 2001.

22 I currently am attributing editor of correctional
23 mental health report and I'm on the editorial advisory Board
24 of Three other professional journals.

25 Q. Now, have you in your field of interest, more

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1 particularly to prison mental health, have you actually
2 conducted any training of staff members in the prison
3 setting regarding mental health issues?

4 A. Yes, I have. I don't work for a salary in a
5 correctional setting. Rather, I'm hired as a consultant and
6 I have been hired in several states to conduct staff
7 trainings on various issues.

8 I am currently being asked to visit a jail where there
9 has been a recent suicide and the staff would like to have
10 some debriefing and training and I will meet with them for
11 several times to talk about that.

12 Q. Doctor Kupers, have you been in the past contacted by
13 the Ohio department of Rehabilitation & Corrections over any
14 of ^ or any of their legal representatives in connection
15 with being a consultant?

16 A. Yes, I have. In the present case, I was asked to be
17 the monitor during the previous phase of the Court
18 proceedings and Mr. Mancini asked me to serve in that
19 capacity. I had to decline because I didn't have the time
20 to travel to Ohio a sufficient number of times to do the job
21 well.

22 Q. Now, in your many years of experience in the issue of
23 mental health and confinement, have you had any experience
24 with Death Row inmates?

25 A. I've had quite a bit of experience with Death Row. I

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1 testified in Mississippi in Willy Russell versus the State
2 of Mississippi which was a case about conditions on Death
3 Row.

4 I have done between six and ten single legal processes
5 with defendants on Death Row, having something to do with
6 one or another stage of their post conviction appeals.

7 I have been asked to determine competency for someone,
8 a prisoner on Death Row in Arizona who wished to waive all
9 further appeals and be executed and I was asked to do a
10 competency evaluation.

11 I have had a number of other cases like that.

12 And I have visited Death Rows in half a dozen states as
13 part of my work in other cases.

14 Q. All right. Now, I want to call your attention to the
15 matter that we are here in Court today on.

16 You were asked by the plaintiffs and their counsel to
17 serve as an expert witness in this case, is that correct?

18 A. Yes. I have been asked to serve as -- I have been
19 asked to serve as an expert on the specific issue of the
20 proposed transfer of Death Row from Mansfield to OSP.

21 Q. And in preparation for addressing the issue of the
22 transferring of Death Row inmates from Mansfield to the Ohio
23 State Penitentiary, what preparation did you engage in in
24 order to come to some opinions in this case?

25 A. I spoke with attorneys STAUNTON and ALLISON LYND. I

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1 read a thick stack of legal documents having to do with
 2 various phases of this litigation. I read the deposition of
 3 Terry Collins, I read the final report of Dr. See mower hall
 4 lick in April of 2004. I read the ninth report on the
 5 medical situation by doctors Cohen and good Monday son and I
 6 read a number of documents, for instance comparisons of the
 7 conditions and programs at Mansfield and those that are
 8 proposed at OSP, which were produced by the State. I then
 9 toured the two facilities. Mansfield, I spent most of the
 10 day July 13 touring Mansfield, talking with staff,
 11 interviewing prisoners, and on July 14 I spent most of the
 12 day at OSP, again talking with warden Hoke, with the
 13 psychologist, with -- I interviewed several prisoners.

14 I interviewed seven prisoners at some length at
 15 Mansfield correctional institution and five at OSP.

16 Q. Now, in your report, Dr. Kupers, you made some
 17 preliminary observations regarding the effects of isolated
 18 confinement in general with respect to prisoners.

19 Can you briefly indicate what that concept means as a
 20 mental health professional?

21 A. Well, I use the term isolated confinement to
 22 encapsulate segregation of various sorts. What is currently
 23 called Supermaximu security confinement, administrative
 24 segregation, in some systems protective custody is isolation
 25 and by this I mean that the prisoner is kept in his cell,

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1 isolated and relatively idle for usually approximating 23 of
 2 the 24th hours a day, and the generally these units are
 3 highly automated so that the doors open and close by remote
 4 control, there is usually a recreation area where the
 5 prisoner is permitted to go for one or several hours once a
 6 day or several times a week, and the staff have relatively
 7 minimal contact with the prisoners and also the prisoners
 8 have minimal contact with each other.

9 What we have found is that confinement in this kind of
 10 unit and there is a great variety of the actual specifics of
 11 the conditions and of the programs, but in general, there is
 12 a number of psychological consequences from this kind of
 13 confinement.

14 A large number, a shockingly large number of prisoners
 15 become psychotic or suicidal or both in these conditions and
 16 it doesn't take long for them to become so.

17 Almost all prisoners are affected. They report
 18 symptoms, I have interviewed thousands of prisoners in ten
 19 states who are in isolated confinement for a long period of
 20 time, and I have rarely met anyone who wasn't symptomatic.

21 For the healthiest of prisoners the symptoms are an
 22 inability to concentrate, loss of memory to for instance
 23 they tell me they can't read in their cell because they
 24 can't remember what they read two pages prior.

25 There is a mounting anxiety, a mounting aggression and

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1 anger so they can't control themselves, and they get into
 2 ridiculous debates with the officers which they then feel
 3 bad about because they were trying to behave and they ended
 4 up getting into an argument sometimes with some assault I
 5 haveness.

6 They do (-- anxiety-driven behaviors, such as cleaning
 7 their cells six or eight times a day or pacing all day in
 8 their cell and they seem unfocused and they feel
 9 disoriented.

10 All of these things that I am describing are in normal
 11 individuals that are kept in isolation for any length of
 12 time.

13 Now, the other thing we find across the country is that
 14 a disproportionate number of people with serious mental
 15 illness and suicidal tendencies end up in this isolated
 16 confinement. There are many reasons for that. The most
 17 prominent being that they just do not know how to handle
 18 themselves. They break rules and they get put in solitary
 19 confinement or isolated confinement.

20 Another reason is that some people who are on the edge,
 21 who are not previously obviously mentally ill are put in
 22 isolated confinement and then they have a psychotic break
 23 down or become suicidal and for this reason in a number of
 24 states the mentally ill are excluded from confinement in an
 25 isolated confinement situation.

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1 Q. All right. Now, the second general observation you
 2 made in your report regarded a concept known as Death Row
 3 Phenomenon. Can you define that concept to us and whether
 4 or not it has some basis in research in that area?

5 A. Yes. The Death Row Phenomenon actually came from the
 6 legal community. It has been discussed in international
 7 cases and it's been discussed in the United States by
 8 justices, and what it has to do with is the high incidence
 9 of mental problems among people on Death Row.

10 We're all aware that mental health staff are very
 11 involved in treating people and also evaluating such things
 12 as competency to be executed on Death Row. So it comes to
 13 our attention and to public attention that there are a
 14 significant number of people who are very disturbed on Death
 15 Row.

16 As mental health professionals are brought in to look
 17 at that problem they find some very consistent and repeated
 18 patterns around the country.

19 For instance, there is the problem of spending time in
 20 a cell, worse if in an isolation cell, but still bad, it is
 21 just in a general population prison situation, waiting to
 22 die.

23 Then there is the added problem of the people one gets
 24 to know, one's neighbors in that prison setting are actually
 25 going to be executed themselves so one then has the

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1 experience of having the people closest in proximity to
 2 them, one after another, dying by execution and this creates
 3 a grieving process, a sadness, and eventually December pair.

4 Then there are the ups and downs of the legal (
 5 process, so that most people on Death Row who I have
 6 interviewed tell me that they get excited and almost
 7 irrationally optimistic about their case when the Court
 8 proceedings turn one way, and then when the Court
 9 proceedings turn another way, their hopes are dashed and
 10 they become depressed and become suicidal and we know there
 11 is a high incidence of suicide attempts on Death Rows and
 12 then there is the issue of waiving appeals and volunteering.

13 In the United States, 20 years ago, approximately ten
 14 percent, when the death penalty was reinstated,
 15 approximately ten percent of prisoners volunteered and by
 16 that I mean they waived all further appeals so that they
 17 would be executed in a very short time.

18 About ten percent, ten or 20 years ago, and at the
 19 current time it is about 30 percent who are, of the people
 20 that are actually executed around the country who are
 21 volunteering and that means waiving their further appeals.

22 What mental health clinicians have found when they go
 23 and talk to these individuals is that the conditions of
 24 their confinement usually it involves isolation, harsh
 25 treatment by staff, a lack of programs, a loneliness, it is

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1 even harder for people that are illiterate, they can't write
 2 or read so they can't be in communication with family and
 3 loved ones through the mail and they become increasingly
 4 depressed and they feel they want to die and one method
 5 available to them so to waive their further appeals and
 6 volunteer to be executed.

7 There is a debate currently, there is some research
 8 showing that this is the cause of severe depression and
 9 psychosis in a significant number of people on Death Row and
 10 there is a debate about whether they should be permitted if
 11 part of their motivation is suicidal should they be
 12 permitted to volunteer and should the State take part in a
 13 suicide in that way.

14 Q. Now, Dr. Kupers, why would the Death Row Phenomenon and
 15 the isolation concerns give rise for some particular issues
 16 in this case?

17 A. Well, what I have observed and others have written
 18 about this is that there is arise in the incidence of
 19 volunteering, and this is just emblem at incompetent of the
 20 problem we are looking at.

21 There has been arise as at the same time more death
 22 Ross are being turned into isolation units. Either they are
 23 being built as a Supermaximum control unit or the programs
 24 are being diminished so that the prisoners essentially spend
 25 practically 24 hours in their cell and as that has occurred

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1 and it has been a gradual process there have been more
2 volunteers.

3 So the logical connection is that as the conditions get
4 more harsh, the prisoner feels they have less to live for,
5 they become more hopeless and then they volunteer.

6 Now, I'm just mentioning volunteering as emblematic,
7 this is true of all the other emotional conditions we find
8 among prisoners on Death Row. That is, there is a lot of
9 psychosis, there is a lot of depression and suicidality, and
10 all of this gets worse as the conditions become more harsh,
11 the programs become fewer, the opportunities to relate to
12 others diminish, and the prisoners deteriorate and
13 they become either psychotic, mentally disturbed in that
14 way, or they deteriorate and become suicidal.

15 Q. Now, in coming to your conclusions, you were provided
16 with some information about what the proposed conversion of
17 the Ohio State Penitentiary Supermax prison would be.

18 Can you lay out what your understanding of the
19 conversion process would be to adapt it to Death Row?

20 A. Well, I should mention that the word conversion in my
21 report, which I do discuss, I introduced. I have not
22 actually heard the word "conversion" in relation to this
23 case.

24 Conversion is the process, we have too many Supermax
25 security units and spread them around the country and

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1 various states they don't have enough prisoners that are
2 qualified because of their chronic dyscontrol and sort of
3 the worst of the worst, they don't have enough of these
4 prisoners to fully fill the Supermax prisons so they were
5 talking about converting them to non Supermax units. That
6 conversion involves letting them out of their cells, to
7 begin with. That is instead of being in their cell 234
8 hours a day they get out for five or eight hours a day.
9 That also then means there has to be provisions for
10 congregate activities, for programs and they need to be
11 permitted to eat meals with others, et cetera.

