

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
J. Michael Baxley, Circuit Court Judge

Case No. 2005-CP-40-02925

T.R., P.R., K.W., and A.M., on behalf of
themselves and others similarly situated; and
Protection and Advocacy for People with Disabilities, Inc., ... Respondents,

v.

South Carolina Department of Corrections; and
William R. Byars, Jr., as Director of the
South Carolina Department of Corrections, ... Appellants.

APPENDIX

Andrew F. Lindemann
William H. Davidson, II
Kenneth P. Woodington
Daniel C. Plyler
DAVIDSON & LINDEMANN, P.A.
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellants

Daniel J. Westbrook
Stuart M. Andrews, Jr.
NELSON, MULLINS, RILEY
& SCARBOROUGH, LLP
Post Office Box 11070
Columbia, South Carolina 29211
(803) 799-2000

Counsel for Respondents

RECEIVED

JUN 13 2014

SC Court of Appeals

INDEX

Order Granting Judgment in Favor of Plaintiffs, filed January 8, 2014	1
Order Denying Defendants' Motion to Alter or Amend, filed April 18, 2014	46
Trial Transcript pp. 1126-1127	59
Hearing Transcript, March 28, 2014	61
Plaintiffs' Trial Exhibit #9	189
Plaintiffs' Trial Exhibit #11	209
Judge Baxley's Letter to Counsel, dated August 23, 2013	236
Emails, dated August 26-27, 2013	251
Certificate of Compliance	253

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

T.R., P.R., and K.W., on behalf of)
themselves and others similarly situated;)
and Protection and Advocacy for People)
with Disabilities, Inc.,)

Plaintiffs,)

v.)

South Carolina Department of Corrections)
and William R. Byars, Jr., as Agency)
Director of the South Carolina Department)
of Corrections)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No.: 2005-CP-40-2925

**ORDER GRANTING JUDGMENT IN
FAVOR OF PLAINTIFFS**

JEANETTE W. BARNES
C.C.P. & G.S.

2014 JAN - 8 PM 12:36

FILED

It has been the privilege of this writer to serve the State of South Carolina as a general jurisdiction judge for fourteen years. At the time this case was heard, Court Administration reported there were more than 5,000 new case filings per year for each of our state's circuit court judges. Thus, over 70,000 cases of every imaginable sort have come to this Court over the years. This case, far above all others, is the most troubling.

This case is a class action brought on behalf of approximately 3,500 state inmates who meet the definition of being seriously mentally ill. For purposes of this suit, the term "serious mental illness" was specifically defined in the Class Certification order dated November 1, 2007, and may be succinctly stated as all SCDC inmates from the date of the filing of the complaint who have been hospitalized for psychiatric services, referred to an Intermediate Mental Health Care Services Unit, or diagnosed by a psychiatrist with the following mental illness: Schizophrenia, Schizoaffective Disorder, Cognitive Disorder, Paranoia, Major Depression, Bipolar Disorder, Psychotic Disorder, or any other mental condition that results in significant

functional impairment including inability to perform activities of daily living, extreme impairment of coping skills, or behaviors that are bizarre and/or dangerous to self or others. Plaintiffs claim that their treatment within SCDC, or lack of treatment, constitutes a violation of the state constitution.

The evidence in this case has proved that inmates have died in the South Carolina Department of Corrections for lack of basic mental health care, and hundreds more remain substantially at risk for serious physical injury, mental decompensation, and profound, permanent mental illness. As a society, and as citizen jurors and judges make decisions that send people to prison, we have the reasonable expectation that those in prison – even though it is prison – will have their basic health needs met by the state that imprisons them. And this includes mental health. The evidence in this case has shown that expectation to be misplaced in many instances.

Just 2
Economic downturn and financial pressures have brought great change to our country. One of these is that the various state departments of corrections are now more than ever the collection place of the seriously mentally ill among the citizenry. The incidence of serious mental illness within the general population is less than four (4%) percent¹. In the typical Department of Corrections, it is between 15 and 20 percent. In South Carolina, the evidence in this case shows it to be approximately 17 percent, in spite of the Department's claim that it is 12.9 percent. If 17 percent of the prison population had advanced cancer and there was inadequate and in some cases nonexistent treatment for cancer in prison, the public would be outraged. Yet this is the case for serious mental illness.

¹ Figures vary depending upon the source, demographics, and differences in various definitions of "serious mental illness." The Court takes judicial notice of the statistical findings of the National Institute of Mental Health, which places the general population figure at 3.9%. Further statistical information may be obtained from the NIH at www.nimh.nih.gov/statistics/SMI_AASR.shtml.

This litigation does not occur in a vacuum. What happens at the Department of Corrections impacts all of us, whether it is from the discharge of untreated seriously mentally ill individuals from prison into the general population, or tremendously increased costs for treatment and care that might have been prevented, or the needless increase in human suffering when use of force replaces medical care. The decisions of our Courts reflect the values of our society. To that end, our state can no longer tolerate a mental health system at the South Carolina Department of Corrections that has broken down due to lack of finances and focus.

96
3

While the Court finds the inadequacy of the mental health system at SCDC has not occurred by design, but instead by default, the Court further finds this decision in favor of Plaintiffs should not come as a shock to SCDC. Previous internal and external reviews of the SCDC mental health system have found multiple inadequacies and failures. Despite its knowledge of the grave risks these deficiencies pose to mentally ill inmates, SCDC has failed through the years to take reasonable steps to abate those risks. The Court recognizes that the Department is underfunded and understaffed in many particulars, not just mental health services delivery. The operation of any state agency is a matter of competing priorities, and the General Assembly, as keeper of the public purse, is not in a position to excessively fund any entity. Thus, this decision will ultimately require an increase in priority for mental health services commensurate with the level of serious mental illness within the prison population.

DECISION

In its prior Order Setting Forth Applicable Constitutional Standards ("Standards Order"), the Court delineated the standard of liability and burden of proof applicable to Plaintiffs' constitutional claim under Article I, § 15 of the South Carolina Constitution, which prohibits "cruel and unusual punishment." To prevail on a claim under Article I, § 15, the Court stated

that Plaintiffs must prove that Defendants acted with “deliberate indifference to serious medical needs of prisoners.” Standards Order at 3 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). This deliberate indifference standard contains both an objective and subjective component. See *Farmer v. Brennan*, 511 U.S. 825, 834-37 (1994). To satisfy the objective component, Plaintiffs must demonstrate that they are subjected to a substantial risk of harm that is sufficiently serious. *Id.* The objective component is not limited to past harm, but also protects inmates from an unreasonable risk of future harm. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). Plaintiffs may satisfy the objective component by showing that systemic deficiencies in a prison mental health system expose inmates with serious mental illness to a substantial risk of serious future harm. Standards Order at 7-8, citing *Helling*; 509 U.S. at 35; *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983); *Flynn v. Doyle*, 2009 WL 4262746 at *19 (E.D. Wis. 2009); *Madrid v. Gomez*, 889 F. Supp. 1146, 1256 (N.D. Cal. 1995); *Neiberger v. Hawkins*, 208 F.R.D. 301, 317 (D. Colo. 2002).

9-15
The Court noted the need for guideposts in determining whether Plaintiffs satisfied the objective component of the deliberate indifference standard. Accordingly, within this legal framework, the Court identified and articulated six factors that would serve as benchmarks for determining whether SCDC’s mental health program exposed mentally ill inmates to a substantial risk of serious harm. Stated succinctly, the evidence at trial should establish whether the SCDC mental health services system contained the following adequately functional components:

1. A systematic program for screening and evaluating inmates to identify those in need of mental health care;
2. A treatment program that involves more than segregation and close supervision of mentally ill inmates;

3. Employment of a sufficient number of trained mental health professionals;
4. Maintenance of accurate, complete, and confidential mental health treatment records;
5. Administration of psychotropic medication only with appropriate supervision and periodic evaluation; and
6. A basic program to identify, treat, and supervise inmates at risk for suicide.

Standards Order at 8-10, *citing Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.C. Tex. 1980) *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

Employing these factors in the context of the objective component of the deliberate indifference standard, the Court finds by a preponderance of the evidence that the Plaintiffs have met the burden of proof and makes the following threshold findings.

 First, the mental health program at SCDC is severely understaffed, particularly with respect to mental health professionals, to such a degree as to impede the proper administration of mental health services. This deficiency has a substantial impact on every aspect of the mental health program, beginning at Reception and Evaluation ("R&E"), where inmates are screened and evaluated for mental health needs, continuing into the treatment programs for seriously mentally ill inmates, and ending with deficient discharge planning for seriously mentally ill inmates being returned to the general public.

Second, seriously mentally ill inmates are exposed to a disproportionate use of force and segregation (solitary confinement) when compared with non-mentally ill inmates. Segregation and use of force are often used in lieu of treatment, with severe consequences for inmates with

serious mental illness. The inappropriate and extended reliance on segregation to manage inmates with serious mental illness, particularly those in crisis, exposes them to a substantial risk of serious harm by limiting their access to mental health counselors and psychiatrists, disturbing their eating and sleeping cycles, disrupting the administration of medications, and deepening their mental illnesses. These conditions have contributed to the deaths of multiple inmates in segregation, while placing other inmates and staff at risk. They have also led to the stigmatization of mental illness within SCDC that discourages inmates from seeking the limited mental health care the agency does provide.

Third, mental health services at SCDC lack a sufficiently systematic program that maintains accurate and complete treatment records to chart overall treatment, progress, or regression of inmates with serious mental illness.

Fourth, SCDC's screening and evaluation process is ineffective in identifying inmates with serious mental illness and in providing those it does identify with timely treatment.

Fifth, SCDC's administration of psychotropic medications is inadequately supervised and evaluated.

Sixth, SCDC's current policies and practices concerning suicide prevention and crisis intervention² are inadequate and have resulted in the unnecessary loss of life among seriously mentally ill inmates.

As a result of the above findings, the Court further finds that SCDC's mental health system exposes seriously mentally ill inmates to a substantial risk of serious harm and Plaintiffs have therefore satisfied the objective component of the deliberate indifference standard.

² "Crisis intervention" refers to SCDC's response to an actively mentally ill inmate who poses an immediate danger and must be sequestered for his own protection or the protection of other inmates and correctional officers.

The subjective component is met by proof that a defendant "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 834-837. At trial, the Plaintiffs presented overwhelming evidence that SCDC has known for years that its policies and practices expose seriously mentally ill inmates to a substantial risk of serious harm but has failed to take reasonable measures to abate that risk. The Court finds, therefore, that the Plaintiffs have satisfied the subjective component of the deliberate indifference standard.

As a result of the above findings, the Court grants judgment in favor of the Plaintiffs.

Below, the Court has separated the remainder of this Final Order into two sections. The first section articulates the factual findings and conclusions underlying the Court's decision with respect to the objective component by examining each of the six *Ruiz* factors listed above. The first section then articulates the factual findings and conclusions related to the subjective component. The findings made therein are by a preponderance of the evidence. Section Two then addresses the remedy the Court will grant in this case and the mechanism used to achieve it.

With regard to the factual findings and conclusions mentioned below in Section One, there are several references to individual circumstances involving specific inmates. The Department argued at trial that reference to an individual inmate and his/her particular situation was anecdotal and not indicative of the general administration of mental health services. Moreover, counsel for SCDC essentially argued that some of the specific inmate situations were "outliers" in that such was a constellation of unique events and circumstances that brought about an unfortunate result. The Court specifically rejects that argument. While no system involving thousands of inmates is expected to be perfect, the Court finds that the individual circumstances

referred to below are the result of a system that is inherently flawed in many respects, understaffed, underfunded, and inadequate.

