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1                                    SEPTEMBER 02, 2005, 11:40 A.M.

2                    THE COURT: We reconvene on case 2001 CV 71.

3                    Would the defense call your next witness.

4                    MR. LANDES: Yes, Your Honor. We would recall

11:41:34 5                    Warden Houk to the stand to complete his redirect.

6                    THE COURT: Warden Houk, you remain under oath.

7                                    REDIRECT EXAMINATION

8                    BY MR. LANDES:

9                    Q. Warden Houk I would like to lead you back to three  
11:41:51 10                    particular items that were raised on cross-examination  
11                    yesterday.

12                    Here is the first one. You were asked about post  
13                    orders from Mansfield and the amount of time that they  
14                    required for out of cell time. Those were exhibits N, O,  
11:42:14 15                    and P and on cross-examination you were asked about the  
16                    effective dates of those orders.

17                    Have you had the opportunity to look at the prior  
18                    orders on those topics?

19                    A. Yes, I have.

11:42:25 20                    Q. I have marked them and provided them to the defense and  
21                    to the Court and I have marked them as Exhibits Z, AA, and  
22                    BB.

23                    Do you have those before you?

24                    A. Yes, I do.

11:42:37 25                    Q. How do those compare in significant respect to the

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1 orders that were dated March of 2005?

2                    MR. BENZA: Your Honor we would object to any  
3 testimony about these exhibits. They have not been provided  
4 to us in discovery this morning. This was the first time we  
5 saw those despite repeated requests for post orders in  
6 discovery.

7                    THE COURT: Were they specifically requested?

8                    MR. BENZA: We did specifically request all the  
9 post orders of Mansfield Death Row.

10                    MR. LANDES: Your Honor, we had communications  
11 with plaintiffs throughout concerning all post orders on  
12 Death Row. We had moved jointly for a protective order, and  
13 had given them everything but post orders awaiting the  
14 decision on the joint protective order. At the beginning of  
15 the trial, we did give them the post orders, notwithstanding  
16 the fact that we had no protective order over them that had  
17 been testified to yesterday. We had no complaint from  
18 plaintiffs about holding the post orders pending your  
19 decision on the motion. We were going to renew that motion  
20 at the time that we moved the exhibits into evidence. I  
21 have checked with the plaintiffs and thankfully they have  
22 not used or shared those post orders with anyone else, but  
23 that is the reason they did not get the post orders in  
24 advance.

25                    THE COURT: Well, did you give them this post

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1 order at the beginning of the trial?

2 MR. LANDES: We did not Your Honor.

3 THE COURT: Why wasn't it produced them.

4 MR. LANDES: Because we had intended to only use  
5 the ones that we had marked at trial. And it is identical.  
6 That's what the guy is going to say.

7 THE COURT: I'll sustain the objection. You can  
8 go into the -- if you want to ask him a generalized question  
9 as to whether they have changed I'll allow you to do that.  
10 But just don't offer the exhibit. But if you want to ask  
11 him, you know, whether the post order reflects a change from  
12 the earlier order, I'll let you do it, as long as you make a  
13 showing that he has knowledge.

14 MR. LANDES: Thank you, Your Honor.

15 BY MR. LANDES:

16 Q. You have reviewed those prior post orders?

17 A. Yes, I have.

18 Q. Did you pay particular attention to those aspects of  
19 them that covered requirements for out of cell or rec time?

20 A. Yes, I did.

21 Q. What change if any has occurred from the 2004 version  
22 to the 2005 versions which are marked as Exhibits N, O and  
23 P?

24 A. There is no change.

25 Q. Why is it that we reissue post orders annually?

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1 A. They are reviewed annually by a standard that we follow  
2 through the American Correctional Association.

3 Q. Do they need to be reissued annually even if there is  
4 no change?

5 A. No, they do not need to be. There is not a requirement  
6 for them to be reissued annually.

7 Q. The second item has to do with a question you were  
8 asked on cross concerning an inmate Hamilton and an injury  
9 claimed by him.

10 You were asked about whether the investigation was  
11 completed yet. What is the status of the investigation?

12 A. It has not been completed.

13 Q. Is it routine to investigate allegations of injury by  
14 inmates?

15 A. Yes, it is.

16 Q. The third item was that you were asked about space for  
17 the criminal defense team to meet with inmates at the Ohio  
18 State Penitentiary. Had you ever been asked for a space for  
19 psychological testing as part of a criminal defense matter?

20 A. No, I have not.

21 Q. What space would you have available if you ever got  
22 such a request?

23 A. There is a space that we can look at to use but it  
24 would take further evaluation. I'm not able to commit that  
25 that would be an effective space, but of course we would

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1 need to know what the needs of the individual is to see even  
 2 if this space would meet their needs if it was something  
 3 that we could use to facilitate their needs.

4 THE COURT: What do you use now for psychological  
 5 sessions?

6 THE WITNESS: Between staff and inmates.

7 THE COURT: Right.

8 THE WITNESS: We use the area known as the barber  
 9 shop.

10 THE COURT: Okay.

11 BY MR. LANDES:

12 Q. Is the barber shop among the spaces that you would  
 13 consider if a defense person wanted to do such an  
 14 examination?

15 A. It would be one that would be part of the evaluation  
 16 process.

17 Q. What if for some reason that was -- that was alleged  
 18 not to be sufficient for that use?

19 A. Then there is another space that we would take a look  
 20 at and compare to the individual's needs versus that space.

21 Q. You had brought a prototype of an alternative -- pardon  
 22 me, an alteration for family visitation for semi-contact  
 23 that lexsan that you have?

24 A. Right.

25 Q. Do you also have in mind an alteration concerning the

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1 attorney visitation area as it regards tables?

2 A. Yes. There is currently a small ledge on the  
 3 attorney's side. We are going to have plans to expand that  
 4 ledge.

5 As I shared with Dr. Metzner and Dr. Kupers during  
 6 their visits, we are going to expand that ledge and if  
 7 needed, we can bring a small table in to put on one end of  
 8 the attorney visit booth.

9 MR. LANDES: Your Honor, this completes my  
 10 redirect examination.

11 THE COURT: Thank you. Would you call your next  
 12 witness?

13 MR. BENZA: Yes, Your Honor, if I may, could I  
 14 have a brief recross, given the testimony regarding the new  
 15 post orders.

16 THE COURT: What area did they bring up that they  
 17 had not dealt with.

18 MR. BENZA: Regarding his review of the old post  
 19 orders that were brought up this morning.

20 THE COURT: Go ahead.

21 RECCROSS-EXAMINATION

22 BY MR. BENZA:

23 Q. Good morning, warden. The purpose of the post orders  
 24 is so that the inmates and staff know the day to day gallons  
 25 and operations of the insure stations isn't that correct?

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1 A. You are incorrect. It is for the officers to know the  
2 day to day guidelines of an operation of the facility.

3 Q. So the officers should know then what those post orders  
4 read?

5 A. Correct.

6 Q. And despite the fact that you have brought Exhibits N,  
7 O, and P, which are the revised 2005 post orders for  
8 Mansfield, we have no post orders regarding the operation of  
9 Death Row at OSP, do we?

10 MR. LANDES: I would object.

11 THE COURT: Overruled. Are there any yet for  
12 Death Row at OSP.

13 THE WITNESS: They are in draft form.

14 BY MR. BENZA:

15 Q. So we have no post orders, do we?

16 A. Correct.

17 MR. BENZA: Nothing further Your Honor.

18 THE COURT: Thank you. Would you call your next  
19 witness.

20 MR. LANDES: Yes, Your Honor, I call Mr. Nathan.  
21 Would you please stand by the ledge and be sworn in.

22 THE COURT: Please come forward, take a seat, and  
23 spell your name and your last name.

24 THE WITNESS: My name is Vincent Nathan.  
25 N-a-t-h-a-n.

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1 MR. LANDES: Your Honor, we would propose to have  
2 Mr. Nathan testify until we break. We have a 1:00 video  
3 hookup and we will resume with Mr. Nathan at the end of the  
4 testimony.

5 VINCENT NATHAN, being first duly sworn, was examined  
6 and testified as follows:

7 DIRECT EXAMINATION OF VINCENT NATHAN  
8 BY MR. LANDES:

9 Q. Have you ever a professor at the University of Toledo  
10 College of Law?

11 A. Yes, sir, I have.

12 Q. How long were you a professor there?

13 A. I joined the University of Toledo College of Law  
14 faculty in 1979, and retired from my position as full  
15 professor and associate Dean in 1980 -- I'm sorry. 1979. I  
16 joined the faculty in '66. I'm sorry, sir. And retired in  
17 '79. Or resigned in '79.

18 Q. Why did you leave?

19 A. I left because beginning in 1975, I became involved  
20 very heavily in corrections related work. I found it  
21 difficult to maintain the rigidity of a teaching schedule.  
22 I joined a law firm where I felt that I would be more in  
23 control of my time in order to pursue my interests in  
24 corrections is.

25 Q. Do you teach now?

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1 A. Having been with a firm and then having formed my own  
 2 firm and been with that firm for about 20 years, I resigned,  
 3 retired, rather, from my law firm in 2003, and joined the  
 4 faculty of the department of criminal justice at the  
 5 University of Toledo. That is not part of the law school.  
 6 I am teaching corrections related courses.

7 Q. What kind of courses do you teach there?

8 A. I teach two graduate level courses in our Master's  
 9 degree program in the field of corrections administration.  
 10 I teach a course in penology at the undergraduate level and  
 11 a course at the undergraduate level from time to time on  
 12 introduction to criminal justice.

13 Q. How did you first become connected to your expertise in  
 14 corrections practices?

15 A. My first experience in corrections occurred in 1975  
 16 when then United States District Judge Don Young in Toledo,  
 17 Ohio asked me and ultimately appointed me to serve as his  
 18 special master in a case involving conditions at the Marion  
 19 correctional institution in Ohio, a medium security  
 20 institution for men.

21 Q. And what -- how long did your role continue in that  
 22 case and what work did you do?

23 A. I believe it was approximately four years, and I didn't  
 24 hear the second part of your question.

25 Q. What was your role in the case?

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1 A. Well, my role as special master was to in general  
 2 oversee the compliance process, and to report regularly to  
 3 Judge Young on the defendants, the department of  
 4 Rehabilitation & Corrections' progress toward compliance  
 5 with the decree, and to assist the department and the staff  
 6 at the prison in any way I could in developing and  
 7 implementing plans that would in fact lead to compliance  
 8 with the Court's order.

9 Q. Where else have you served as a special master  
 10 appointed by Federal judges?

11 A. By Federal courts, sir?

12 Q. Yes.

13 A. The same Court, the United States District Court for  
 14 the Northern District of Ohio, appointed me to serve as  
 15 special master in a case involving conditions in the Lucas  
 16 County jail, which is in Toledo, Ohio.

17 I have served as a special master in a system-wide case  
 18 in the State of New Mexico. That case involved all medium,  
 19 closed and maximum security facility prisons in the State.

20 I served as special master for the chief judge of the  
 21 Southern District of Georgia in a case involving conditions  
 22 at the then highest security prison in the State of Georgia.

23 I served as special master for the Southern District of  
 24 Texas, the District Court, Southern District of Texas in  
 25 RUIZ versus ESTELLE a case that addressed conditions, a very

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1 wide scope of conditions throughout the entire Texas  
2 Department Of Corrections the adult correctional system.

3 I served as a special master in a case involving all  
4 jails and prisons in the Commonwealth of Puerto Rico.

5 Those are the cases that come to mind. I served as a  
6 special master, though by a different name, in a case  
7 involving parole conditions, the application of parole  
8 policies in the State of Michigan. I was appointed by  
9 United States district judge for the Southern District of  
10 Michigan.

11 Those are the ones I recall. All of those experiences  
12 and if I have skipped any are mentioned in my resume.

13 Q. Are you currently serving as a special master in the  
14 Northern District of Ohio, appointed by a judge in Akron?

15 A. Yes, sir. In connection with a case that deals with  
16 problems primarily relating to crowding in the Mahoning  
17 County jail.

18 Q. Had you mentioned Georgia?

19 A. I think I did mention Georgia. Southern District of  
20 Georgia.

21 Q. Thank you. Where have you served as an expert for  
22 inmates in corrections litigation?

23 A. Well, I have served typically as an expert for inmate  
24 classes, though I have testified in a few individual cases.  
25 I will mention the class cases first and others if you wish.

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1 I served as an expert for the inmate class in a case  
2 involving conditions at the Supermax facility in California  
3 at pelican bay.

4 I served as an expert for the plaintiff case in a case  
5 involving conditions at the Supermax facility in Wisconsin.

6 I served as an expert for the plaintiff class in a case  
7 involving conditions of confinement in a prison in St.  
8 Thomas, in the Virgin Islands.

9 Was your question limited to plaintiffs?

10 Q. It was.

11 A. Okay, sir.

12 Q. Have you worked in New York?

13 A. I have been an expert witness, thank you, in three  
14 cases. I am currently serving in the third, involving  
15 primarily the use of excessive force by staff in the Rikers  
16 Island Jail Complex in New York City.

17 Those are the principal cases I have served as an  
18 expert for the Court in a couple of cases, but I don't know  
19 if that is within the scope of your question.

20 Q. Thank you. Did you mention a Mississippi case in which  
21 you represented the -- testified on behalf of inmates?

22 A. Yes. That is particularly relevant to this case.

23 I testified for the plaintiff class as an expert in a  
24 case involving conditions on Death Row in the State of  
25 Mississippi. Yes, sir.

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1 Q. Have you done any consulting for the U.S. Department of  
2 Justice?

3 A. Yes, I have.

4 Q. Please describe that for the Court.

5 A. The United States Department of Justice conducts what  
6 are referred to as CRIPA investigations, civil rights of  
7 institutionalized persons act.

8 The Department of Justice special litigation specs of  
9 the civil rights division has employed me to serve as an  
10 expert in the course of their investigations under CRIPA of  
11 the Memphis, Tennessee jail; conditions in a jail in Nassau  
12 County, that investigation having been triggered of the  
13 murder of an inmate by several staff.

14 I have served as an expert for the Department of  
15 Justice in what I thought was a very interesting project,  
16 the then Attorney General Janet Reno was concerned about  
17 reports she was receiving about conditions in jails  
18 throughout the United States that are under contract with  
19 the Department of Justice in the form of immigration,  
20 naturalization services, it was not the U.S. Marshal of  
21 Bureau of Prisons itself and pursuant to those contracts  
22 were holding Federal prisoners for various periods of time  
23 and I served on a committee, the constituency of which did  
24 include the Department of Justice civil rights lawyers or  
25 division, and contributed what I could to the formation and

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1 ultimately the development of standards for the minimum core  
2 standards for detention to apply to those institutions in  
3 order for an agency of the Department of Justice to be able  
4 to enter into a contract for housing Federal prisoners.

5 I served as a consultant on a couple of occasions  
6 through the national institutes of corrections, once  
7 relating to matters in the Arkansas corrections system, once  
8 in relation to the New Mexico corrections system. That was  
9 before I became special master in New Mexico, and I was also  
10 a consultant for the national Institute of Corrections in  
11 the development of a manual referred to as the manual for  
12 special masters, I believe. It was basically a description  
13 of the phenomenon of the use of special masters which was  
14 fairly new at that point and making some suggestions as to  
15 what the appropriate role would or would not be for a  
16 special master.

17 Q. What was your, if I could lead you to this, what was  
18 your first contact with the Ohio department of  
19 Rehabilitation & Corrections?

20 A. When I was appointed as special master by Judge Young  
21 in the case involving conditions at Marion correctional  
22 institution.

23 Q. What was your --

24 THE WITNESS: Your Honor, could I have some water,  
25 please, if possible.

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1 I'm fine. Go ahead with your question.

2 BY MR. LANDES:

3 Q. What was your first work with the Ohio department of  
4 Rehabilitation & Corrections as a consultant?

5 A. As a consultant, my first involvement was that of a  
6 consultant to the department in connection with the 21 point  
7 agreement that was reached between the department and self  
8 appointed inmate leadership at Southern Ohio Correctional  
9 Facility at the time of the riot in that facility, the very  
10 serious riot that occurred in that facility in 1975, I  
11 believe.

12 Q. It was in the '90s, I believe?

13 A. I said '70? I meant '90. I'm sorry. '90.

14 My task was to in effect monitor at the department's  
15 request its performance, its compliance with the 21 points  
16 with which they had agreed with the defendants, and I did  
17 that, I wrote several reports, and at one point asked  
18 director Wilkinson to make available to me a committee of  
19 wardens, which interestingly included both then Warden  
20 Collins at Southern Ohio Correctional Facility and the  
21 warden at Mansfield, the then warden of Mansfield, and we  
22 made a number of recommendations, that group, with me, to  
23 the director, and essentially I concluded that the  
24 department had made a good faith effort and a by and large  
25 successful effort to achieve full compliance with all of the

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1 21 points. That was my first experience as a consultant.

2 Q. Okay. Let me go to this.

3 You attached to your report a resume, which we have  
4 attached and put in the record as Defendant's Exhibit F.  
5 Does that further explain your background and experience in  
6 this area?

7 A. Yes, sir, it does.

8 Q. And also with your report, did you list what you  
9 reviewed in order to base your opinions in this case?

10 A. I attached to my report an Exhibit B in which I listed  
11 all of the materials that I reviewed, rather than read  
12 those, unless you want me to, they consisted of opinions and  
13 prior related litigation, processes, procedures, projections  
14 about the operation of Death Row at the Ohio State  
15 Penitentiary, a number of motions and other documents  
16 submitted to the Court.

17 I reviewed a summary of Dr. Kupers' impressions based  
18 upon his review and discussions.

19 I looked at a substantial number of documents,  
20 correspondence, policies, procedures, all of which are  
21 listed at the conclusion of my report.

22 Q. Thank you, and we have attached that as Defendant's  
23 Exhibit G from your report.

24 Are these items typically used by experts in your field  
25 to form opinions concerning corrections practices?

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1 A. Yes, sir.

2 Q. And are these the matters that you reviewed in order to  
3 form your opinions in this case?

4 A. Yes. I should add to that. There are two sources that  
5 I mentioned in the report, and in fact the last thing I said  
6 in my report, because I knew I would probably make the  
7 mistake, any other document named or cited in the report,  
8 and I believe counsel assisted me by finding two documents  
9 that I didn't list.

10 I also visited both OSP and the Mansfield correctional  
11 institution in June, early June of this year, and I relied  
12 upon my impressions and information I received during the  
13 course -- thank you very much -- during the course of those  
14 visits.

15 Q. Is that taxed as costs, Your Honor?

16 THE COURT: Somebody owes him money.

17 MR. LANDES: I think you're right.

18 THE WITNESS: Thank you very much.

19 BY MR. LANDES:

20 Q. How does your work as a special master assist this  
21 Court in comparing the conditions for Death Row inmates,  
22 those at present and those as proposed at the Ohio State  
23 Penitentiary?

24 A. My work as a special master?

25 Q. Yes.

1 A. Well, I think in several ways. My work as special  
2 master has involved essentially evaluation of programs,  
3 security, and virtually all phases and facets in the  
4 operation of a correctional system or correctional  
5 institution.

6 I think in addition, my work as special master has  
7 exposed me to the very substantial extent in the process of  
8 change within a correctional system and within a  
9 correctional institution, the very purpose of the litigation  
10 cases in which I served as a special master was to bring  
11 about change, and indeed, I have heard the phrase "change of  
12 culture" that has certainly been an essential element of  
13 many of the cases, at least, in which I have served as a  
14 special master, so I think those are the insights that  
15 will -- that are of help to me in making my evaluation of  
16 the proposed transfer of death sentenced inmates from  
17 Mansfield to OSP.

18 Q. Have you also been present during all the testimony in  
19 this case thus far?

20 A. Yes, I have, and I have appreciated that opportunity  
21 and I want to again thank the Court. I had a problem with  
22 hearing, and I was very grateful to be allowed to hear the  
23 testimony more clearly by sitting in the jury box.