12 In this case, it seems to me the conversion has not
13 been mentioned to me and I have not read about it in the
14 documents but I'm calling the conversion the kind of a
15 captions which are being positive posed for OSP and by the
16 way just for cell blocks, cell blocks B and D that will
17 house the death sentenced prisoners in the proposal and the
18 idea is to let them out of their cells, I was told five
19 hours a day, to give them more congregate activities, and
20 therefore to make OSP look less like a Supermax unit, more
21 like a general population unit, and in a comparison chart I
22 was shown, where the amenities and programs at Mansfield
23 today and what would be available at OSP after the transfer
24 were compared, that essentially they were similar so
25 that life at OSP after the transfer would essentially be as

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1 good or better than life at Mansfield.

2 If that were successful, that would be a conversion, in
3 my mind.

4 Now, I don't think it is going to be successful, which
5 was the conclusion that I made in my report.

6 Q. And why is it that you feel, your opinion is that it is
7 likely not to be successful?

8 A. Right. In this case, the conditions and programs and
9 life at OSP have been found to be an atypical and
10 significant hardship.

11 In contrast, I assume, to life in Mansfield on Death
12 Row.

13 I believe that after the proposed transfer, it would
14 still constitute an atypical and significant hardship. The
15 reason is this. In my view, conversion has three parts.
16 One is architecture, one is programs, and one is culture.
17 The culture of the institution.

18 In terms of architecture, if there are things about the
19 architecture of an institution which limit its conversion
20 for different functions, then the conversion is going to be
21 obstructed, and there are several such conditions at OSP.

22 For instance, there is the steel and concrete and
23 cinder block construction, which creates an echo chamber and
24 the slamming of doors, which are rather loud, the screaming
25 of prisoners echos throughout the institution, so it sounds

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1 like a Supermax prison. It is noise E and there is little
2 quiet time for prisoners to contemplate.

3 Now, in addition, there are other things. The attorney
4 visiting booths are entirely inadequate for Death Row
5 situations. The doors on the cells have strips on their
6 sides and on the bottom which basically seal the prisoner
7 into the cell so there is very little -- there is no
8 circulation of air, there is an internal vent system but
9 there is no circulation of air with the outside, no windows
10 in the cell, there is a window that doesn't open, a small
11 window, so basically, this increases the isolation and I had
12 myself locked in a cell and that was very true, so one has
13 to raise one's voice to communicate with a prisoner in the
14 next cell or across the hallway.

15 There are other architectural problems with OSP. That
16 is the first requirement for conversion, is that the
17 architecture be consistent with the converted non Supermax
18 use of the facility.

19 The second is programming. What I was told -- by the
20 way, I want to mention that I do believe -- I don't believe
21 that the State is being disingenuous or non truthful in its
22 plan. I believe there is an Ernest plan to alter the
23 conditions at OSP and the programs such that the Death Row,
24 if it were to be moved to OSP, would be comparable to Death
25 Row at Mansfield. I believe the State is sincere about that

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1 and I'm not trying to impugn anyone's character here. It is
 2 just that certain things are possible and certain things are
 3 not, and I think well meaning people can fail in their
 4 efforts to create a converted institution if the obstacles
 5 are too great.

6 In terms of programming, the idea is to let prisoners
 7 on Death Row at OSP out of their cells five hours per day.
 8 I don't believe -- and to give them significant amount of
 9 outdoor recreation.

10 I actually don't think that is possible and the reason
 11 I think that is that I had made a comparison. Currently at
 12 OSP there are a number of prisoners on B block who are
 13 security Level 4 A and that means they are lower security
 14 than Supermax, than require Supermax confinement and
 15 therefore their inside OSP, but supposedly receiving a
 16 program comparable to 4-A security level around the State.

17 In fact, that is not the case. They were promised five
 18 hours a day out of their cell and they don't receive that
 19 five hours. I talked to three individuals who are security
 20 Level 4 A at OSP and they told me that at least half of the
 21 time they do not get that five hours, they don't even get
 22 out of their cell.

23 There is also the phenomenon in an institution that
 24 when there is trouble in one part of the institution, and
 25 there has been quite a lot of trouble at OSP, both violence,

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1 racial conflicts, there has been a number of assaults, there
 2 has been a number of suicides throughout the institution.

3 When there is trouble in one part of an institution
 4 like OSP, it has major consequences in all parts of the
 5 institution. So for instance, the prisoners who are Level 4
 6 A at OSP on sell block B told me when there is trouble in
 7 another part of the institution, they don't get out of their
 8 cells for five hours or even in groups when there is trouble
 9 in the institution. There is essentially an institution
 10 wide lock down.

11 Well I assume if Death Row were moved it would be
 12 similar. That is, OSP is a Supermaximum security
 13 institution and is run at such and if there is trouble
 14 somewhere else in the institution, which there continues to
 15 be, then it would affect Death Row in a similar way as
 16 currently the trouble in the rest of the institution affects
 17 the prisoners who are 4-A and B cell block.

18 So in terms of PRACHLing I don't actually think the
 19 changes that are being promised and again I think they are
 20 being sincerely promised would actually be affected.

21 Another example is outdoor recreation. There is a huge
 22 difference between the recreation facilities at OSP and at
 23 Mansfield. The heightened, elevated privileges unit, DR-6
 24 at Mansfield, essentially the prisoners can walk out in the
 25 yard whenever they want, it is a large yard, they have

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1 freedom to play basketball, et cetera, there is no such
2 arrangement at OSP and one has to go down a sallyport and an
3 elevator to get to the recreation area.

4 It is my understanding and I have done some
5 calculations that currently the staff at OSP is barely able
6 to get the prisoners currently at OSP out for outdoor
7 recreation as much as they are entitled to.

8 I don't understand how if 150 to 200 more prisoners,
9 those on Death Row at Mansfield, are transferred to OSP,
10 this staff, which won't be significantly enhanced, can get
11 the prisoners out to the yard for recreation, so I don't
12 actually believe that the programs that are being promised
13 are even mathematically possible.

14 The third criterion for conversion or the third
15 consideration is the culture of an institution.

16 At Supermaximu security prisons and this is
17 traditional it is certainly true by the record in Ohio by
18 the record of this lawsuit and what the prisoners told me in
19 my interviews and all that I have read about Ohio State
20 prison it is an institution dominated by punishment. There
21 is great distance between officers and prisoners. That is
22 the idea of a Supermax prison. The remote control doors,
23 the purpose of them is to decrease the interaction between
24 the prisoners and the staff, and I deli, that helps to
25 decrease the arguments and the assaults between prisoners

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1 and staff.

2 In fact, that doesn't work, and we are finding around
3 the country that that doesn't work because the increased
4 isolation actually results in more anger among the prisoners
5 in a unit. Therefore, more yelling going on with staff, the
6 staff become short tempered and there are more violent and
7 unfortunate interactions between staff and prisoners.

8 But in any case, the Supermax was designed to minimize
9 contact. The prisoners at OSP tell me that the staff don't
10 really talk to them. That if they were to Beck ona staff
11 member, an officer to their cell door to ask a question,
12 that officer would be impatient with them, would be
13 basically taking the attitude why are you bothering me and
14 therefore the prisoners learn not to make contact with
15 officers, not to talk to them.

16 Things are very much different at Mansfield. There is
17 a relaxed, informal attitude on the part of staff.
18 Prisoners feel very free to interact with staff. There is
19 touching. For instance, they shake hands. One of the
20 prisoners at Death Row at Mansfield told me that when the
21 OSP officers came to visit, to look at Death Row, he offered
22 him his hand and the officer stepped back, seemingly in
23 shock that a prisoner would touch him and just kind of moved
24 right on without recognizing, acknowledging that this
25 prisoner wanted to shake hands.

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1 There is a lack of communication in a Supermax unit,
 2 and it is my feeling -- first of all it is my observation
 3 that on B cell block, where the 4-A security level prisoners
 4 are, that same punitive distance interaction between staff
 5 and prisoners exists, even though that is not a Supermax
 6 unit.

7 The reason is because the officers are the same
 8 officers who work in the other cell blocks at OSP who have
 9 been trained to work at OSP and most of the staff at OSP
 10 have been trained at OSP and only work at OSP, and when
 11 Death Row is moved, if it is, to OSP, there will be no
 12 significant changes in staff. The Mansfield staff, who are
 13 very skilled and experienced working with Death Row
 14 prisoners, who have special needs, will remain at Mansfield.
 15 The OSP staff will bid for the jobs on Death Row.

16 So what you will have is the culture of the Supermax
 17 institution inVATing the new Death Row. It is for all of
 18 these reasons that I believe that the conversion will fail
 19 and that in spite of the Ernest desire of administrators to
 20 make it succeed it is duped.

21 Q. Now, Dr. Kupers I want to call your attention to your
 22 visit to Mansfield, and observing the conditions there and
 23 talking to the prisoners, did you have any observations
 24 about any changes in privileges around the time that the
 25 Death Row move was announced and planned?

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1 A. Yes. The announcement to prisoners that there would
 2 be -- that they were contemplating, the State is
 3 contemplating the transfer was approximately March of this
 4 year. The prisoners tell me that until that time, they were
 5 out of their cell, for instance, in the elevated privilege
 6 DR-6 YOONLT it, they were out of their cells six and a half
 7 hours a day. Half of the prisoners, the top row would be
 8 out in the morning; the bottom row would be out in the
 9 afternoon, from 6:30 to maybe 1:00, the one row would be out
 10 and that would be 18 prisoners, by the way, at once.

11 And the other half of the day, from 2:00 to 8:30, the
 12 other row would be out. Now, again, it would be 18
 13 prisoners.

14 When you were out of your cell you would roam around
 15 you could go to the library you could go to the recreation
 16 area, you would have a job, and things were relatively
 17 informal. If you were out during the meal time you would
 18 eat your meal together at the tables out in the day room
 19 area or indoor recreation area.

20 As of the announcement of the move, or so it seems to
 21 the prisoners at Mansfield, the privileges, the amenities,
 22 were severely constricted and they were then told that they
 23 could only be out of their cell an hour or an hour and a
 24 half at a time, it would be five prisoners at a time, not
 25 18; that they would be searched more often or actually they

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1 were searched more often and life at Mansfield became
 2 significantly harsher. There was less freedom to use the
 3 phone and things just change there was an escape attempt at
 4 that time, two individuals climbed one wall and there are
 5 several walls they would have to climb to get out and
 6 prisoners told me about that and they said that they
 7 supposed that the State uses that as the reason for
 8 restricting the privileges but they don't believe that and
 9 the escape was ineffect you will and because two people
 10 tried to escape why should everyone's privileges be cut
 11 back.

12 But in any case as they were telling me why the list,
 13 the comparison between conditions and programs at Mansfield
 14 would be essentially the same in the eyes of the State as
 15 those at the proposed unit at OSP, they said actually the
 16 entire list is entirely erroneous because it talks about
 17 privileges and programs that have been cut back severely
 18 since the announcement of the move to OSP.

19 Q. Now, did you have a chance to talk to or look at,
 20 evaluate what is known as DR-6, which is the extended
 21 privilege unit on Death Row at Mansfield? Did you have a
 22 chance to look at that?