I. FACTUAL FINDINGS/DISCUSSION

A. Objective Component

1. A systematic program for screening and evaluating inmates to identify those in need of medical care

As of 2011, 12-13 percent of the SCDC inmate population had been diagnosed by SCDC with a mental illness and was on the Department's mental health caseload. From that data, with a total inmate population at the time of trial of 23,306, a 12.9 percent fraction yields an approximate figure of 3,006 inmates that have been diagnosed as mentally ill.³ Based on universally accepted national statistics, evidence presented to the Court at trial strongly indicates this percentage should be much higher. Multiple studies conducted nationwide suggest that a more accurate percentage of inmates with a serious mental illness should be somewhere in the range of 15 to 20 percent. SCDC's expert, Dr. Scott Haas, testified that seriously mentally ill inmates ordinarily comprise 18 percent of a prison population. Plaintiffs' expert, Dr. Raymond F. Patterson, testified that after detailed analysis, 17 percent was a conservative estimate of SCDC's seriously mentally ill population, and the Court finds the basis of his analysis to be credible.

The Court further finds this low, acknowledged percentage of mentally ill inmates at SCDC troubling because it indicates a high likelihood that there are hundreds of inmates with a serious mental illness at SCDC who are not receiving any treatment due to deficiencies in the screening and evaluation process used to identify and classify those with a serious mental illness.

³ Exact numbers fluctuate due to the constant intake and release of inmates.

This low identification of mentally ill inmates has a synergistic impact on the mentally ill population, as it leads to a reduction in mental health professionals, the further disproportionate cutting of costs in difficult economic times within the mental health system because of a perceived lack of need for services, and a skewed analysis as to the efficacy of the existing mental health system. R&E serves as the intake facility for inmates entering into SCDC. If inmates with mental illnesses are not identified and appropriately classified at R&E, the Court finds that these inmates face a substantial risk of serious harm.

gs
19
In addition to the concerns mentioned above, there was also evidence presented to the Court of regular violations of the SCDC mental health policy, two of which are particularly relevant to the Court as they relate to the screening and evaluation process at R&E. First, SCDC policy requires that a mental health counselor must meet with an inmate within 48 hours of the inmate being assigned to that counselor's caseload. At trial, there was evidence submitted to the Court of regular and persistent violations of this policy. Second, inmates are not being seen by a psychiatrist within thirty days of the counselor's initial assessment when a need for psychiatric treatment is indicated, also a violation of SCDC policy. Consequently, this results in inmates who are referred to a psychiatrist at R&E, but are then transferred into SCDC general population prior to assessment by that psychiatrist, creating a risk of harm for all inmates.

The Court finds, due to the concerns listed above, that the program used by SCDC for screening and evaluation fails to adequately identify and classify those inmates suffering from serious mental illness, thereby exposing them to a substantial risk of serious harm.

2. **A treatment program that involves more than segregation and close supervision of mentally ill inmates**

a. **Segregation**

The treatment program at SCDC places heavy reliance on segregation and use of physical force against seriously mentally ill inmates, as opposed to treatment.

Mentally ill inmates are substantially overrepresented in segregation units, known as Special Management Units ("SMU"), within SCDC. Inmates in segregation stay in solitary confinement in their cells 23-24 hours a day. Visitation, telephone, and other privileges are significantly restricted. As of September 2011, the percentage of mentally ill inmates in SMUs at the three SCDC institutions where the majority of men with serious mental illness are assigned ("Area Mental Health Institutions") demonstrates the disproportionate use of segregation to which members of the Plaintiff class are subjected. At Lee Correctional Institution ("Lee"), 16 percent of the total inmate population was mentally ill, yet 27 percent of its inmates in SMU were mentally ill.⁴ The corresponding numbers at Perry Correctional Institution ("Perry") were 24 percent and 40 percent. At Lieber Correctional Institution ("Lieber"), the differential was even greater, where mentally ill inmates comprised 20 percent of all inmates, yet 42 percent of the inmates that were in segregation. During this same period, the percentage of mentally ill inmates in SMUs in all SCDC institutions was 23 percent, even though they represented less than 13 percent of the total inmate population.

Taking the entire population into consideration, a mentally ill inmate is twice as likely to be placed in segregation as a non-mentally ill inmate. As of September 2011, 16 percent of inmates on the mental health caseload were in SMUs in contrast with 8 percent of non-mentally ill inmates. For security detention, the most restrictive form of segregation, where inmates are placed in solitary confinement for indefinite periods, mentally ill inmates are more than three

⁴ These percentages are based on the SCDC mental health caseload.

times more likely to be assigned this status than other inmates, at a rate of 8.7 percent compared with 2.8 percent.⁵

Not only are mentally ill inmates overrepresented in SMUs, they also spend disproportionately longer periods of time in the SMUs. For many mentally ill inmates, this period of isolation in SMU has lasted for several years. For example, the average cumulative disciplinary detention sentence for inmates with mental illness as of January 13, 2012 was 647 days, compared to 383 days for non-mentally ill inmates. These averages include extremely long periods of segregation for inmates whose disciplinary detention sentences exceeded their projected release date from SCDC. Again, these extended sentences were meted out against mentally ill inmates at over twice the rate of other inmates. The lengths of these sentences in segregation were also far greater for members of the Plaintiff class, exceeding their projected release date on average by 1,968 days or 5.39 years, compared with 1,065 days or 2.92 years for other inmates. Of the ten longest periods of disciplinary detention sentences beyond projected release dates, nine of the inmates were mentally ill. Their cumulative sentences for solitary confinement ranged from 20-36 years.

The evidence showed that these extended periods of segregation too often reflect the accumulation of disciplinary detention sentences for non-assaultive behavior of mentally ill inmates. For example, one 51-year-old mentally ill inmate who had been hospitalized at SCDC's psychiatric facility accumulated 19 years of disciplinary detention sentences from 2005-2008. For one non-assaultive offense in which he threatened harm, he received 999 days of disciplinary detention and lost visitation for three years. In interviews with Plaintiffs' experts, he was

⁵ The two principal forms of punitive segregation are security detention and disciplinary detention. Disciplinary detention consists of sentences served in segregation for a specific period of time for violation of SCDC administrative rules. Security detention is a classification assigned to inmates determined to present a particular risk to other inmates or staff that often remains in effect for periods lasting several years.

distressed that he was being denied "400 million dollars in his bank" and was set to appear on the television program "The Rich and Famous."

A 27-year-old female mentally ill inmate accumulated six and a half years of disciplinary detention segregation and lost access to the telephone and visitation for eight years for non-assaultive offenses, most of which were verbal or profane threats to staff or other inmates. One of the charges was prompted when she threatened two inmates who were making derogatory remarks about a medical condition that required her to wear diapers.

The evidence revealed that the great majority of the extreme periods in segregation are in fact served. For example, Leslie Cox, a member of the Plaintiff class, was confined in SMU for at least 2,565 consecutive days, from February 2001 - February 2008. James Wilson, another mentally ill inmate, was confined in SMU for at least 2,491 consecutive days.⁶ SCDC records provide conflicting information about mentally ill inmate Rowland Dowling, who spent either 1,777 or 2,200 consecutive days in solitary. Other mentally ill inmates were confined in solitary for similarly lengthy periods.

SCDC's Guilty But Not Accountable ("GBNA") policy should theoretically reduce the number of mentally ill inmates in segregation but, in fact, has had a negligible effect. SCDC counselors are responsible for recommending findings of GBNA but this Court finds that, as Dr. Patterson testified, many SCDC counselors are not qualified to analyze accountability. Only 2 percent of mentally ill inmates receiving segregation sentences are determined to meet GBNA criteria.⁷ Moreover, of those found to be GBNA, the finding has had no effect on their

⁶ SCDC records indicate that inmates Cox and Wilson were still in segregation as of February 25, 2008. It is unknown how much longer they remained in segregation after that date.

⁷ Evidence introduced by Plaintiffs also showed that a small percentage of the disciplinary detention sentences for male mentally ill inmates at Area Mental Health Institutions were reduced or waived during a 21-month review period between 2010 and 2011.

sentences. Of all inmates in SCDC custody on September 1, 2011 who had been found GBNA, 25 were mentally ill. Despite being found "not accountable," all 25 had been sentenced to segregation.

The American Correctional Association ("ACA") defines disciplinary detention or punitive segregation as follows:

A form of separation from the general population in which inmates committing serious violations of conduct regulations are confined by the disciplinary committee or other authorized group for *short periods of time* to individual cells separated from the general population.

ACA Standards for Adult Correctional Institutions Supplement, p. 306 (2008) (emphasis added).

The ACA standards also recognize the potentially harmful effects of punitive segregation on the mental health of any inmate:

Inmates whose movements are restricted in segregation units may develop symptoms of acute anxiety or other mental health problems; regular psychological assessment is necessary to ensure the mental health of any inmate confined in such a unit beyond 30 days.

ACA Standards for Adult Correctional Institutions, 3rd Edition, Standard 3-4244 (2008).

J. 13
The evidence presented by Plaintiffs demonstrates that SCDC consistently showed little to no regard for the mental health of inmates in imposing periods of disciplinary or security detention, in the lengths of the segregation imposed, or in the effects on mentally ill inmates. The Department's practice consistently violates the ACA standards. Neither the disciplinary detention sentences nor classifications in security detention are for short periods of time. Once in segregation, the level of therapeutic care or intervention to address the needs of mentally ill inmates is grossly inadequate.

Dr. Janet Woolery, the principal psychiatrist at Lee, estimated that approximately 40-50 percent of the Lee SMU inmates she saw were demonstrating active psychotic symptoms.

Rather than placing mentally ill inmates into treatment programs, it appears that they are merely placed in SMUs. SMU patients receive no group therapy and sessions with both psychiatrists and mental health counselors are seldom held in a confidential setting. Sixty-three percent of the counselor audits produced by SCDC noted deficiencies for untimely psychiatric sessions and 77 percent noted deficiencies for untimely counselor assessments. Patient medical records provide further evidence that SMU patients often do not see psychiatrists or counselors on a timely basis. For example, SCDC policy requires that Edward Barton, diagnosed with schizophrenia and classified as an Area Mental Health patient, be seen by a mental health counselor at least once every 30 days, as well as by a psychiatrist at least once every 90 days. Yet, from July 2008 – November 2010, while confined in an SMU, Barton on six occasions went over 30 days without seeing a counselor; on four of those occasions he went over 60 days without seeing a counselor; and once he went 9 months without seeing a counselor. From September 2010 – August 2011, Barton twice went over 120 days without seeing a psychiatrist and once went over 6 months.

9-8
14
SCDC's heavy reliance on segregation of mentally ill inmates raises serious concerns for the Court. As acknowledged by SCDC Mental Health Regional Coordinator Jacqueline Strong, risk factors for psychosis and suicide increase while an inmate is in SMU. It is not uncommon for an inmate in SMU to develop depression and experience a disturbance in eating and sleeping cycles.⁸

⁸ Defendants relied upon a Colorado Department of Corrections study to assert that long-term segregation has no significant detrimental effect on mental health. However, the Court finds that the Colorado study is distinguishable from the situation at SCDC for two reasons. First, the Colorado study was limited to inmates who had spent no more than twelve consecutive months in segregation. Many SCDC mentally ill inmates stay in segregation for much longer periods of time. Second, the Colorado study was expressly limited to SMUs with substantially similar conditions to the Colorado State Penitentiary. Plaintiffs' two psychiatric experts, Dr. Metzner and Dr. Patterson, each testified they were familiar with the Colorado State Penitentiary and that conditions in SCDC segregation units were much harsher. As Dr. Patterson testified, the difference was like "night and day."

Moreover, evidence in the case shows conditions in SMUs fall below what is acceptable for a 21st century correctional institution. SMU cells are both extremely cold and inordinately filthy, often with the blood and feces of previous occupants smeared on the floor and walls.