24 Q. Why do you stay here for the testimony?

25 A. To supplement my understandings of -- my understanding

1 of the facts and to hear from others with other  
 2 perspectives, to note points of agreement and disagreement,  
 3 and basically to learn more about the case and some of the  
 4 opinions that I will express today have certainly been  
 5 affected by what I have heard.

6 Q. I would like to go to those opinions now?

7 A. I'm sorry, sir?

8 Q. I would like to go to your opinions now in your report  
 9 and the first one had to do with a comparison between the  
 10 prospective conditions for Death Row at the Ohio State  
 11 Penitentiary and the conditions of Level 5 maximum security  
 12 inmates at the Ohio State Penitentiary.

13 Do you have an opinion concerning that?

14 A. Yes, sir.

15 Q. What is that?

16 A. My opinion is this, that the conditions that are  
 17 projected to be in place at the Ohio State prison -- and  
 18 your question went to Mansfield?

19 Q. No, it went to the Level 5 inmates at the Ohio State  
 20 Penitentiary.

21 A. I'm sorry. The conditions under which Death Row  
 22 prisoners will be confined at OSP will be enormously more  
 23 relaxed than those I witnessed and saw at earlier times, not  
 24 during my most recent inspection, in the Level 5 area.  
 25 There is a difference between day and night.

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1 Q. Did you in your report look at a comparison of  
 2 privileges between what has been described for Level 5  
 3 inmates and would you please turn, and I think you removed  
 4 the minder, let me get that, exhibit V as in Victor. That  
 5 would be Defendant's Exhibit V.

6 Would it be helpful if I put it on the screen, Your  
 7 Honor?

8 THE COURT: Yes. Look at the screen. He will  
 9 move them on the screen. It is easier than sorting through  
 10 the folder. Is the screen on in front of you.

11 A. Yes, sir. I see the exhibit.

12 Q. Okay. Does that assist you in explaining your  
 13 testimony to the Judge?

14 A. Yes. That is one of the documents I relied upon and  
 15 listed as having been relevant to the conclusions that I  
 16 reached.

17 Q. You looked at out of cell time. Why was that  
 18 significant to you?

19 A. Excuse me. I actually --

20 Q. I don't believe this was --

21 A. I want to be sure this is precisely --

22 Q. I don't believe you had this listed and had this  
 23 available. I believe we did this from your report in order  
 24 to illustrate your testimony. I don't want to mislead you?

25 A. Okay. I'm sorry, sir. Yes. I see.

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1 Q. Does this assist in describing your testimony?

2 A. Yes. It is a very brief summary of the opinions I have  
3 reached. I attempted to contrast the conditions that the  
4 District Court and the United States Supreme Court relied  
5 upon in the Austin case in reaching the conclusion that it  
6 did with respect to Level 5 --

7 MR. LYND: Your Honor, we have a concern with a  
8 summary of the expert's report prepared by the defendant's  
9 counsel.

10 THE COURT: Okay. Let me ask counsel to approach  
11 one second.

12 (Discussion had off the record.)

13 BY MR. LANDES:

14 Q. Did you find any of the prospective conditions for  
15 Death Row inmates at Ohio State Penitentiary to be less than  
16 those or more restrictive than those experienced by Level 5  
17 inmates at the Ohio State Penitentiary?

18 A. More restrictive? No.

19 Q. If you could please just mention briefly the out of  
20 cell time and the congregate activities that you found  
21 significantly different in comparing prospective conditions  
22 for Death Row at the Ohio State Penitentiary and what is  
23 experienced by Level 5 inmates?

24 A. I did not make a careful examination of what is  
25 happening with respect to Level 5 inmates at this time. My

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1 recollection is an hour perhaps a day out of cell for  
2 recreation, outdoor recreation in Level 5, but that's based  
3 upon a visit several years ago.

4 The prisoners, the Death Row prisoners upon their  
5 transfer, if that occurs, will have opportunity for as many  
6 as 35 hours a week of out of cell activity.

7 Q. As to the conditions for prospective, the prospective  
8 conditions for Death Row inmates at the Ohio State  
9 Penitentiary, would you please comment on your observations  
10 concerning any parole change by virtue of being transferred  
11 to the Ohio State Penitentiary, and any aspects of  
12 indefiniteness of stay.

13 What were your observations about those things?

14 A. Well, Death Row prisoners wherever they may be are not  
15 eligible for parole consideration. That is obvious. They  
16 may leave Death Row only as a result of commutation or a  
17 reduction in sentence or a reversal or execution. And I  
18 noted that length of stay is similarly out of the control of  
19 the Department Of Corrections and that the term of  
20 imprisonment on Death Row is a term that ends when the  
21 prisoner either obtains a commutation or a change of  
22 sentence or reversal of sentence or is executed.

23 Q. Given your experience with Death Row inmates and with  
24 corrections in general, what is your observation on the  
25 value of contact or semi-contact visitation for Death Row

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1 inmates?

2 A. I think it is important, and I probably should have  
3 mentioned that two of my cases, two of the cases in which I  
4 served as special master involved conditions on Death Row.  
5 The Texas case and the Georgia case. But interaction and  
6 socialization is obviously an important part of every human  
7 being's life.

8 Q. What did you note in your report concerning the number  
9 of visits typically experienced by Death Row inmates?

10 THE COURT: As to form, you shouldn't ask his  
11 report indicates. You can ask him directly.

12 BY MR. LANDES:

13 Q. What did you observe concerning the frequency of visits  
14 for Death Row inmates?

15 A. At Mansfield?

16 Q. Yes?

17 A. I observed that they were few in number. 56 prisoners  
18 received between 1 and 3 visits in the year 2004. 79  
19 prisoners received no visits during that year. And others  
20 received more, but the number of visits in which these men  
21 actually participated during 2004 was small.

22 Q. We have had heard a lot about culture in institutions  
23 and the ability to change culture.

24 What has been your observation and your experience  
25 concerning changing culture at an institution?

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1 A. Well, I am obviously borrowing when I say that I think  
2 a change of culture, change of attitude follows a change in  
3 practice.

4 You don't simply exhort people to do the right thing.  
5 All of my cases have involved efforts by departments of  
6 corrections and institutional corrections administrators to  
7 change the behavior of their staff in one way or another, or  
8 in a number of ways, and my experience is that you can have  
9 a remarkable and very positive change in the attitudes of  
10 staff after they begin behaving differently.

11 The best single example that I think I would use would  
12 be the change that I saw at the Georgia state prison. It  
13 was built in 1937, it was a typical old southern maximum  
14 security prison, and the philosophy of the prison was  
15 entirely punitive, there was no mental health program, the  
16 medical program was operated by a former inmate who was a  
17 physician who had done time there and who got a special  
18 license to practice only in that prison just to give you a  
19 flavor, and during the course of my work there, the staff,  
20 the administrators decided to establish a sheltered unit for  
21 inmates who were mildly retarded or who had a mental illness  
22 that was less than a very serious one.

23 These were people who needed to be protected in the  
24 sense that other inmates would take their commissary, they  
25 could be subject to physical violence by other inmates, and

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1 we -- existing security staff went into that unit by  
 2 assignment and through volunteering, and of course there  
 3 were mental health and other staff, program staff that were  
 4 part of that as well, and the attitudes of the staff  
 5 literally within weeks was simply astonishingly and  
 6 refreshingly changed because for the first time, they had an  
 7 opportunity to do something that they were really very, very  
 8 proud of, and they became very invested, and I can't believe  
 9 it, but that was in the '70s and that program is still  
 10 operating at that prison, I am told, and I think I have  
 11 never dealt with a more intractable group of line staff than  
 12 the officers particularly with whom I dealt at Georgia state  
 13 prison. I think there have been enormous changes in the  
 14 attitude of officials in the Texas Department Of  
 15 Corrections. It is still a pretty rough prison system,  
 16 but -- and of course I have seen enormous change here. When  
 17 I went to Marion correctional institution, every decent job  
 18 in the institution was assigned to a white inmate. And  
 19 African-American inmates were assigned to the lowest and  
 20 most menial jobs. The housing assignments were based on  
 21 race, discipline was based on race, everything was based on  
 22 race, and that is not true today. I have been there  
 23 recently and it could have been torn down and rebuilt from  
 24 scratch, it is such a different place inside. It has been  
 25 rebuilt in terms of its human dimensions.

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1 So change of attitude, change of behavior, change of  
 2 culture, if you will, I think that is what my career has  
 3 been about.  
 4 Q. Did you will use your experience and expertise in  
 5 making a comparison between the existing conditions for  
 6 Death Row at Mansfield and those planned at the Ohio State  
 7 Penitentiary?  
 8 A. Yes, I did.  
 9 Q. What was your opinion of those?  
 10 A. My overall opinion, as I stated in my report, was that  
 11 in all significant respects, the conditions at OSP that are  
 12 projected were the equivalent to or better than those  
 13 inmates are enjoying at Mansfield.  
 14 Q. I would like you to turn to Exhibit B as in bravo,  
 15 please, the Death Row privileges comparison chart?  
 16 A. What was the exhibit number?  
 17 Q. B as in BRAVO? Did you find the comparison chart to  
 18 be accurate as compared to what post orders are as man field  
 19 and what is planned at the penitentiary?  
 20 A. Accurate. It doesn't reflect all the plans for OSP but  
 21 generally accurate, yes. Accurate.  
 22 Q. You heard the testimony that inmates at one point had  
 23 been getting more time for recreation than the policy  
 24 allowed. What is the significance of that?  
 25 A. Well, the significance is that practice and policy are

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1 diverging at Mansfield, and while I'm pleased that the  
 2 inmates are having an opportunity I think to have roughly  
 3 about an hour and a half as opposed to about an hour of  
 4 recreation, it is fundamentally unsound to operate a  
 5 correctional facility in a way that is not consonant with  
 6 the written policies and procedures.

7 So in that respect, I would have to be critical, but my  
 8 understanding is -- and in that respect I suppose I might  
 9 have to --

10 Q. The privilege comparison chart does not list out of  
 11 cell time --

12 A. That's right.

13 Q. Is out of cell time important?

14 A. I'm important, sir?

15 Q. Is out of cell time important?

16 A. Terribly important, yes.

17 Q. Why is that?

18 A. Well, because out of cell time assuming that one is  
 19 referring to a single occupancy cell structure, out of cell  
 20 time is the time one has to mingle with other people, to  
 21 interact face-to-face, to exercise, to recreate, engage in  
 22 certain kinds of programming.

23 Q. Did you create a chart in your report concerning out of  
 24 cell time at Mansfield for a typical Death Row cell block  
 25 for general population?

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1 A. I think actually two. Two charts.

2 Q. I would turn your attention to what is mark Defendant's  
 3 Exhibit M which I show now in front of you, with some help.

4 A. Yes, sir.

5 Q. Is that a chart that you constructed?

6 A. Yes.

7 Q. And does that show the out of cell time for general  
 8 private Mansfield?

9 A. Yes, as required by policy.

10 Q. I appreciate that.

11 I show you now what's been marked exhibit L last in  
 12 Lima. Is that a chart that you constructed as to what is  
 13 planned at the Ohio State Penitentiary for a typical Death  
 14 Row cell block?

15 A. Yes.

16 Q. What was your observation concerning meals at Mansfield  
 17 for Death Row inmates, the manner in which they were taken?

18 A. My understanding is that in general, meals are served  
 19 to prisoners in their cells at Mansfield. The exception  
 20 being that if an inmate is in the midst of his recreation  
 21 period at the time that a meal is served he may eat that  
 22 meal out of his cell.

23 At the Mansfield facility, there is a warming area,  
 24 trays are prepared and delivered to inmates' cells, and that  
 25 would be true of almost all the inmates at any given time.

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1 Q. I would like to ask you about outdoor recreation at  
 2 Mansfield for the extended privilege, the 36 that we have  
 3 heard about. Is that an outdoor recreation plan that you  
 4 would recommend for the Ohio State Penitentiary for those  
 5 people?

6 A. Well, certainly the hours don't trouble me. If they  
 7 can be extended. And I believe that they are extended for  
 8 the extended privilege group.

9 I would be critical of the recreation yard itself while  
 10 I understand that it is, from the perspective of the  
 11 prisoners a better yard, it is also an unacceptably insecure  
 12 yard in my opinion.

13 Q. How so?

14 A. Because a, I believe a single chain link fence is the  
 15 perimeter, beyond which is a perimeter road which is used by  
 16 a patrol car, perimeter patrol car, and beyond that is  
 17 freedom in the woods. That would worry me a lot if I were  
 18 responsible for holding death sentenced prisoners.

19 Q. We have also heard descriptions of attorney visitation  
 20 at both Mansfield and at Ohio State Penitentiary.

21 What did you learn about the manner in which an inmate  
 22 is held during attorney visitation at Mansfield?

23 A. Well, that is an area in which my participation as a  
 24 viewer of these proceedings has been very helpful to me.

25 I was concerned by some of the testimony I heard about

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1 limitations, sound problems, for example at OSP, but the  
 2 Court I think has gotten only one complete explanation of  
 3 what the comparable or the comparison or contrast at  
 4 Mansfield should be.

5 It is true that Mansfield has spacious, relatively  
 6 spacious rooms with a conference table and chairs. It was,  
 7 I believe, the Defendant's witness and I'm sorry I forgot  
 8 his name, the Death Row lawyer --

9 Q. Stebbins?

10 A. Stebbins, Mr. Stebbins, who testified toward the end of  
 11 his testimony that during the meetings in these rooms, the  
 12 inmate is chained to the floor, he is in full shackles, leg  
 13 shackles, and handcuffed.

14 Now, that fact seems to me diminishes greatly the value  
 15 of the physical arrangement and what I am describing I  
 16 understand applies only to non extended privilege, that is  
 17 to say all but 36 prisoners at Mansfield.

18 I was so concerned about that that I asked Mr. Collins  
 19 for confirmation. He confirmed it. I went beyond that and  
 20 asked for confirmation from the prison, and Warden Bradshaw  
 21 confirmed that that was the case.

22 I had overlooked that in my evaluation.

23 MR. LYND: Your Honor, I believe that the witness  
 24 is going beyond the material contained in his report. The  
 25 conversation subsequent to that.

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1 THE COURT: I sustain it. There was other  
2 testimony on that issue. I don't know that this adds  
3 anything anyways.

4 MR. LANDES: He relied upon Mr. Stebbins, so I  
5 agree that that information is in the record already.

6 THE COURT: Okay.

7 BY MR. LANDES:

8 Q. How does the architecture at the Ohio State  
9 Penitentiary relate to the ability of corrections officials  
10 to unshackle that kind of inmate in a situation of attorney  
11 visitation?

12 A. Well, because of the nature of the attorney visiting,  
13 you're speaking of attorney visiting, sir?

14 Q. Yes.

15 A. Because of the nature of attorney visiting, there is,  
16 that is to say, the separation. There is no need to be  
17 concerned that a prisoner will attack someone during a  
18 visit. And in my opinion, there would be absolutely no  
19 security justification for shackling, chaining to a floor or  
20 placing in leg irons a prisoner who is using one of the  
21 semi-contact visiting booths that are planned for operation  
22 at OSP.

23 Q. You have heard concerns about attorney visitation at  
24 OSP and you have heard about the plans to attempt to address  
25 those concerns.

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1 What is your opinion of that plan?

2 A. Well, I'm not an engineer, but it is critically  
3 important that that problem be addressed in a proper way by  
4 someone that knows more about engineering than I do.

5 It is also in my opinion critical to address the  
6 testimony that I heard that there may be difficulties in  
7 testing inmates in connection with mitigation evidence at  
8 OSP. That doesn't require anything to be built. What it  
9 requires is the designation of an appropriate place.

10 MR. LYND: Again, Your Honor, we acquiesce in  
11 Mr. Nathan's being in the courtroom, but it seems to me that  
12 he should not be able to go beyond what he described in his  
13 report.

14 THE COURT: I thought he was just helping you. I  
15 thought he was just helping you.

16 MR. LYND: He was, Your Honor. But --

17 THE COURT: So you want to strike the testimony  
18 that gives you help?

19 MR. LYND: No. I would just ask that henceforth,  
20 he be cautioned on not to describe what --

21 THE COURT: Not to help you?

22 MR. LYND: You may help us all you wish,  
23 Mr. Nathan.

24 THE COURT: Usually Mr. Landes cautions him not to  
25 help you.

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1 MR. LYND: But in general, Your Honor, I think  
2 that it is not proper for Mr. Nathan to go beyond what he  
3 observed at the time that he prepared his report.

4 THE COURT: Why don't you keep him just strictly  
5 to the report. He is going to try to keep you to the area  
6 that you covered in your initial report.

7 THE WITNESS: I appreciate some direction, because  
8 it has been my understanding in other cases and here that  
9 the reason that I was in the courtroom was to listen and to  
10 react to any testimony that was relevant.

11 THE COURT: The question comes then under Rule 26,  
12 whether you have given a sufficient report that covers the  
13 area.

14 MR. LYND: That is something for you.

15 THE WITNESS: That is something for you to decide,  
16 obviously.

17 THE COURT: I'm going to take a lunchtime recess  
18 now and we'll try to get this to set up for 1:00. I'll ask  
19 counsel to approach for a second.

20 (Recess from 12:39 p.m. to 1:15 p.m.)

21 THE COURT: Would you state your name?

22 THE WITNESS: Jeanne S. Woodford.

23 JEANNE S. WOODFORD, being first duly sworn, was  
24 examined and testified as follows:

25 DIRECT EXAMINATION OF JEANNE S. WOODFORD

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1 BY MR. LANDES:

2 Q. Miss Woodford, what is your present position?

3 A. I'm the undersecretary for the California Department of  
4 Rehabilitation & Corrections.

5 Q. What is within the purview of the Department of  
6 Corrections and rehabilitation in California?

7 A. Adult corrections, juvenile justice, as well as the  
8 boards and commissions within the California Rehabilitation  
9 & Corrections.

10 Q. Is the Department of Corrections in fact a division in  
11 California of the California Department of Corrections and  
12 Rehabilitation?

13 A. Yes. Adult operations is a division.

14 Q. We previously marked your resume as Defendant's Exhibit  
15 T in the defense exhibits. I will ask you just a very few  
16 questions about them.

17 First of all you, you received a Bachelor's degree in  
18 1978, is that right?

19 A. Yes, that's correct.

20 Q. You got to be a corrections officer then at San Quentin  
21 starting in 1978?

22 A. Yes, that's correct.

23 Q. You worked your way up to warden of San Quentin, is  
24 that right?

25 A. Yes.

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1 Q. In between you had some contact with Death Row. Could  
2 you explain to the Court briefly what that was?

3 A. Well, I had contact with Death Row in a variety of  
4 assignments, as a correctional officer, I spent a little  
5 time on Death Row. But more precisely, I spent a great deal  
6 of time on Death Row as a correctional counselor one and  
7 correctional counselor two, having Death Row inmates in my  
8 case load in both of those positions.

9 Then as the litigation coordinator at San Quentin state  
10 prison I also had contact with Death Row for a variety of  
11 reasons, managing litigation filed by Death Row inmates as  
12 well as overseeing the consent decree that covered the  
13 conditions of confinement for Death Row inmates, male Death  
14 Row inmates in the State of California.

15 Q. Tell the Judge something about San Quentin. When was  
16 it built and what does it house?

17 A. Well, San Quentin was built in 1852 and of course it  
18 has had a variety of missions since it was originally built,  
19 but currently today it houses 612 Death Row inmates.

20 The original Death Row at San Quentin consisted of 68  
21 cells on the sixth floor or north block in a unit known as  
22 Death Row or North Hague. Because of the number of Death  
23 Row inmates obviously they have outgrown the original Death  
24 Row and they are now housed in two additional buildings add  
25 San Quentin the largest of which is east block, with 511

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1 cells, and the adjustment center that has 102 cells.

2 San Quentin also has two other missions. It is a Level  
3 II general population and it is also a northern reception  
4 center, receiving approximately 100 inmates a day.