23 A. Yes, I did.

24 Q. . And I interviewed three prisoners there?

25 Q. And do you believe THA(those particular individuals,

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1 and I believe there are 36 of them, will have a significant
 2 change in circumstances if they are sent to Death Row and
 3 even provided extended privileges at OSP, I'm sorry, even
 4 with the extended privileges promised the DR-6 inmates from
 5 Mansfield, will there be a significant change in their
 6 situation?

7 A. Yes. Again, I should start by saying that warden Houk
 8 was very enthusiasm in explaining to me there would be no
 9 diminution in their privileges or activities, he showed me a
 10 pod that would be converted into an Jim niece YUM, indoor
 11 Jim mass YUS and another would be an activity rooms and no
 12 prisoners housed in the units and the prisoners would be
 13 housed in that day, it would be a microwave oven and I
 14 believe warden Hoke believes this and would try to make this
 15 happen there would be no change but in fact the changes
 16 would be severe.

17 For instance, the access to the recreation yard and
 18 what kind of recreation yard there is, the DR-6 recreation
 19 yard at Mansfield is rather generous and the prisoners are
 20 spontaneous and able to play sports with each other there
 21 and go out in the yard as they like.

22 As I mentioned at OSP they have to take an elevator.
 23 The plan is that DR-6 or extended privilege prisoners will
 24 not be accompanied to the yard but they have to go through a
 25 sallyport so there is significant staff involvement in

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1 watching them go and if there is a lock down anywhere in the
 2 prison it is my opinion they won't get to be able to go to
 3 the yard whereas at Mansfield they can.

4 Now, the most significant change, two I will mention
 5 that I have not mentioned yet is the easy communication
 6 among prisoners and between prisoners and officers.

7 At Mansfield, the prisoners tell me, and I actually
 8 witnessed this while I was in a cell, that they can talk
 9 freely to their cell -- their neighbor on each side. That
 10 the cells are, the walls of the cells are permanent Eable,
 11 there is enough sound, ease of conducting sound that they
 12 speak in a normal conversation tone to the individual
 13 celling next to them on each side and they can talk to the
 14 person passing in the hallway in front of their cell and in
 15 fact they do and the officers are relaxed and allow a
 16 prisoner that is on his way to the yard or wherever he is
 17 going to stop and talk to other prisoners.

18 That is not true at OSP and part of the reason is
 19 architectural, it is the strips around the sides and bottom
 20 of the cells. Mr. Nathan mentions in his report that it is
 21 his opinion that those strips should not be removed because
 22 talking among prisoners in their cells should not be
 23 fostered.

24 I actually would respectfully disagree with Mr. Nathan.
 25 I think it is a constant that prisoners try to communicate

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1 with each other. They are feeling isolated and when they
 2 spend a significant amount of time in their cells, their
 3 discussions with their neighbor are often what keeps them
 4 sane or keeps them from committing suicide. So it is a
 5 constant that prisoners are going to try to communicate.
 6 There is no way to change that. They do very creative
 7 things to communicate. They do what is called fishing or a
 8 train and that is they throw springs out under the bottom of
 9 their door with a message to someone in a neighboring cell
 10 or outside their steel ^ springs.

11 As you make the cell more sealed, that is, you put
 12 metal strips on the side of the cell and on the bottom, what
 13 the inhas been and the of the cell has to do is raise his
 14 voice in order to be heard by the person in the next cell.
 15 That is definitely true at OSP and one has to raise one's
 16 voice in order to be heard by the prisoner in the next cell.

17 Now, back to the difference between Mansfield and OSP
 18 that is very much not the case at Mansfield. If I can
 19 continue with my point about Mr. Nathan's report, he, I
 20 think, ERS in saying that by leaving the strips on, there is
 21 a tendency to reduce the loud communication between
 22 prisoners. Actually, I think the opposite occurs and two
 23 things are possible. Either the prisoners raise their voice
 24 in order to be heard, and this is not necessary at
 25 Mansfield, or the officers come by and say stop yelling and

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1 they discipline them for raising their voice.

2 In either case, and this is another major difference
3 between Mansfield and OSP, there is a more punitive
4 approach. Either there is a loud cabbng phony of raised
5 voices in the cell block which is what I have afraid would
6 happen at OSP as it happens at the higher security levels,
7 the Level 5, security Level 5 YIEN its at OSP or there would
8 be a more punitive approach by officers that would come by
9 and tell the prisoners to stop yelling and therefore more
10 tickets would be given and it would be a HAR SHER situation.

11 And that is in Stark contrast to what there is at
12 Mansfield. The other huge difference, but this is of all
13 the units at Mansfield, not just the exended privilege unit
14 it is the attorney visiting area that I have not mentioned
15 yet.

16 The contrast between the Mansfield attorney visit unit
17 areas and possibilities and phone use and possibilities and
18 what is being proposed at OSP are very Stark.

19 At Mansfield, the extended privilege prisoners as well
20 as the prisoners in segregation on DR 5 and all of the
21 general population Death Row units meet with their attorneys
22 in a conference room. It is a contact visit, they have a
23 large table approximately like the one I have here, actually
24 LARNLER where they can spread papers out and become involved
25 together in the legal proceedings.

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1 There is no such place or opportunity at OSP. In fact,
2 the legal visits booths are extremely SPAL, they are very
3 narrow, there is no tabletop on the attorney's side and on
4 the prisoner's side there is a very narrow strip under a LEX
5 an window so there is no contact visiting and that
6 difference is rather Stark and because of what I mentioned
7 about the Death Row Phenomenon, how involved prisoners are
8 in Death Row on their legal cases their appeals, their post
9 conviction relief, that would be a very severe loss for
10 them.

11 Q. And how would that impact their mental health?
12 Specifically, I'm referring to Death Row inmates who are
13 housed at OSP with the level of restrictions in
14 attorney/client contact, which you have just discussed, how
15 would that impact mental health considerations?

16 A. Well, the legal situation is a very big part of the
17 Death Row Phenomenon. When someone is placed on Death Row,
18 and by the way, in Ohio, I think the figure is 39 percent,
19 but nationwide it is between 30 and 40 percent of people
20 that are placed on Death Row eventually are removed from
21 Death Row either to do a life sentence or they are
22 exonerated in one way or another or given clemency or have
23 their appeals upheld so we are not talking about just people
24 that are actually going to be executed, these are people
25 that are going to go back into the general population of the

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1 prison or into the community.

2 Contact with an attorney becomes their most significant
3 human relationship. Isolation is their biggest fear and it
4 is actually the biggest hazard for their mental health.
5 That is, that an individual gets totally isolated in a cell
6 on Death Row, with no contact with anyone.

7 They then become -- they deteriorate in one way or
8 another, they either become angry and resentful, they become
9 depressed and suicidal, they become psychotic or they just
10 become mute and uncommon KA tiff.

11 The attorney is often the most significant social
12 relationship they have. Their cases are the way that they
13 keep their hope going. You can't live for a long time
14 without any hope of something happening to improve your
15 situation. You can't live in good mental health without
16 having a feeling that you are participating in activities
17 that eventually can create change that somehow would be
18 better for you.

19 The legal process is the main avenue for Death Row
20 prisoners, and this is a big part of the Death Row
21 Phenomenon.

22 Any interference with the contact between the attorney
23 and the prisoner or in the legal process has severe
24 psychological consequences. This is a place I disagree with
25 Dr. Mets near again with great respect, but he declares one

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1 after another issue to be legal concerns, I actually think
2 there are no pure legal concerns for a Death Row prisoner.
3 A prisoner on Death Row that has legal issues inevitably has
4 rather closely linked psychological changes because those
5 legal changes are so significant for what is going to
6 happen.

7 So the quality of contact between the prisoner on Death
8 Row and the attorney is often all that keeps the prisoner
9 from killing himself or from going insane.

10 Q. Now, you and I and some other people visited OSP and
11 received a tour of the facility. We were able to ask
12 questions of warden Houk and others regarding the proposed
13 changes that were going to be made.

14 Now, do you recall questioning, questions asked of
15 warden Houk about how they would improve the attorney
16 visitation situation once the Death Row prisoners arrived?
17 Do you recall that?

18 A. Yes, I do.

19 Q. And what were the accommodations that you were -- that
20 you understood to be in the works?

21 A. Well, at the time, warden Houk stressed that the entire
22 project was in transition, that it was a fluid matter and
23 that there would be changes.

24 When I MEPGSed the concerns, approximately, what I have
25 just said and explained to him how important the legal

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1 process is and quality contact with an attorney and having a
 2 table where one can spread out papers, how important that is
 3 for the emotional health of prisoners on Death Row, he
 4 seemed sympathetic and he said "we will work on that" and in
 5 the half hour following that exchange, we looked at some
 6 other rooms to see if they could be converted, early, into
 7 the equivalent of the conference room at Mansfield.

8 Now, there is a problem doing that at OSP and again
 9 this is part of the architectural problem. There is a
 10 series of offices right outside each cell block at OSP, but
 11 they are outside the security unit of the cell block and
 12 pries NERPS are not allowed in those offices. So they are
 13 the offices used by security staff, by counselor, by mental
 14 health, et cetera.

15 When they are not in contact with prisoners.

16 So I discussed with him whether somehow that barrier
 17 between prisoner space and space that would only be used by
 18 staff without prisoners present could be moved so that some
 19 of those rooms could be substituted for the conference rooms
 20 at Mansfield, which currently are the site of attorney
 21 visits.

22 He said we will think about that. And he seemed very
 23 flexible and was going to think about a number of things.

24 Now, I understand that subsequently it has been decided
 25 and it is in Dr. Mets near's report that the attorney visits

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1 will not occur anywhere else except for the attorney
 2 visiting booths, which as I described are inadequate for
 3 that purpose with Death Row prisoners, or if there is an
 4 overflow because there is only one booth for each cell block
 5 then they will occur in the regular contact visiting booths
 6 where there is no opportunity to exchange papers or the
 7 third place is the barber shop, which is a room on each cell
 8 block at OSP which, by the way, has its own problems in
 9 terms of confidentiality, but that would be the third backup
 10 place for attorney visits to occur and even that is not
 11 adequate and does not come anywhere near the conditions that
 12 exist at Mansfield, even in the most secure unit for the
 13 attorney and prisoner to have quality contact.

14 Q. And why is that? Would would the, quote, barber shop
 15 be substantially different than the regular conference room
 16 take they have been used to at Mansfield?

17 A. The barber shop is a room right as one enters each cell
 18 block at OSP it has lexsan sides that are transparent,
 19 lexsan is an in-December truck tibial form of plexiglass and
 20 therefore there is visual, people in the hall walking onto
 21 and off the cell block can look through the lexsan and see
 22 what is going on in that room.

23 Inside the room there is a booth which is constructed
 24 of lexsan, it is a little larger than a phone booth, it has
 25 wire restraints and lexsan restraints and a hole for

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1 basically a food port.

2 The prisoner is housed in that booth and confined
3 thereen and the individual doing an interview, it could be
4 an attorney visiting him and as warden hawk explained to
5 have to be in the attorney visiting rooms and the visiting
6 rooms were not adequate and this would be the third backup
7 for attorney visits and also be the place where the mental
8 health staff and warden interviews the prisoner.