Within the SMU of Lee Correctional Institution is a special 8-cell unit known as "Lee Supermax." On February 7, 2008, inmate Jerome Laudman was transferred to a cell in Lee Supermax. Laudman was schizophrenic, intellectually disabled, and had a speech impediment. According to his mental health counselor, he was neither aggressive nor threatening. No one notified the counselor of Laudman's transfer to Lee Supermax. According to an internal SCDC investigative report, Laudman was sprayed with chemical munitions and physically abused by a correctional officer during the transfer to Lee Supermax. The move was videotaped pursuant to policy, but when viewed by the SCDC investigator, the tape was, inexplicably, mostly blank. Laudman was stripped naked and left in a completely empty Supermax cell.

*JLB
1.5*

On February 11, a correctional officer observed that Laudman was sick and weak but did not report it. At some point after February 11, Laudman stopped eating and taking medication. On the morning of February 18, a correctional officer saw Laudman lying on the cell floor in feces and vomit. He lay there "all morning," according to the SCDC investigative report. At approximately 1:30 or 2:00 p.m., two nurses were called. They reported that, in addition to feces and vomit, 15-20 trays of rotting, molding food were in the cell. Both the nurses and the correctional officers refused to retrieve the body. After a further delay, two inmates came to retrieve Laudman, who was unconscious but alive. Later that afternoon, however, he died in a local hospital ER of a heart attack. The hospital report noted the presence of hypothermia. The SCDC investigator found evidence of an attempted cover-up by correctional officers who cleaned Laudman's cell before photographs could be taken. Even after the cleaning, the

photographs taken by the investigator show the cell in a deplorably dirty state. After Laudman's death, SCDC did no quality improvement reviews of Lee Supermax procedures and practices. In September 2008, seven months after Laudman's death, Dr. Metzner and Dr. Patterson inspected Lee Supermax and described it as "filthy."

b. Use of force

Mentally ill inmates also suffer from disproportionate, unnecessary, and excessive uses of force.

i. Disproportionate Use of Force. Between January 2008 and September 2011, mentally ill inmates were subjected to uses of force at a rate two and half times greater than non-mentally ill inmates. During this period, 27 percent of the Plaintiff class was subjected to the use of force in contrast to only 11 percent of other inmates. At the Area Mental Health Institutions for men, the reliance on use of force was even greater. At Lee, Lieber, and Perry, 40 percent, 43 percent, and 44 percent of mentally ill inmates were subjected to force, respectively, while the corresponding numbers of non-mentally ill inmates subjected to force at these institutions were 23 percent, 21 percent, and 16 percent, respectively. Although force was applied far less frequently at Camille G. Graham Correctional Institution ("Graham"), the Area Mental Health Institution for women, the same pattern was present. During the relevant review period, only fourteen use-of-force incidents were reported; however, ten of these incidents were directed toward mentally ill women, even though members of the Plaintiff class constituted less than half of the total inmates at Graham.

The evidence was clear and compelling that SCDC resorts to use of force in the agency's attempt to manage the conduct of mentally ill inmates. Of the inmates who were subjected to use of force, each mentally ill inmate who had been the object of a reported use of force during this

period was subjected on average to 3.35 separate incidents, while the use-of-force rate for other inmates was almost half that, at 1.72 incidents per inmate.

Of the thirty inmates most frequently subjected to the use of force, twenty-six were on the mental health caseload. The mental health conditions were so serious for many of these individuals that fifteen of the twenty-six required hospitalization during the same period at Gilliam Psychiatric Hospital ("Gilliam" or "GPH"). Ten of these fifteen inmates were hospitalized on multiple occasions. James Howard was subjected to 81 separate use-of-force incidents. Mr. Howard was hospitalized for psychiatric treatment on five separate occasions during this same period between January 2008 and September 2011.

SCDC's overreliance on the use of force in attempting to manage mentally ill inmates is, in part, a direct effect of the lack of training correctional officers receive. SCDC training coordinator Yolanda Delgado testified in deposition only twelve days before trial that "less than a handful" of correctional officers attended training sessions intended to improve the staff's knowledge and skills in dealing with mentally ill inmates.

ii. Unnecessary and Excessive Use of Force. Plaintiffs' corrections expert, Steve J. Martin, testified that while SCDC's use-of-force policy was consistent with national correctional standards, its use-of-force practices were not. Based on his review of over 1,000 incident reports at SCDC involving OC spray (pepper spray), Mr. Martin testified a pattern and practice existed that violated national standards and SCDC's own use-of-force policy. First, Mr. Martin testified in detail about eighteen case examples at SCDC of the unnecessary use of force where no threat of harm or other urgent circumstances were present and, in some cases, where OC spray was used simply as punishment. Mr. Martin testified, and the Court finds, that these cases were representative of the more than 1,000 incidents he

reviewed. Second, Mr. Martin found it common for SCDC correctional officers to use excessive force. For example, contrary to SCDC policy, SCDC officers routinely gas inmates with OC spray in amounts that exceed manufacturer instructions and at closer distances than the manufacturer directs. Mr. Martin identified nine case examples, documented in SCDC reports, where SCDC officers had used MK-9 crowd control fogger devices in large disbursements in individual closed cells, again contrary to manufacturer instructions and SCDC policy. In fact, Mr. Martin testified that having reviewed thousands of uses of OC spray in prisons and jails throughout the country, he had "never seen MK-9, a crowd control contaminant, so frequently used by a correctional force inappropriately." The use of such force is without penalogical justification.

9/18 SCDC's unnecessary and excessive use of OC spray on mentally ill inmates is consistent with its unnecessary and excessive use of physical restraints. Contrary to its policy and national correctional standards, SCDC places inmates in restraint chairs for predetermined blocks of time in set, four-hour increments.⁹ For example, on December 12, 2007, inmate Steven Patterson was transferred to Perry from Gilliam but, by SCDC's mistake, with only five days' worth of psychotropic medications. On January 2, 2008, Patterson's medical record noted that he had not received medication since December 17, 2007 "and he's not doing well." That same day, he cut himself with a plastic spoon and was placed naked in a restraint chair for twelve hours, even though the videotape of his time in the chair shows him calm and cooperative. On January 3, he was returned to Gilliam.

⁹ SCDC witnesses testified this practice was changed shortly before the start of this trial so that inmates no longer will be placed in restraint chairs for predetermined blocks of time. The timing of this change concerns the Court, however, for "practices may be reinstated as swiftly as they were suspended." *Thomas v. Bryant*, 614 F.3d 1288, 1320 (11th Cir. 2010).

Mr. Patterson's experience was only one example of how SCDC uses restraint chairs as a substitute for medical treatment. Plaintiffs entered into evidence two gruesome SCDC videotapes of inmates with self-inflicted wounds who were kept in the restraint chair for extended periods of time before receiving adequate medical treatment. Inmate Jerod Cook cut himself on his arm. Approximately 90 minutes after being discovered, he was placed in a restraint chair where he remained for four hours. The videotape shows a pool of blood on the floor of Mr. Cook's cell. He is hardly able to stand before being placed in the restraint chair. He continues to bleed while in the restraint chair and pleads with correctional officers for medical help. As Dr. Patterson testified, the decision by security staff – rather than by medical staff – to keep Mr. Cook in a restraint chair for four hours under those conditions was an "outrageous, horrific response."

Job 19
Inmate Baxter Vinson underwent a similar experience, cutting himself in the abdomen while in his cell. Approximately three hours and twenty minutes after his wound was discovered, security staff placed him in a restraint chair where he remained for approximately two hours before being transported to a hospital. The videotape shows that while in the restraint chair, Mr. Vinson is eviscerating, with his intestine coming out of the abdominal wall. The tape shows correctional officers tightening the restraints, thereby putting additional pressure on his abdomen. As Dr. Patterson testified, this was a medical emergency that required a sterile environment. The videotape gives further evidence of what Dr. Patterson characterized as "a broken system."

Inmates are often placed naked in restraint chairs. Bathroom breaks are infrequent, so that at times they are forced to urinate in the chair. A common practice at Perry when placing inmates in a restraint chair is to secure them in a painful, "crucifix" position, demonstrated to

Mr. Martin both by Perry correctional officers and inmates. Inmates Richard Patterson and Jonathan Roe both testified about spending hours in what they characterized as the "Jesus" position.

OC spray and restraint chairs are not the only methods of physical force employed by SCDC against mentally ill inmates. Shawn Wiles, a mentally ill inmate in SCDC's Maximum Security Unit, testified that correctional officers restrained his arms in a twisted position, soaked him with water, and left him outside for approximately an hour on a cold December night.

While SCDC contends these are isolated examples of inappropriate conduct by correctional officers, it offered little or no evidence of effective supervisory oversight of the use of force. Mr. Martin testified that one of the standard protections prison systems use to guard against excessive use of force is review of use-of-force incidents. The first element of an effective review process is an examination of the cases that are referred to senior management for review of questionable uses of force. The second element consists of an assessment of the findings concerning allegations of inappropriate force and corrective actions taken. Of the more than one thousand cases Mr. Martin reviewed, very few were referred to senior SCDC officials to assess an alleged inappropriate use of force. Mr. Martin found that of the few cases that were referred, SCDC officials made virtually no findings of excessive or unnecessary force.

In a prison system of more than 23,000 inmates, Mr. Martin testified that the almost complete absence of the identification by managers of inappropriate uses of force is a "huge red flag" that raises serious questions about the existence of an effective system to manage the use of force by correctional officers. Mr. Martin testified that the risk of harm to mentally ill inmates from the unnecessary and excessive use of force, if left unattended and not corrected, is ongoing

and substantial. The Court finds Mr. Martin's testimony, and the bases for his opinions, to be credible.

The Court is concerned by the absence of referrals for investigation of the cases presented by Mr. Martin, and the absence of findings by senior SCDC managers that those cases raise serious questions about the application of force against mentally ill inmates. The Court finds that such excessive uses of force have been largely unreported, uninvestigated, and unmanaged. The Court further finds that Plaintiffs have proven a pattern and practice of the use of unnecessary and excessive force.

c. Limited involvement of psychiatrists

JB
21
A substantial contributing factor to the lack of an effective treatment program is the limited involvement of psychiatrists in creating and administering treatment plans for mentally ill inmates. Psychiatrists at SCDC have no administrative or policy-making duties, and there is evidence that they do not attend meetings to create and develop treatment plans for inmates. The Court finds that psychiatrists, as the lead mental health professionals in the mental health program, must be more directly involved in creating and developing treatment plans. Furthermore, deposition testimony of some psychiatrists reveals an alarming lack of knowledge of policies and procedures at SCDC, the levels of care and criteria for referral to a particular level of care, and the role of the counselor in the mental illness treatment process. For example, SCDC psychiatrist Dr. Poiletman did not know what the terms SMU and CI stood for – meaning Special Management Unit and Crisis Intervention – terms inextricably tied to mentally ill inmates at SCDC. He did not know the difference between Area Mental Health patients and outpatients, did not know what mental health counselors do, and had “no idea” who drafted treatment plans. Likewise, Dr. Crawford, the principal psychiatrist at Graham, could not

describe the distinction between an Intermediate Care Services patient and an Area Mental Health Patient. She did not review treatment plans and did not start attending treatment team meetings until after her deposition. Dr. Woolery, the principal psychiatrist at Lee, was unfamiliar with treatment plans, did not know whether any of her patients were in Lee Supermax, and had never seen Lee Supermax herself. The Court finds these examples both illuminating and disturbing. For psychiatrists and other mental health staff at SCDC to provide effective services, they must have a more intimate knowledge of the processes and procedures vital to the mental health services system they are expected to direct.

d. Limited access to higher levels of care

Finally, SCDC's treatment program fails to provide mentally ill inmates with sufficient access to higher levels of care. All correctional mental health systems are organized by levels of care, and SCDC's system comprises four levels. From lowest to highest, these are outpatient, area, intermediate (ICS), and inpatient. The higher the level, the more services and staffing are required.