5 Q. At one time was San Quentin the Supermax prison, so to  
6 speak, for the California?

7 A. Yes. When I started in 1978, San Quentin and fall so  
8 many state prison were the two prisons considered to be our  
9 Supermax. We housed our most violent on Fenn years in both  
10 of those pry since.

11 At San Quentin we also had 1500 security housing  
12 inmates confined in 1978.

13 Q. You were asked to volunteer your services to take a  
14 look at the plan for Death Row at the Ohio State  
15 Penitentiary and you were sent some documents. I'm going to  
16 try to Dick date what those are to speed up play a little  
17 bit here and I notice that you have many papers in front of  
18 you and you can confirm what it is that you looked at in  
19 preparation to give opinions to the Court in that regard.

20 You were given the depositions of inmates that were  
21 taken for this hearing. Is that right?

22 A. Yes, that's correct.

23 Q. You were given the deposition of Terry Collins.

24 A. Is Terry Collins one of the inmates?

25 Q. No. Terry Collins is the assistant director of the

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1 Ohio department of Rehabilitation & Corrections?

2 A. I don't have that document in front of me.

3 Q. Very good. You were given responses to requests for  
4 production of documents.

5 A. Yes, I was.

6 Q. And you were given the expert reports of Nathan,  
7 Metzner and Kupers?

8 A. Yes, that's correct.

9 Q. And you also had the opportunity to speak to Warden  
10 Houk at the Ohio State Penitentiary.

11 A. Yes, that's correct.

12 Q. You were also able to view a video of the Ohio State  
13 Penitentiary?

14 A. Yes.

15 Q. Is there anything else upon which you would base your  
16 opinions here today?

17 A. I also reviewed the declaration of Mr. Nathan. Did you  
18 cite that document?

19 Q. I called that an expert report. Yes. That's the same  
20 document.

21 A. Okay.

22 Q. Thank you. Based upon what you reviewed and what you  
23 know of Death Row in California, were you able to form an  
24 opinion as to whether the plan for Death Row inmates at the  
25 Ohio State Penitentiary presents an atypical and significant

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1 hardship for those Death Row inmates in making that move?

2 MR. LOBEL: Your Honor, I object. That's a legal  
3 conclusion.

4 THE COURT: Overruled.

5 A. Yes. I have formed an opinion. It is my belief that  
6 it does not pose a significant hardship on inmates of Ohio.

7 Q. Would you please contrast for the Court, first talk  
8 about how Death Row inmates are held in California under  
9 your watch as both warden of San Quentin, also as director  
10 of corrections in California, and now in your present job as  
11 undersecretary of your current department?

12 A. Well, the concern in California is that we have  
13 outgrown the original Death Row and the original Death Row  
14 was designed for the housing of Death Row inmates N the  
15 original Death Row, inmates were allowed out of cell  
16 activities both on the tier for six hours a day or on an  
17 exercise yard, on the roof of that facility.

18 When we outgrew the original Death Row and placed  
19 inmates in two other housing units our ability to provide  
20 that kind of program was greatly curtailed. For example, on  
21 north Hague, inmates are allowed to work out on the tier  
22 because of its designed, when we moved Death Row inmates to  
23 east block, because of its design, we don't have the ability  
24 to have inmates out working, there are many blind spots, it  
25 is an older facility, it was not designed for high risk,

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1 high security inmates.

2 The inmates in east block are crowded on six small  
3 exercise yards. We don't have the ability to provide the  
4 kind of out of cell time and program for those Death Row  
5 inmates who abide by the rules and do as we expected them,  
6 as we are able to in north Hague. That was designed for  
7 Death Row inmates.

8 Because of our concern about the security of their  
9 current housing, our inability to provide what we think is  
10 adequate program opportunity and the security of our staff  
11 and inmates, we have gone forward to build a new Death Row  
12 at San Quentin.

13 The money has been appropriated to move that project  
14 along and we are in the process of completing our EIR  
15 studies and hopefully will begin building that facility  
16 later this year.

17 Q. Are those environmental studies that you refer to?

18 A. Yes. I'm sorry. Environmental studies.

19 The new facility will be a high security Supermax  
20 facility, designed to be able to handle the high security  
21 needs of Death Row inmates, at the same time provide the  
22 safety and security for staff and inmates that will allow us  
23 to provide greater out of cell time and greater programs for  
24 Death Row inmates who are classified as meeting the  
25 requirements for those kind of programs.

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1 Q. Why is it sound correctional practice for you to build  
2 a Supermax facility to house Death Row inmates at San  
3 Quentin?

4 A. Well, it is sound correctional practice because Death  
5 Row inmates are always, should always be considered your  
6 highest security inmates because of their death sentence.

7 So you have the greater concern for escape, you have  
8 the greater concern for public safety. You want to be sure  
9 that you have a facility that is designed with an acceptable  
10 perimeter, that is escape proof because the risk to public  
11 safety should a Death Row inmate escape.

12 You also want a facility where there are not blind  
13 spots, where there is good staff observation of inmates when  
14 they are out of their cell, that there is sufficient control  
15 so that you can program Death Row inmates in an appropriate  
16 way.

17 Q. You mentioned programming of inmates. How does the  
18 architecture of a Supermax prison lend itself to programming  
19 of Death Row inmates?

20 A. Well, the only way that a correctional system should  
21 allow Death Row inmates out to work or to be involved in  
22 group activities or activities in the yard is in a prison  
23 that provides for the right perimeter, so that you don't  
24 have an escape risk, and provides for good observation by  
25 correctional staff to keep both staff and inmates safe.

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1 I think that that is really the only way that you can  
 2 insure that you have the kind of security you need to allow  
 3 Death Row inmates outside of their cells in small groups or  
 4 outside of their cell to share in meals or other activities.

5 Q. Why is it that Death Row is kept in such a secure  
 6 location, even though their conduct might be good on an  
 7 individual basis?

8 A. Well, because of their sentence. They are sentenced to  
 9 death, and the motivation for them to escape or to be  
 10 involved in activities that could lead to hostage taking is  
 11 certainly there, so you -- even though their behavior might  
 12 afford them or might allow you to give them greater program  
 13 opportunities, you want to be sure that you are doing that  
 14 in a facility that does not allow for escape, and in a  
 15 facility where there is just wonderful observation of  
 16 inmates at all times.

17 Q. Is it the predominant correctional practice to consider  
 18 Death Row a classification unto itself?

19 A. Yes. Death Row is really a classification unto itself.  
 20 While they meet have a max custody, it really is the  
 21 sentence that you need to pay attention to.

22 Death Row inmates, within that category you may have  
 23 inmates who abide by the rules, you may have inmates that do  
 24 not abide by the rules but you really need to focus on the  
 25 sentence in classifying Death Row inmates.

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1 Q. Given the current structure for housing Death Row in  
 2 California, what are the opportunities that they have for  
 3 out of cell time, jobs, and programming?

4 A. Well, it depends on their housing location. In the  
 5 original Death Row, they are allowed out of their cells six  
 6 hours a day, either out on the tier that was designed for  
 7 that or up on an exercise, small exercise yard on the roof  
 8 of north Hague. In that unit there are two units assigned  
 9 as barbers, there are two units assigned to clean the tier  
 10 and that really is about their only work opportunity.

11 In a new Supermax, the one that we are planning on  
 12 building, we are planning on having more inmates working  
 13 because the physical plant will allow us to do that. We  
 14 intend to have about 68 inmates with jobs when we move to  
 15 our new facility.

16 Q. You mentioned four jobs presently for Death Row  
 17 inmates. Did those rotate, so that other individuals have  
 18 the opportunity to do that?

19 A. That is not how we have done it in California.  
 20 Inmates who are assigned to those positions keep those  
 21 positions.

22 Q. Why is a job important for an inmate in an extended  
 23 stay like Death Row?

24 A. Well, it gives them the opportunity to earn at least in  
 25 California some wages, very small, but some wages.

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1 It also is an opportunity to be out of their cell and  
 2 it addresses issues like idleness. It gives inmates  
 3 something to look forward to. It really is what we refer to  
 4 as seamless security. The more activities you provide for  
 5 inmates the more motivated they are to abide by the rules  
 6 and it makes it safer for both staff and inmates so jobs are  
 7 very important when you talk about programming inmates.

8 Q. The materials that you reviewed concerning the plan for  
 9 Death Row at the Ohio State Penitentiary, what is your  
 10 opinion concerning the soundness of the correctional  
 11 practice of it?

12 A. In reviewing the plan, I think that it is very sound.  
 13 It certainly is providing the inmates 35 hours of out of  
 14 cell time, that is an improvement.

15 And it appears that it is going to be done in a  
 16 facility that is safe and allows you to do that.

17 Q. How does that compare with what you plan to do at San  
 18 Quentin once you get your building built?

19 A. Very similar programs. California is planning a  
 20 program very similar to what Ohio is planning.

21 Q. How about the physical plant, the building that you are  
 22 hoping to build for \$220 million, how does that compare to  
 23 where Death Row is being proposed to be taken now?

24 A. In Ohio?

25 Q. Yes.

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1 A. It is a similar design. The building proposed in  
 2 California will be a stacked design but when you look at the  
 3 interior of the building it is a very similar design, with  
 4 the open day rooms and the cell structure, they are  
 5 equivalent.

6 Q. Did you look in particular at the calculation for  
 7 outdoor recreation at the Ohio State Penitentiary at my  
 8 request?

9 A. Yes, I did. In looking at the outdoor recreation plan,  
 10 it appears that they have plans, five hours of outdoor  
 11 recreation for each inmate and they have planned for 250  
 12 inmates, which is, I believe, 50 above their current Death  
 13 Row population.

14 Q. And for the record that is Defendant's Exhibit I that  
 15 you looked at.

16 Did you find that to be calculated correctly and  
 17 pursuant to sound correctional practice?

18 A. Yes.

19 Q. I note that it allows for a hundred percent of inmates  
 20 to take outdoor recreation opportunities. What has been  
 21 your experience as to the amount of time -- the number of  
 22 inmates that say yes when they are asked to go outside?

23 A. Well, I have never seen it be a hundred percent.  
 24 Inmates will have visits, for example, or there is something  
 25 they want to watch on TV that day, there are reasons they

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1 want to spend in their sell, particularly Death Row inmates.  
 2 Death Row inmates spend a lot of time working on their cases  
 3 and they spend a lot more time inside their cell and choose  
 4 not to partake of exercise when asked.

5 Q. We have heard of experiences with both open cell fronts  
 6 and also closed cell fronts without strips around, metal  
 7 strips around the edges of the doors for what we here call  
 8 flinging, and I understand in California you call gassing,  
 9 and also the practice of fishing.

10 Would you explain to the Judge your experience in  
 11 California with those concerns?

12 A. Well, in California, we are always concerned about  
 13 gassing and fishing. Both of those.

14 At San Quentin where we currently house Death Row, we  
 15 have open cell fronts. We just were able to put solid cell  
 16 fronts in one of the units there, the adjustment center and  
 17 we really went forward with putting solid cell fronts in the  
 18 adjustment center because of the inmates of inmates throwing  
 19 feces and urine at staff. We had inmates attempt to spear  
 20 the staff. We had inmates go as far as to take the elastic  
 21 out of their underwear and use that to create a bow and  
 22 arrow and fling darts at our staff.

23 So modern day correctional practice is that you will  
 24 have solid cell fronts with high security inmates for the  
 25 protection of both staff and inmates because we've had, on

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1 Death Row, inmates attempt to spear other Death Row inmates  
 2 as they were under escort by correctional office staff.

3 So it makes it safer for both inmates and staff. It  
 4 also, solid cell front also reduces the noise within a unit  
 5 and it just provides for a more secure, appropriate  
 6 environment for both staff an inmates.

7 With fishing, it is our policy that we don't allow  
 8 inmates to fish. What inmates do with fishing is trade  
 9 often in illegal items, trying to pass drugs or attempting  
 10 to pass tobacco and other items not allowed in the housing  
 11 units, so it is not an appropriate way for inmates to pass  
 12 items to each other. When an inmate wants to give another  
 13 item to another inmate it should be given to a staff member  
 14 who should search the item and make a decision whether it  
 15 ought to be passed to the other inmate.

16 Q. I would like to ask you something about correctional  
 17 attitudes.

18 Do you have something called SHU inmates in California?

19 A. Security -- yes. Security Housing Unit inmates.

20 Q. When what does that equate to in other states? Is that  
 21 like a Supermax status or lockdown, severe lockdown status?

22 A. It is a lockdown status for the most part. Inmates  
 23 that are in security housing units in California are allowed  
 24 ten hours of outdoor exercise a week. These are our high  
 25 security inmates that have committed a felony or what we

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1 refer to as a SHU-able offense within a California prison,  
 2 they will be sent to security housing unit for a period of  
 3 time that is consistent with whatever behavior they were  
 4 involved in.

5 Q. At one time was San Quentin synonymous with SHU  
 6 inmates?

7 A. Yes. When I started in 1978, it was a Level 4  
 8 facility, meaning that on the general population, we had our  
 9 high end offenders and also security housing prison and  
 10 housed 1500 security housing unit inmates.

11 Q. What was your experience at San Quentin with the  
 12 ability of correction officers to change attitudes from an  
 13 all SHU environment to a changed mission at San Quentin?

14 A. Yes. In about 1986, the mission at San Quentin changed  
 15 from a security housing unit Level 4 mission to a general  
 16 population Level 2 reception center mission.

17 Level 2 is the lower end of the medium custody. The  
 18 staffing remained the same but it was my experience that  
 19 staff react to the way inmates behave. So while there was  
 20 an initial period of settling in, staff adjusted to the  
 21 mission and San Quentin became a programming prison that it  
 22 is today, known for its many programs, for its Level 2  
 23 general population, and the staff are very much a part of  
 24 that.

25 MR. LANDES: Thank you. That completes my direct

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1 examination.

2 THE COURT: Cross-examination.

3 CROSS-EXAMINATION

4 BY MR. LOBEL:

5 Q. Thank you for appearing, Miss Woodford. My name is  
 6 Jules Lobel. I am one of the attorneys for the plaintiff.

7 Now, you have never seen Ohio State Penitentiary or  
 8 Mansfield, is that correct? You have never visited? You  
 9 have never visited?

10 A. I have not.

11 Q. So you have not seen what is known as the barber shop  
 12 at OSP.

13 A. I have not.

14 Q. You have never seen that. Do you know how prisoners  
 15 are transported into the recreation facilities? Do they  
 16 walk there or do you know anything about how they get there?  
 17 From their cells. From their cells to the recreation  
 18 facility?

19 A. No.

20 Q. You don't know that. So you don't know they take an  
 21 elevator?

22 A. No.

23 Q. Okay. Did you talk to any of the prisoners at either  
 24 Ohio State Penitentiary or Mansfield?

25 A. No. I did not have the opportunity to do that.

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1 Q. Now, when you observed the plan that, when you looked  
2 at the plan the defendants had, would any of these  
3 structures, would any of the prisoners' comments, would any  
4 of that make any difference, or do you just look at the  
5 paper and that is all that you have to look at?

6 If you were a prison official deciding whether this  
7 plan would work, would you have to know the structure of the  
8 prison, how people are transported from one place to  
9 another, how the whole prison works?

10 A. It would be useful information to know how the whole  
11 prison works, yes.

12 Q. Thank you. You looked at a video. Was that a  
13 approximately four minute video, very short video of OSP and  
14 Mansfield?

15 A. It was not a video of Mansfield. It was a video of  
16 OSP, and I looked at it quite some time ago. I wanted to  
17 rereview it but was told not to, so I had a vague  
18 recollection of it but it was an empty building at Ohio  
19 State Penitentiary.

20 Q. Did Mr. LANDES tell you what that video was made for?  
21 Did he say the video was just for your review or did he say  
22 he was going to show that video to the Court also?

23 A. He didn't say. It was sent to me by Ohio State  
24 Penitentiary -- I believe Ohio State Penitentiary sent it to  
25 me. I'm not sure about that, though.

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1 Q. Was there any commentary on the video?

2 A. No.

3 Q. Did it show prisoners playing basketball at one point,  
4 do you remember?

5 A. No, it did not.

6 Q. Miss Woodford, at San Quentin I assume there are lawyer  
7 client visiting rooms in the Death Row unit. Is that  
8 correct?

9 A. We have a visiting room for Death Row that consists of  
10 visiting booths inside the room. We at one time had open  
11 visiting in that room, but we had a very unfortunate  
12 experience where a Death Row inmate stabbed another Death  
13 Row inmate during visiting so we have restructured that to  
14 booth visiting.

15 Q. Now, do those visiting rooms permit the attorney and  
16 their client to have confidential conversations which cannot  
17 be overheard by other inmates or by the guards?

18 A. They are designed to have some confidential  
19 conversations. It depends on the volume, how loud are  
20 speaking in those rooms. In the new prison design, of  
21 course, we are planning a much more appropriate visiting  
22 room.

23 Q. Which would be confidential? Which would allow for  
24 confidential conversations totally? Is that correct?

25 A. Yes.

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1 Q. Now, the current visiting rooms, do they, the booths,  
2 do they have a table in the middle of them, where the  
3 attorney and the client can sit down and converse?

4 A. Well, it depends on what par, who you are visiting in  
5 what part of the prison.

6 If an attorney is visiting a grade B inmate they are  
7 visiting through a glass on a non contact basis and they are  
8 allowed to pass material through a slot, and those are  
9 confidential rooms with an outer door, a solid outer door.

10 If they are visiting a grade A inmate, they are  
11 visiting in the booth as I described and there is a small  
12 table that you can set coffee and things on and that is in  
13 the east block visiting room.

14 They can currently schedule visits in the main visiting  
15 room, where there are larger tables, but I would describe it  
16 as the size of a kitchen table in the larger visiting booths  
17 and in the main visiting room.

18 Q. And just so the Court understands, grade A prisoners  
19 are those who are not disciplinary problems and grade B  
20 prisoners would be prisoners who are might send to the SHU  
21 if you -- if you didn't have them all at Death Row. Is that  
22 correct?

23 A. That's correct. Yes. That's correct.

24 Q. So grade A is sort of general population of Death Row.

25 A. The intent of the grade A classification is to treat

1 them as much like Level 4 general population inmates as  
2 possible.

3 Q. And do these visiting rooms for grade A people provide  
4 for contact visits? Is there any glass or anything between  
5 the attorney and the client?

6 A. No. They are actually locked into a booth with their  
7 client.

8 Q. But there is --

9 A. They are plexiglass booths.

10 Q. As between the client and the lawyer, there is no  
11 separation for grade A?

12 A. That's correct. For grade A, that's correct.

13 Q. And the lawyer can bring in food or soda into the  
14 visiting booth to share with the client?

15 A. The attorney can purchase from the vending machines in  
16 the visiting room and bring them into the booth and share  
17 with their client. That's correct.

18 Q. Now, as a system wide director, is it generally the  
19 case that visiting areas for lawyers and clients are  
20 confidential in the California system? Is that the typical  
21 arrangement?

22 A. That is our effort, to have them -- have them in  
23 confidential areas, but we in California still have some  
24 older prisons that were not designed. But that is our  
25 effort, yes.

1 Q. And but for the SHU people, are the lawyer/client  
2 visits generally contact visits in California?

3 A. Yes. That is correct, except for SHU inmates or grade  
4 B inmates on Death Row.

5 Q. And, now, this move to a new prison, I assume that's  
6 been a lengthy process. That's gone through a lengthy  
7 process.

8 A. Yes, that's true.

9 Q. Approximately how long has this been in the works?

10 A. Well, California has attempted to build a new Death Row  
11 probably for the last 20 years, but more currently, we  
12 started this effort about four years ago.

13 Q. Four years ago?

14 A. Four or five years ago.

15 Q. And did you consider a number of different sites for  
16 the new Death Row prison?

17 A. Over that 20-year period?

18 Q. Over either the 20 or the four-year period?

19 A. Well, we looked at -- yes. We looked at the entire  
20 state, but the penal code in California says that all male  
21 Death Row inmates will be sent to San Quentin state prison.