9 In that boot again because of the lexsan barrier
10 between -- the boot is constructed of lexsan one has to
11 raise one owes voice in order to be heard. I have been
12 inside the booth and talked to prisoner where I was inside
13 the booth the prisoner was inside the booth you have to
14 raise your voice somewhat to be heard and the people passing
15 by in the hall can then hear what is going on in the barber
16 shop so there is no confidentiality, no privacy. One
17 prisoner told me he had cried with one of the mental health
18 Collin issue asbestos that came to see him in that setup and
19 other prisoners, there are two or three cages right next to
20 the cash ear shop on the, alongside the hall, which hold
21 PRIGS years that are in movement from one place to another,
22 and there are prisoners this those booths, they are not
23 lexsan, so these prisoners can see him cry and probably hear
24 what is going on in the conversation as can the staff and
25 prisoners passing by in the hallway.

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1 So there is absolutely no privacy or confidentiality,
2 and of course if a prisoner is seen crying, that can be a
3 very dangerous situation, because there is this code of not
4 showing weakness and someone can be attacked because they
5 expressed emotions or seemed to be weak or hurting.

6 Q. Let me ask you this. You know, as a lawyer, when we
7 meet with our clients we like to spread out papers and files
8 and sometimes even books, where we can look at these
9 documents together, and discuss them and make judgments, is
10 there any way to do that in the barber shop?

11 A. No, there is not. There actually is no desk for sure.
12 There is no shelf, either. There is a very thin platform.
13 The warden told me that would be expanded and I don't know
14 if that is going to be possible in terms of the actual
15 building but still that would not be the same as having a
16 table or desk to SPRAED papers out and I agree with you that
17 is very important because it makes the quality of the
18 attorney-prisoner contact possible.

19 Q. Now, likewise --

20 A. The conference room --

21 Q. With respect --

22 A. I'm sorry --

23 Q. The actual existing attorney visitation booth that we
24 saw at OSP, where there is a ledge for the attorney to put,
25 a very narrow ledge, and there is a slot to pass through

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1 documents, did you notice that at OSP?

2 A. Yes. Yes. And it is a lexsan shield between the
3 prisoner and the attorney. There is a thin slot on the
4 bottom of the shield, right about waist high, where papers
5 can be passed. Actually not easily. It is a very thin
6 slot. And then there is a ledge on the prisoner's side
7 which is only a few inches wide and nothing on the
8 attorney's side. I don't actually see how it is possible
9 without being very uncomfortable and going through some call
10 is ten incompetents to share documents in that context.

11 And besides, the booth itself is very uncomfortable, it
12 is very narrow from front to back, and neither the attorney
13 or the prisoners will be comfortable there and certainly
14 will not have a table of any kind where they can spread
15 papers out and look together at the important documents.

16 Q. Now, I want to change the subject a bit. You actually
17 had an opportunity to interview three prisoners who
18 volunteered to go to OSP as Level 4 A prisoners under that
19 classification.

20 Why was that important for you, to talk to the four A
21 prisoners. ^ ?

22 A. Well, I actually chose to them. I had limited time so
23 I had to interview someone to find out what was going on in
24 the institution from the prisoner's perspective. The reason
25 I chose 4-A is that for instance, the propose transfer of

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1 Death Row involves giving all prisoners on Death Row five
2 hours a day out of their cell.

3 Four A prisoners concern, and I believe it is by policy
4 are permitted five hours out of their cell so I wanted to
5 get some idea, since we're talking about a transfer that
6 might happen in the future, I needed some way, in some kind
7 of concrete way, to get a sense of what will actually
8 happen.

9 The problems for the four A prisoners and for the staff
10 managing them, I should add, and what would happen if Death
11 Row was transferred, are essentially equivalent. That is, a
12 unit is being taken over within a Supermax security
13 institution, and the staff are Supermax staff, and the
14 institution by itself architecture is designed for Supermax
15 uses.

16 The question is has there been a successful conversion
17 for the prisoners on 4-A. It was my strong opinion, and I
18 mentioned that they are not let out of their sell, they also
19 talked about the lock downs, that is, they lose all
20 activities, including congregate, the ability to be with
21 other prisoners when the entire institution is in a lock
22 down because there is violence somewhere else.

23 I think there is a certain critical mass when you want
24 to convert an institution to non Supermax uses. You can't
25 convert a small part of an institution because the culture

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1 and events of the entire institution too much shape what
2 goes on in the small portion.

3 That is essentially what has happened to the prisoners
4 who are 4-A and as they described to me in great detail,
5 they are not getting the programs nor the amenities that 4-A
6 security level prisoners are getting in other institutions
7 throughout the State. Therefore, having very little else to
8 go by in terms of predicting what will be the situation if a
9 transfer were to occur, I make some simple equations.

10 If the four A prisoners are not getting the five hours
11 they were promised, if they were being locked down because
12 of trouble elsewhere in the institution, and if they
13 describe the staff, which they universally did as punishment
14 oriented, that the staff is not easy to talk to, that they
15 have learned because they get into 2001 when they try to
16 talk to the staff in any kind of informal way, they have
17 learned to leave the staff alone and not have contact with
18 the staff, it is my opinion that that is a predictor of what
19 will happen were Death Row to be moved to that same
20 institution.

21 Q. Now, you got a chance to read the reports of professor
22 Nathan and the reports of Dr. Metzger, is that correct?

23 A. That's correct.

24 Q. Now, do you have any observations about the process
25 that Dr. Mets near used to interview inmates at the prison,

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1 either pry?

2 A. Yes, I do. Dr. Mets near's observations were different
3 than mine. I think I used the word stunning in my report.
4 I was impressed by the fact that all twelve prisoners I
5 spoke to described certain differences between Mansfield and
6 the proposed OSP situation for Death Row prisoners and all
7 of them were concerned about the culture of punishment at
8 OSP, about the strips on the door.

9 Dr. Mets near found that there was little concern.

10 Now, Dr. Mets near from how he described his
11 interviews, they seemed very brief, one or more occurred
12 right in the recreation area, which would not be a privilege
13 Sentencing Reform Act for confidential issues.

14 It seems the interviews were very brief and that might
15 be the problems because it takes a while to gain the trust
16 of a prisoner when you are an outsider coming in in the suit
17 and you are accompanied by the warden and Attorney General
18 you come in to talk to the Attorney General it takes a while
19 to describe who you are and they have to decide whether they
20 can trust you enough to tell you what is really going on.

21 I suspect that is the reason that Dr. Nets near's
22 findings are so different than mine, there was twelve out of
23 twelve I found and he found there was no concern.

24 I suspect he asked very simple question, do you have a
25 problem with the move and people said no and what they were

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1 really saying is leave me alone I don't want to talk to you
2 in front of the warden. That's my suspicion and you have to
3 talk to Dr. Nets near about that.

4 Q. With respect to Dr. Nathan, I know you have discussed
5 your and his take on the metal strip of the door. What
6 about the issue of his proposition that it was not
7 appropriate to pre-judge what is going to be in the future.
8 He made, stated a lot of information about that in his
9 report.

10 What is your response to that?

11 A. Well, I don't agree. Again, I respectfully disagree
12 with Mr. Nathan. I think what is clear to me from what I
13 have seen happen in policy changes and institutional moves
14 in other states that once a move happens, it happens. It is
15 much harder to change things once things have happened.
16 This is actually what the prisoners universally told me,
17 that is maybe they are being promised a lot of things right
18 but as soon as the Court proceedings are over and time goes
19 on and there is another budget crisis in Ohio or something,
20 these things will be taken away.

21 So -- and I have viewed that. That is that once a move
22 happens, it is much more difficult, for instance, in the
23 legal arena, to make changes. It would be much more
24 difficult to move Death Row back from OSP to Mansfield once
25 it was moved.

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1 So I think it is reasonable, and here I'm a psychiatric
2 expert who, he is a security expert, but I think it is more
3 reasonable to make the changes, to actually see how it
4 works, to monitor what is going on on 4-A and whether people
5 actually get their five hours out of cell and whether the
6 institution is able to move everybody to the KWLOUT door
7 recreation areas, and whether the -- I think as a bare
8 minimum you would have to remove the strips from the door.
9 That's not a very expensive thing to do.

10 But I thoroughly disagree with Mr. Nathan about that
11 because I think what you are setting up on the proposed
12 Death Row would be basically loud cabbng phony because the
13 prisoners would shout to be heard around the strips.

14 So I think those changes need to be made first. The
15 bigger problem I have with Mr. Nathan's report and Mr. Mets
16 near's report is that they take as true the proposals from
17 the department of Rehabilitation & Corrections.

18 Now as I said, I believe that the department, warden
19 hawk, and others are Ernest in their attempts to make these
20 changes but they have not made these changes yet. They are
21 having staff short a gentlemen's. For instance, even now of
22 getting at the prisoner out to outdoor recreation the way it
23 is set up and the census at OSP is probably approximately
24 half the designed capacity, so I'm concerned about that.

25 Dr. Mets near and Mr. Nathan take as truth what it is

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1 that the department says they are going to do. I don't
 2 think any of us know that. And then they don't question
 3 some of the most important things. Mr. Nathan is just wrong
 4 about the legal visiting situation. He just made a mistake
 5 in his report about what the visiting area would be like,
 6 saying there would be a conference table there. So he is
 7 forming an opinion based on the wrong facts.

8 I don't think either of them take seriously the problem
 9 of the prisoners with serious mental illness who are
 10 excluded and the State agrees they should be excluded from
 11 OSP and I think that is a good policy and practice, but it
 12 is proposed that they be sent to Warren correctional
 13 institution, where there would be a mental health unit.

14 I actually think that would be a mistake. I wasn't
 15 asked to give an opinion about that in this case but I think
 16 that it is a significant problem that the prisoners with
 17 mental illness that are now getting along very well as far
 18 as I can tell at Mansfield because I believe the staff are
 19 well trained and are easy with the prisoners, that is, they
 20 have a lot of social interaction as I described earlier, I
 21 think that works well for people with chronic mental
 22 illness.

23 I'm concerned that if you split off the, the inhas been
 24 ants of Death Row that have a mental I willness and send
 25 them to Warren they are going to be in more restrictive

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1 conditions at Warren and the situation for them will not be
 2 as good as it is or as mental health inducing as it is at
 3 Mansfield.

4 Neither Dr. Mets near nor Mr. Nathan looked at that.
 5 There are other problems with the move. For instance, there
 6 is the issue in this case of individual hearings, because
 7 this is an atypical and significant hardship that prisoners
 8 transferred to OSP need to have some kind of due process and
 9 the Court has made some rulings on that.

10 Neither Dr. Nets near nor Mr. Nathan address the
 11 problem the prisoners have if they are denied their
 12 individual hearings but rather moved as a class just because
 13 they are on Death Row. They are going to feel that it is an
 14 unfair process and they are being placed in a much HAR SHER
 15 situation than they had at Mansfield. That unfairness will
 16 then make their ability to tolerate the situation even less.

17 Q. As I read --

18 THE COURT: How much more time do you have? We
 19 don't have a half hour.

20 MR. GILBERT: One or two questions and I'm done.

21 THE COURT: Every question has been about a half
 22 hour. So make sure your questions are FRARL direct. And
 23 doctor, try to answer the question directly.