SCDC's Mental Health Director, Pamela Whitley, estimated that in 2008 the combined ICS and Area Mental Health caseload at SCDC was 515. In 2012, however, the combined ICS and area caseload was only 310, a 40 percent reduction. In February 2008, at Lee and Lieber combined there were 212 area and 211 outpatient mental health inmates, a 50/50 split. By September 2011, however, there were only 83 area inmates at Lee and Lieber (14.8 percent), while the outpatients numbered 478 (85.2 percent). From 2003 to 2011, male ICS inmates decreased from 315 to 135. The women's ICS program was discontinued, then revived, but at the time of trial consisted of only five inmates. In the 1990s Gilliam, the 88-bed inpatient psychiatric facility for male inmates, operated at full capacity, but at the time of trial only 47

beds were filled. It is undisputed that women inmates have a higher rate of mental illness than male inmates, but from 2007-2009 SCDC referred only 13 women to Geo Care (formerly "Just Care"), a private company with which SCDC contracts for inpatient psychiatric services for female inmates. SCDC offered no persuasive explanation for the decline in the number of inmates receiving higher levels of services during a period when the overall inmate population and mental health case load remained flat.

e. Conclusion

This Court finds that SCDC's use of force and segregation, as opposed to treatment, in a mental health system where psychiatrists have limited roles and where inmates face systemic obstacles in accessing higher levels of care, creates a substantial risk of serious harm for inmates with serious mental illness.

3. Employment of a sufficient number of trained mental health professionals

Job 23
The Court finds that the mental health program at SCDC is substantially understaffed. This has a causal effect for many insufficient aspects of the mental health program and greatly inhibits SCDC's ability to provide effective services to its mentally ill inmate population.

From 2008-2011, psychiatric staff at SCDC (psychiatrists and psychiatric nurse practitioners) ranged from 4.5 to 5.5 full-time equivalents (FTEs). At the time of this trial, SCDC had 5.5 FTE psychiatric staff serving an estimated 2,409 inmates on psychotropic medication, for a ratio of 1:437. If 17 percent of SCDC's population is mentally ill, rather than the 12.9 percent diagnosed by SCDC, the estimated number of inmates on psychotropic medication should be 3,170 and the ratio then is 1:575. Based on the testimony of Dr. Metzner and Dr. Patterson, the Court finds an appropriate ratio would be one FTE psychiatrist/psychiatric

nurse practitioner to every 150-200 inmates on psychotropic medication. At Gilliam, there are 1.2 FTE psychiatrists and psychiatric nurse practitioners for 62 patients, a 1:52 ratio. Based on the testimony of Plaintiffs' experts, the Court finds that an appropriate ratio for an inpatient setting would be 1:20. For the ICS program, there is currently .7 FTE psychiatric staff for 135 patients, a ratio of 1:193. Based on the testimony of Plaintiffs' experts, the Court finds that an appropriate ratio for intermediate care would be 1:150.

The Court also finds that SCDC is understaffed in clinical psychologists. In 2003, SCDC employed or retained four FTE clinical psychologists but needed, by its own admission, seven. From 2007-2011, however, SCDC averaged only .3 FTE psychologists.¹⁰ To add some context, SCDC's expert, Dr. Haas, testified that the Kentucky Department of Corrections, his former employer, had 15-16 FTE psychologists to serve a total population of 12,000 – 13,000 inmates, a ratio of approximately 1:800. By contrast, SCDC's .3 FTE psychologists serve a total population of approximately 23,000 inmates, a ratio of 1:69,697.

Jan 24
Likewise, the ratio for counselors at Area Mental Health Institutions as of January 2012 is also problematic: 1:72 at Lee; 1:84 at Perry, and 1:100 at Lieber. In response to this information, Dr. Patterson and Ms. Whitley, SCDC's Mental Health Director, agreed that a more appropriate ratio for counselors at the Area Mental Health Institutions is 1:40. Counselor staffing at outpatient prisons is also insufficient. Ms. Whitley testified she became "very concerned" when counselor-patient ratios at outpatient prisons exceeded 1:65, and Dr. Patterson agreed. SCDC data, however, shows that counselor ratios at most of its outpatient prisons exceed 1:65. At the time of trial, the counselor-patient ratio at McCormick Correctional Institution was 1:157 and at Turbeville Correctional Institution 1:183.

¹⁰ Shortly before trial, SCDC increased its psychologists to .7 FTE.

In total, Dr. Patterson recommended that SCDC employ at least an additional 20 FTE counselors, 14.5 FTE psychiatrists, and 17 FTE other types of mental health professionals. The Court accords great weight to Dr. Patterson's recommendations for staffing.

While it is clear that SCDC does not have enough counselors, it is equally clear that many of the counselors they do employ are unqualified. Hiring unqualified counselors can lead to the kind of deterioration in the delivery of mental health services that Perry experienced in 2009-2010. Within a period of a few months, all five of Perry's counselors were fired or resigned under investigation or following a serious reprimand. As Dr. Patterson testified, those counselor departures had a significant effect on mental health services provided at Perry, resulting in the cancellation of many psychiatric clinics and group therapy sessions. Disciplinary reprimands in counselor personnel files give further evidence of the overall poor quality of SCDC counselor services.

JB 25
In 2009, SCDC began conducting internal audits of its mental health counselors. As Dr. Patterson and Dr. Metzner testified, the audits document a wide range of serious counselor deficiencies. Scores were particularly poor for Lee, Lieber, and Perry, the male Area Mental Health Institutions, where 55 percent of the audits were either "unsatisfactory" or "satisfactory, but with major concerns." Some of the deficiencies listed are disturbing. They include numerous instances of mentally ill inmates going for many months without seeing a counselor or psychiatrist, in violation of SCDC policy; treatment plans that were out of date and incomplete; and inadequate documentation of medication administration and group therapy sessions. Some counselors repeatedly failed their audits.

The Court finds that inadequate mental health staffing at all levels within SCDC represents a substantial risk of serious harm to inmates with serious mental illness.

4. Maintenance of accurate, complete, and confidential mental health treatment records

A treatment plan is intended to be a dynamic and fluid process that continues on a regularly scheduled basis, supplemented by constant updates and revisions. In order to be effective, treatment plans must be accurate, complete, readily accessible to professional staff, and confidential. During trial, evidence was presented to the Court indicating that documentation and maintenance of these records is poor. The treatment plans and automated medical records ("AMR") do not clearly state problems, objectives, goals, or even identify plan-responsible staff.

The importance of maintaining accurate and complete treatment records is vital to any medical services delivery system. For mentally ill inmates in particular, treatment plans and AMRs are critical for assessing progress as well as the effect of medication and therapy.

In addition, Dr. Metzner offered several examples of basic information about its mental health program that SCDC's aged computer system is unable to provide. For example, SCDC's computer system cannot retrieve the names or numbers of all inmates referred to the ICS program; the number of women inmates referred to Geo Care for inpatient psychiatric services; the number of inmates who have made serious suicide attempts; or the number of inmates whose psychotropic medications have expired without being timely renewed.

In summary, the evidence in this case shows that the recordkeeping system for SCDC is outmoded, poorly maintained, and not readily accessible to all staff. The Court finds that SCDC's failure to maintain accurate and complete mental health treatment records represents a substantial risk of serious harm to mentally ill inmates.

5. Administration of psychotropic medication only with appropriate supervision and periodic evaluation

In evaluating this factor, some of the same concerns overlap with those of the previous factor – maintenance of accurate, complete, and confidential mental health treatment plans. The Court, however, will note three specific issues that raise further concerns. First, Medication Administration Records (“MAR”) of mentally ill inmates provide crucial information upon which psychiatrists rely. SCDC uses standard MAR forms where nurses are required to sign their initials to confirm that medication was provided and administered. At trial, various MARs were introduced indicating the absence of initials and absence of any record that medications were provided at all. This indicates either the medication was not provided or the nurses failed to maintain accurate records. For example, in October and November 2008, inmate Jonathan Mathis was prescribed one medication to be taken twice a day and two other medications to be taken once a day. From his MAR, however, it appears he received no medications either month, without explanation.

Jo 27
Although counselors monitor MARs, the Court agrees with Dr. Patterson that SCDC counselors are not qualified to do so, as evidenced by counselor audits showing deficient MARs. Ms. Delgado acknowledged that a failure to adequately monitor MARs has no effect on a counselor’s audit score. For example, the only audit that one Lieber counselor has ever passed was an audit in which 14 of the 15 MARs reviewed for which she was responsible were found incomplete or outdated.

The second issue of concern involves the suicide of Robert Hamberg. SCDC records show that Mr. Hamberg’s morning medications had expired – specifically his anti-psychotic medicine Geodon – which he was supposed to receive twice a day. Nevertheless, his counselor

was still recording that he was compliant with his medication – that he was receiving it in the mornings and evenings. Thus, Mr. Hamberg was only receiving half of his prescribed dosage of anti-psychotic medication. Mr. Hamberg committed suicide on June 9, 2010 at Perry Correctional Institution.

The third issue of major concern in the area of medication administration involves pill lines. As Dr. Patterson testified, medication compliance is especially difficult for many mentally ill inmates, due to medication side effects and the nature of their illness. At many institutions, pill lines occur between 3:00 - 4:00 a.m., and mentally ill inmates are often left to their own devices to timely awake, stand in line, and then take their medication. The timing, press of business, and lack of individual attention at the pill line lends itself to inmates failing to take psychotropic medications.

This Court finds that the failure to appropriately supervise, evaluate, and dispense psychotropic medications creates a substantial risk of serious harm to inmates with serious mental illness.

gab
28

6. A basic program to identify, treat, and supervise inmates at risk for suicide

a. The setting of Crisis Intervention ("CI") cells

At trial, Dr. Patterson identified seven mentally ill inmates at SCDC, in addition to Jerome Laudman, whose deaths from 2008-2011 were both foreseeable and preventable.¹¹ In his opinion, two common factors contributed to these deaths. First, crisis intervention cells are located in segregation units, not in a medical setting, and thus lack sufficient medical interaction

¹¹ Six of these were suicides. The seventh, Stephen Jeter, was not ruled a suicide, but his death was related to a failed suicide attempt. Moreover, the Court is aware that two more SCDC inmate suicides occurred while this trial was actually in progress, one at Lee and one at Lieber, with both decedents either on or should have been on the mental health caseload.

and treatment. For example, CI inmates are not being assessed daily for mental health purposes. As of the date of trial, SCDC policy only required that inmates in CI be seen Monday through Friday, excluding holidays, and this policy is often violated. Inmates in CI cells spend the entire day in those cells, and are held for long periods of time – typically one to two weeks – but sometimes longer. CI cells, like other SMU cells, are cold and filthy, with trash, blood, and feces scattered or smeared about. Inmates are placed naked in CI cells. They often are not provided a blanket, and when one is provided it often is not clean. CI cells do not have mattresses. Inmates sleep directly on a cold steel or concrete slab. Inmate Richard Patterson testified how he tore up his Styrofoam food trays, then spread the pieces on his concrete slab to serve as a form of mattress. In addition, most inmates in CI do not see a psychiatrist and are not allowed group therapy. Interaction with counselors is brief, limited, and not confidential.

For at least a three-year period, from 2008-2010, correctional officers at Lieber, at times with the acquiescence of mental health staff and at other times without their knowledge, routinely placed CI inmates naked in shower stalls, “rec cages,” interview booths, and holding cells for hours and even days at a time. Most of these alternative CI spaces did not have toilets and none were suicide resistant. Details of these placements are contained in Dr. Metzner and Patterson’s inspection report, entered into evidence, as well as in their testimony and the testimony of various inmates. SCDC’s own logs document over 100 of these alternative placements during the 27 months for which logs were provided.¹² The Court finds that the vast majority, if not all, of these placements were for inmates on crisis intervention. SCDC logs show that 55 of these placements at Lieber were for twelve hours or longer and 29 exceeded 24 hours. Inmate Isaac Anderson was confined over 86 consecutive hours in a Lieber rec cage from April

¹² SCDC could not locate Lieber SMU logs for several of the months requested.