22 Q. But you looked at other possibilities. Isn't that  
23 correct?

24 A. Over the last 20 years we studied many possibilities,  
25 yes.

1 Q. And isn't it true that you concluded that there were  
2 only two real viable possibilities, one the prison at full  
3 some and the other the prison at San Quentin, there were  
4 only two real serious possibilities.

5 For example, you didn't consider pelican bay, did you?

6 A. I didn't know if the Department Of Corrections over the  
7 last 20 years did or not. I don't know the answer to that.  
8 I don't know that it would be correct to say that there is  
9 only two viable possibilities. Given the penal code, saying  
10 that all male Death Row inmates will be at San Quentin state  
11 prison, unless the penal code were changed, that really is  
12 the only option for us in California? But.

13 Q. But one possibility would have been to change the penal  
14 code, correct?

15 A. Well, that is a possibility, but that is not within my  
16 ability to do.

17 Q. Well, let me just ask that question and then I will be  
18 done with this.

19 Didn't you consider in considering other sites how  
20 difficult or easy it would be for lawyers to get to see  
21 Death Row prisoners at whatever site you built the prison?

22 A. We considered those issues, yes, in deciding where  
23 Death Row should be housed.

24 Q. And was that an important consideration?

25 A. Yes. I would say that that was an important

1 consideration.

2 Q. You say the mission of San Quentin changed in 1986.

3 A. About that time, yes.

4 Q. And when it changed, was -- could you describe the  
5 changes in the custody that prisoners experienced at San  
6 Quentin.

7 For example, were they -- in Level 2, are they  
8 segregated in their own cells?

9 A. Level two inmates are the lower end of medium custody  
10 so they are allowed out of their cell to go to work, school,  
11 vocational program, to visiting, yard activities, other  
12 recreational activities.

13 Q. So you changed the mission of San Quentin from a high  
14 security prison, the highest security prison, to a very low  
15 security prison or reasonably low security prison.

16 A. Well, it actually changed to being a -- part of the  
17 prison became a reception center and those are unclassified  
18 inmates and part of the prison became a Level 2 facility,  
19 which is the lower end of the medium custody facility.

20 Okay. So we ended up with about 2000 Level 2 general  
21 population inmates there, changing our mission from Level 4  
22 GP to Level 2 GP.

23 Q. And did you find when the guards went from the high  
24 security prison to the Level 2 prison, their attitudes and  
25 relationships with the prisoners changed?

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1 A. Yes. I believe that is true. I think that  
2 correctional officers react to the behavior of inmates, and  
3 so that when you have Level 2 general population inmates,  
4 lower and medium custody inmates who tend to be more  
5 respectful of staff, who tend to abide by the rules, it just  
6 changes the attitude of staff as they interact with those  
7 inmates.

8 Q. And you considered Death Row prisoners high -- the  
9 highest security prisoners, is that correct?

10 A. Yes, that's correct.

11 Q. Just one other question.

12 In California, is there something equivalent to maximum  
13 security which is not SHU, not minimum, but maximum security  
14 prison. Maximum security facility. Not the highest, but  
15 what is a Level III prison, maybe?

16 A. A Level III prison would be medium custody. When you  
17 say -- I think you are referring to what we refer to as our  
18 Level 4 prisons, which is our highest security in  
19 California, and so we have Level 4, general population  
20 inmates in those prisons and those might be inmates who have  
21 life without possibility of parole or life sentences or very  
22 lengthy sentences.

23 Or who may be placed there because of prior behavior  
24 that required higher security.

25 Q. For the people who are placed there simply because of

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1 their sentence, do their cell fronts also have solid steel?

2 A. In some of our -- in our newer prisons, yes. Not in  
3 all of them, no.

4 MR. LOBEL: Thank you. I have no further  
5 questions.

6 THE COURT: Is there any redirect?

7 MR. LANDES: There is not, Your Honor.

8 THE COURT: Thank you, ma'am.

9 THE WITNESS: Thank you.

10 THE COURT: We'll ask the defendant to recall your  
11 last witness.

12 MR. LANDES: Mr. Nathan, would you please retake  
13 the stand.

14 DIRECT EXAMINATION OF VINCE NATHAN (CONTINUED)

15 BY MR. LANDES:

16 Q. I have a couple more points to make concerning the  
17 comparison between Mansfield and Ohio State Penitentiary,  
18 and then I would like to move through the rest of your  
19 report and come plead your testimony.

20 One of the things I wanted to ask you about is you  
21 heard about the word "turmoil" as it applies to the Ohio  
22 State Penitentiary.

23 What was your observation and evaluation as to the  
24 cause of any turmoil at the Ohio State Penitentiary?

25 A. My recollection is the references to turmoil related to

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1 Mansfield.

2 Q. Okay.

3 A. But perhaps I'm mistaken.

4 Q. Well, Mr. Collins had mentioned that, for instance, the  
5 corrections officers staff had not been reduced because of  
6 what he saw was turmoil at the Ohio State Penitentiary.

7 What was your observation about that?

8 A. I understand. Well, I think, what I understood

9 Mr. Collins to say was the prison was the focus of

10 substantially -- substantial and important litigation, the  
11 outcome of which was not known at the time, and that he and  
12 the department simply made a decision to permit the status  
13 quo with respect to staffing to continue until that matter  
14 got resolved.

15 I think there has been confusion on the part of the  
16 department and other departments about what to do with  
17 maximum -- with these Supermax facilities that have been  
18 bill at great cost, and this hearing relates to Ohio's plan.  
19 That is my understanding of the use of the term "turmoil."

20 Q. What was your observation as to the effect if any of  
21 that turmoil on the relationship between inmates and staff  
22 at the Ohio State Penitentiary?

23 A. I really cannot respond to that. I looked primarily  
24 during the June visits at the areas that would be used for  
25 Death Row. I have indicated that I did not go into the

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1 Supermax portion of that prison. I saw at a distance, I  
 2 think it must have been -- I think they were Level 4-A  
 3 prisoners that were recreating, when I say at a distance, I  
 4 didn't speak to them, I didn't see about the staff that  
 5 would permit me to form an opinion.

6 I primarily looked at spaces that are being virtually  
 7 entirely limited my tour to spaces that are being planned to  
 8 be used for Death Row.

9 Q. Is it within your experience, sir, that in this kind of  
 10 turmoil as described by Mr. Collins that inmates choose  
 11 sides and feel as if they have to choose sides?

12 A. Not at OSP --

13 MR. LYND: Object.

14 THE COURT: I sustain the objection.

15 BY MR. LANDES:

16 Q. I would like to move to Mansfield. You have heard that  
 17 described as stable and peaceful. Would you agree with that  
 18 assessment based on your observations and evaluations?

19 A. No, I would not.

20 Q. Why not?

21 A. I think there have been too many extremely serious  
 22 incidents. Attempted escape, a riot, three suicides, a  
 23 handcuff key found on the prisoner's side of the visiting  
 24 area, and I sensed a great deal of tension at Mansfield when  
 25 I was there.

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1 Q. Was that key found in attorney/client visiting?

2 A. I do not recall, sir.

3 Q. The things that you mentioned, would that under sound  
 4 correctional practice justify fewer people congregating in  
 5 Death Row after those events, especially the escape attempt?

6 A. I think they would justify that.

7 Q. What was your evaluation of the impact on inmate safety  
 8 if they make the move from Mansfield to the Ohio State  
 9 Penitentiary?

10 A. It is my belief that the level of safety will be  
 11 enhanced by the move for staff and inmates.

12 Q. How so?

13 A. There is a more secure facility. As others have  
 14 described. More secure perimeter facility. The ability to  
 15 allow movement in adjacent day rooms.

16 I believe that the more -- the more the department can  
 17 allow inmates to do without taking any risk of escape, and  
 18 that is the standard for Death Row, any risk, the better the  
 19 inmates are going to live.

20 I think that the very structure of OSP is one that will  
 21 permit that, and I think frankly it is an ideal use of an  
 22 expensive facility that is now housing only about 50 of the  
 23 prisoners whom the legislature had in mind when it  
 24 authorized the construction of that prison.

25 Q. We have not heard a lot about this. I would like you

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1 to focus on just a couple of comparisons between Mansfield  
2 and Ohio State Penitentiary.

3 How did you compare the size and layout of the cells  
4 for Death Row at Mansfield and where they are going at the  
5 Ohio State Penitentiary?

6 A. My recollection of either the comparison chart or some  
7 other document that I reviewed indicated that the cell size  
8 was the same. I did not measure the sizes. The cells,  
9 rather.

10 Q. I appreciate that you can't give square footage on each  
11 of them. Did you look at the cells in both places?

12 A. I was in a cell at both places, yes.

13 Q. Did you have a basis of comparison as to how large or  
14 roomy or not roomy they felt comparatively?

15 A. I did not sense a difference, and I would describe them  
16 as reasonably adequate or better in terms of size.

17 Q. The doors at Mansfield and at the Ohio State  
18 Penitentiary are both solid front doors, aren't they?

19 A. That is correct.

20 Q. The Ohio State Penitentiary has strips around the  
21 outsides of the doors, as we've heard?

22 A. That is correct.

23 Q. Is there a correctional practice that justifies the use  
24 of those strips?

25 A. In my opinion, definitely.

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1 Q. What is that?

2 A. It is primarily to interdict a practice that  
3 unfortunately has become too common in American corrections  
4 which is the use of my opening to throw urine, feces, water,  
5 or anything else the inmates can get his hands on out of his  
6 cell.

7 And even though he may not be able to hit somebody,  
8 having that kind of substance in your hallway is not  
9 appropriate.

10 I also believe that anything, that any -- as several  
11 witnesses have, I agree with the proposition that any  
12 passage of any property of any form between inmates from  
13 cell to cell is a substantial security risk.

14 It can be a piece of paper or it can be a piece of  
15 paper with drugs.

16 Q. The conditions for Death Row inmates at the Ohio State  
17 Penitentiary are a projection or a plan.

18 How is that significant in the manner in which you have  
19 formed your opinions?

20 A. I'm sorry, sir? Give it to me again. I heard you. My  
21 mind went blank.

22 MR. LANDES: No. My witness has hearing aids, by  
23 the way --

24 THE WITNESS: I heard you.

25 Q. I'm not yelling at you on purpose, just so you know.

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1 A. I heard you.

2 Q. The conditions at the Ohio State Penitentiary for Death  
3 Row inmates are projections. They are a plan.

4 A. That is correct.

5 Q. How has that been significant in the manner in which  
6 you have made your comparisons and formed your opinions?

7 A. As I have stated, I hope clearly in my report, I have  
8 attempted to compare practice on the one hand with a plan or  
9 a proposal on the other. That is very difficult to do. It  
10 would be much easier, much more rational, it would have been  
11 in my opinion, from a correctional point of view, to have  
12 been able to make an evaluation of how the facility was  
13 running at OSP and how the facility, if that's the  
14 comparison, at Mansfield, but by definition, that's just not  
15 possible.

16 Q. Did you also compare the prospective conditions at the  
17 Ohio State Penitentiary with other jurisdictions with a  
18 Death Row?

19 A. Yes, I did.

20 Q. What were your findings?

21 MR. LYND: Your Honor, we object. We think the  
22 Court of Appeals in this case has made it clear that the  
23 appropriate comparison for determining atypicality and  
24 significant is comparing it with other institutions in the  
25 State of Ohio not with institutions in other states.

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1 MR. LANDES: There are two responses to that. One  
2 comes from your opinion Your Honor, which when determining  
3 Level 5 inmates you said they should be compared to  
4 similarly situated inmates and you picked, you did pick  
5 other inmates in Ohio, but the phrase was "similarly  
6 situated inmates." We only have one Death Row in Ohio.

7 Also, the U.S. Supreme Court when they made their  
8 opinion, their point of comparison was by any measure. They  
9 went through the ordinary incidents of prison life that are  
10 found at Level 5, got to those two items that are not, the  
11 indefiniteness of the stay, and the lack of parole  
12 possibilities, and they said by any measure, this would make  
13 it atypical and significant.

14 We believe it is important for the for the record  
15 to have this comparison.

16 THE COURT: I'll allow it. It is not indication  
17 that that is not necessarily going to be found to be the  
18 appropriate standard but I will allow the testimony.

19 BY MR. LANDES:

20 Q. The question is what were your observations.

21 A. Yes, sir. Give me just one moment, and I can move  
22 through this very quickly if you wish.

23 Let me say that the reason I included this section is  
24 because any, any important correctional decision should be  
25 laid against and measured against sound correctional

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1 practice, and I think that for that reason I'm delighted  
2 that the Court will hear me.

3 Q. Did you hear Dr. Kupers in fact make comparisons to  
4 Death Row in other areas?

5 A. Yes, as well as miss Woodford.

6 Anyway, what I did was to ask the -- ask the Department  
7 Of Corrections to work with me to develop a brief  
8 questionnaire about certain operational activities in every  
9 Death Row in the country. There are 39 states and the  
10 Federal Government which employ the death penalty.

11 That questionnaire, which I finalized, went to every  
12 jurisdiction with a death penalty, and we got responses  
13 from, I believe it was about 25. I'm not going to take the  
14 time to look specifically.

15 So it was a good response. And basically, if I -- if  
16 you wish, I will simply run through those observations.

17 Q. Let me just ask a couple of questions and I will lead  
18 you, for ease of use.

19 As to the jurisdictions that had 24 -- I'm sorry, 23  
20 hours or more of lockup on Death Row, that was eleven out of  
21 24 respondents?

22 A. Yes.

23 Q. And the Federal government has their Death Row in a  
24 Supermax or maximum Level 5 type area, is that it?

25 A. A maximum penitentiary at Terre Haute. They are not

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1 using the Supermax, which is in Colorado, for that purpose.

2 Q. I see. As to how common it was to have no congregate  
3 activities on Death Row, no congregate activities  
4 whatsoever, that was twelve out of 24 respondents.

5 A. That is correct.

6 Q. In summary, how do the prospective conditions for Death  
7 Row at the Ohio State Penitentiary compare with other  
8 jurisdictions?

9 A. There were only three jurisdictions in the country that  
10 had lock down periods as short as the lock down period will  
11 be at OSP, which will be 19 hours a day.

12 As you point out, the majority were 23. One was 22 and  
13 a half.

14 In other cases, for example, the use of night lights, a  
15 majority, I believe it was 16 jurisdictions, did not use  
16 night lights, but eight did.

17 There was no practice proposed at OSP that is not  
18 followed by a very significant number and in most cases  
19 significant number of other jurisdictions with death Ross,  
20 and in, I think the most important respects, the regimen  
21 prisoners will live under at OSP will be far more relaxed,  
22 liberal, and open than is common and accepted correctional  
23 practice in the United States.

24 That does not mean that what OSP is doing is wrong.  
25 They are simply above any reasonable definition of sound

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1 correctional practice.

2 Q. I would like to ask your observations concerning Dr.  
3 Kupers', his report and statements from the stand.

4 He had a concern about isolated confinement and defined  
5 that. Do you share his concern about isolated confinement  
6 as it applies to the plan for Death Row at the Ohio State  
7 Penitentiary?

8 A. Well, the thrust of the plan is obviously to reduce the  
9 amount of isolation. You had other witnesses who testified  
10 to the harmful effects of isolation with respect to certain  
11 groups of inmates, and I'm not in a position to take sides  
12 on that.

13 But the 35 hours a week of outside activity, which is  
14 to me a remarkable number for day one of a transfer, and I  
15 hope and I think others hope as well that our Death Row will  
16 prove to be manageable with even fewer restrictions, but  
17 that is something that the department will have to feel its  
18 way through to.

19 Does that answer your question?

20 Q. Yes. Thank you. What is your observation concerning  
21 his methodology in assuming that Death Row will become Level  
22 5?

23 A. I think it is incorrect, and I'm sorry, I think it is  
24 insulting.

25 Q. Why?

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1 A. Because I think that the people who are administering  
2 the Ohio Department Of Corrections are making what may be  
3 the most significant effort in the United States to, and  
4 it's been part of this litigation that has focused on that,  
5 to use a so-called Supermax prison in a constructive way, by  
6 mixing its mission and acknowledging that there should never  
7 be 500 or 550 people who require what Level 5 conditions  
8 are, and I think they should be encouraged to do so, and  
9 that's why I'm testifying on their behalf, because by  
10 definition, it is going to be used somehow.

11 MR. LYND: Your Honor, I wish to ask that if  
12 Mr. LANDES again refers to an alleged assumption by Terry  
13 Kupers, that putting someone at OSP means putting them on  
14 Level 5, that he give us some source for that statement.

15 THE COURT: That question wasn't helpful. I mean,  
16 it is not helpful. You can ask him on the same areas and  
17 I'll try to draw a conclusion as to which is more  
18 persuasive, but characterizing other witness' testimony is  
19 not very helpful.

20 MR. LANDES: I appreciate that Your Honor.

21 THE COURT: And I'm not sure you fairly  
22 characterized it. So I think you're better off just asking  
23 him his opinions, which, you know, he expressed.

24 MR. LANDES: I think the answer was better than  
25 the question.

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1 THE COURT: I'm not under oath, but if I had been  
2 under oath, I would have said that. So why don't you try to  
3 go on.

4 MR. LANDES: Thank you, Your Honor.

5 THE COURT: If you have any more questions.

6 BY MR. LANDES:

7 Q. You were asked to look at the transfer form, the notice  
8 of transfer that was given to the inmate?

9 A. Yes, sir.

10 Q. Do you find that to be within sound correctional  
11 practice?

12 A. I think it has a use. I have never seen a form like  
13 it, so there is nothing unsound about giving an inmate an  
14 opportunity to express his position.

15 I think it would be -- it can be a useful, and I hope  
16 will be a useful instrument.

17 Q. In what way?

18 A. Well, obviously, the central question to be asked about  
19 eligibility for housing on Death Row is what is the inmate's  
20 sentence, and I'm assuming that Ohio does not have any  
21 inmates in Mansfield on Death Row who are not death  
22 sentenced.

23 So for the majority of inmates, I assume the vast  
24 majority, the form will not produce any realistic likelihood  
25 of avoiding the transfer, but here are some of the kinds of

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1 issues that I can imagine inmates raising.

2 One, I went through my mental health screening and they  
3 are wrong. I want it to be looked at again. I have a  
4 medical condition that is not going to be able to be  
5 attended to at Youngstown. I'm going to -- I have an  
6 execution date in 30 days. Leave me alone. I have enough  
7 on my mind.

8 Individual circumstances that might warrant individual  
9 exceptions, that is really a rather remarkable thing that  
10 very few prisons or prison systems do, and I can't predict  
11 what the outcome is going to be but it seems to me that the  
12 development of the form reflects a good faith intent on the  
13 part of the department to listen to what it regards to be  
14 truly unusual and exceptional circumstances that might  
15 result in deciding, for example, to take an inmate to the  
16 correctional Medical Center, someplace else.

17 Q. I have a point I need to back up to and that is did you  
18 discover when you were at the Ohio State Penitentiary that  
19 the cells for these Death Row inmates will have conditioned  
20 air?

21 A. Yes. Cooled air and a return. So it is not correct,  
22 as Dr. Kupers testified, that the cells would be stuffy or  
23 hot. I was in a cell in June and it was very comfortable.

24 Q. And were you saying that they have both an air return,  
25 it has a complete system within each cell?

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1 A. Yes. There was an air conditioning vent pushing the  
2 air out and there was a return on the opposite wall taking  
3 air out of the cell.

4 MR. LANDES: That concludes my direct examination,  
5 Your Honor.

6 THE COURT: Thank you. Cross-examination.

7 CROSS-EXAMINATION

8 BY MR. LYND:

9 Q. Good afternoon, Professor Nathan.

10 A. Good afternoon, Mr. Lynd.

11 Q. I am a soft spoken Quaker, so should my voice drop  
12 below an appropriate level, please raise your hand and let  
13 me know.