24 MR. GILBERT: Okay.

25 THE WITNESS: Okay, ZBLIL the reports of the

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1 experts submitted by the defense all talk about comparing
2 what will be at Ohio State Penetentiary with other Death Row
3 facilities around the country.

4 In your report, did you -- were you called upon to
5 consider a comparison with other Death Row facilities around
6 the country.

7 A. No, I was not. No, I was not. What I was told -- what
8 I understood was that the comparison was with the situation
9 at institutions within Ohio and at Mansfield.

10 MR. GILBERT: Thank you. I have no further
11 questions.

12 THE COURT: Cross-examination.

13 CROSS-EXAMINATION

14 BY MR. MANCINI:

15 Q. Good afternoon, Dr. Kupers. Can you hear me?

16 A. Good afternoon.

17 Q. Nice to see you again.

18 A. Can you hear me?

19 Q. Yes. Thank you. Doctor, you served as an expert
20 witness in the Wisconsin case, am I correct?

21 A. Yes, that's correct.

22 Q. Basically, what was your -- what did they ask you to do
23 in that?

24 A. The actual Court appearance that I made, it was a
25 lawsuit about the confinement of prisoners with serious

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1 mental illness in a Supermax institution at was KERville, it
2 was the Jones case, and I was asked to consider the way that
3 the conditions affect those suffering from serious mental
4 illness.

5 Q. Okay. And you interviewed the inmates?

6 A. Yes, I did. I interviewed a sample of inmates.

7 Q. Okay. A sample. That was a mental status exam, mental
8 health evaluation, and so on?

9 A. Yes.

10 Q. Okay.

11 A. That's correct.

12 Q. Now, in this case here, what were you asked to do?
13 This particular case.

14 A. I was asked to give an opinion about the possible
15 mental health ramifications of the proposed transfer of
16 Mansfield Death Row from Mansfield to OSP.

17 Q. Okay. Compared to your Wisconsin assignment, in
18 Wisconsin you had the inmate population in existence, you
19 also had in existence the conditions. Am I correct?

20 A. I'm sorry. Could you repeat that? It slurred.

21 Q. In the Wisconsin case, you dealt with existing
22 conditions of confinement and the existing class of inmates,
23 correct? Everything is in existence?

24 A. That's correct.

25 Q. Now all right. In this case, you're talking about a

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1 proposed plan, correct?

2 A. That's correct.

3 Q. And the plan is a proposal that is -- none of those

4 conditions are really in existence, am I correct?

5 A. Well, not -- none of them, but there will be changes

6 NESHGDZ, but a lot of those conditions already exist.

7 Q. Now, the proposed plan itself in toto is not in

8 existence. Am I correct?

9 A. That is correct.

10 Q. And you're opining about ramifications of a proposed

11 plans that is not in existence. Am I correct?

12 A. That's correct. I think that is the assignment I was

13 given.

14 Q. Okay. Now, with regard to your assignment, then, when

15 you came here, you spent most of the okay at OSP and also

16 another day at Mansfield, correct?

17 A. That's correct.

18 Q. Okay. Now, because of your assignment, you never

19 evaluated each and every inmate at OSP with regard to their

20 mental status, mental evaluation and so on. Am I correct?

21 A. Partially correct. I get your point. Whenever I

22 interview a prisoner, I am doing doing a mental status exam

23 so the twelve prisoners I interviewed, five at OSP, I

24 certainly did a mental status examination.

25 Q. Okay. With regard to OSP, what areas did you tour,

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1 then? You toured the proposed Death Row block, am I right?

2 Block B?

3 A. Correct.

4 Q. Block A. Did you tour the other part of the facility?

5 A. I did, but it was much more casual on my way to

6 interview prisoners in the other parts of the facility.

7 Q. Okay. So this is --

8 A. Actually, I should add that I also toured the

9 infirmary, I spoke to the warden in his office, and I saw

10 the administrative section of the institution.

11 Q. Right. In other words, not only did you see the

12 proposed Death Row block, but you saw other areas that Death

13 Row inmates and other inmates would access, like medical and

14 so on, correct?

15 A. That's correct.

16 Q. Okay. However, you never toured and visited the

17 housing units of Level 5, did you?

18 A. Well, that is partially correct. I did go and

19 interview, I believe it was two prisoners on Level 5, I went

20 on those cell blocks, I didn't look in their cells but I

21 certainly saw their cell block, I saw the barber shop, which

22 is where I interviewed them, so I did see another cell block

23 which is used for Level 5.

24 Q. Okay. And what about where the Level 4 Bs were house?

25 Ed did you enter that area?

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1 A. Again, only to interview the prisoners. So I was in
2 the -- in that situation, I wasn't in the barber shop with
3 them, since we were permitted contact interview, I was in
4 the medical office, directly across from the barber shop.

5 Q. Well, you interviewed 4-A inmates, correct?

6 A. That's correct.

7 Q. You didn't go to the 4-Bs or interview 4 W inmates,
8 correct?

9 A. (I believe that's correct.

10 Q. Okay. You interviewed --

11 A. However --

12 THE COURT: Go ahead and finish.

13 A. (Continuing) The prisoners I interviewed had been on
14 Level 4-B and five.

15 Q. The inmates you interviewed at OSP, you said five of
16 them, correct?

17 A. That's correct.

18 Q. Who selected them for you?

19 A. That was a collaborative process. Two of them were
20 members of this class. They are Death Row, death sentenced
21 prisoners that are housed at OSP, and they were people who
22 were known to the Lynds and therefore I asked to interview
23 people and they made them available.

24 The four A prisoners I believe I selected. I started
25 with someone who they had had contact with, who had written

1 them a letter, and then I asked that individual who else
2 might be a good historian and then interviewed who others.

3 Q. I'm sorry. Who referred you to the other three?

4 A. Well, the Lynds, attorneys Lynd knew one of them from
5 correspondence, and that is why I pulled that name and asked
6 to see that individual.

7 I then asked that individual who else among the four A
8 prisoners might be a good historian who could tell me what
9 the situation was on the unit.

10 Q. So it went from the Lynds to the person they selected
11 who then referred you to another, and you got the five.

12 Correct?

13 A. Well, that way I got those three. The other two were
14 because they were part of this class.

15 Q. Right. And the initial two were designated by the
16 Lynds. This is inmate Lamar, inmate Robb, and you were given
17 the name of another inmate who referred you to two others,
18 the five. Correct?

19 A. That is partly correct. What actually happened with
20 Robb and Lamar is that the Lynds made known to me the
21 prisoners at OSP who were death sentenced who they knew
22 about and they knew about all of them and then I chose those
23 two for reasons having to do with what they explained about
24 that.

25 Q. Okay. At Mansfield, we were given the names of five

1 inmates that you interviewed, and I accompanied you there,
2 right?

3 A. That is correct.

4 Q. And those five inmates refer you to the two others,
5 correct?

6 A. That sounds correct, yes.

7 Q. Does that sound like you really conducted here a non
8 random inview of inmates?

9 A. I had absolutely no intention of doing a non random
10 sampling because I didn't have the time or the numbers to do
11 that. What I was impressed with was the University salt of
12 the descriptions anesthetic are inmates who don't know each
13 other in many cases and they all told me the same thing ^ .

14 I don't depend on a random sample in this kind of
15 investigation because I don't have the time to do the random
16 sampling. It is not the only scientific method. And as
17 strong a scientific method is to interview individuals,
18 qualitative interviews, find outlet which themes are very
19 strong, assess the credibility of the people being
20 interviewed, and then because of this strength or the
21 University salt of the descriptions they give to assume that
22 there is some truth in that.

23 Q. Dr. Kupers, you don't know if they didn't know each
24 other, correct?

25 A. I think by the end of my interviews I knew which ones

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1 knew which ones yes and there were several that didn't have
2 any idea who the others were.

3 Q. You seemed to have a universal response by all the
4 people, twelve out of twelve, by you?

5 A. On the issues I summarized in my report. Certainly
6 they had different opinions on different things, but issues,
7 the importance of them of the attorney visits and the effect
8 of those strips, metal strips on the doors, yes, they all
9 gave me the exact same opinion.

10 And in terms of the difference between the way officers
11 relate to prisoners at Mansfield and OSP there was
12 absolutely no disagreement.

13 Q. Okay. While you were at Mansfield, did you -- do you
14 remember Dr. Coffee?

15 A. Yes, I do.

16 Q. Did you ask him any questions about the so-called Death
17 Row Phenomenon?

18 A. I don't believe I had that conversation with him, no.

19 Q. Okay. Because of your assignment, again you didn't go
20 around taking a sample with a number of Mansfield inmates
21 with regard to a mental status exam or a mental health
22 evaluation, am I correct?

23 A. That's correct.

24 Q. Okay. Did you attempt to find out through data or
25 anything if any of the inmates on Death Row at ManCI were

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1 experiencing any of these symptoms of the so-called Death
 2 Row syndrome?
 3 A. The term -- there is something called a Death Row
 4 syndrome but the term I have been using is the Death Row
 5 Phenomenon and I would say yes, all of them do.

6 Q. Well, let me ask you this question, Dr. Kupers. Aren't
 7 these two terms almost used synonymously?

8 A. Well, what I would guess and this is an informal
 9 opinion is that some people use one and some people use the
 10 other and they are describing essentially the same thing.

11 But I think a syndrome implies that there is some
 12 psychopathology in the individual being discussed and I
 13 don't assume that. The Death Row Phenomenon I assume
 14 applies to all people on Death Row. Whether or not they
 15 actually develop psychiatric symptoms and therefore the
 16 syndrome would be a slightly different population.

17 Q. You referred to two articles in your report dealing
 18 with this, the phenomenon.

19 A. Yes, I did.

20 Q. Do you recall the authors?

21 A. I can look them up. I have the report right here. I
 22 don't recall them offhand.

23 Q. Terry BLUN?

24 A. Hmm. One of the articles, I didn't put the name in and
 25 I apologize for that. The other is BLOOM, yes.

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1 Q. And isn't there the other one starts with an S, if I
 2 recall correctly. I read the article.

3 A. I don't recall. Yeah. I don't have it here and I
 4 don't recall, and I didn't -- I didn't include it so I
 5 apologize for that.

6 Q. Would you look on page seven of your report, please?
 7 Last paragraph, maybe about seven lines down.

8 A. Yes.

9 Q. A gentlemen by the name of STRAT Ford?

10 A. I think our numbers are different. Let me just -- are
 11 you talking about the paragraph just above the section five,
 12 observations?

13 A. I'm under the heading Death Row Phenomenon, probably --
 14 about the fourth paragraph, doctor.

15 A. Okay. Yes. Oh, yes. You're right. I did include the
 16 name. Straighter. You are absolutely right.

17 Q. You are welcome. Doctor, STRAFR, isn't he a lawyer?

18 A. I believe so, yes.

19 Q. And you also mentioned BLUM, BLUME. Isn't he a lawyer?

20 A. I don't know if he is a lawyer or law student. This
 21 was a Law Review article, yes. He is in the legal
 22 profession.

23 Q. Now, using the term "Death Row syndrome" or Death Row
 24 Phenomenon, aren't those terms legal constructs? They are
 25 not -- they have nothing to do with a medical diagnosis, am

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1 I right?