2-6, 2009, with his first documented bathroom break coming after 42 hours in the cage. The interview booths and showers used for CI were often filthy and too small a space in which to lie down. Correctional officers brought CI inmates "finger food" meals to these spaces. Since inmates were not always provided bathroom breaks, some were forced to urinate and defecate in the same spaces where they were fed. Moreover, the Court finds that the use of such inappropriate spaces for CI has not been limited to Lieber. Plaintiffs presented inmate testimony and other evidence that SCDC has placed CI inmates in such spaces at other institutions prior to 2008 and after 2010. For the reasons discussed, the Court finds that SCDC's normal CI placements expose inmates with serious mental illness to a substantial risk of serious harm. The dehumanizing conditions of SCDC's alternative CI placements expose inmates to even greater risk.

b. Lack of constant observation

30
Second, SCDC's policy does not require constant observation; rather, inmates in CI cells are checked on 15-minute intervals, documented in cell-check logs. The evidence before the Court contains proven instances of fabricated cell check logs. For example, the cell check log of inmate Edward Broxton noted that at 6:30 a.m. on February 2, 2010, he was eating breakfast, even though an hour earlier, at 5:30 a.m., Broxton had hanged himself in his CI cell at Lee. Many of the cell check logs for Jerome Laudman were initialed "GM," although the only Lee Supermax correctional officer with those initials denied making the entries or authorizing anyone to use his signature. The SCDC Inspector General report on the drug overdose suicide at Perry of inmate James Bell documented evidence that his cell check logs had also been falsified. To make matters worse, on the Saturday before Bell's suicide his aunt, in an upset state, phoned SCDC to warn them of a "goodbye letter," suicidal in nature, she had received from her nephew.

SCDC mental health staff did not check on Bell until two days later, on Monday afternoon, when a counselor found him dead in his cell.

SCDC's expert, Dr. Haas, agreed with Dr. Patterson and Dr. Metzner that inmates on suicide watch require continuous observation. In 2008, inmate Brian Schriefer committed suicide while on CI at Gilliam by stuffing either toilet paper or a paper gown down his throat. As a result of Schriefer's death, SCDC stopped distributing gowns to CI inmates, instead requiring them to remain naked while in CI. SCDC did not change its policy, however, on continuous observation of suicidal inmates. Continuous observation would have prevented Schriefer's death.

The Court finds that SCDC's suicide prevention and crisis intervention practices create a substantial risk of serious harm to seriously mentally ill inmates.

7. Summary of objective component

As detailed above, this Court finds that the evidence in this case has proved SCDC's mental health program is inherently flawed and systemically deficient in all major areas. The Court further finds that a major contributing factor to the deficiencies in the SCDC program is the lack of a formal, comprehensive quality management program.

Finally, having observed the testimony of the psychiatric and correctional experts for both Plaintiffs and Defendants, this Court finds Plaintiffs' experts more credible. In part, this finding is due to a comparison of their credentials and experience; in part, due to their relative persuasiveness on the witness stand; and in part, due to the wide disparity between Plaintiffs' and Defendants' experts in case preparation and particular knowledge of the SCDC system.

Based on the testimony of these experts and the other evidence presented at trial, the Court finds that SCDC's mental health program exposes inmates with serious mental illness to a

substantial risk of serious harm. Plaintiffs have therefore satisfied the objective component of the deliberate indifference standard.

B. Subjective Component

The subjective component of the deliberate indifference standard requires proof that SCDC knew that Plaintiffs were exposed to a substantial risk of serious harm, but failed to take reasonable measures to abate the risk. *Farmer*, 511 U.S. at 847. The subjective component should be determined in light of the prison authorities' "attitudes and conduct at the time suit is brought and persisting thereafter." *Id.* at 845-846.

The evidence is overwhelming that SCDC has known for over a decade that its system exposes seriously mentally ill inmates to a substantial risk of serious harm. In 1999, SCDC retained Dr. Patterson (Plaintiffs' expert), through a grant, to inspect its mental health program. His report, issued in 2000, characterized the program as being in a state of "profound crisis." In October 2000, a Joint Legislative Proviso Committee report concluded that "inmates with mental illness are not receiving adequate treatment . . . and oftentimes leave prisons worse off than when they entered." In April 2003, a South Carolina Task Force whose members included three former SCDC Directors issued a report that concluded Gilliam was "clearly inadequate." In May 2003, the South Carolina Department of Mental Health issued a report on SCDC's mental health program, noting "[t]he lack of psychiatric coverage has resulted in a critical situation, with extremes of poor care, inhumane treatment, and dangerousness" In September 2003, SCDC Director Jon Ozmint, in an application for technical assistance, stated that "[t]he current plight of persons with mental illness at SCDC is at a crisis level." In June 2005, the Plaintiffs filed their Complaint in this case, alleging constitutional deficiencies in SCDC's program. From 2006-2010 Plaintiffs' experts issued eight site inspection reports criticizing conditions in SCDC

facilities. In October 2007, SCDC psychiatrist Dr. Michael Kirby wrote a letter to his supervisor noting several serious problems with SCDC's mental health system. In June 2008, SCDC investigator Lloyd Greer issued his report on the death at Lee Supermax of Jerome Laudman. From 2008-2010, Lieber SMU logs documented the use of shower stalls and other inappropriate spaces for CI placements. In 2009-2010, SCDC was aware that the counselor shortage at Perry created serious deficiencies in the delivery of mental health services. In January 2010, a United States Department of Justice report was highly critical of SCDC's medication management and administration practices. SCDC's own counselor audits from 2010-2011 revealed numerous unsatisfactory practices and major deficiencies. January 2012 internal data showed counselor-to-patient ratios at many SCDC facilities that were excessively high. Finally, through the discovery process in the litigation of this case from 2005-2012, SCDC was made aware of the serious allegations raised by Plaintiffs and their experts, many of which are supported by SCDC's own records.

gab
33 The Court finds from this evidence that SCDC knows and has known, since before this lawsuit was filed, and persisting thereafter until the time of trial and even to present date, that its mental health program is systemically deficient and exposes seriously mentally ill inmates to a substantial risk of serious harm.

That, however, does not end the analysis. The second element of the subjective component focuses on action: has SCDC taken reasonable measures to abate the risks of which it is aware? The evidence shows that from 1999 until the filing of this action in 2005, SCDC did virtually nothing to address, much less eliminate, the substantial risks of serious harm to which class members were exposed. What limited action SCDC has taken since the filing of this lawsuit has had little to no effect in abating the unconstitutional deficiencies this Court has

found. “[T]o rely on intervening events occurring after suit has been filed the defendants must satisfy the heavy burden of establishing that these such events ‘have completely and irrevocably eradicated the effects of the alleged violations.’” *Thomas v. Bryant*, 614 F.3d 1288, 1320-21 (11th Cir. 2010).

SCDC has failed to meet this “heavy burden.” At trial SCDC identified the measures it has taken since 2005 to improve its mental health program. These include the hiring of two administrators and some administrative support staff, an increase in psychiatric staff FTEs, a reorganization of group therapy, a new protocol for addressing self-injuring behavior (“SIB”), mental health dorms, increased use of tele-psychiatry, new training programs for clinical and security staff, and counselor audits.

906
134
The Court finds that these are small steps that have had little impact on the systemic deficiencies in SCDC’s mental health program. The mere hire of administrators to replace other administrators is not necessarily an improvement. Additional administrative support staff does not address the dire need for more clinical staff. Since 2008, SCDC’s psychiatric staff has remained relatively flat and currently consists of 5.5 FTEs, although this Court has found that at least 14.5 FTEs are needed. As discussed, counselor and psychologist FTEs are far too low. Reorganized or not, group therapy sessions are frequently cancelled and unavailable for most inmates in segregation and crisis intervention. SCDC introduced no persuasive evidence that its new, decentralized SIB protocol has improved SIB-related issues. SCDC’s concentration of some mentally ill inmates in designated dorms is no substitute for an adequately staffed mental health program. At the time of trial, SCDC had not implemented expanded tele-psychiatry services, but had merely requested a feasibility study. SCDC’s training programs are limited in scope and poorly attended. Counselors are the only mental health clinicians subject to formal

audits, and those audits, though limited in scope, reveal alarming deficiencies. Despite a low bar for passing, many counselors fail their audits, some repeatedly.

Half-hearted measures will not foreclose a finding of deliberate indifference. “Patently ineffective gestures purportedly directed towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it.” Standards Order at 13, (quoting *Coleman v. Wilson*, 912 F. Supp. 1282, 1319) (E.D. Cal. 1995)). See also *Thomas*, 614 F.3d at 1320 (11th Cir. 2010) (“practices may be reinstated as swiftly as they were suspended”). The steps SCDC has taken have been small ones, characterized by SCDC itself as “band aids,”¹³ many of which were instituted shortly before and even during trial, that have failed to adequately address the known systemic deficiencies in its mental health program. The SCDC mental health program needs far more than band aids, and the Court finds that the measures taken by SCDC to correct its systemic deficiencies are neither reasonable, timely, nor effective. Plaintiffs have therefore satisfied the subjective component of the deliberate indifference standard.

35
II. REMEDY TO ADDRESS CONSTITUTIONAL VIOLATIONS

A. Overview

In devising a remedy for the constitutional deficiencies at SCDC, the Court is required to balance two competing interests. First, it is not the role of this Court to micromanage the daily administration of the mental health program at SCDC. Moreover, this decision comes in a time of economic recession and heavy scrutiny of governmental expenses. However, “[c]ourts may not allow constitutional violations to continue simply because a remedy could involve intrusion into the realm of prison administration.” *Brown v. Plata*, 131 S.Ct. 1910, 1928-29 (2011).

¹³ SCDC’s June 8, 2009 Memorandum on Applicable Standards contended that SCDC had a “well-developed mental health system . . . in place for decades,” that needed nothing more than “band aids or other minor remedies.”

Additionally, the economic “cost of protecting a constitutional right cannot justify its total denial.” *Bounds v. Smith*, 430 U.S. 817, 825 (1977). “A plea of lack of funds is an insufficient justification for the failure of the executive department” to provide constitutionally mandated treatment programs. *Crain v. Bordenkircher*, 176 W.Va. 338, 364, 342 S.E.2d 422, 449 (1986), (quoting *Moore v Starcher*, 167 W.Va. 848 - 853, 280 S.E.2d 693, 696 (1981)).

Second, under the separation of powers doctrine, this Court may not usurp the authority of other branches of government. The separation of powers doctrine, however, “is not fixed and immutable.” *State v. Langford*, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012). On the contrary, the doctrine contains “grey areas” and an “overlap of authority” among governmental branches. *Id.*

“Separation of powers does not require that the branches of government be hermetically sealed; the doctrine of separation requires a cooperative accommodation among the three branches of government; a rigid and inflexible classification of powers would render government unworkable.” At its core the doctrine therefore “is directed only to those powers which belong exclusively to a single branch of government.”

Id. (quoting 16A Am.Jur.2d, *Constitutional Law* § 244, 246).