14 A. Thank you. I have heard you very easily throughout the  
15 week. You are very clear.

16 Q. Good. The State's attorney initially asked you to make  
17 some comparisons between the conditions projected for  
18 prisoners who would transfer from ManCI to OSP and Level 5  
19 prisoners at OSP, correct?

20 A. No, sir.

21 Q. You yourself testified that the conditions projected  
22 for the ManCI transferees would be enormously more relaxed  
23 than present conditions for Level 5 prisoners at OSP.

24 A. That is true.

25 Q. You are aware, Professor Nathan, that the law of this

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1 case is that Level 4 prisoners, including Level 4-A  
2 prisoners at OSP, are confined in conditions of atypical and  
3 significant hardship.

4 A. Yes, sir.

5 Q. When you described your visits to OSP and to ManCI, and  
6 indicated that you had looked at spaces and that you could  
7 not respond to a question about inmate/staff relations, it  
8 made me wonder, with how many prisoners at OSP did you  
9 speak?

10 A. Other than statements of courtesy, none on this visit.

11 Q. And with how many prisoners on Death Row at ManCI did  
12 you speak?

13 A. None, because I thought it was inappropriate to do so.  
14 Or would have been inappropriate to do so.

15 Q. You stated just now, I believe, my notes have it in  
16 quotation marks, that in all significant respects, what is  
17 projected for transferees from Death Row would be superior  
18 to what they now experience at ManCI.

19 A. I believe that is not quite accurate. I think I said  
20 equal to or superior.

21 Q. In your report, Professor Nathan, did you not say that  
22 one significant advantage some ManCI condemned inmates  
23 currently enjoy is access to an open yard containing 21,216  
24 square feet of unencumbered recreation area?

25 A. I did, sir, and that is entirely consistent with my

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1 general finding that in general, conditions and out of cell  
2 activities will be substantially more liberal at OSP.

3 Q. And incidentally, Professor Nathan, in connection with  
4 your comment that you felt that the recreation yard near  
5 DR-6 was insecure --

6 A. Yes, sir.

7 Q. Are you aware that ManCI puts local control prisoners  
8 in that area on alternate days?

9 A. My recollection is based upon the information I got  
10 from staff, there are two caged areas -- I'm sorry -- there  
11 are two caged areas within that recreation area. I know  
12 those are used by some inmates. You may be correct that  
13 there are others who use the open area. I just do not  
14 recall.

15 Q. And with regard to attorney visits, I think you have  
16 conceded that your statement that attorney visits at OSP  
17 occur in a room with a table, that statement was incorrect?

18 A. I wrote a letter to counsel for the department, I  
19 believe about five days after my report was completed. I  
20 had made a mistake. I was thinking about the wrong prison,  
21 and I was very disappointed to learn that that didn't reach  
22 you until this hearing began, because it was intended to  
23 reach you. I think I pointed out my second mistake.

24 Your question related to OSP, correct?

25 Q. It related to what I believe was your statement --

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1 A. Yes.

2 Q. -- that in all significant respects, the conditions  
3 projected for OSP would be --

4 A. I just wanted to be sure that you were asking me,  
5 wouldn't I mistaken when I said that there was a table at  
6 OSP. And I was mistaken.

7 Q. Yes.

8 A. Okay. There is a table at Mansfield.

9 Q. And you do agree that there are strips around all the  
10 cell doors at OSP and not at ManCI?

11 A. And I do not regard that to be. I do, sir, and I do  
12 not regard that would be a diminution or significant  
13 diminution, because it is entirely warranted by sound  
14 security practice.

15 Q. I think the question was it not had to do with the  
16 degree of restriction in the two institutions, not whether a  
17 particular degree of restriction was warranted?

18 A. I don't think those can be separated, sir.

19 To the extent that the Mansfield cells allow an inmate  
20 to pour urine out of his cell, I don't think that is a  
21 privilege that ought to be repeated.

22 I have heard testimony that there can be communication.  
23 I have expressed my opinion on that matter. But I simply do  
24 not agree with you that a sound security related change in  
25 operations constitutes a diminution to the extent that it is

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1 keeping prisoners from doing things they shouldn't be doing.

2 Q. Now, at the end of your report and again in your  
3 testimony today, you touched on the issue of security.

4 A. I spoke about security, that's correct.

5 Q. You indicated, did you not, that in your view, there  
6 were significant security reasons for transferring Death Row  
7 prisoners from ManCI to OSP.

8 A. That is my opinion. Whether they led to the transfer,  
9 I don't know.

10 Q. Isn't it true, Professor Nathan, that Mr. Collins has  
11 said repeatedly, including in his testimony here, that the  
12 decision to move Death Row to OSP was based on financial,  
13 not security reasons?

14 A. That is his testimony, and my opinion is that in  
15 addition to that, there are sound security reasons to do so.

16 Q. But something that seems to me in contradiction between  
17 his testimony and yours is that he says that considering  
18 Death Row at ManCI as a whole, Death Row inmates have always  
19 been inmates who didn't get in trouble?

20 A. No, sir. His statement is correct. Most inmates on  
21 Death Row don't smuggle handcuff keys into the visiting  
22 area. Most inmates do not attack other inmates on Death  
23 Row. Most inmates do not engage in a riot on Death Row.

24 Most inmates do not commit suicide on Death Row. But  
25 some do. And when you tell me there has been a riot in

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1 Death Row, you have told me that there was an enormous break  
2 down of security with horrendous potential implications, and  
3 I think that is not inconsistent with the fact that most of  
4 the inmates get along just fine and do not tend to be  
5 disciplinary problems or to be assaulted, but there is a  
6 potential on Death Row among some inmates for whatever  
7 reason there are in my opinion several reasons, for conduct  
8 that is life threatening to staff and inmates.

9 Q. And for the particular individuals on Death Row whose  
10 misconduct or alleged misconduct is of the kind you  
11 describe --

12 A. Is or is not, sir?

13 Q. Is. There is an existing process, is there not, to  
14 give those individuals a security classification hearing and  
15 if the facts justify it, transfer them to Level 5 at OSP?

16 A. Yes, sir, but that's of little comfort if a riot  
17 results in the death of three or four people and then you  
18 are able to have your hearing and transfer the inmate.

19 Q. What riot that resulted in the death of three or four  
20 people?

21 A. Well, one at Lucasville, which was not Death Row  
22 related. I'm simply saying to you sir --

23 Q. It certainly wasn't Death Row related and the event  
24 that I think you refer to at ManCI involved the release of  
25 the officers involved in the first few moments of the

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1 disturbance?

2 A. That's true but you are missing my point. I'm simply  
3 saying that when you have a riot, you are only a step away  
4 from the kind of disaster that occurred at Lucasville in  
5 '93, I believe I said '95 earlier.

6 You don't get that close to disaster. Not on Death  
7 Row.

8 Q. Assuming that during the ten and a half years that  
9 Death Row at ManCI has existed there have been, as you  
10 suggest, whatever we wish to call significant incidents of  
11 misconduct, disturbance, even in this spring an attempted  
12 escape by two prisoners, it was curious to me that in saying  
13 that OSP would provide a more secure environment, you  
14 appeared to give no consideration to existing security  
15 problems at OSP.

16 A. You will have to tell me what you mean by "existing  
17 security problems."

18 Q. Let me do that, and actually, Plaintiff's Exhibit for  
19 identification 14, which is not admitted into evidence, is  
20 an attempted chronology of such incidents.

21 A. I don't have that.

22 Q. I would be happy to put it on the screen if I can make  
23 the machinery work.

24 MR. LANDES: Your Honor, we would object to the  
25 use of this exhibit. It is typed, I believe, by the Lynds.

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1 It says violence at the Ohio State penitentiary, partial  
2 listing, and gives some descriptions of fights and there is  
3 no -- there is no information backing it up. It doesn't  
4 qualify as a Rule 1000 summary. It is not based upon  
5 testimony or any facts in evidence.

6 THE COURT: It is not in itself being offered. I  
7 think he can ask the questions about the incidents to test  
8 whether the opinions are reliable. I don't think the  
9 exhibit is going to be admissible. But he can ask about  
10 something.

11 MR. LYND: We have already agreed not to offer it,  
12 Your Honor.

13 THE COURT: So I will overrule the objection. You  
14 can ask him about the incidents and if this helps direct his  
15 attention to them.

16 BY MR. LYND:

17 Q. So Professor Nathan, directing your attention to what  
18 you see on the screen, the first four entries concern what  
19 appear to have been incidents of interracial violence  
20 between prisoners during the months of April, May, and June,  
21 2005.

22 A. That is correct, sir.

23 Q. Were you told anything about these incidents?

24 MR. LANDES: Your Honor, we object. We don't know  
25 that there were incidents.

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1 THE COURT: He can ask him about them. Go ahead.  
2 Do you know anything about these?

3 THE WITNESS: I'm sorry, sir?

4 THE COURT: Do you know anything about these, or  
5 were you told anything about them?

6 THE WITNESS: Not specifically. I'm aware that  
7 there was a precedent to the change in recreation schedule  
8 for, I believe it is Level 4-B. I'm not aware of the  
9 specific incidents, no.

10 BY MR. LYND:

11 Q. So Professor Nathan, you are then aware of the fact  
12 that as a result of these incidents, early in June, there  
13 was a prohibition of congregate recreation for the more than  
14 100 prisoners on Level 4-B and the prisoners on Level 5-A.

15 A. I was told, and I have heard this week that there was  
16 significant change and diminution in the recreation program  
17 because of interracial tension and violence. Yes, sir.

18 Q. Thank you. And you are aware that as we stand here  
19 this afternoon, almost three months later, that prohibition  
20 on congregate recreation is apparently still in force.

21 A. That is the testimony I have heard, sir.

22 Q. Are you also aware since you mentioned suicides in your  
23 discussion of security at ManCI that there have been four  
24 serious suicide attempts in the months of July and August,  
25 2005?

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1 A. No, I did not know that. I know there have been  
2 successful suicides during the early years of the  
3 institution but I was not aware of the suicide attempts that  
4 are on this piece of paper.

5 Q. And that with regard to relations of staff and inmates,  
6 a matter which you said you were not able to look into when  
7 you were at OSP, the description next to the bottom on  
8 Plaintiff's Exhibit for identification 14 contains a  
9 description of facts which if true I think would be  
10 disturbing to any of us, don't you agree?

11 I'm talking about the sentences having to do with  
12 prisoner Hamilton, the allegation that he was found in a  
13 hallway at OSP, cuffed behind the back in a pool of his own  
14 blood?

15 A. Well, I have to answer that with a little bit of  
16 detail. I'm not going to extend it unnecessarily.

17 Obviously, any person is disturbed to read that  
18 description. One, it is an allegation, and two, it by no  
19 means leads to a fair inference that there is a pattern and  
20 practice of excessive force at a facility.

21 Unfortunately, there are officers who break rules, and  
22 sometimes they break rules that are intended to control an  
23 officer's response, and to limit use of force to legitimate  
24 use of force.

25 Now, the fact that an inmate has stitches or the lying

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1 on the floor in a pool of blood tells me nothing because if  
2 he hadn't, if he was armed, was attempting to -- it tells me  
3 I have an incident that I need to investigate, of course,  
4 but it doesn't tell me that the officer was culpable because  
5 if the inmate had a lethal weapon, for example, that's about  
6 where he belongs.

7 Q. I was interested in your discussion --

8 THE COURT: Let me just ask, because I had a case,  
9 isn't the rule that there is -- it is almost by definition  
10 excess force if someone is handcuffed behind their backs?

11 THE WITNESS: If all of that is true, yes. That  
12 is a disturbing incident and it needs to be investigated  
13 thoroughly and quickly. And if you are asking me, sir, do I  
14 suspect, I mean, I would go into that investigation  
15 recognizing the unusual circumstances, but again, we need to  
16 know -- there are cases, sir, in which some force against a  
17 restrained prisoner may be appropriate. They are extremely  
18 unusual. Extremely unusual. And certainly this doesn't  
19 describe one. To the extent that this is true, it is prima  
20 facie inappropriate.

21 I didn't mean to imply the contrary.

22 BY MR. LYND:

23 Q. Excuse me for interrupting.

24 A. You didn't.

25 Q. Professor Nathan, with regard to your interesting words

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1 about culture change, for example, in Georgia, we're on  
2 common ground, I think, that of the 242 correctional  
3 officers presently at OSP, 89, I'm tempted to say only 89  
4 but I will say 89 have prior experience in other penal  
5 institutions, and a much larger number, 153, are doing their  
6 first prison work at OSP.

7 In view of this, do you think it is appropriate for  
8 Warden Houk to have said, as he did the other day, that no  
9 training is necessary for these officers to prepare them for  
10 dealing with the special needs of Death Row prisoners?  
11 A. Training is somewhat of a term of art, and I can only  
12 tell you what I understood Mr. Houk, Warden Houk's response  
13 to be.

14 These prisoners under Ohio practices have been exposed  
15 to a substantial, perhaps six weeks or more of amount of  
16 preservice training and to annual retraining, like all  
17 officers in the State of Ohio.

18 So of course we need trained officers in any prison.

19 I believe that the appropriate word would be  
20 orientation. There is -- if you are going to handcuff a  
21 Death Row inmate, you need to know how to handcuff a person.  
22 If you are going to escort a Death Row inmate, you have to  
23 know how to escort a person, and by and large, many of these  
24 staff to the extent they have been working on high security  
25 units are accustomed to dealing with high security inmates.

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1 Would I orient my staff to some of the special problems  
 2 that Death Row inmates will present, emotional problems,  
 3 problems that require human understanding? Yes, but I think  
 4 I would agree with Warden Houk. I would not describe that  
 5 as training. And it would be ongoing. It is the kind of  
 6 thing that needs -- that needs to be reinforced through  
 7 leadership and through modeling and mentoring, but it is not  
 8 what those of us who work heavily in corrections think of as  
 9 classroom training.

10 I don't think we need a syllabus. I don't think we  
 11 need classroom training. I don't think we need physical  
 12 contact training. That is what I think of as training. But  
 13 yes, I think they just -- just as they are -- well, that's  
 14 enough.

15 Q. I'm sorry. What was that?

16 A. That's enough, I said.

17 Q. What was the last sentence?

18 A. I think that's enough. I think the kind of orientation  
 19 that I have described would be appropriate.

20 Q. Now, you were shown the transfer form that the  
 21 department proposes to use for folks on Death Row at ManCI,  
 22 correct?

23 A. That is correct, sir.

24 Q. And you indicated some interesting uses that form might  
 25 have.

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1 A. Possible.

2 Q. But so that we're clear, it is without question that  
 3 the level of due process provided by that form is less than  
 4 that required for inmates proposed to be transferred to OSP  
 5 under present rulings of this Court, the Court of Appeals,  
 6 and the Supreme Court?

7 MR. LANDES: Your Honor, I will object.

8 THE COURT: I think that's a legal conclusion and  
 9 I'll sustain the objection.

10 MR. LYND: Although I am questioning a law  
 11 professor, Your Honor.

12 THE COURT: Why don't you go on to another  
 13 question.

14 MR. LYND: All right. I will.

15 BY MR. LYND:

16 Q. There were two comments in your report, Professor  
 17 Nathan, that I found puzzling and disturbing. The first had  
 18 to do with the fact that plaintiffs were seeking an  
 19 injunction. And as I understood your comment, it would be  
 20 far preferable to let the transfers proceed and three or six  
 21 months down the road evaluate how they were working.

22 Do I understand you?

23 A. It would certainly be preferable from a correctional  
 24 point of view, and I believe it would be a matter of legal  
 25 efficiency. But yes, that's my opinion.

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1 Q. Well, here is what I want to ask. Suppose six months  
2 down the road, despite everyone's good intentions, it were  
3 found that this project had disastrously miscarried and was  
4 obviously inappropriate.

5 Are you seriously suggesting that Death Row as it now  
6 exists could be recreated, that officers could be called  
7 back to their present work from all over Ohio?

8 A. The answer to that is of course, you can always restaff  
9 a prison, but your question is going to a much more  
10 fundamental question, a much more fundamental issue that has  
11 confused me since my original entry into the case.

12 The evidence I have heard is evidence that is going to  
13 conditions of confinement.

14 I don't understand what kind of a hearing will cure the  
15 problems, what kind of process will cure the problems.

16 It is either -- it seems to me it is either an  
17 appropriate move or it is not but the ultimate question is  
18 are you on Death Row. Are you a death sentenced prisoners.

19 And the fact that you have or have not been a bad or good  
20 inmate, I just don't see that as -- I don't understand it.

21 I just -- I have not understood it. Yes, the process is  
22 very different and more limited and it seems to be tailored  
23 to the fact that you are dealing with a very different group  
24 of people that are not being transferred because of

25 behavioral problems in other institutions. Death Row is

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1 different.

2 Q. But Professor Nathan, isn't it is case that when you  
3 testified in the Parchman penitentiary case to which you  
4 have referred, Russell versus Johnson, you said explicitly  
5 that you favor a system that would distinguish between the  
6 level of security risk presented by different prisoners on  
7 Death Row.

8 A. Within Death Row, sir. Yes. I personally, though they  
9 are not without problems, favor a differentiation among  
10 Death Row prisoners based upon behavior. That would not  
11 extend to differentiation with respect to their unit or  
12 their facility of assignment. It might very well affect  
13 their housing unit or pod, and their level of privileges.

14 Now, whether -- apparently, when I wrote my report I  
15 understood that Ohio has sort of decided to put that to one  
16 side. The evidence that I have heard tells me that there is  
17 going to be an extended privilege unit at OSP, and I applaud  
18 that and I hope some day that conditions are such that  
19 inmates who behave themselves can lead as normal a life as a  
20 human being can under the very difficult circumstances these  
21 men face.

22 Q. And of course you remember your extended monitor ship  
23 in the Texas case that you mentioned.

24 A. I do, sir.

25 Q. And isn't it true that a system was set up in Texas,

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1 successful for many years, in which the Death Row population  
2 was separated as apparently as is also the case in  
3 California be security risk, and that group of prisoners who  
4 were felt to represent a smaller security risk had in fact  
5 an active work program and a variety of privileges?

6 A. They lived in separate housing units. They were at the  
7 same prison.

8 Q. I understand?

9 A. And that is what I'm saying. Of course, yes, if you  
10 are going to differentiate, for example, privilege levels,  
11 for example, by anything, it is unwise to mix prisoners who  
12 can take advantage of that with those who cannot in the same  
13 housing unit. You are simply teasing the others.

14 But what I'm saying is that yes, within the confines of  
15 OSP, I think the warden and the directors' office can  
16 develop a privilege level system, if that is what they  
17 choose to do, and if you are asking me do I think it is a  
18 good idea, yes, and was that my testimony in Mississippi,  
19 yes.

20 Q. But that's not exactly my question.

21 A. I'm sorry. What is?

22 Q. My question is if it is appropriate to sort people out  
23 in that way when they get off the bus, why should those  
24 prisoners not receive before they get on the bus the kind of  
25 individualized assessment of the security risk that each

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1 presents, which we have struggled to create over four and a  
2 half years in this litigation?

3 A. I have a couple of answers to that. In the first  
4 place, security risk is not a table and entirely predictable  
5 factor and I think that may be particularly true in a Death  
6 Row setting.

7 So that one wants to be cautious about the level of  
8 security that is imposed on even the least restricted  
9 program for Death Row prisoners because you simply have no  
10 margin of error. You may not -- you cannot allow a single  
11 escape. You cannot allow these incidents to occur. And I  
12 do not understand why inmates who are, quote, better behaved  
13 on Death Row should be out of cell for seven hours rather  
14 than 35. I don't understand why they shouldn't have  
15 congregate dining. I don't understand why they should be  
16 chained to the floor when they visit. Is that a level  
17 system?