2 A. Well, Death Row Phenomenon, you are right. It comes
3 from the legal community.

4 Death Row syndrome, I don't use that term but it
5 implies a mental condition. It uses the term.

6 Q. Are those two terms, either term recognized by the
7 American Psychiatric Association?

8 A. If you mean are they contained in the Diagnostic and
9 Statistical Manual, the answer is no. But there are a lot
10 of conditions I treat that are not in the Diagnostic and
11 Statistical Manual.

12 Q. Thank you. Now, while you were at ManCI and so on, did
13 you have an opportunity at all to gauge whether or not any
14 of the Death Row inmates there were experiencing symptoms of
15 Death Row Phenomenon?

16 A. I believe that they -- their experience is well
17 described by the concept of Death Row Phenomenon, and some
18 of them were experiencing psychiatric symptoms.

19 What I would not do is link their symptoms to the Death
20 Row Phenomenon except in this way, that because of the Death
21 Row Phenomenon, the condition that they have is exacerbated,
22 so for instance, one of them was manic depressive and had
23 made a suicide attempt a short time before I interviewed
24 him.

25 I believe that they suffers from the psychiatric

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1 condition bipolar disorder, that he was in a depressive
2 episode, and he attempted suicide, but I believe all of that
3 is very related to the Death Row Phenomenon in the sense
4 that that's the stress on him that underlies the suicide
5 attempt.

6 Q. Okay. Any others? On Death Row?

7 A. Of the prisoners?

8 Q. Yes.

9 A. Yes. I -- now, this is not a psychiatric symptom, so
10 much as a subjective experience.

11 I believe that most of them experience a certain amount
12 of December pair and hope lessness, which if that backs
13 intensified is part of clinical depression but these
14 individuals are not currently suffering from a major
15 depressive disorder so again they have symptoms, they don't
16 qualify as a Diagnostic and Statistical Manual diagnosis.

17 One of the individuals, the one that I interviewed on unit 5
18 at Mansfield, suffers from major depressive disorder
19 recurrent. He wasn't especially depressed when I
20 interviewed him, but that certainly was -- it seemed to me
21 from history a proper diagnosis, and yes, I think his
22 depression is made much worse because of the hope lessness
23 he feels about ever getting out of both Death Row and the
24 extra harsh conditions of segregation on Death Row five at
25 Mansfield.

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1 Q. Did you attempt to ascertain whether or not any inmates
2 on Death Row at ManCI have waived their appeal rights?

3 A. I'm not aware of any that I interviewed who had done
4 so.

5 Q. Okay. So your generalizations about Death Row inmates
6 waiving appeal rights and so on is just a general principle,
7 correct?

8 A. Well, correct. I didn't observe any particular rate of
9 volunteering in Ohio. But I was sharing with the Court my
10 understanding of the phenomenon from research around the
11 country.

12 Q. Well, doctor, let me ask you this. There is not a
13 universal response by individuals to anything, is there?

14 A. I think that's fair to say.

15 Q. Okay. So you come in for a day, like a snapshot, you
16 are not really in a good position to tell us that there --
17 that it is universal there within Death Row that these
18 inmates, Death Row inmates are experiencing this Death Row
19 Phenomenon. Am I correct?

20 A. I wouldn't exactly say it like that. What I would say
21 is that it is impressive within the short time that I was
22 there that I saw so much of the Death Row Phenomenon
23 reflected in the stories of the twelve prisoners who I did
24 interview.

25 Now, I have not -- you're correct, I have not

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1 interviewed all the prisoners on Death Row, but I was
2 impressed by the reflexes of the Death Row if he non non in
3 subjective things like a sense of hopelessness a sense of
4 unfairness a sense of if Death Row is transferred to OSP it
5 would be very unfair since all the other prisoners are being
6 granted an individual hearing before being transferred but
7 these individuals, many of whom told me very strongly they
8 have not received any disciplinary writeups while on Death
9 Row, yet they are going to be transferred to a Supermax unit
10 without recourse to a hearing.

11 Q. Did you attempt to find out while you were at ManCI how
12 many Death Row inmates -- first of all, are you aware, you
13 are aware that they have been confined at ManCI for ten
14 years. Correct?

15 A. That's correct.

16 Q. Death Row has been there. Okay.

17 A. Yes.

18 Q. Did you attempt to find out -- did you get any
19 statistics on how many suicides have taken place in ManCI?

20 A. No, I did not.

21 Q. How about self harming behaviors and so on?

22 A. I didn't investigate that.

23 Q. Okay. Now, Dr. Kupers, when I accompanied you the day
24 you visited OSP, do you recall, I had a little discussion
25 with you of how quiet OSP was?

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1 A. Yes.

2 Q. Would it be a fair statement to say that the day you
3 toured, it was very quiet?

4 A. No. I believe it would be fair to say that on the cell
5 block where we had that discussion, that was the case, but
6 actually, when I went to visit the, interview the prisoners
7 on Level 5, I was impressed by the noise, and noise is not
8 constant in a prison of any kind. Prisoners tell me about
9 noise, for instance, that it tends to be louder at night.
10 So I don't always witness it myself.

11 It is true that certainly on cell block D, which we
12 toured together, there was silence because it was empty. B
13 was more silent than the other cell block and I forget
14 whether that was A or C. I forget which, cell block it was
15 but it was quite a bit noisier than either B or D.

16 Q. Now, what did you have to do with the be I can buy
17 case? Were you involved?

18 A. I was involved in the preparation of that case and then
19 it was decided, they limited the number of witnesses for
20 various reasons including financial and I didn't actually
21 testify in that case, but I did some of the interviews that
22 were the background research for that case.

23 Q. Is Dr. Mets near the monitor in that case, of the
24 monitor of mental health?

25 A. I believe he is.

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1 Q. To your knowledge didn't they have a lot of
2 difficulty -- pardon? I'm sorry?

3 A. I believe that his position was as an expert to the
4 master in that case. I'm not positive.

5 Q. Didn't one of the problems involved in that case was
6 the attitude of the COs and so on, and they successfully
7 changed their attitudes over the years?

8 A. That's a controversial point, and I'm not involved with
9 any litigation involving be I can buy right now but the
10 attitude of the officers continues to be a problem.

11 Q. Are you telling this Court that you can't change
12 attitudes?

13 A. Oh, no. I very much believe the OSPs it. I believe
14 attitude can be changed and that training, administrative
15 attitudes, that changes in administrators, the zero
16 tolerance for certain kinds of abuse, all of those things
17 are very effective in changing attitudes.

18 Q. Did you interview any of the officers at OSP,
19 correctional officers?

20 A. Only casually as we were touring.

21 Q. So really, you didn't interview anybody to any extent.
22 Am I correct?

23 A. Who has -- what was the last?

24 Q. Let's put it this way. You may have casually said
25 something to them but you really didn't interview them. Am

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1 I correct?

2 A. That is correct.

3 Q. Okay. You also stated in your report that you thought
4 one of the reasons why it would be difficult to change them
5 is because you said a majority of them only experience was
6 at OSP. Did you make that statement?

7 A. Yes, I did.

8 Q. Where did you get your information?

9 A. The prisoners told me that, and I took that as a given.

10 If that is not the case I would be very interested in
11 hearing that but it is my understanding that most of the
12 staff at OSP did done most of their time at OSP.

13 Q. Did you check, did you ask the warden? He was with us
14 that day.

15 A. Yes. No, I didn't ask him that question. I did ask
16 him whether he was going to draw entirely from OSP staff
17 when he staffs Death Row, and he answered affirmatively.

18 Q. Did you ask the warden whether or not these officers
19 had worked at other institutions?

20 A. I didn't happen to ask him that, no.

21 Q. Did you ask the warden whether these officers also
22 worked in the camp at OSP?

23 A. No, I didn't.

24 Q. Let's put it this way. You have a proposed program
25 here. It is almost like starting a business, isn't it?

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1 Nobody really knows which way, what will happen in the end,
2 but you don't start with the idea that you are going to
3 fail, do you?

4 A. Oh, absolutely not, and I did not in this case, by the
5 way, and I listened very closely to you, to warden Houk, I
6 read the documents that I reviewed, and I actually do favor
7 conversion because as I said in my report I think we've
8 overbuilt Supermax units.

9 No, it was because of the evidence that was available.

10 For instance, the significance of those metal strips or the
11 lack of adequate attorney visiting situations that swayed me
12 to the opinion that it is not going to succeed.

13 No, I approached the problem with an open mind and the
14 hope that it would succeed.

15 Q. Well, let's go over a couple of these things.

16 You talked about communication between cells. Did you
17 talk -- did you talk to the inmates, did they tell you that
18 they play chess and things of that sort? Did you talk to
19 them about this? They do communicate, don't they, doctor?

20 A. There is no prison in the country where the prisoners
21 don't communicate with their neighbors. However, some
22 prisons are louder than others and they communicate by
23 raising their voices and that is what I testified about.

24 Yes, I am aware that they play chess with a neighbor.

25 I'm also aware that the contrast between the easy

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1 conversation which can be in a low tone of voice not
 2 overheard between anyone else between a prisoner and his
 3 neighbor at Mansfield is going to be sharply different than
 4 what happens at OSP, whereas we know, because you and I were
 5 in a cell or we were on opposite sides of the door of a cell
 6 together, you have to raise your voice to be heard at OSP
 7 and it is that difference that I was commenting about in my
 8 testimony.

9 Q. Okay. What is so bad about taking an elevator from one
 10 floor to another to go to recreation?

11 A. I don't know that I would say there is something so bad
 12 about it. It is different. What it requires is a certain
 13 amount of staff time, for instance, the officer in the
 14 control booth who is observing the process, and therefore,
 15 it is subject to break down.

16 If a prisoner can walk out a door onto the yard, that
 17 prisoner can then feel that he could go to the yard wherever
 18 he wants. Elevators can be in disrepair. There can be a
 19 shortage of staff so that prisoners are not moved. It is a
 20 different process. That is all. I didn't say it was so
 21 bad. I just said it was quite a contrast to the easy access
 22 to the outside at the DR-6 unit at Mansfield.

23 Q. But it doesn't cause irreparable harm, does it, doctor,
 24 to take an elevator?

25 A. That in itself --

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1 Q. Am I right?

2 A. That in itself does not.

3 Q. Okay. And more difficulty communicating between cease
 4 by itself doesn't cause irreparable harm. Am I correct?

5 A. That I'm not so sure of. I would agree with you about
 6 taking an elevator to the yard, whenever I say that there is
 7 the risk of irreparable harm, what I'm talking about is on
 8 average in a large number of cases, not the actual
 9 prediction, and in the individual prisoner's case I don't
 10 know about that, I'm not able to predict the future.

11 Now, there is much more hardship for the prisoner in
 12 not being able to communicate with other prisoners than
 13 there is having to take an elevator to the yard, that is
 14 correct, however I think that is a substantial problem
 15 because these individuals even if they have five hours out
 16 of their cell are significantly isolated.