In Blaney v. Cmmr. of Corrections, 374 Mass. 337, 372 N.E.2d 770 (1978), following defendants’ submission of deficient plans to remedy prison conditions, the court entered a remedial order giving explicit directions for defendants to follow. The court rejected defendants’ argument that the order violated separation of powers, noting that courts have power to direct public officials to carry out their lawful obligations. 374 Mass at 339-42, 372 N.E.2d at 773-74. “As to judges’ authority to fashion detailed orders to correct established violations of constitutional rights . . . [s]uch functions are judicial, and in no way usurp the power of the executive.” 374 Mass. at 342-43, 372 N.E.2d at 774, citing *Swann v. Charlotte-Mecklenburg*

County Bd. of Educ., 402 U.S. 1, 15 (1971); *U.S. v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 234-36 (1969). See also *In re K.C.*, 325 Ill. App. 3d 771, 779-80, 759 N.E.2d 15, 23 (2001) (“When the legislature creates a statute that contemplates an interplay between the courts and the executive branch, court orders directing the actions of the executive agencies do not violate the doctrine of the separation of powers.”); *Crain*, 176 W.Va. at 364, 342 S.E.2d at 449 (where a court ordered the West Virginia Department of Corrections to implement an extensive remedial plan addressing constitutionally deficient prison conditions.); *Haley v Barbour Cnty.*, 885 So. 2d 783, 790 (Miss. 2004) (noting court regulation of the number of inmates a county may deliver to a prison does not violate separation of powers.); *Massameno v. Statewide Grievance Comm.*, 234 Conn. 539, 567, 663 A.2d 317, 333 (1995) (stating a court does not violate separation of powers doctrine by supervising and disciplining executive branch prosecutors.)

37
37
Finally, this Court is bound to uphold the South Carolina Constitution and protect the rights of the mentally ill inmates at SCDC. Moreover, it is the action of a circuit court that triggers the placement of an inmate into the custody of SCDC, under Court authority, and thus this Court has the inherent power - and responsibility - to see that the imprisonment of that inmate complies with constitutional mandates. The Court is convinced that to view the evidence put forth in this case and then do nothing could be a great miscarriage of justice.

To address the constitutional deficiencies in the mental health system at SCDC, Plaintiffs have proposed a remedial plan comprised of three components. First, SCDC would be required to submit a written plan for remedying the systemic deficiencies identified by the Court. Second, SCDC must rely upon factors and guidelines identified by the Court in creating this plan, which the Court will then review and either approve or disapprove. Third, the Court will retain jurisdiction of this case and appoint expert monitors and/or a special master who will report

periodically to the Court. SCDC has raised objections to this plan, arguing that it constitutes an impermissible burden shift and is violative of the separation of powers doctrine.

The Court denies SCDC's objections. It would be highly impractical for Plaintiffs to identify and create a plan to implement changes to the mental health system at SCDC. Rather, once the Court has ruled, SCDC is in the best position to propose steps and changes to its existing system. *See Alexander S. v. Boyd*, 876 F. Supp. 773, 804-04 (D.S.C. 1995) (where a court ordered the South Carolina Department of Juvenile Justice to submit remedial plan within 120 days of order); *Crain*, 176 W.Va. at 341, 342 S.E.2d at 426 (where a court ordered the West Virginia Department of Corrections to submit remedial plan within 180 days of order). As a result, the Court adopts Plaintiffs' proposals and requires SCDC to submit a written plan to the Court within 180 days of the date of the Final Order in this case. In executing the remedial plan to be submitted by SCDC, the Court will retain jurisdiction but also intends to appoint a monitor who will report periodically to the Court. The Court will provide the parties, through motions, an opportunity to suggest the appropriate appointee(s) to oversee this process.

B. Remedial Factors and Guidelines

In formulating specific factors and guidelines for SCDC's remedial plan, the Court will again utilize the *Ruiz* factors above, along with additional sub-factors and components listed thereunder. In devising a plan to remedy the constitutional deficiencies identified by the Court, SCDC shall be directed in the Order to prepare a written plan that includes, at a minimum, the following:

1. The development of a systematic program for screening and evaluating inmates to more accurately identify those in need of mental health care

- i. Develop and implement screening parameters and modalities that will more accurately diagnose serious mental illness among incoming inmates at R&E with the stated goal of increasing the number of inmates recognized as mentally ill and being admitted to the mental health program by a minimum of two percentage points (14.9 percent of the inmate population);
- ii. The implementation of a formal quality management program under which mental health screening practices are reviewed and deficiencies identified and corrected in ongoing SCDC audits of R&E counselors;
- iii. Enforcement of SCDC policies relating to the timeliness of assessment and treatment once an incoming inmate at R&E is determined to be mentally ill; and
- iv. Development of a program that regularly assesses inmates within the general population for evidence of developing mental illness and provides timely access to mental health care.

2. The development of a comprehensive mental health treatment program that prohibits inappropriate segregation of inmates in mental health crisis, generally requires improved treatment of mentally ill inmates, and substantially improves/increases mental health care facilities within SCDC

a. Access to Higher Levels of Care

- i. Significantly increase the number of Area Mental Health inmates vis-a-vis outpatient mental health inmates and provide sufficient facilities therefor;
- ii. Significantly increase the number of male and female inmates receiving intermediate care services and provide sufficient facilities therefor;
- iii. Significantly increase the number of male and female inmates receiving inpatient psychiatric services, requiring the substantial renovation and upgrade of Gilliam

Psychiatric Hospital, or its demolition for construction of a new facility;

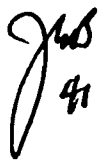
- iv. Significantly increase clinical staffing at all levels to provide more mental health services at all levels of care; and
- v. The implementation of a formal quality management program under which denial of access to higher levels of mental health care is reviewed.

b. Segregation

- i. Provide access for segregated inmates to group and individual therapy services;
- ii. Provide more out-of-cell time for segregated mentally ill inmates;
- iii. Document timeliness of sessions for segregated inmates with psychiatrists, psychiatric nurse practitioners, and mental health counselors and timely review of such documentation;
- iv. Provide access for segregated inmates to higher levels of mental health services when needed;
- v. The collection of data and issuance of quarterly reports identifying the percentage of mentally ill and non-mentally ill inmates in segregation compared to the percentage of each group in the total prison population with the stated goal of substantially decreasing segregation of mentally ill inmates and substantially decreasing the average length of stay in segregation for mentally ill inmates;
- vi. Undertake significant, documented improvement in the cleanliness and temperature of segregation cells; and
- vii. The implementation of a formal quality management program under which segregation practices and conditions are reviewed.

Job 40

c. Use of Force

- 
- i. Development and implementation of a master plan to eliminate the disproportionate use of force, including pepper spray and the restraint chair, against inmates with mental illness;
 - ii. The plan will further require that all instruments of force, (e.g, chemical agents and restraint chairs) be employed in a manner fully consistent with manufacturer's instructions, and track such use in a way to enforce such compliance;
 - iii. Prohibit the use of restraints in the crucifix or other positions that do not conform to generally accepted correctional standards and enforce compliance;
 - iv. Prohibit use of restraints for pre-determined periods of time and for longer than necessary to gain control, and track such use to enforce compliance;
 - v. The collection of data and issuance of quarterly reports identifying the length of time and mental health status of inmates placed in restraint chairs;
 - vi. Prohibit the use of force in the absence of a reasonably perceived immediate threat;
 - vii. Prohibit the use of crowd control canisters, such as MK-9, in individual cells in the absence of objectively identifiable circumstances set forth in writing and only then in volumes consistent with manufacturer's instructions;
 - viii. Notification to clinical counselors prior to the planned use of force to request assistance in avoiding the necessity of such force and managing the conduct of inmates with mental illness;
 - ix. Develop a mandatory training plan for correctional officers concerning appropriate methods of managing mentally ill inmates;
 - x. Collection of data and issuance of quarterly reports concerning the use-of-force incidents against mentally ill and non-mentally ill inmates; and

- xi. The development of a formal quality management program under which use-of-force incidents involving mentally ill inmates are reviewed.

3. **Employment of a sufficient number of trained mental health professionals**

- i. Increase clinical staffing ratios at all levels to be more consistent with guidelines recommended by the American Psychiatric Association, the American Correctional Association, and/or the court-appointed monitor;
- ii. Increase the involvement of appropriate SCDC mental health clinicians in treatment planning and treatment teams;
- iii. Develop a training plan to give SCDC mental health clinicians a thorough understanding of all aspects of the SCDC mental health system, including but not limited to levels of care, mental health classifications, and conditions of confinement for caseload inmates;
- iv. Develop a plan to decrease vacancy rates of clinical staff positions which may include the hiring of a recruiter, increase in pay grades to more competitive rates, and decreased workloads;
- v. Require appropriate credentialing of mental health counselors;
- vi. Develop a remedial program with provisions for dismissal of clinical staff who repetitively fail audits; and
- vii. Implement a formal quality management program under which clinical staff is reviewed.

4. **Maintenance of accurate, complete, and confidential mental health treatment records**

- i. Develop a program that dramatically improves SCDC's ability to store and retrieve, on a reasonably expedited basis:
 - Names and numbers of FTE clinicians who provide mental health services;

- Inmates transferred for ICS and inpatient services;
- Segregation and crisis intervention logs;
- Records related to any mental health program or unit (including behavior management or self-injurious behavior programs);
- Use of force documentation and videotapes;
- Quarterly reports reflecting total use-of-force incidents against mentally ill and non-mentally ill inmates by institution;
- Quarterly reports reflecting total and average lengths of stay in segregation and CI for mentally ill and non-mentally ill inmates by segregation status and by institution;
- Quarterly reports reflecting the total number of mentally ill and non-mentally ill inmates in segregation by segregation status and by institution;
- Quality management documents; and
- Medical, medication administration, and disciplinary records.

- ii. The development of a formal quality management program under which the mental health management information system is annually reviewed and upgraded as needed.

5. **Administration of psychotropic medication only with appropriate supervision and periodic evaluation**

- i. Improve the quality of MAR documentation;
- ii. Require a higher degree of accountability for clinicians responsible for completing and monitoring MARs;
- iii. Review the reasonableness of times scheduled for pill lines; and
- iv. Develop a formal quality management program under which medication administration records are reviewed.

Job
43

6. A basic program to identify, treat, and supervise inmates at risk for suicide

- i. Locate all CI cells in a healthcare setting;
- ii. Prohibit any use for CI purposes of alternative spaces such as shower stalls, rec cages, holding cells, and interview booths;
- iii. Implement the practice of continuous observation of suicidal inmates;
- iv. Provide clean, suicide-resistant clothing, blankets, and mattresses to inmates in CI;
- v. Increase access to showers for CI inmates;
- vi. Provide access to confidential meetings with mental health counselors, psychiatrists, and psychiatric nurse practitioners for CI inmates;
- vii. Undertake significant, documented improvement in the cleanliness and temperature of CI cells; and
- viii. Implement a formal quality management program under which crisis intervention practices are reviewed.

gas
44

CONCLUSION

Even the most brief and facile view of the evidence put forth by Plaintiffs in this case reveals obvious, significant, and longstanding problems with mental health services delivery at SCDC. Prior to trial, this Court tried its very best to bring the parties together for settlement purposes, even requiring the Director of SCDC and the guardian for the Plaintiffs, attorneys for both sides, and other interested parties to meet in an effort to resolve the case. The Court was not present for these discussions and thus cannot determine why they were unsuccessful.

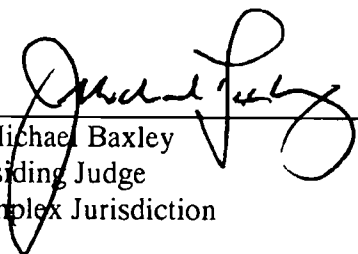
We are now eight years into this litigation. Rather than accept the obvious at some point and come forward in a meaningful way to try and improve its mental health system, Defendants

have fought this case tooth and nail—on the facts, on the law, on the constitutional issues, portraying itself as beleaguered by the burdensomeness of Plaintiffs' discovery, and generally harrumphed by the invasive nature of Plaintiffs' counsels' tactics and strategies. This Court has spent dozens of hours in hearings and conferences in an effort to resolve discovery disputes, most of which involved delay, missed deadlines, and recalcitrance on the part of the Defendants.