18 Q. And I don't understand why they should not be able to  
19 remain at Mansfield if that is their preference.

20 A. I will answer that very directly. Prisoners simply  
21 don't have control over that question. I mean, if I were to  
22 go to prison, I would have some distinct preferences about  
23 where to be. I would want to be close to my family, I would  
24 want to be in a modern rather than -- there are lots of  
25 preferences but the primary duty of the department is to

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1 place prisoners where it wants to, so long as it is placing  
2 them in constitutional and appropriate conditions.

3 Q. Unless --

4 A. And I think splitting Death Row is a very difficult  
5 proposition to deal with.

6 Q. Unless that authority to transfer and place prisoners  
7 is restricted by a finding of the unanimous Supreme Court of  
8 the United States that the prison to which these persons are  
9 to be sent gives rise to a constitutional right to avoid  
10 placement there?

11 A. With all due respect, and I have read the opinion --

12 THE COURT: This is not helping me at all. Go on  
13 and ask another question in some other way.

14 MR. LYND: I will, Your Honor.

15 BY MR. LYND:

16 Q. Did I read your survey of other states correctly to say  
17 only six of 39 states, to your knowledge, hold Death Row  
18 prisoners in Supermax prisons?

19 A. Rather than take the time, I'm assuming -- or if you  
20 wish to give me a page reference I can --

21 Q. Your report at 26-27?

22 A. That would be helpful. We can move along.

23 I'm sorry. What was your question again, please.

24 THE COURT: Among the States surveyed, did only 6  
25 of the 39 states hold Death Row inmates in a Supermax

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1 prison?

2 THE WITNESS: Thank you, Your Honor.

3 A. I'm sorry. You said page 26 and 27?

4 Q. Um-hmm. 6 states reported that they hold death  
5 sentenced prisoners in Supermaxium security?

6 A. I wonder if we have a pagination problem.

7 If that's what you are reading. You are correct.

8 Q. I will put it on the screen I am I'm sorry?

9 A. They describe their facilities at Supermax. That would  
10 probably be helpful, because I think there may be a --

11 Q. Here it comes. Here it comes.

12 A. Okay. Yes, sir. Six states reported they hold death  
13 sentenced prisoners in, quote, Supermaximum, and I list the  
14 States.

15 Q. And nine of the States you surveyed, including  
16 California, permit Death Row prisoners to have contact  
17 visits?

18 A. Yes. Again I'm not seeing that on the screen in front  
19 of me, but I assume you would not mislead me.

20 Q. One last question, Professor Nathan. In your report,  
21 you indicate that in your opinion, plaintiffs in this  
22 lawsuit are accusing the State of Ohio of lying. You refer  
23 on page nine of your report to plaintiffs unsubstantiated  
24 belief that defendants are lying to the Court. Correct?

25 A. That is correct, sir.

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1 Q. Is there some pleading, some explicit statement, some  
2 piece of paper which enables you to say that?

3 A. A prediction, which I have seen in the depositions I  
4 relied upon from your clients, the testimony here, that the  
5 department does not intend to do what it is promising the  
6 Court to do is a lie and that's what I have heard.

7 Q. Does not intend or will not in fact be able to,  
8 Professor Nathan?

9 A. Well, and if that -- assuming that you are correct, if  
10 that level of knowledge is obvious, then the line between  
11 that and a lie is a very thin one. Terry Collins knows what  
12 he can and cannot do.

13 Q. I wish I could agree. Let me give you an example, and  
14 I'm almost at an end, Your Honor.

15 When Death Row prisoners were moved from SOCF to ManCI,  
16 it was their understanding as they have testified that they  
17 had been promised contact visits and a large outside  
18 recreation yard, like the yard at SOCF, correct?

19 A. That's my understanding, yes, sir.

20 Q. It's my understanding that two or three months after  
21 they arrived at ManCI, Warden Dennis Baker, who had been a  
22 part of that promise-making, was for entirely different  
23 reasons removed as warden.

24 A. Yes, sir. What do you mean, different reasons?  
25 Different from what?

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1 Q. Reasons that had nothing to do with the transfer.

2 A. Absolutely.

3 Q. And you yourself say in your report that penological  
4 reality is that things sometimes work out differently?

5 A. Yes, sir.

6 Q. So I'm wondering, would you want to retract your charge  
7 that plaintiffs are accusing the State of Ohio of lying?

8 A. No.

9 Q. You would not.

10 MR. LYND: I have no further questions.

11 THE COURT: Is there any redirect?

12 MR. LANDES: No, Your Honor.

13 THE COURT: Thank you. Do you have any other  
14 witnesses?

15 MR. LANDES: We have one 22 minute videotape. By  
16 virtue of agreement with plaintiffs we have agreed to allow  
17 the Court and to just offer it. It is already filed. His  
18 name is Joe Wilhelm. He is the witness. And rather than  
19 play it and take up the Court's time, the Court has it  
20 available.

21 THE COURT: Is there a transcript of it?

22 MR. LANDES: There is. The transcript has been  
23 filed with the Court.

24 THE COURT: Okay. Thank you.

25 MR. LANDES: We have exhibits and then we may

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1 rest.

2 THE COURT: Do you move the admission of any  
3 exhibits?

4 MR. LANDES: Thank you, Your Honor.

5 THE COURT: What exhibits do you move the  
6 admission of?

7 MR. LANDES: We move A, B, D, E, F, G, I, L, M, N,  
8 O, P, Q, R -- and by R I mean an appropriate representation  
9 of R, that was the lexsan screen model -- T, U, Y. That's  
10 it, Your Honor.

11 THE COURT: Do you object to any of those?

12 MR. LYND: Yes, Your Honor. We open to first of  
13 all Exhibit B.

14 THE COURT: Just give me the list of the ones you  
15 object to.

16 MR. LYND: B, N, O, P, and V as in very.

17 THE COURT: V was not offered.

18 MR. LANDES: That's correct.

19 MR. LYND: Good.

20 THE COURT: So without objection, the Court will  
21 receive exhibits A, C, D, E, F, G, I, L, M, Q, R, T, U, and  
22 Y.

23 What's the grounds for objecting to B?

24 MR. LYND: Your Honor, B is identified in the  
25 table of contents for defendants' exhibits and it was also

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1 identified by counsel in his questioning as a draft later  
2 than the draft of May 11, which is --

3 THE COURT: You mean earlier than May 11?

4 MR. LYND: No. They identified this as a later  
5 draft, and my point is that the date on the exhibit is  
6 April, not later than May 11, and that without that  
7 confusion having been clarified, the exhibit should not be  
8 admitted.

9 THE COURT: I'll receive B. I think it goes more  
10 to weight than to admissibility.

11  
12 MR. LYND: N, O, and P Your Honor have to do with  
13 the fact that these were post orders, Professor Nathan  
14 relied on them in his report, and yet we saw them for the  
15 first time when we walked in to the courtroom.

16 THE COURT: I'll sustain the objection to N, O and  
17 P on the grounds that they were not provided in compliance  
18 with rule 26. With that, do you rose your case.

19 MR. LANDES: Yes, Your Honor, may I comment and NO  
20 and P for the record.

21 We moved for a protective order when we made the  
22 submission in response to requests for production from  
23 plaintiff, we made clear that we were holding back the post  
24 orders until the protective order was ruled upon.

25 The protective order was never ruled upon.

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1 Notwithstanding that, we went ahead and gave them the post  
 2 orders at the beginning of the case, the very beginning of  
 3 the case. We still don't have a ruling on the protective  
 4 order. We think for security reasons we should have one.

5 THE COURT: Just by way of explanation, in the  
 6 flow of paper I had not seen the motion, but beyond that, I  
 7 still think that the disclosure of them at this late date,  
 8 you know, there is an obligation to respond to discovery,  
 9 and you really need -- should have come to the Court,  
 10 somebody should have come to the Court and more specifically  
 11 identified the issue.

12 But in any case I find that it wasn't produced  
 13 within times fair to the opposing party. So with that  
 14 understanding, you rest. Do you have anything else?

15 MR. LYND: Yes, Your Honor.

16 THE COURT: What do you think you need that is  
 17 worth the time? The case is -- I would indicate that I  
 18 understand the case, I believe.

19 MR. LYND: Well, let me just explain the two  
 20 rebuttal witnesses we have in mind and of course it is up to  
 21 you.

22 There has been reference to the culture --

23 THE COURT: Who are the names of the two  
 24 witnesses?

25 MR. LYND: The first witness would be Dr. Ann

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1 Haddad, the physician at the Ohio State Penitentiary. The  
 2 issue as to which we hoped Dr. Haddad can testify is that  
 3 there has been discussion of a culture of punishment or  
 4 culture of violence at OSP, whether that institution is  
 5 really prepared to receive 170 prisoners on Death Row. Dr.  
 6 Haddad had personal knowledge --

7 THE COURT: Who is the other one.

8 MR. LYND: The other is Jason Rob, who is  
 9 responsive to the issue, who was filed documents on the  
 10 issue of the inadequate access to attorneys and to phone  
 11 calls from attorneys at OSP.

12 THE COURT: How long do you expect?

13 MR. LYND: I would hope, it is 3:00, I think we  
 14 would take no more than 15 minutes per witness. I don't  
 15 know what defendants would do on cross. But we would be  
 16 through by 4:00.

17 MR. LANDES: May we state our position, Your  
 18 Honor?

19 THE COURT: Yes.

20 MR. LANDES: As to Mr. Robb, the question of  
 21 attorney access was brought up in the Plaintiff's case  
 22 through five inmate witnesses, through Mr. Stebbins, through  
 23 Dorian hall. It is not rebuttal testimony.

24 THE COURT: Think that is accurate. It is not a  
 25 surprise you brought up in the defense case. It is

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1 something you focused on in your own case in chief.

2 MR. LYND: If I might respond Your Honor there was  
3 a statement at opening, which I understand is not evidence,  
4 that there had never been a complaint about this matter, and  
5 furthermore, the warden testified that he had become aware  
6 of this as an issue only in the past two or three weeks.

7 THE COURT: Let me take a recess. I have had  
8 people waiting here all day on another hearing, so I'm not  
9 even sure -- are they here?

10 MR. LANDES: Your Honor, are you inclined to allow  
11 both of the witnesses?

12 THE COURT: I assume. I think you both belabored  
13 the case. You have both done a good job of presenting your  
14 case but I think the presentation could have been not more  
15 than half of what you put on. So -- but you can try your  
16 cases the way you see fit. And we'll going to have to stand  
17 in recess until I find out what's happened with this other  
18 matter.

19 MR. LANDES: Thank you, Your Honor. We reconvene,  
20 would the defense call your first rebuttal witness?

21 MR. LYND: Yes. Dr. Aim Haddad.

22  
23 (Recess from 3:01 to 3:12 p.m.)

24 THE COURT: Please state your name and spell your  
25 last name.

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1 THE WITNESS: My name is Ahim, last name Haddad.

2 H-a-d-d-a-d

3 AHIM HADDAD, being first duly sworn, was examined and  
4 testified as follows:

5 DIRECT EXAMINATION OF AHIM HADDAD

6 BY MR. LYND:

7 Q. Good afternoon, Dr. Haddad.

8 A. Good afternoon, sir.

9 Q. Dr. Haddad, I'm going to show you, if someone can help  
10 me turn this on -- thank you --

11 MR. MANCINI: Your Honor, we object.

12 THE COURT: Overruled. Go ahead.

13 BY MR. LYND:

14 Q. I will show you, Dr. Haddad, what seems to be a list of  
15 certain incidents at the Ohio State Penitentiary, and ask  
16 you if you know anything about some of them.

17 To begin with, do you have any personal knowledge of an  
18 injury to an African-American prisoners named Alvin Jones?

19 A. Yes, I do.

20 Q. Which occurred on or about April 1, 2005?

21 A. Yes, I do.

22 Q. What is that knowledge?

23 A. He had a disagreement with another inmate and he was  
24 hit in the jaw, has fractured jaw. Mandible, fractured  
25 mandible. He underwent surgery and possibly he will have

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1 another surgery.

2 Q. With regard to prisoner Anthony is he session, who it  
3 is alleged here was stabbed in the neck on May 28, 2005, do  
4 you know anything about that situation?

5 A. Yes, I do.

6 Q. Did you say yes?

7 A. Yes.

8 Q. What do you know?

9 A. He was -- there was an attempt to stab him by another  
10 inmate. And he sustained minor laceration around the chest  
11 and the neck.

12 Q. And you treated the wound yourself?

13 A. Yes, sir.

14 Q. And with regard to the injury alleged to prisoner  
15 Jeremie Elkins on June 4 or 5, 2005, do you know anything  
16 about that?

17 A. Yes, I do.

18 Q. What do you know?

19 A. He was assaulted by another inmate, and he sustained  
20 something called subdural hematoma, bleeding under the  
21 skull. And he has change in mental status and he was  
22 transferred to hospital, where he stayed about three days in  
23 the hospital.

24 Q. I see. Now, there are also alleged here, Dr. Haddad,  
25 certain suicide attempts by a man named Daryel Jones on July

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1 15, by a man named James Were on August 6, by a man named  
2 Daniel McCauley on August 26, and a prisoner named Wendell  
3 Watkins on August 26, and I ask you if you know anything  
4 about those four incidents.

5 A. Some of them. Not every one.

6 Q. Would you tell us what you do know.

7 A. Mr. Jones, Daryel Jones, he attempt to commit suicide.  
8 Apparently he use his sheet as a rope and tried to hung  
9 himself. One of the correction staff saved him. And he was  
10 on suicide watch for a few days.

11 Q. And when did you come on the scene of this suicide, Dr.  
12 Haddad?

13 A. A few minutes after the correction staff discover that  
14 attempt.

15 Q. And what did you see and hear?

16 A. He was on the floor was crying. There was no obvious  
17 injury at that time.

18 Q. I see. And with regard to the alleged assault on  
19 prisoner Hamilton on August 25, 2005, do you have any  
20 personal knowledge of that incident?

21 A. Yes, I do.

22 Q. And I know it is a complicated story, but the Court's  
23 time is limited, and if you could just give us the  
24 essentials.

25 A. Okay. This inmate has some disagreement with the

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1 custody and he was sprayed.

2 The disagreement continued. I saw him after he was  
3 sprayed. He was medically stable. Then half hour later, we  
4 call the emergency signal, I went to the block, he was on  
5 the floor, cuffed from behind, he has laceration on his  
6 scalp, multiple ecchymosis, abrasion on his face, cuffed, on  
7 the floor.

8 Q. And what happened then?

9 A. Then I asked the unit manager to uncuff him, and we  
10 have some argument at that time about cuff him or uncuff  
11 him. So I says to uncuff the inmate to assess him.

12 Q. And did the inmate receive further medical treatment?

13 A. Yes, sir. He was transferred to the hospital, where we  
14 obtain CAT scan of the head, and he was okay. Also he has  
15 laceration, they suture his laceration.

16 Q. I see. Dr. Haddad, when did you first go to work at  
17 OSP?

18 A. Three years ago, 2002.

19 Q. And I wonder, a final question, if you could compare  
20 the atmosphere at OSP when you first went to work with the  
21 atmosphere in these last few months regarding the kind of  
22 incident we have been discussing, do you have an opinion as  
23 to whether the situation is better, is worse, is about the  
24 same?

25 A. The last few months, for some reason is worse. The

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1 last few months, than before.

2 MR. LYND: Your Honor, I have no further  
3 questions.

4 THE COURT: Cross-examination?

5 CROSS-EXAMINATION

6 BY MR. MANCINI:

7 Q. Good afternoon, doctor.

8 A. Good afternoon, sir.

9 Q. Nice to see you.

10 A. Nice to see you again.

11 Q. Doctor, with regard to these events here, when the  
12 patients came, the patients here came to you, did you treat  
13 them?

14 A. Yes, sir.

15 Q. Gave them the best effort you had, right?

16 A. Yes, sir.

17 Q. Okay. Now, with regard to these suicides --

18 A. Yes, sir.

19 Q. Did the staff try to help them?

20 A. Yes, yes.

21 Q. And did you try to help them?

22 A. Yes, sir.

23 Q. Save their lives?

24 A. Yes.

25 Q. When did you start at OSP again?

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1 A. Like three years ago.

2 Q. Let me ask you something. Let's talk about the culture  
3 at OSP. You tell me from when you started to now, better,  
4 worse, how is it?

5 A. Much better than three years ago. It is much better  
6 than three years ago.

7 Q. What do you mean by that?

8 A. It is less tense. How can I say? Less tense generally  
9 less violence. And the prisoner security status with some  
10 inmate, we have one block has more free movement, so it is  
11 better than three years ago.

12 Q. With regard to accessing patients --

13 A. Is better.

14 Q. What is OSP doing for you? Do you have an officer  
15 escort you all over, a lieutenant?

16 A. Yes. There is lieutenant escort.

17 Q. Does it help you --

18 A. It help me a lot.

19 Q. -- in accessing the patients?

20 A. Yes.

21 Q. Doctor, with regard to your conflict, let's call it  
22 that, with the nursing staff, is that better?

23 A. No, that's not better.

24 Q. Hmm?

25 A. That's not better.

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1 Q. Are there many or are there few --

2 A. Very few. Very few.

3 Q. Very few? Let me ask you something. Give me a  
4 percentage here. The nursing staff, what percentage --

5 MR. LYND: Objection, Your Honor.

6 BY MR. MANCINI:

7 Q. -- dent give you a problem?

8 MR. LYND: Beyond the scope of the direct.

9 THE COURT: It is somewhat beyond, but go ahead.  
10 I'm not sure if this really helps your case.

11 MR. MANCINI: May I get an answer, please?

12 THE COURT: It is kind of an old issue. We've had  
13 an earlier hearings. I'm not sure how it goes into the --

14 MR. MANCINI: I'm laying the predicate for the  
15 other one.

16 THE COURT: Go ahead and answer about the nursing  
17 staff, is the fight with all of the nurses or just some of  
18 them?

19 A. Yes. A few of them. A few of them. Percentage, five  
20 percent of the nursing staff.

21 Q. So with 95 percent, you don't have a problem with them?

22 A. No.

23 MR. MANCINI: I have no further questions. Thank  
24 you, doctor.

25 THE WITNESS: You are welcome.

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1 THE COURT: Thank you, doctor. Do you have any  
2 other witnesses?

3 MR. LOBEL: Yes. We would like to call Jason Robb  
4 to the stand.

5 THE COURT: Please come forward, take a seat,  
6 state your name and spell your last name.

7 THE WITNESS: Jason Robb. R-o-b-b.

8 JASON ROBB, being first duly sworn, was examined and  
9 testified as follows:

10 DIRECT EXAMINATION OF JASON ROBB

11 BY MR. LOBEL:

12 Q. Mr. Robb, good afternoon. We testified before, so we  
13 won't go through your previous testimony.

14 I just have really one series of questions for you.

15 Did you in 1999 file a grievance with the inspectors at OSP  
16 about the attorney/client visits and the phone conversations  
17 with attorneys that you experienced at OSP.

18 A. Yes.

19 Q. And what was the gist of your objection? What was your  
20 objection?

21 A. Well, to the confidentiality issue in the attorney  
22 booth. The fact that the visits could be overheard, the  
23 other people close to the booths could see your interaction  
24 with your attorney, could read documents that your attorney  
25 is showing you, the person in the next booth could read the

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1 documents that have nothing to do with your cases, general  
2 population inmates. General overall confidentiality of the  
3 visits.

4 Further at that time they had a camera pointing into  
5 the attorney booth with a speaker on it, which they did  
6 remove that, but still they didn't do anything else to  
7 change any of that other problem with that.

8 Q. And did you also complain about the phone  
9 conversations?

10 A. Yes, I did. I had numerous occasions requested access  
11 to my counsel doing my death penalty cases that I had to  
12 immediately respond to requests I had received in the mail.  
13 I had asked John Guard on numerous occasions, my unit  
14 manager at the time at OSP, that I had to have access to an  
15 attorney phone call and was refused.

16 I filed a complaint on that, and the institution  
17 inspector at that time, I believe it was Guy Denn, backed  
18 the administration's position that I used up the telephone  
19 that was given to me for my family calls, which are  
20 recorded.