17 For instance, they are cut off from loved ones that
 18 don't travel very often to see them. So the relationships
 19 between prisoners is very central in their social
 20 interactions and if it is made more difficult for instance
 21 by the strips on the door, the difficulty talking from cell
 22 to very or is harshness of the officers so that they are not
 23 allowed to talk to each other as they are pass not guilty
 24 the hallway, that makes a large difference in terms of their
 25 social ^ interaction. There will be some cases where that

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1 will cause irreparable harm.

2 For instance, in someone who becomes December pairing
3 and harms themselves because of their sense of isolation.

4 Q. Maybe. Maybe. Am I correct? It's a maybe.

5 A. Well, I think I would have to say maybe in any
6 particular case, and from all we know, certainly across the
7 board, it will increase -- it increases the risk of self
8 destructive behavior. It is not that in any case we can
9 predict there will be self destructive behavior but for
10 instance we have research that shows that in solitary
11 confinement, in isolated confinement there is more suicide
12 attempts than elsewhere in a prison setting.

13 So it is not that -- it is not maybe but it is also not
14 a definite prediction in any one case. It is a matter of
15 statistical findings.

16 Q. Doctor --

17 A. A pattern.

18 Q. When compare two institutions, it is not unusual to
19 find pros and cons in one, one is a little better in this
20 aspect than the other, am I correct? Nothing unusual about
21 that.

22 A. That's correct.

23 Q. Okay.

24 A. That's correct.

25 Q. Now, you made a big thing about outdoor rec in

1 Mansfield, let's compare something else. The basic housing
2 unit at OSP, the day room. Isn't that a lot better than
3 what they have at Mansfield?

4 A. In some of the units, yes, and in some no. That is a
5 larger unit, if that's what you mean. The day room area at
6 OSP, it is knoll KURM used as a day room but there is a
7 space in front of the tiers of cells.

8 It is a bigger space than exists at Mansfield, that's
9 true. The particular way the space is employed at DR-6 is
10 pretty optimal, so I wouldn't say that the situation at OSP
11 is better.

12 Because then the other problems continue. The lining
13 of the doors, so that prisoners in their cells will have to
14 shout to be heard. The climbing ^ clanking, the noise of
15 the institution because it is so much constructed out of
16 concrete cinder block and steel so there is not the
17 softening of furniture, wood, et cetera, that you have more
18 of at Mansfield.

19 Q. What about the program booths? Did you have an
20 opportunity to look at those? Doesn't that provide them
21 with another opportunity to socialize?

22 A. Yes, and definitely I agree that allowing prisoners out
23 of their cell five hours a day is much better than allowing
24 them out once a day.

25 My concern is whether they are actually going to get

1 those five hours out of cell a day, how much congregate
2 activity there will be, how much access to the outside yards
3 and that's what I commented about in my report.

4 Q. Well, whether or not they get them, we won't know until
5 this program is implemented. Am I right?

6 A. I partly agree with you, but I also think that we can
7 use precedents and that's why I looked at the situation of
8 the prisoners on 4-A.

9 It is striking that the five hours promised to the
10 Death Row prisoners once Death Row is moved and the five
11 hours granted the four A prisoners currently at OSP is the
12 same number of hours.

13 So I think it is reasonable to make some kind of
14 assessment of how many of those five hours the four A
15 prisoners actually get, which then doesn't make an absolute
16 prediction, nobody can predict the future, but if the
17 prisoners on 4-A are not getting the five hours they are
18 promised I think that leans us toward thinking it is
19 possible the Death Row prisoners would not get the five
20 hours they are being promised and in fact universally that's
21 what the prisoners think.

22 Q. Universally where? You don't know really what the
23 inmates at OSP think, do you?

24 A. ? You interviewed five inmates, doctor. Five. Now,
25 again, we come back to, you're the person who analyzes human

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1 nature. I'm of the opinion you can't come up with a
2 universal response for human nature.

3 MR. GILBERT: Objection.

4 THE COURT: Sustained.

5 BY MR. MANCINI:

6 Q. Agree or disagree?

7 THE COURT: Wait until there is a question. Go
8 ahead and ask a question.

9 BY MR. MANCINI:

10 Q. Do you agree or disagree with what I just said?

11 THE COURT: He can't agree. I sustained the
12 objection. Go ahead and ask him another question.

13 MR. MANCINI: Thank you, Your Honor.

14 BY MR. MANCINI:

15 Q. All right. You talked to five inmates. Is it proper
16 for you to generalize from those five what the response is
17 of the entire OSP population?

18 A. No. And I don't believe I did so. I did misspeak in
19 terms of the use of the term universal. What I meant and
20 what I will define it now is the universe of the twelve
21 people who I interviewed, so at OSP, that is five people.

22 When I say universally, and I think it is not a good
23 word, I should have said five out of five told me
24 such-and-such, and no, I don't generalize about what the
25 opinions of everybody at OSP is. I take it as a sampling of

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1 opinions of prisoners who are living there.

2 Q. Okay. Doctor, you're not aware of any future
3 additional developments with regard to attorney visitation,
4 you have not talked to warden Houk this week?

5 A. Not this week, but it is my understanding, and this
6 comes from Mr. Lynd, who accompanied Dr. Nets near on a tour
7 sometime after I toured and what Mr. Lynd related to me was
8 that warden Houk said that there will not be any chains and
9 that in fact the three situations I described will be the
10 primary visiting, that is the attorney visiting booth, the
11 visiting room as a secondary option if there is no papers to
12 be passed and the barber shop as the third option.

13 I am not aware of any further develop. S and I would be
14 happy to be made aware of that.

15 Q. Okay. Now, in your report, I'm looking at page 17, at
16 the bottom. Let me identify that by your paragraph, it is
17 paragraph nine. You designate it as nine.

18 A. Oh, the points at the end?

19 Q. Yes. Yes, doctor.

20 A. Yes. Okay.

21 Q. Okay? On nine the sentence reads "there is a high
22 prevalence of mental illness on Death Row even after mental
23 health screening, DA DA DA DA.

24 Doctor, you said before you have not examined inmates
25 on Death Row at ManCI. Am I right?

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1 A. That's correct, and what I was referring to here was a
2 more general opinion, and I should have specified that.
3 That on Death Row in general, in every state, there is a
4 high incidence of mental illness.

5 Q. Well, let me ask you this. As I read your report,
6 you're talking about Death Rows in general, about
7 everything, and we're not so sure it is what is happening at
8 OSP or ManCI. Am I correct?

9 A. No. I think I have some evidence about Mansfield.
10 Two of the seven prisoners I interviewed, and I wasn't
11 choosing them in order to discover a mental illness, that
12 was not my purpose, two of them have major mental illness,
13 that is a major depressive disorder and bipolar disorder and
14 I'm sure others of them have other diagnoses on their charts
15 so I believe that hi I statement there is a high prevalence
16 of mental illness on Death Row, which I meant as a general
17 phenomena, would be matched by the actual data at Mansfield.

18 Q. Now, let's get back to this. You're making a statement
19 that, you're talking about culture, you're talking about
20 change, difficult to change opinions and so on.

21 Now, I looked at your report and I noticed that what
22 you relied on or at least read was Dr. See mower hall lick's
23 report of April 6, 2004.

24 Do you know Dr. Hall lick?

25 A. I'm not personally. I certainly know his work.

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1 Q. Okay. And you read his report. Correct?

2 A. Yes, I did. His final report, yes.

3 Q. Doesn't he go at great lengths to say there has been
4 tremendous changes at OSP and it is a favorable environment?

5 A. Yes, he did say that.

6 Q. Well, let's contrast that with five inmates that you
7 talked to at OSP. Where does Dr. Hall lick's opinion fit
8 into this equation? Isn't there hope here we're going to
9 work through this?

10 A. I certainly hope so. And I know that you do. And I
11 believe warden Houk is sincere in his efforts to do so.

12 Q. Weren't you of the -- I'm sorry.

13 A. Well, I also read the record of Dr. Cohen and gone deny
14 son and they mentioned a culture where basically prisoners
15 are not considered to have a right to proper health care.

16 So there were conflicting reports in the documents. I
17 then talked to the prisoners, and you're absolutely correct,
18 I didn't talk to or interview officers besides casual
19 conversations in the hall.

20 But it is my impression that Dr. Hall lick is correct
21 and there have been improvements. Now, my guess is because
22 I watched this process in other states where I have been
23 involved in litigation that removed people with serious
24 mental illness from Supermax confinement that when the
25 prisoners with the most serious mental illness are removed

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1 the staff are in a better mood and are able to a toned the
2 needs of the other prisoners and that's why I testify in
3 those lawsuits.

4 THE COURT: Why don't you wait until we have
5 another question. Go ahead and ask a question.

6 THE WITNESS: Okay.

7 BY MR. MANCINI:

8 Q. With regard -- having read Dr. Hall lick's report, now,
9 he spent a couple years here monitoring. You're aware of
10 that.

11 A. Yes, I am.

12 Q. Okay. Now, he visited the so-called barber shop, he
13 visited the attorney visiting and so on, and he didn't
14 disapprove of anything, so we have another psychiatrist
15 saying things are okay, doctor.

16 Now, how does Dr. Hall lick's opinion factor into what
17 you are doing?

18 A. I don't believe -- well, Dr. Hall lick and I have not
19 spoken about it, and if given the opportunity I would speak
20 to him about the barber shop and whether he considers that
21 confidential.

22 What I know is the context of his report was he is
23 saying please release me, I'm done here, and that the
24 internal mechanisms of the department of Rehabilitation &
25 Corrections can take over and do the job. He actually

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1 advised an ombudsman actually in place of what he thought
 2 was the plaintiff attorney's roles and I'm not sure that he
 3 is correct about that but what he was doing, the context of
 4 his report is that he was saying please relieve me of
 5 responsibility, things are sufficiently better for me no
 6 longer to be the monitor here.

7 Now, I don't believe that is the same question as
 8 moving Death Row where the prisoners have not committed any
 9 prison infractions worthy of being in Supermax confinement,
 10 moving the entire Death Row inside a Supermax. That is a
 11 different question. It is a different level of concern
 12 about something like the confidentiality in the barber shop.

13 Q. I don't disagree with you, doctor, but all I'm
 14 suggesting is this. There is nothing wrong with the
 15 proposed plan, is there?

16 A. There are some things wrong with the proposed plan,
 17 absolutely.

18 Q. Again, if we implement this plan, and as some people
 19 testified this morning, any time you are implements you are
 20 going to be making changes, you run into problems, you make
 21 changes, we're hopeful and we believe we can get it done --

22 MR. GILBERT: I object to the narration.

23 BY MR. MANCINI:

24 Q. Don't you think we deserve the opportunity to do that?

25 A. I don't know how to answer the question, deserve the

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1 opportunity. Mr. Mancini, I think you have done wonderful
 2 work and I really respect what you have done in this case
 3 and elsewhere in the correction department and I think the
 4 correction department is much improved because of your
 5 efforts.

6 I do think that there are some problems with the plan,
 7 which iffy number rated. For instance, the metal strips on
 8 the doors, for instance, the attorney visiting situation,
 9 and I gave my opinion that I don't think the transfer is
 10 going to be a successful example of conversion because of
 11 all of the issues that I enumerated, and I still believe
 12 that.