This Court can never criticize any party for a vigorous exercise of offense or defense in civil litigation, for such is the foundation of our adversarial system of justice. But justice in this case is not really about who wins or loses this lawsuit. The hundreds of thousands of tax dollars spent defending this lawsuit, at trial and most likely now on appeal, would be better expended to improve mental health services delivery at SCDC.

For the reasons set forth above, the Court grants judgment in favor of the Plaintiffs and orders SCDC to submit a proposed written remedial plan consistent with this Order.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge
Complex Jurisdiction

Hartsville, South Carolina

January 8, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No.: 2005-CP-40-2925

T.R., P.R., and K.W., on behalf of)
themselves and others similarly situated;)
and Protection and Advocacy for People)
with Disabilities, Inc.,)

Plaintiffs,)

v.)

South Carolina Department of Corrections)
and William R. Byars, Jr., as Agency)
Director of the South Carolina Department)
of Corrections)

Defendants.)

ORDER DENYING DEFENDANTS'
MOTION TO ALTER OR AMEND

I. **INTRODUCTION**

This is an action brought by a class of inmates with serious mental illness and a not-for-profit organization, Protection and Advocacy for People with Disabilities, Inc., ("P&A"). Defendants are the South Carolina Department of Corrections ("SCDC") and, in his official capacity, the SCDC Director. Plaintiffs seek declaratory and injunctive relief, alleging that SCDC's mental health program is systemically deficient and violates the cruel and unusual punishment clause of Article I, § 15 of the South Carolina Constitution.

This action was filed in 2005 and tried non-jury over a six-week period in 2012. The parties presented 36 witnesses and entered well over 200 documents into evidence. SCDC argued that Plaintiffs' evidence was dated and that any deficiencies were relatively minor and had been corrected. The Court rejected both these positions in its January 8, 2014 Order Granting Judgment for Plaintiffs ("Final Order").

As detailed in the Final Order, the Court relied heavily on evidence from 2008-2012 in finding that systemic deficiencies in SCDC's mental health program expose mentally ill inmates to unacceptable risks of harm. The Court further found that SCDC knows and has known of these deficiencies and risks "since before this lawsuit was filed, and persisting thereafter until the time of trial and even to present date." Final Order at 33.

On January 21, 2014, Defendants filed a Motion to Alter or Amend pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure. After Plaintiffs filed a memorandum in response, the Court heard oral arguments on March 28, 2014 at the Richland County Courthouse. For the reasons set forth below, SCDC's motion is hereby denied, and the previous decision of this Court is confirmed in its entirety.

II. DISCUSSION

A. Standing of Plaintiff Class and Class Representative

The Plaintiff class consists of approximately 3,500 inmates with serious mental illness. Final Order at 1. By the time of trial, only one class representative remained in SCDC custody, a mentally ill inmate referred to as "T.R."

After six years of litigation and six weeks of trial, SCDC first raised the issue of the standing of the Plaintiff class and class representative during its closing argument.¹ SCDC bases its standing argument on *Lewis v. Casey*, 518 U.S. 343 (1996). South Carolina law, however, not federal law, governs standing in this case. The distinction is significant. Federal courts are courts of limited subject matter jurisdiction, where plaintiffs must overcome a presumption that the court lacks jurisdiction. 13 Wright Miller & Cooper, *Federal Practice and Procedure*:

¹ Fifteen mentally ill inmate members of the Plaintiff class testified over three days at trial. On the morning class representative T.R. was scheduled to testify, SCDC unexpectedly notified Plaintiffs' counsel that T.R. had not been transported to the courtroom along with the other inmate witnesses scheduled for that day. According to SCDC, T.R., who is chronically psychotic, stated he did not wish to testify in court that day.

Jurisdiction § 3522 at 103 (3d ed. 2008). By contrast, South Carolina courts are courts of general jurisdiction. *Limehouse v Hulsey*, 397 S.C. 49, 723 S.E. 2d 211, 218 (Ct. App. 2011).

In the courts of this state, standing may be acquired in any one of three ways: 1) by statute; 2) by constitutional standing; or 3) by the public importance exception to standing requirements. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). As discussed below, the Plaintiff class and class representative have constitutional standing, as well as standing through the public importance exception.

1. **The Plaintiff Class and Class Representative Have Constitutional Standing.**

3
As this Court recognized in its September 29, 2010 Order on Constitutional Standards ("Standards Order"), liability in an Article I, §15 case alleging systemic deficiencies does not depend on past harm; actual injury is established by evidence of a substantial risk of serious future harm.² Exposure to the risk, rather than past harm, is the relevant injury. Standards Order at 6-7, citing *Helling v. McKinney*, 509 U.S. 25 (1993); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Shakka v. Smith*, 71 F.3d 162 (4th Cir. 1995).

SCDC's reliance on *Lewis* is misplaced. Not only does *Lewis* apply federal standing law, it did not involve an Eighth Amendment allegation of cruel and unusual punishment. Instead, plaintiffs in *Lewis* alleged that the defendant prison system denied them adequate access to the courts, in violation of the First, Sixth, and Fourteenth Amendments. The deliberate indifference standard, requiring a showing of the substantial risk of serious future harm, was not applicable. Instead, liability depended on a showing of past harm, "such as the inability to meet a filing deadline or to present a claim." 504 U.S. at 348-349.

² The Standards Order also held that the analysis for a case brought under Article I, §15 of the South Carolina Constitution is the same analysis used by federal courts for cases brought under the Eighth Amendment of the United States Constitution. Standards Order at 2-3.

The present case is quite different. As this Court stated in its July 28, 2013 letter to the parties:

Although T.R. himself never testified, Plaintiffs presented evidence at trial of systemic deficiencies in SCDC's mental health program that expose every inmate with serious mental illness – including specific reference to T.R. – to a substantial risk of serious future harm. Under this Court's Order on Constitutional Standards dated September 29, 2010, injury in an Eighth Amendment case alleging systemic deficiencies may be established by evidence of a substantial risk of serious future harm. Therefore, under this constitutional standard governing this case and the evidence presented at trial, T.R. and, by extension, the entire plaintiff class has standing to pursue their claims.

Although unnecessary to establish actual injury under Article I, §15, Plaintiffs also introduced evidence at trial of past injury suffered by T.R. Evidence showed that T. R. had "a history of extended lockup,"³ was currently housed at Gilliam Psychiatric Center ("GPH"), had been formerly housed in the Intermediate Care Services program ("ICS"), and had failed to receive confidential psychiatric assessments. Plaintiffs' Trial Ex. 9 at 13-15. During trial, Plaintiffs' experts provided detailed testimony on the systemic deficiencies of SCDC lockup units, GPH, and ICS. Plaintiffs' experts further testified that SCDC's failure to provide psychiatric assessments in confidential settings constituted inadequate mental health treatment. Even if actual injury required a showing of past harm, the evidence submitted about T.R. would be sufficient to confer standing.

2. The Public Importance Exception

South Carolina courts have long recognized the public importance exception to standing requirements. *ATC South*, 380 S.C. at 198, 669 S.E.2d at 341. "Standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* (quoting *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)). Whether an issue is of sufficient public importance

³ "Lockup" and "segregation" are synonymous terms meaning solitary confinement.

requires an "appropriate balance" by the court of "competing policy concerns." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

While the nature of the public importance exception "resists a formulaic approach," the "key" to the analysis is "whether a resolution is needed for future guidance." *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341. "It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Id.*

Over the years, South Carolina courts have held that the public importance exception conferred standing on plaintiffs in a variety of cases. *See, e.g., Davis* (county commissioners have standing to challenge the constitutionality of legislation that authorized their removal from office); *Sloan v. Dep't of Transportation*; 365 S.C. 299, 618 S.E.2d 876 (2005) (taxpayer had standing to sue Department over alleged statutory bidding violations); *Baird*, 333 S.C. at 530, 511 S.E.2d at 75 (doctors have standing to sue county to enjoin issuance of bonds for purchase and renovation of hospital); *Thompson v. S.C. Comm'n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (law enforcement officials have standing to challenge constitutionality of the Uniform Alcohol and Intoxication Treatment Act).

It is difficult to think of a case more fitting for the public importance exception than the one at hand. An appropriate balance of policy concerns, as called for in *Sloan v. Sanford*, weighs heavily in favor of Plaintiffs, especially now, nearly nine years after the action was filed. To dismiss the case at this point would not only be a colossal waste of time and resources, it would constitute a terrible injustice to mentally ill prisoners. A comprehensive ruling by this Court is absolutely necessary as future guidance to the State on how it may operate its prisons within Constitutional bounds. As discussed above, the Plaintiff class and class representative have

constitutional standing, but even if they did not, the public importance exception would confer standing on them.

B. Standing of P&A

SCDC first challenged P&A's standing in its 2005 Motion to Dismiss, which this Court denied in an Order dated June 20, 2006, (the "2006 Order"). SCDC next raised the issue in its closing argument.

When a statute confers standing on a plaintiff, no further standing requirements need be met. *See Fowler v. Beasley*, 322 S.C. 463, 465, 472 S.E.2d 630, 632 (1996). In an order dated June 20, 2006, this Court ruled that S.C. Code § 43-33-350(1) conferred standing on P&A to bring and maintain this suit:

gms
6

A review of South Carolina law reveals that SCP&A was specifically created pursuant to the dictates of the United States Public Law 94-103, for the express purpose to protect and advocate for the rights of developmentally disabled and handicapped persons by "pursuing legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons..." S.C. Code Ann. 43-33-350(1). Defendants argue that under this mandate SCP&A may facilitate litigation, but may not be a party. This Court finds no controlling precedent to support Defendants' position. A plain reading of the statute, which is entitled "Powers and Duties of System" states that the organization is authorized to pursue legal remedies. Filing a lawsuit is the seeking of a legal remedy, and therefore Defendants' motion to dismiss Plaintiff SCP&A for lack of standing is respectfully denied.

June 20, 2006 Order at 1-2.

In addition to statutory standing, P&A has a form of constitutional standing known as "associational" standing, because its mentally ill inmate constituents have standing to sue in their own right,⁴ the interests at stake are germane to P&A's purpose, and neither the claims asserted nor relief requested require participation of P&A's individual members or constituents. *See*

⁴ Fifteen inmates with serious mental inmates testified at trial. Expert testimony and SCDC records were admitted specific to many others.

Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588, 589 (Ct. App. 2001).

Finally, even if it did not have statutory and associational standing, the public importance exception would confer standing on P&A.

C. Private Right of Action

SCDC argues that Plaintiffs have no private right of action by which to allege violations of the South Carolina Constitution. SCDC previously raised this argument in its 2005 Motion to Dismiss, in its Rule 41(b) motion at the close of Plaintiffs' case, and in its closing argument.

SCDC relies upon an unpublished South Carolina Court of Appeals opinion, *Gibbs v. S.C. Dep't of Prob., Parole, and Pardon Servs.*, 2002-UP-363, to support the proposition that there is no implied private right of action for violations of the South Carolina Constitution. As a threshold matter, unpublished opinions of the Court of Appeals have no precedential value. *Lanham v. Blue Cross Blue Shield of South Carolina, Inc.*, 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000); Rule 220(a), SCACR. Even assuming, *arguendo*, that *Gibbs* had precedential value, SCDC's reliance upon its holding would still be misplaced. *Gibbs* addresses the narrow issue of whether an individual has an implied private right of action under the South Carolina Constitution to seek monetary damages. Plaintiffs seek only equitable relief. Accordingly, the *Gibbs* case is inapplicable here, and the court rejects SCDC's argument.

D. Separation of Powers

In 2005, both SCDC and the South Carolina General Assembly moved to dismiss this action on several grounds. In its August 16, 2006 Order, the Court granted the General Assembly's motion on grounds of separation of powers, but denied SCDC's. SCDC raised

separation of powers again in its 2012 Rule 41(b) motion, which the Court denied, and reasserted it in closing argument.