21 I then went to central office, central office basically  
22 backed my claim, saying that I had a right to an attorney  
23 phone call and confidentiality, and that they would get with  
24 the staff members up there and take care of that situation  
25 to where I could ask for a phone call to the staff, and it

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1 would be taken care of on a confidential line, and it still  
2 hasn't been to this day been taken care of.

3 Q. So that has not changed?

4 A. Two weeks ago, three weeks ago I requested a phone  
5 call, and to this day I have not received it.

6 Q. I just show you a document which is a grievance appeal,  
7 and I just want you to identify this. Is this the response  
8 you got from the chief inspector at OSP?

9 A. Yes. That's dealing with the attorney visitation.

10 MR. HOLLOWAY: Your Honor, I have an objection.  
11 This is not an exhibit that's been given to defendants prior  
12 to the start of the hearing.

13 MR. LOBEL: It was in rebuttal. We didn't know we  
14 were going to raise it. There it is.

15 MR. HOLLOWAY: Your Honor, we would still have an  
16 objection to any testimony based upon this document. It  
17 wasn't provided prior to the time of the hearing. There is  
18 a requirement under the prison litigation format that any  
19 evidence or proof of exhaustion of administrative remedies  
20 be made part of an initial filing or a complaint. That  
21 wasn't done in this case.

22 THE COURT: It is just evidence. It is not a 1983  
23 claim. He is not making a 1983 claim based upon his  
24 grievance. He is just offering evidence in this case.

25 MR. LOBEL: That's all.

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1 THE COURT: I think your administrative  
2 prerequisite is correct. If this was an independent action,  
3 but I think it is still admissible in this case and as to  
4 the failure to give it to you before, it does sound like it  
5 is rebuttal, so I will overrule the objection.

6 BY MR. LOBEL:

7 Q. And so -- and this grievance was denied by the chief  
8 inspector, is that correct?

9 A. That's correct.

10 Q. And this is in the files at OSP?

11 A. Yes, that's correct.

12 Q. The second document, the last one I have to show you,  
13 is the decision of the chief inspector. And I just would  
14 point out, at the bottom it says I hereby affirm with  
15 comments to the decision of the inspector, and I assume the  
16 comments is your point that the general phones, he affirmed  
17 the denial of your grievance about the attorney visiting  
18 spaces, and he said that the phone calls are generally not  
19 privileged and therefore can be monitored but if you request  
20 a special phone call with your attorney, you should be able  
21 to get one?

22 A. That's correct.

23 Q. And to this day that has never happened?

24 A. No, it has not.

25 Q. One last question. To this day, have they done

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1 anything about the attorney visiting area besides remove the  
2 video cameras in response to your complaint?

3 A. No.

4 MR. LOBEL: Thank you.

5 THE COURT: Do you have any cross-examination?

6 MR. HOLLOWAY: No questions. Thank you, Your  
7 Honor.

8 THE COURT: You can step down. With that, do you  
9 complete your rebuttal here?

10 MR. LYND: We do complete it, Your Honor.

11 THE COURT: Do you have any other exhibits to move  
12 the admission of?

13 MR. LYND: No, sir.

14 THE COURT: Okay. I understand there is no more  
15 exhibits. Do you have any brief final argument that you  
16 want to make in the case?

17 I gave you the briefing schedule before, but I  
18 will afford you a few minutes to make a comment.

19 MR. LOBEL: Your Honor, when you said a few  
20 minutes, we've had an -- unfortunately as law professor a  
21 few minutes is difficult, but I will try my best.

22 The gist of this case, Your Honor, both here and  
23 in the past, is that a prisoner not be put in a high  
24 security, very restricted environment which is atypical and  
25 significant hardship unless they warrant being placed in

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1 those kind of conditions.

2 THE COURT: I understand their argument to be that  
3 while that may be the law of the case with regard to Level  
4 5, that the hours within the cell and the physical  
5 conditions associated with the life in the cell block are  
6 going to be so different that the earlier decision is no  
7 longer controlling.

8 MR. LOBEL: That is what I take to be their  
9 argument.

10 THE COURT: I take it their argument is they are  
11 trying to visit the notion as to whether it is atypical from  
12 the life of a --

13 MR. LOBEL: And the first thing I would say is  
14 they should not be allowed to relitigate issues that are  
15 already closed, not the question of whether it is atypical,  
16 but for example, the question of whether there is  
17 communication between cells with the strips and solid steel  
18 doors, the warden says now that he has concluded you can  
19 communicate perfectly fine.

20 You concluded as a factual matter after hearing  
21 their own witness in the first trial that you can't. And --

22 THE COURT: Back to the more central issue,  
23 though, can they change the conditions of the confinement  
24 thus that it becomes more typical of a typical confinement?

25 MR. LOBEL: I think there is two answers to that.

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1 Number one, can they theoretically, and second, will this  
2 plan do it.

3 The first is I think there are certain basic  
4 conditions here which are endemic or typical of not the  
5 typical conditions, but high security conditions, like the  
6 strips on the door, and I just use that as a symbol of a  
7 hundred of the myriad types of conditions at OSP --

8 THE COURT: Did the strips on the door have  
9 greater importance when someone is locked down 23 hours a  
10 day and the only hour in which they are out is when they are  
11 by themselves in a closed off room.

12 MR. LOBEL: It does.

13 THE COURT: I think they are trying to make the  
14 argument or their experts do that that has less importance  
15 when they are out in congregate facilities for five hours a  
16 day.

17 MR. LOBEL: That is true, Your Honor. I just used  
18 the strips on the door as one symbol of a general panoply of  
19 things which reflect a Supermax high security prison. And  
20 Mr. Nathan said, for example, that you want to put people in  
21 a place where there are strips on the door, where there is  
22 no big recreation yard, because these prisoners are high  
23 security prisoners, and there may be some prisoners at Death  
24 Row that are high security prisoners and that warrant these  
25 kind of general conditions apart from the -- let's put it to

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1 one side, the amount of hours outside of the cell for one  
2 minute and look at the general conditions that reflect a  
3 Supermax prison.

4 But for people in the honor block or for people  
5 that are not at Death Row, committed violations many years,  
6 that have been good, solid citizens at these prisons, there  
7 is no reason to put them in this kind of restrict I have  
8 conditions.

9 THE COURT: That may be. I mean, there may be no  
10 reason. I think in part your argument, the weakest point is  
11 I think that you have somewhat effectively said this is a  
12 dumb, dumb decision, and --

13 MR. LOBEL: It is.

14 THE COURT: And all the earlier dumb decisions by  
15 the Department Of Corrections in building this place and  
16 probably a dumb decision by the legislature in paying to  
17 build 500 Level 5 cells when there was even at the time of  
18 Lucasville there was probably not a need for 30 of them.

19 But that is not, I don't think, where we are at.  
20 We are at a position where we have to look on the  
21 Constitutional basis as to whether the conditions are so  
22 atypical and significant that they are so much different  
23 from life in other high security prisons as to justify or  
24 require the hearing.

25 MR. LOBEL: Everything I agree with you, including

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1 the various dumb, dumb decisions points except when you got  
2 to the other high security prisons.

3           The Sixth Circuit has ruled affirming your  
4 position in a ruling that was not disturbed by the Supreme  
5 Court that the comparison is not other high security prisons  
6 around other states, because if that were the case, this is  
7 a repeat of their argument in the earlier trial.

8           THE COURT: I'm not sure they said that. Maybe --  
9 I stand to be corrected but I thought their position was it  
10 was not -- it was not to be compared with other high  
11 Supermaxes. I thought they said that it is improper to  
12 compare them to other Supermaxes because by the definition,  
13 you're almost saying that there can never be a significant  
14 and atypical --

15           MR. LOBEL: And isn't that what they are trying to  
16 do here today.

17           THE COURT: But correct me if I'm wrong, I thought  
18 in the first opinion, I thought most of the comparison was  
19 with a maximum security prison.

20           MR. LOBEL: No. Actually, with maximum security  
21 and with segregation around the State.

22           THE COURT: But not high max.

23           MR. LOBEL: Not high max, right.

24           THE COURT: Well, shouldn't that still be the  
25 comparison F the conditions for the Death Row at OSP would

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1 be equivalent to the conditions of the maximum security at  
2 Lucasville or Mansfield --

3           MR. LOBEL: That's correct, Your Honor. We would  
4 accept that as the comparison. And I don't think they are  
5 anywhere near the conditions --

6           THE COURT: Well, what are the hours at, apart  
7 from the people in somewhat the honors program at Mansfield,  
8 how many hours do you believe the others get out a week?

9           MR. LOBEL: I'm not sure of the exact amount in  
10 practice, but I don't think it is the same. I think they  
11 are correct. The evidence seems to suggest that they are  
12 increasing the number of hours out of cell, except for the  
13 honor block, and I don't think you can lightly just put  
14 aside the honor block. Here are people who have --

15           THE COURT: I think that's in the mix, but that  
16 still is only 36 out of almost 200.

17           MR. LOBEL: That's right but I think you have to  
18 consider that as a separate group of people. I don't think  
19 you could simply say as Mr. Could Wednesday said well they  
20 have to give up their privileges for the greater sacrifice  
21 of the good of the whole good or Mr. Nathan says well you  
22 just put them in the makes and you average it out and it all  
23 works out --

24           THE COURT: Let me take you back to something that  
25 Mr. Landes said in his opening statement and then I'm going

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1 to afford you a chance to make any other arguments but  
 2 something that -- in rereading something I had written some  
 3 years ago, in this case isn't et true that we don't have the  
 4 thing that was so damming to the State before, this whole  
 5 issue of this kind of a Wizard of Oz where there is a  
 6 bureaucrat behind a curtain that was making decisions that  
 7 prevented people from ever coming up for parole even people  
 8 the parole board themselves had said should likely get out.

9 MR. LOBEL: That's correct. There is not the same  
 10 issue of parole.

11 THE COURT: Wouldn't that fairly important in the  
 12 earlier decision, to making this atypical.

13 MR. LOBEL: I would agree with you, it was fairly  
 14 important.

15 Let me get to your basic question, Your Honor,  
 16 which is if you look at this plan, does it remove the  
 17 atypical and significant hardship? I would answer it  
 18 doesn't for several reasons. Apart from the general  
 19 conditions which I have tried to argue with you.

20 But first, the Courts have held that in the  
 21 context of segregation, even if the general segregation is  
 22 not an atypical and significant hardship because there are a  
 23 couple hours outside of a cell or maybe even five hours  
 24 outside of a cell there might be certain conditions in  
 25 combination with that that create the atypical and

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1 significant hardship, and because these are fact specific  
 2 determinations, so you have to look at all the conditions,  
 3 you can't just say is it segregation, is it five hours  
 4 outside the cell. You look at the whole panoply of  
 5 conditions.

6 We have already seen that in our earlier case with  
 7 recreation, that the Eleventh Circuit in was versus paren  
 8 held that the deprivation of outside recreation was an  
 9 atypical and significant hardship in the context of  
 10 segregation, even if the segregation generally was not.

11 I earlier on cited another case to that same  
 12 effect involving the wheelchair, that there is no  
 13 requirement in segregated prisons for wheelchairs or  
 14 wheelchair ramps and wheelchair access but if you put a  
 15 person with a wheelchair into one of those it becomes an  
 16 atypical and significant hardship.

17 Now, here I think we have the problem of  
 18 attorney/client visits --

19 THE COURT: Yes, I think that's your best  
 20 argument.

21 MR. LOBEL: I think so, Your Honor. And I think  
 22 it is a very -- it is a very troubling argument and even the  
 23 State is troubled by it.

24 You have the problem that here are people whose  
 25 very life and death depends on their being able to

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1 communicate with their attorney, developing trust in their  
 2 attorney, going over legal documents, and you give them a  
 3 room which may or may not be adequate under the Fourteenth  
 4 Amendment, a situation which may or may not be adequate in  
 5 interprets of phone calls, in terms of confidentiality, all  
 6 the rest of that, but whether or not it is adequate under  
 7 the Fourteenth Amendment, whether we could sue for those  
 8 rooms as an independent constitutional violation, that is  
 9 not the issue here.

10 The question is whether those attorney/client,  
 11 that attorney/client situation in the context of a Death Row  
 12 prisoner in the context of other conditions of general  
 13 segregation give rise to an atypical and significant  
 14 hardship and I agree with you, Your Honor, that that is our  
 15 best argument.

16 And with respect to that, the plan says nothing.  
 17 The best they can come up with was after -- in the middle of  
 18 the trial, they said well, we'll put something on the  
 19 walls --

20 THE COURT: They do argue, though, that that's  
 21 something that has only come up -- you say that Mr. Robb,  
 22 that was something that has been around here before --

23 MR. LOBEL: Mr. Robb filed, there is no --

24 THE COURT: That went more though with the phone  
 25 calls as opposed to the meeting rooms. The meeting was

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1 mentioned in that, but --

2 MR. LOBEL: No, no. He raised both of those  
 3 issues directly, and Mr. Wilhelm, you will hear --  
 4 Mr. Wilhelm says -- he is their witness. He called him to  
 5 depose him. And he is a public defender, I believe, and he  
 6 says, you know, I think this is -- I can do my job. Unlike  
 7 miss hall. But he says it is a problem. It is a real  
 8 problem here. And despite that, they come to the hearing  
 9 and they have done nothing about it and they say that they  
 10 can't do anything substantially about it, and I don't see  
 11 any way around that for the time being.

12 THE COURT: I thought they said there were some  
 13 alternatives either with the barber room or others that may  
 14 potentially be able to be looked at.

15 MR. LOBEL: May potentially, which I guess I'll  
 16 get to in a few minutes but let me just mitt a couple other  
 17 issues on whether or not those changes suffice.

18 With respect to the honor block, you have a group  
 19 of people who have a large yard, very liberal conditions,  
 20 and I don't see any way that that move of this -- of those  
 21 36 people could not be an atypical and significant hardship  
 22 unless you say we're just going to subject zoom their claim  
 23 among the 170 general people, but I think the whole point of  
 24 this is some individualized treatment.

25 You know, if they were -- if they were putting a

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1 group of Death Row people and they had them in a general,  
 2 you know, camp, where there was minimum security and then  
 3 all of a sudden they are going to put them in high security  
 4 and there is no -- this is after years and years of good  
 5 behavior, where there is --

6 THE COURT: What, though, if they keep them at  
 7 Mansfield, and they are in, say, the honor section, is it  
 8 your argument that before they take them out of the honor  
 9 section for whatever reason and put them in the general  
 10 Death Row population, that they are required to give them a  
 11 hearing?

12 MR. LOBEL: Well, that would raise a question of  
 13 whether the Mansfield conditions are atypical and  
 14 significant hardship.

15 THE COURT: I mean the jump between the honor  
 16 section and the general Death Row section.

17 MR. LOBEL: Yes. I see your point, Your Honor.  
 18 Which is that they could --

19 THE COURT: I'm not sure there is a right to a  
 20 hearing jumping from honors to the other because we've  
 21 already heard that there is a large number of inmates who by  
 22 background and conduct are probably entitled to the honors  
 23 treatment as it is and I suppose they have just as much  
 24 claim that we should be in the 36 rooms as these other guys.

25 MR. LOBEL: Yes. I see where you are going with

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1 it, Your Honor, except for the fact that isn't the  
 2 comparison the conditions that they have been in  
 3 historically, not whether they could move them to conditions  
 4 which wouldn't be an atypical, but whether the conditions  
 5 they are in and historically, namely over the last 10, 20  
 6 years are so fundamentally different that this move to OSP  
 7 would work a dramatic departure --

8 THE COURT: I'll take that, but I think it almost,  
 9 your argument almost proves too much because if it is  
 10 accepted, there is probably a lot of inmates that would  
 11 rather be close to Cleveland because of family members or  
 12 friends that can travel easier, so they are shipped to a  
 13 similar house, housing facility in Cincinnati, for them it  
 14 is probably, you know, atypical and a real hardship. But  
 15 I'm not sure that they are entitled to a hearing on that.

16 MR. LOBEL: That is what I would disagree with you  
 17 on, Your Honor.

18 I think the Supreme Court has already held and we  
 19 can't say anything about it that being moved around the  
 20 State or even out-of-state is not an atypical and  
 21 significant hardship, but being moved from very liberal  
 22 conditions to the conditions at OSP, even with this less  
 23 restrictive, you know, environment that they say they are  
 24 going to set up I think is still an atypical and significant  
 25 hardship. If it is. That's the question. If it isn't,

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1 then but for them, I think it clearly is.

2 But that is the plan as they have already stated  
3 it.

4 THE COURT: Let me give Mr. Landes, I will give  
5 you a chance to respond to his comments.

6 MR. LOBEL: Give me another few minutes at the  
7 end. Thank you, Your Honor.

8 THE COURT: Let me just ask a question. What  
9 happens if despite your best wishes, it doesn't turn out  
10 this way, and that just the logistics of getting people to  
11 the outside rec area, you can't accomplish, given anywhere  
12 near the hours or just -- or even with regard to the time in  
13 the pod? What happens then?

14 MR. LANDES: An individual inmate may have an  
15 Eighth Amendment claim. Most of what you have heard in the  
16 last three days has sounded like an Eighth Amendment case.  
17 I don't know the plaintiffs thought they couldn't make an  
18 Eighth Amendment case. We are guessing as to what is going  
19 to happen in the future. You are being asked to give an  
20 injunction on something that has not happened yet, on  
21 conditions that don't exist.

22 THE COURT: I'm asked to give an injunction but  
23 the defense of it largely is this is what we hope to do.  
24 Without anything concrete.

25 MR. LANDES: Right. That's right. Because we

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1 have not moved the inmates yet. We have waited for the  
2 Court's decision. The plaintiffs have really asked for an  
3 advisory opinion as to whether or not this move can be done.

4 THE COURT: I'm not sure that fairly characterizes  
5 it. I think it was as much your decision not to move them  
6 as their demand that they not be moved pending a decision.

7 MR. LANDES: I think you said is fair in that the  
8 defense wants that same advisory opinion. I think we want  
9 to know whether or not the Court is going to stop us after  
10 we have spent the money to put up new lexsan, spent the  
11 money to move off everybody, laid off people, done the kind  
12 of things we're talking about. Hopefully we don't lay  
13 anybody off.

14 Your Honor, if it doesn't come out the way we say,  
15 and if it doesn't come out the way we say in a significant  
16 enough way to create an Eighth Amendment case, that ate  
17 amendment case can be brought. That's what the plaintiffs  
18 have in their future. They don't have an order that  
19 prohibits the moving of Death Row from one place to another.  
20 They don't have the luxury of going from law professor to  
21 director of corrections, determining where inmates should  
22 go.

23 THE COURT: Although there has earlier been an  
24 order with regard to the need for the hearing, so if it  
25 turns out that the conditions in actuality are not what you

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1 have represented them to be, don't they then have a claim  
2 that you violated the earlier Court order?

3 MR. LANDES: They may have a claim that --

4 THE COURT: To provide a hearing when there is  
5 atypical and significant hardship.

6 MR. LANDES: It is well into conjecture, but this  
7 is what I would say, Your Honor.

8 The amount of process allowed or required would be  
9 dependent upon the changes in condition, so we would have to  
10 assume what the changes in condition ended up being and then  
11 determine whether Defendant's Exhibit Y, which gives the  
12 inmate notice and an opportunity to be heard under Hewitt,  
13 which is what the Supreme Court in Austin one approved,  
14 whether they felt that was sufficient process after the fact  
15 given after the fact what the differences would be and the  
16 manner in which the inmate was transferred.

17 So we would look at whether or not it turned out  
18 to be an atypical and significant hardship at all based upon  
19 what the conditions are, and then look back to see what  
20 process was given to see if it was sufficient.