13 You certainly deserve a chance, but when it comes to
 14 moving the entire group of death sentenced prisoners to OSP
 15 I don't believe your dessert of a chance justifies moving
 16 them when I prediction the situation for them will not be
 17 good.

18 Q. Are you saying that with a degree of medical certainty,
 19 that it will fail?

20 MR. GILBERT: Objection.

21 BY MR. MANCINI:

22 Q. Is that a medical opinion? Is that a medical opinion
 23 doctor?

24 A. That's not what I'm saying here. What I am trying to
 25 do, because I believe there is a trier of fact who is going

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1 to need to make a determination in this case, so it is not
2 my issue.

3 What I'm trying to do is elucidate all of the
4 variousables and factors that I can to help that trier of
5 fact determine whether this is, this move is going to result
6 in a situation which is an atypical and significant hardship
7 for the death sentenced prisoners were they to be moved.

8 No, I'm not saying anything with a level of medical
9 certainty because that is not the standard in this
10 particular testimony.

11 Q. What is the standard?

12 A. I believe that my position here is to give an informed
13 opinion about the effects of the proposed transfer and that
14 is what I have done.

15 I have not said, and I don't think we can predict the
16 future, I have not said that, you know, it is my opinion
17 that this will happen or that will happen. What I think is
18 in general, the transfer, the proposed transfer would not
19 succeed in creating a converted Supermax unit such that the
20 atypical and significant hardship would no longer exist.

21 Now, if you would like I can say that would be medical
22 certainty but I'm not aware of the literature about the
23 situation we are dealing with here it is unDecember
24 presented.

25 Q. I was just going to ask you, your opinion is not based

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1 on any scientific study, correct?

2 A. It is based on a lot of scientific study it is based on
3 all scientific studies that I can muster. For instance, the
4 scientific studies that show that isolated confinement tends
5 to lead to a greater degree of mental pathology and suicide
6 in prisoners. The scientific study that the Death Row
7 phenomena tends to make depression worse, that there is a
8 significant amount of mental illness on Death Row, that
9 conditions matter. That architecture influences how people
10 live in a space. All of that is scientific literature.

11 Now, what I am prying to do in this unprecedented
12 question is bring to bear all the scientific literature that
13 I'm aware of, which I tried to do in my report and in my
14 testimony, and therefore give an informed opinion about the
15 likely effects of the proposed transfer. That is how I'm
16 using science.

17 Q. You admit, though, that this is unpress dented.

18 A. Absolutely. There has not been a situation where there
19 is a Court decision that prisoners to be moved to a certain
20 institution have the right to an individual hearing and then
21 a class of prisoners are proposed to be transferred to that
22 institution without that hearing, and my opinion about that
23 situation is formed by all of the background that I have
24 presented in my report and my testimony, but I have never
25 been asked been opinion about a situation like that.

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1 Q. Doctor, with regard to what you just said, are you
2 aware of the who witness ^ huh witness decision?

3 A. I'm sorry?

4 Q. Who witness. HEWITT.

5 A. I don't recall what that is.

6 Q. All right. Does the HEWITT decision say that we have
7 to provide a hearing?

8 MR. GILBERT: Objection.

9 THE COURT: Sustained.

10 BY MR. MANCINI:

11 Q. Or does it say an opportunity to be heard?

12 MR. GILBERT: Objection.

13 THE COURT: Sustained. Wait. I sustained the
14 objection. He gets to ask another question.

15 THE WITNESS: I'm sorry. I didn't hear the
16 objection or the discussion.

17 THE COURT: He will ask another question. Go on
18 and ask another question.

19 MR. MANCINI: All right.

20 BY MR. MANCINI:

21 Q. Doctor, with regard to our screening of the mentally
22 ill, and we want to send them elsewhere, you're not saying
23 that we can't do that, right?

24 A. Well, I wouldn't preclude you. I did give an opinion
25 about a possibility effect of doing that, and it is

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1 reflected in Dr. Hall lick's report.

2 Q. Well, with regard to the mental health screening that
3 is going on now, you make the comment that they are
4 declining and concerned about missing, missing somebody who
5 has a problem, correct?

6 A. When I expressed ^ what I expressed concern about is
7 that the situation for inhas been ants of Death Row at
8 Mansfield who suffer from a mental illness is, it is working
9 well, and I am concerned about disrupting them by separating
10 those prisoners from the others on Death Row and then
11 subjecting them to a program which I -- I'm not familiar
12 with, but reading Dr. Hall lick's report it seems to me that
13 there is a problem in the system having to do with a lack of
14 long-term residential treatment.

15 Q. Well, Dr. Ham lick was not dealing with Warren in his
16 annual sighs, he was talking about SOCF in terms of that.
17 He feels talking about OSP and SOCF, not Warren. Correct?

18 A. I believe that's correct but what I'm saying is --
19 that's correct, but what I'm saying is that the people on
20 Death Row at Mansfield with serious mental illness are doing
21 well, I think and I offered the opinion it is because of the
22 rapport between staff and prisoners.

23 I'm concerned about what will happen to them, and I
24 said in my testimony, I'm not familiar with the program at
25 Warren and no one seems to be able to tell me much about it

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1 because I have asked mental health professionals about it
2 and they don't know about it either.

3 Within the system.

4 So all I was doing was expressing a concern about
5 taking a group of prisoners that are doing well relatively
6 now with the staff intervention at Mansfield, splitting them
7 off from the main population of Death Row, and sending them
8 somewhere, and I don't know what the program will be, where
9 they are being sent.

10 Q. So you don't know much about it and you really can't
11 give an informed opinion, am I correct, with regard to --

12 A. I gave the opinion --

13 Q. You have given an opinion, you are concerned, period.

14 A. That's correct.

15 Q. Okay. Is that a medical opinion?

16 A. Yes.

17 Q. Okay.

18 A. It is my medical opinion that for prisoners with
19 serious mental illness when they have good rapport with
20 staff, that helps in their mental health treatment. And
21 helps their eventual prognosis.

22 Q. And --

23 A. And mental health status.

24 Q. And you have expressed a concern, correct?

25 A. Yes. Yes.

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1 Q. But you have not gone beyond that with a prediction,
2 have you?

3 THE COURT: His testimony will speak --

4 A. No.

5 Q. Now, if you had, it wouldn't be a medical opinion, am I
6 correct?

7 A. Well, I don't know. That gets into a legal discussion.
8 I wouldn't give an opinion knowing as little as I do about
9 what is going on at Warren. I expressed a concern and I
10 think it is warranted.

11 Q. I'm not arguing with you about what you just said,
12 doctor. I agree.

13 Now, you're also talking about the difficulty of
14 running an institution when they have different levels,
15 different populations. You're familiar that this happens
16 throughout the country. ManCI has three populations. It is
17 operating. And we think well?

18 THE COURT: You need to ask a question.

19 BY MR. MANCINI:

20 Q. What is the problem? It is well known that this is a
21 common practice.

22 MR. GILBERT: Objection.

23 THE COURT: Sustained. You need to ask a
24 question. Wait for the question.

25 BY MR. MANCINI:

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1 Q. What is your opinion with regard to this area?

2 A. Well, I agree with you. It is actually advisable to
3 makes security levels in institutions ^ mix ^ and the
4 reason is because the larger plant can then supply better
5 programs.

6 And support professionals, for instance, in education
7 and rehabilitation.

8 However, I didn't give an opinion about that. What I
9 gave an opinion about is the specific culture at OSP, and
10 what I said is that the culture is one of punishment,
11 control, in other words, a Supermax security culture, and I
12 believe that there is a critical mass, that is, that if you
13 change a part of the institution, the culture remains.

14 So it becomes very important to change enough of the
15 institution so that the Supermax punitive control culture
16 does not remain. That is the opinion I gave. It wasn't a
17 general opinion about mixing security levels.

18 Q. Do you really think you know the culture at the Ohio
19 State Penetentiary?

20 A. I presented the evidence I had about it and gave my
21 interpretations of that evidence. I think it needs to stand
22 on its own.

23 Q. Well, it is based on talking to five inmates, period.

24 A. Well, I talked to twelve prisoners and several of the
25 prisoners I talked to at Mansfield had been to OSP and as I

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1 said, explained before, the uniformity of their presentation
2 and how strongly they felt about it gives some reflection of
3 how serious a problem it is.

4 Q. Doctor, have you ever served as a monitor?

5 A. No, I have not.

6 Q. Do you have experience in the long term management of a
7 facility?

8 A. That I do as a consultant. I have never worked within,
9 for a salary inside a correctional institution.

10 Q. I'm sorry, doctor; I didn't hear you. Would you repeat
11 your answer?

12 A. I have consulted with various institutions, yes. I
13 consult as a psychiatric consultant to various institutions
14 and their staffs, and in that sense I follow what goes on in
15 the institution over a long period of time, but I have not
16 actually been employed to provide clinical direct services
17 within a correctional institution.

18 Q. Okay. With regard to a prediction in the future, if we
19 sent Death Row inmates up there, are you in a position to
20 tell us with any degree of medical certainty whether this
21 population will be harmed and when it will be harmed?

22 A. I believe that I have done that in stages. Let me say
23 it this way. I believe that I can say to you that to the
24 extent the OSP facility continues to be run as a
25 Supermaxiumu security unit there will be the predictable

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1 negative psychiatric consequences that I have testified
 2 about in Jones EL, in Wisconsin, in Willy Russell in
 3 Mississippi and that I helped prepare a case about in the ma
 4 dried case in California.

5 Also I testified about that in Coleman in California.

6 Now, the question then is is OSP going to continue to
 7 function as basically a Supermaximum security unit? That is
 8 the thing we don't know for sure, and what I have done is
 9 presented the Court with my most informed opinion based on
 10 what we do know.

11 For instance, the comparison with the four A unit or
 12 the way the architecture, the metal strips or the attorney
 13 visiting booths weigh towards the failure, weigh me in the
 14 direction of saying that the attempt to convert is going to
 15 fail and I've presented that to the Court with a degree of
 16 certainty or uncertainty that I have because I don't have a
 17 crystal ball.

18 Q. So at best, it is your informed opinion --

19 MR. LOBEL: Your Honor, haven't we gone over this?

20 THE COURT: I think you have covered it.

21 MR. MANCINI: Okay. Is there an objection?

22 THE COURT: There was an objection and I sustained
 23 it. Go on to another question if you have any more.

24 MR. MANCINI: May I have a moment, Your Honor?

25 BY MR. MANCINI:

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1 Q. Before I for GE, doctor, with regard to your comments
 2 on the appropriate staffing levels if they are up there,
 3 would you agree with Dr. Metz near's statement that once
 4 they are up there, six months later, after completion, the
 08:58:52 5 transfer is advisable to determine if the staffing is
 6 adequate and do something about it if it isn't?

7 A. You are saying assuming that the transfer does happen?

8 Q. Yes.

9 A. Yes, I do agree with Dr. Metz near on that. There has
 08:59:11 10 to be a constant reappraisal of staffing levels.

11 MR. MANCINI: I have no further questions. Thank
 12 you very much, doctor.

13 MR. GILBERT: No further questions.

14 THE WITNESS: Thank you Mr. Man's.

08:59:22 15 THE COURT: Thank you. And we'll adjourn for the
 16 day understanding there is no redirect.

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