21 I think there is an easier answer for that and you  
22 hit on it. The answer is that the Supreme Court in Austin  
23 when looking at whether or not it was an atypical and  
24 significant hardship and no it wasn't appealed but they  
25 ruled on it, they listed the ordinary incidents of prison

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1 life. They said they were harsh, but it wasn't until they  
2 got to the last two elements that they said under any  
3 measure, this is -- we're going to declare this to be  
4 atypical and significant and it was the loss of parole and  
5 the indefinite nature with which the corrections department  
6 held their stay.

7 Those are not present here.

8 THE COURT: What about the whole idea that they  
9 can't get an attorney visit? Isn't that almost akin to the  
10 Wizard of Oz behind the screen making decisions that have  
11 major impact upon somebody if someone is not able to consult  
12 with counsel on something as important as, you know, some  
13 appellate or habeas decision?

14 MR. LANDES: Your Honor, we would not want that to  
15 be the way we would run the Ohio State Penitentiary, and in  
16 fact it is not.

17 What Mr. Wilhelm said was, I asked him, you had  
18 mentioned you had been to the Ohio State Penitentiary. Had  
19 you been to attorney visitation, and used that to meet with  
20 clients at OSP before.

21 A. Yes, I had, I don't know, I had maybe half a dozen  
22 occasion I'm not quite sure about a half dozen or five.

23 "Question: Were you able to competently represent your  
24 clients through meeting with them in that area?

25 "Answer: I think if you phrase it that way

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1 competently represent, yeah, I think I was able to  
 2 competently represent them. There is definitely  
 3 difficulties encountered when you go to see the inmates in  
 4 that visit room. It is very difficult to hear and there is  
 5 risk in my mind that conversations can be heard, so I'm very  
 6 reticent about what I would discuss in the visit room at OSP  
 7 as opposed to what I would discuss in the visit room at  
 8 ManCI.

9 "Question: Okay.

10 "Answer: But to answer the question that you asked,  
 11 I wouldn't say that it rendered me incompetent in my  
 12 representation. It just changes the way that I have to deal  
 13 with communicating with the client and interacting with the  
 14 client."

15 It is not a light switch like you could get parole, we  
 16 move you, you can't get parole. Is it better than ManCI to  
 17 have an inmate who is not shackled and tethered like a dog  
 18 to the floor?

19 THE COURT: I don't even think that's close. You  
 20 know, I know you made a point of that, but I thought it was  
 21 weak.

22 MR. LANDES: As far as shackling?

23 THE COURT: If I was an inmate, I would much  
 24 rather be shackled in a room that had the door closed and I  
 25 was able to sit there and talk to a counsel, than to be in

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1 a -- able to put my hand through a plexiglass wall with  
 2 people all around, potentially listening to it. The  
 3 shackling, I don't find that to be -- they have been  
 4 shackled, I don't find it to be a big issue. People are  
 5 shackled all the time.

6 MR. LANDES: I think the department is especially  
 7 concerned about them being shackled to the floor, but I  
 8 appreciate what you said about the evidence. It is not that  
 9 critical to a determination. It was critical to give you a  
 10 whole perspective as to what the plaintiffs seem to feel was  
 11 like a regular law office. It is not like a regular law  
 12 office when you go to visit ManCI. They are competency  
 13 represented through visits at OSP and you have heard about  
 14 improvements being planned to make it better. This warden  
 15 heard about it, he has people working on it. That's the  
 16 evidence you have. They have a burden to prove that there  
 17 will be irreparable harm, and they have not met that burden.  
 18 They have a burden to prove that there is an atypical and  
 19 significant hardship.

20 The way we understand that now with the U.S.  
 21 Supreme Court is you have to have or at least it is a big  
 22 deal to have a lack of parole and an indefinite stay because  
 23 of what the corrections officials have done. We don't have  
 24 that here. I don't think you have to get into the practice  
 25 of measuring exercise yards or counting whether or not 36

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1 inmates get this and the other ones don't. I don't think  
2 you ever get there, Your Honor.

3 THE COURT: How individualized is the right? We  
4 have been dealing with this all as a group. They try to  
5 make the argument that as to the 36 they have to be dealt  
6 with separately from the other 160.

7 MR. LANDES: And they are all in the same class  
8 and all represented by the same lawyers.

9 THE COURT: Okay, but the right is an  
10 individualized one as to a hearing. The lawsuit may be  
11 joint.

12 MR. LANDES: If you get past atypical and  
13 significant hardship in the first place.

14 THE COURT: Okay. I think -- you know, I  
15 understand your arguments. Frankly, I think the weakest  
16 part of your case is the whole right to counsel and the  
17 facilities available for that.

18 MR. LANDES: We're concerned about that as well  
19 Your Honor. And we have --

20 THE COURT: In candor, you will admit that this  
21 was a dumb decision that the legislature made to build this?

22 MR. LANDES: I wasn't -- that is above my pay  
23 grade.

24 THE COURT: They could have built this whole  
25 facility for a maximum security population at probably twice

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1 or -- half the cost, or twice the beds for the same amount  
2 of money.

3 MR. LANDES: I have never given it thought because  
4 it wasn't my inquiry in the Court, but I appreciate the  
5 comment.

6 I would also note it is interesting that  
7 California is about to do the same thing. The prison they  
8 are talking about building looks like what OSP is, and they  
9 are building it from scratch for Death Row solely, 220  
10 million bucks. They want to end up \$220 million from now  
11 with what we are planning to do now. And that should weigh  
12 upon whether or not --

13 THE COURT: Well, there are differences in  
14 there --

15 MR. LANDES: There is a hardship.

16 THE COURT: They have the attorney counsel room,  
17 different ability to contact that. As I understand the  
18 testimony, they had different outside recreation or more of  
19 them at that facility.

20 MR. LANDES: The outside recreation that I believe  
21 she spoke of, at least that I recall that she spoke of dealt  
22 with the 68 lucky inmates still on the sixth floor that got  
23 time out on the roof but as to what was planned in the  
24 future, I don't recall her testimony as to what exercise  
25 yards were available.

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1 THE COURT: In looking through her report I  
2 thought she had talked about the inmates that they had --  
3 maybe I misrecall. I thought they had outdoor rec areas  
4 somewhat similar to OSP, albeit with greater numbers.

5 MR. LANDES: They have cages that they go outside  
6 in and I think that she made the comment in her report that  
7 the inmates voluntarily declined on different shifts so that  
8 there would be more room in them, but that presently is how  
9 the 600 some inmates are kept at Death Row in California.

10 THE COURT: But that's in the current facility.

11 MR. LANDES: In the current facility.

12 THE COURT: Okay. I was talking about the one  
13 that's been proposed.

14 MR. LANDES: I don't believe that we have evidence  
15 on the exercise yards proposed.

16 THE COURT: Okay. Let me give him, counsel --

17 MR. LANDES: If I could, I did want to say  
18 something about process.

19 Who wet talks about notice and an opportunity to  
20 be heard. This was being tried as an Eighth Amendment case.  
21 It is not one. A decision for you is whether or not you are  
22 going to give an opinion on whether or not they have met the  
23 extraordinary burden to enjoin the State from making a  
24 transfer of an entire population. And it is very important  
25 for us to do that. Whatever we have to do to

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1 attorney/client rooms, notwithstanding, you have had good  
2 people planning to do, we have a lot at stake to do it and  
3 your best opinion, Your Honor, because I believe this is my  
4 last opportunity to speak to you, would be that A, it is an  
5 advisory opinion, if it is not an advisory opinion, then it  
6 is not an atypical and significant hardship because it is  
7 just the ordinary incidence of prison life, you don't have  
8 to measure exercise yards, you don't have to count heads as  
9 to who goes where. The parole issue and the indefinite stay  
10 issue is not here and even if it was atypical and  
11 significant, the process offered, the process offered is  
12 sufficient for whatever the deprivation is.

13 I brought out Exhibit M to answer your question as  
14 to how much time does the general population inmate have out  
15 of cell in ManCI. And the answer is seven hours. That is  
16 23 hours lockup per day, just like Level 5. That is what  
17 everybody but 36 are doing. Thank you, Your Honor.

18 MR. LOBEL: To just get to the question of -- the  
19 question you asked, what if this doesn't work out, first, I  
20 disagree that it is our burden. You have already ruled that  
21 this whole place including the 4-As, who are treated roughly  
22 equivalently, except that they don't get a big ball and they  
23 don't get a sports fantasy league and \$60 a week, only get  
24 \$40 a week but they already get the five hours, they are  
25 supposed to get the five hours a day, and you already ruled

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1 that that was an atypical and significant hardship.

2 THE COURT: I'm not sure, I --

3 MR. LOBEL: But independent of that I think it is  
4 their burden to show that they are changing these  
5 conditions, that they are definitely changing these  
6 conditions, not in some half baked plans, but not  
7 speculatively that they are definitely changing it to remove  
8 it from the typical and significant hardship --

9 THE COURT: I understand there have been earlier  
10 orders but the question is you're in the stage where you are  
11 seeking an injunction under Rule 65 and the moving parties  
12 with regard to injunctions typically have the burden.

13 MR. LOBEL: Yes, and the burden is that this is  
14 already been held to be -- and it has already been helped to  
15 be an atypical and significant hardship.

16 THE COURT: That goes to likelihood of success on  
17 the merits.

18 MR. LOBEL: Does this plan change that  
19 definitively and I think it is speculative, that it changes  
20 that, and I think the key thing is what evidence do we have  
21 that this is really going to be implemented. You asked that  
22 question.

23 THE COURT: What is the evidence that this will  
24 what?

25 MR. LOBEL: That this will really will be

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1 implemented, and I think we have a pattern and practice that  
2 you could consider as evidence in determining whether it  
3 really would be implemented to show that in the past, they  
4 have said things and they have not been implemented and the  
5 best exams are the 4-As.

6 The 4-As were promised five hours a week of  
7 outdoor recreation, and they don't get it. They were  
8 promised a gym and they don't have it. My suggestion, as  
9 both a constitutional one, a legal one --

10 THE COURT: Remind me of the testimony. Was the  
11 testimony they did not get those hours or was that the  
12 testimony, that they had not gotten the hours until these  
13 more recent --

14 MR. LOBEL: No, it was as of August. This man  
15 came in, I forget how to pronounce his name, he came in and  
16 said I have been keeping records, in August of 2005, and  
17 we've gotten two to three hours a week of out you're  
18 recreation, that's just now, and that is for people for who  
19 their plan, if you look at the documents we'll show you it  
20 says five hours a week of outdoor recreation and yet it is  
21 not happening.

22 So as a legal matter it seems to me what they  
23 should do if they want to show that this is no longer an  
24 atypical and significant hardship is show it with respect to  
25 the 4-As that are already there. They cost with respect to

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1 the 4-As, we'll open up the cuff port. There is no reason  
 2 those folks have to have their cuff port closed. They come  
 3 from Lucasville where there is no cuff port.

4 They cost we'll construct an adequate indoor gym.  
 5 Now E they are promising the Death Row people an indoor gym.  
 6 They already promised the 4-As an indoor gym. Let's see  
 7 them construct the indoor gym, let's see them provide  
 8 attorney contact rooms for 4-A, semi-contact visits for the  
 9 4-A and then come back and say look what we did, not look at  
 10 the piece of paper that shows you the plan that we have  
 11 gotten here and we changed it every couple of weeks and we  
 12 are going to change it a little more and it is a work in  
 13 progress, which I have heard from my good friend Joe Mancini  
 14 from the day one of that, that you don't have to rule  
 15 because we have a work in progress here.

16 Let them change it and then they have a different  
 17 claim, but now they are putting them in this oppressive,  
 18 repressive institution, and what they have to tell you they  
 19 are going to face is a plan when it would be very easy for  
 20 them to actually change the conditions for the people who  
 21 they say don't really warrant those conditions and put them  
 22 there.

23 THE COURT: It might be, but that's not the  
 24 circumstance we're in now. I mean, the evidence you have as  
 25 to the 4-Bs and the 4-As is relevant to your issue as to

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1 whether or not there will be an atypical condition or  
 2 whether I believe that. We're not in a position where  
 3 things I think can necessarily be put on hold.

4 MR. LOBEL: No, but if we get an injunction, the  
 5 question is going to be -- one question I think you have to  
 6 address is how realistic is it that they are going to put  
 7 in -- what is the evidence on whether this plan will reE be  
 8 put into effect? I have already said even if they put the  
 9 plan into effect, I think the attorney/client situation is  
 10 an atypical hardship.

11 But let's assume you say, okay, I want to also see  
 12 how likely is it for the plan to be put in effect. I think  
 13 you have to consider the past practice with respect to Death  
 14 Row, the past practice going on right now with respect to  
 15 4-A, where they have come to you with a similar plan and the  
 16 similar plan is not being implemented and my argument would  
 17 be as a legal matter, before they come to you with a new  
 18 plan and say trust us, we'll implement it, why don't they  
 19 implement their old plan, and for a population which is also  
 20 not a Level 5 population.

21 And finally, I would want to say -- well, a couple  
 22 of little points. They say this is not indefinite stay. I  
 23 don't know what they are talking about. I don't see any way  
 24 out for the Death Row people except a very Draconian one.

25 THE COURT: I think the argument was that the

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1 hearing was more important to people that had parole  
2 opportunities because they were disqualified to take  
3 advantage of those opportunities.

4 MR. LOBEL: Mr. Landes made two points. One was  
5 as to parole, and I'm dealing with the other one, which is  
6 the duration point.

7 The duration here is in many cases going to be for  
8 the life of the prisoner, not going to be for two or three  
9 years, four years, five years, but for their entire life and  
10 that is a very, very harsh reality.

11 If you look at the balancing of the arms, they say  
12 well, don't worry, these folks, if it all screws up, if it  
13 all screws up, you have a remedy. It's the Eighth Amendment  
14 remedy. So if we don't give you five hours a day out of  
15 cell, or we only give you one hour a day, if we put you on  
16 Level 5, essentially Level 5 conditions, you can bring an  
17 Eighth Amendment challenge to this.

18 I don't think we have to say much more about that.  
19 I mean, the likelihood of an Eighth Amendment challenge to  
20 the Level 5 conditions right now, if we thought we had a  
21 good one we would be bringing it right now.

22 You have already said that two hours of outdoor  
23 recreation doesn't violate the Eighth Amendment, so they  
24 presumably could say well, we can't give you the plan, we're  
25 only going to give you two hours a week, and we come back to

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1 Your Honor and you say, well, the law of the case is it is  
2 not an Eighth Amendment violation.

3 So in sum, this is not an advisory opinion. They  
4 are taking real people whose housing is critical to them.  
5 It would not be an advisory opinion to me, and I'm sure to  
6 Mr. Landes, if somebody said to Mr. Landes, and I don't want  
7 to pick on you on this, but if somebody said to him well  
8 we're going to move you from your house and we're going to  
9 put you into owe other house that is a dump right now, it  
10 has terrible conditions, but don't worry we'll fix it up,  
11 and you have to wait until you go there and see if we're  
12 going to fix it up. I'm sure Mr. Landes would scream and it  
13 would not be an advisory opinion.

14 That's the situation we have now. You are taking  
15 people out of their homes, the only homes they have known,  
16 for many of them ten years and you are transferring them  
17 into an unknown situation, which is at this point atypical  
18 and oppressive.

19 And they tell us, they tell these folks don't  
20 worry, we're going to fix it. You look at their past record  
21 and they have plenty to be worried about.

22 THE COURT: Thank you. Get the briefs in on the  
23 dates we talked about. And then I will take it under  
24 advisement try to get an opinion out fairly quickly.

25 MR. LANDES: Your Honor, you had mentioned a week,

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1 I take that as next Friday, although we have holidays and  
2 such? We would like to make it next Friday.

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

4 MR. LANDES: A week from today.

5 MR. LOBEL: We prefer a little later. We prefer  
6 Tuesday. But we are prepared.

7 THE COURT: We know.

8 MR. LANDES: We know you have something coming  
9 in --

10 THE COURT: Try to get it in next Friday, and a  
11 reply a week following that.

12 MR. LOBEL: And a week for the reply?

13 THE COURT: Yes. And there may be some -- there  
14 is at least some potential that I will try to turn a  
15 decision out fairly quickly, but I'm giving some thought to  
16 the idea of issuing a fairly brief decision followed by a  
17 more, a fuller, you know, opinion.

18 So it may be that I get an opinion out on an  
19 earlier basis and follow it with a longer opinion. Okay.  
20 So if you get a brief order, I still intend to get something  
21 out that is a bit longer.

22 MR. LANDES: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MRS. LYND: Your Honor, while we are here could we  
25 decide what we want to do about the remand?

1 I think you asked us to come up with a schedule  
2 within 30 days. We are in the 30 day period since the case  
3 has come back to the District Court. Taking into account  
4 your schedule and the other things the parties have to do,  
5 could we set some date for getting on with that matter,  
6 rather than have to do a lot of paperwork and come back to  
7 you?

8 MR. LOBEL: We were going to suggest sometime in  
9 November.

10 MR. MANCINI: That is way too late.

11 MR. LOBEL: Way too late? Okay.

12 Tell us what the latest date is.

13 MR. MANCINI: My suggestion is this: Let me talk  
14 to them and get back with proposed dates. I want to talk to  
15 others. It will be somewhere in between what they are  
16 saying and today. And we'll get back to you on it Your  
17 Honor. Let me just talk to some other people about it.

18 THE COURT: It is a particularly bad  
19 September-October.

20 MR. LOBEL: That's why we suggested the beginning  
21 of November.

22 MR. MANCINI: Okay. Let me talk --

23 THE COURT: I'll try to accommodate you. I'm just  
24 indicating that --

25 MR. MANCINI: Is it really bad, those two months

1 is what you are saying?

2 MR. GAMS0: Yes.

3 MR. MANCINI: Okay. Fine.

4 MR. GAMS0: Nine defendants, if you can talk them  
5 all into entering a plea, we'll do that. I have a trial  
6 that starts the 19th and two weeks of trial before that.  
7 There is a trial next week, a trial the 12th, and this case  
8 is set for the 19th that is supposed to take three to four  
9 weeks. So that would take you until about the 20th of  
10 October.

11 MR. MANCINI: Okay. Thank you very much.  
12 (Proceedings adjourned at 4:11 p.m.)

13 MR. LANDES: This is a proffer for the record.  
14 We need to proffer Exhibits N, O, and P, which were not  
15 admitted to the Court.

16 We also proffer the joint motion for protective  
17 order that was filed, according to the face of it, on  
18 8/15/2005. It is Document Number 586.

19 We would also proffer information from  
20 communications between plaintiff and defendant concerning  
21 the timing of the turnover of the post orders concerning  
22 Mansfield Death Row.

23 On August 12, 2005, Eric Holloway wrote to the  
24 Lynds, "I write further to provide you with an update about  
25 discovery responses. As indicated earlier this week,

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1 concerns exist about providing all requested documents  
2 regarding procedures on Death Row and Mansfield. I should  
3 be able to send today the responses that are complete and  
4 unrelated to those procedures."

5 On the 15th, the Lynds wrote to Eric Holloway,  
6 "One, we agree to the proposed protective order." So that  
7 was on the 12th. That was transmitted to Mr. Holloway --  
8 I'm sorry. That was transmitted from Mr. Holloway to the  
9 client on August 15, and on that same day, the joint motion  
10 for a protective order was filed.

11 On August 16, the next day, Mr. Holloway wrote to  
12 the Lynds, in substance as follows. "I understand that you  
13 requested from Joe Mancini the receipt of the privilege  
14 comparison, the post order applicable to Death Row at ManCI.

15 I respond, "We have an agreement already regarding  
16 the production of security sensitive materials to include  
17 post orders used at ManCI's Death Row. When the Court signs  
18 our protective order that I filed yesterday, 8/15 for us, I  
19 will send you Exhibits G and H to the supplemental discovery  
20 responses. Those exhibits contain post orders and  
21 procedures regarding Death Row at ManCI."

22 MR. LANDES: That's the substance of the proffer.

23 MS. LYND: Can we indicate that the reason for  
24 that request was because those were items that were relied  
25 on by Vince Nathan in his report?

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1 MR. LANDES: That's all I have.

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