The Final Order sets forth the Court's basis for rejecting SCDC's separation of powers argument. *Id.* pp. 36-37. In addition, the August 16, 2006 Order rejects SCDC's separation of powers argument on grounds that, unlike the General Assembly, SCDC is expressly charged with management of the prison system and statutorily authorized to be sued. *Id.* at 12-14, *citing* S.C.Code Ann § 24-1-130, 140 (Supp. 2005). Moreover, SCDC is the agency authorized to request funding from the General Assembly, and to decide how to spend at least some of the funding it receives. For all these reasons, the Court rejects SCDC's argument on separation of powers.

E. Public Policy Limitations

SCDC raised this defense in its 2005 Motion to Dismiss, which the court denied, then again in closing arguments. SCDC contends that *Sullivan v. S.C. Department of Corrections*, 355 S.C. 437, 586 S.E. 2d 124 (2004) sets forth as South Carolina's public policy a "hands off" approach to courts with respect to South Carolina prisons. However, *Sullivan* bears little resemblance to the present case. It did not involve allegations of systemic deficiencies under Article I, § 15. In *Sullivan*, the Court ruled that Article XII, § 2 of the South Carolina Constitution did not require SCDC to provide the inmate plaintiff with enrollment in a particular sex offender program. 355 S.C. at 444, 586 S.E.2d at 127.

The present case presents a far different situation. As detailed in the Final Order, inmates with serious mental illness in South Carolina prisons are exposed to a substantial risk of serious harm by system-wide deficiencies in SCDC's mental health program. These deficiencies include inadequate mental health screening that fails to identify a large percentage of mentally ill

inmates; the use of force and long term segregation in lieu of treatment; a denial of access to many inmates of higher levels of mental health care; inadequate record keeping and medication administration; and a suicide prevention and crisis intervention program that involves placing inmates naked in filthy cells, shower stalls, interview booths, and other inappropriate settings for long periods of time without reasonable access to treatment. As further detailed in the Final Order, SCDC has known of the deficiencies of its program for years, but has failed to take adequate corrective measures.

This Court recognizes the importance of judicial restraint, but it cannot ignore the troubling facts of this case. A "hands off" approach towards prison management does not mean that prison officials have free rein to violate the constitutional rights of inmates. The court therefore rejects SCDC's argument.

9
F. Use of Force Against Mentally Ill Inmates

SCDC mischaracterizes the Final Order as prohibiting any use of force against mentally ill inmates, in violation of public policy, and cites *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992) in support. The Final Order, however, does not prohibit the use of force against mentally ill inmates. Instead, it concludes that SCDC's use of disproportionate, unnecessary, and excessive force against mentally ill inmates, often in violation of SCDC's own policies, violates Article I, § 15 of the South Carolina Constitution. Final Order at 16-21.

G. Political Question

SCDC argues that this case is a non-justiciable political question, an argument it raised in its 2005 Motion to Dismiss and again in its closing. The Court finds that the actions taken by SCDC in running its mental health programs do not represent policy judgments of the South Carolina General Assembly and that this case is not a non-justiciable political question.

H. Fourth Circuit Case Law

SCDC contends that the Final Order failed to give appropriate weight to Fourth Circuit federal case law, especially *Williams v. Branker*, 2012 WL 165035 (4th Cir. 2012). Instead, SCDC contends that the Final Order relies primarily on law from other federal circuits, which SCDC characterizes as inconsistent with Fourth Circuit interpretations of the Eighth Amendment.

As this Court has recognized, the appropriate standard of liability for Article I, § 15 of the South Carolina Constitution is the deliberate indifference standard used by federal courts in analyzing the Eighth Amendment of the United States Constitution. Standards Order at 2-3, citing *State v. Wilson*, 206 S.C. 498, 512, 413 S.E. 2d 19, 27 (1997). This Court is unaware of any split among the circuits as to the deliberate indifference standard. In its Final Order and Standards Order, this Court relied primarily on decisions applying the deliberate indifference standard to cases factually similar to this one, including cases from the courts of appeals of several different federal circuits. This Court has not cited *Williams* or some of the other cases offered by SCDC because they are dissimilar to the case at hand. *Williams*, for example, did not involve a class or an allegation of systemic deficiencies. Instead, it affirmed judgment on the pleadings against an individual inmate plaintiff who failed to allege that defendants actually knew of his exposure to the risk of harm: “*Williams* alleges no facts suggesting that appellees had actual knowledge of the risks to him.” *Id.* at 5. Defendants’ knowledge of the risk is an essential element of the subjective component of the deliberate indifference standard. As the *Williams* court concluded, Plaintiff’s failure to allege Defendants’ knowledge was, therefore “fatal to his claim.” *Id.*

By contrast, in the present case Plaintiffs alleged and the Court found that SCDC had actual knowledge, for years prior to this lawsuit and continuing "to present date," that all mentally ill inmates in South Carolina prisons are exposed through systemic deficiencies to a substantial risk of serious future harm.

I. Status of P.R. and K.W.

SCDC asks the Court to make note of the dismissal of P.R. and K.W. as "party plaintiffs." It is undisputed that class representatives P.R. and K.W. were inmates in SCDC custody at the time this action was filed, but were no longer in SCDC custody at the time of trial. After discharge from SCDC, they remained members of the class, under the definition set forth in the Court's Order of November 2, 2007, even if they were no longer class representatives.

J. Standard of Liability

SCDC argues that the Final Order applied the standard of liability applicable to Article XII, § 2 of the South Carolina Constitution, rather than that applicable to Article I § 15. The Court disagrees. See Standards Order and Final Order at 3-7.

K. Extreme Deprivations

SCDC claims that the Court failed to acknowledge that cruel and unusual punishment requires proof of "extreme deprivations."

The Final Order states that to satisfy the objective component of the deliberate indifference standard, Plaintiffs must prove a "substantial" risk of harm that is "sufficiently serious". Final Order at 4, citing *Farmer v. Brennan*, 511 U.S. 825, 834-37. Some courts have described the degree of seriousness required as one involving "extreme deprivations," but these are not magic words. Other courts have used different but consistent language. Pages 4-5 of the Standards Order discuss in detail the degree of seriousness required to satisfy the objective

component. The Final Order details numerous examples of extreme deprivations mentally ill inmates have suffered because of SCDC's constitutionally deficient mental health program, including preventable and foreseeable deaths. As the Final Order makes clear, the future harm to which mentally ill inmates are exposed by SCDC's system is sufficiently serious to satisfy the deliberate indifference standard.

L. Plaintiffs' Experts and ACA Standards

SCDC contends the Court relied "exclusively" on Plaintiffs' experts and/or American Correctional Association ("ACA") standards. The Court did not do so. The Court simply found Plaintiffs' experts a great deal more credible than SCDC's. Final Order at 31. The Court did not rely exclusively on ACA standards, but did find them relevant and persuasive. However, the Court also relied on a great deal of other evidence – testimony by fact witnesses, documentary evidence, and admissions by SCDC.

M. Breadth of Remedies

The Court has ordered SCDC to submit a proposed remedial plan within 180 days of the Final Order, consistent with remedial factors and guidelines listed by the Court. Final Order at 38-44. SCDC argues the Court's remedies are excessive, but the Court disagrees, given the breadth and pervasiveness of the systemic deficiencies in SCDC's mental health program.

N. Inherent Authority of the Court

SCDC also argues that the Court erred in holding that it had the inherent authority "to see that the imprisonment of that inmate complies with constitutional mandates." Final Order at 37. The Court disagrees and again reaffirms that it has the duty and responsibility to see that imprisonment of inmates complies with constitutional requirements.

III. CONCLUSION

For the reasons set forth above, the Court denies Defendants' Motion to Alter or Amend.

IT IS SO ORDERED.



J. Michael Baxley
Complex Jurisdiction Judge
Fourth Judicial Circuit

Hartsville, SC

April 7, 2014.

1 A. You would have to define what you mean.

2 Q. Well, for instance; the Brown v Plata case, which
3 is the 2011 Supreme Court case. You are familiar
4 with that, I am sure?

5 A. I am.

6 Q. And you filed an Amicus Brief; is that correct?

7 A. I was part of an Amicus Brief.

8 Q. Were you the lawyer on the Amicus Brief, or were
9 you a party?

10 A. I filed it as a Corrections Professional.

11 Q. Did you, yourself file --- I should say sign your
12 name to it, or have your name affixed to it?

13 A. Yes.

14 Q. And what was the position that was taken in that?

15 A. That the system was overcrowded.

16 Q. In California?

17 A. In California.

18 Q. So, that is what I mean by a Amicus position. Are
19 you taking an Amicus position for the Plaintiffs'
20 side of these cases? And, your answer, I assume,
21 is yes?

22 A. Yes.

23 Q. Would you agree that you are not offering or
24 rendering any opinion to OC spray from that? That
25 OC spray constitutes cruel and unusual punishment?

1 A. I am not.

2 Q. And you as a lawyer is not really retained to
3 render legal opinions; is that correct?

4 A. That's correct.

5 Q. More opinions about legal cases?

6 A. That's correct.

7 Q. Do you agree that at least at the time of your
8 deposition, you had not looked at fourth circuit
9 cases, or District of South Carolina cases on
10 corrections?

11 A. That's correct.

12 Q. Have you updated or looked at any since then?

13 A. No.

14 Q. And I assume you haven't looked at the State of
15 South Carolina --- State court cases on prisons
16 either?

17 A. I have not.

18 Q. Isn't it true that the decisions of District of
19 South Carolina, Fourth Circuit, South Carolina
20 State Courts, those are the ones that govern the
21 constitutional --

22 MR. ANDREWS: Objection, Your Honor. That
23 calls for a legal conclusion.

24 THE COURT: What do you say to that?

25 MR. WOODINGTON: I'll move on.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2005-CP-40-2925
	)	
T.R., P.R., K.W., and A.M.,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
SOUTH CAROLINA DEPARTMENT OF	)	
CORRECTIONS,	)	
	)	
DEFENDANT,	)	

March 28, 2014
Columbia, South Carolina

BEFORE:

THE HONORABLE J. MICHAEL BAXLEY, JUDGE.

APPEARANCES:

DANIEL WESTBROOK, ESQ.
Attorney for the Plaintiffs

ANDREW F. LINDEMANN, ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: We are here today in the matter of TR and
2 others versus SCDC and others on the motion that SCDC has
3 filed under Rule 52 and Rule 59 for -- to alter or amend
4 the order that was issued by the Court in this case.

5 Plaintiffs, in the meantime, I believe, have also
6 made a motion to amend a portion of that order.

7 Am I correct in that, Mr. Westbrook? I saw that
8 document. It was -- have you made a formal motion to do
9 so?

10 MR. WESTBROOK: No, Your Honor. I have not. I -- I
11 don't -- I'm not sure of the document that you're
12 referring to.

13 THE COURT: Well, I believe you -- I saw some
14 communications that involved a -- what I believe you said
15 was a scrivener's error that involved a number of
16 professionals required, specifically the number of
17 psychiatrists, FTEs necessary, based on the testimony of
18 the case.

19 I saw a communication, and I believe it was between
20 counsel. I was not certain whether there had been a
21 formal order, motion to that.

22 MR. WESTBROOK: No, Your Honor, no formal motion.
23 The -- the issue that -- that you're referring to, I do
24 recall having a conversation with your law clerk,
25 Mr. Scruggs, but I don't recall any kind of written

1 communication. But I may be wrong. I just don't recall
2 it.

3 THE COURT: Very good.

4 MR. WESTBROOK: But I have not made any kind of
5 formal motion.

6 THE COURT: Thank you.

7 MR. WESTBROOK: But I appreciate your --

8 THE COURT: All right. Then -- then the sole issue
9 we are here today on is the motion by SCDC to alter or
10 amend the final order.

11 Ladies and gentlemen, you briefed this thoroughly. I
12 appreciate your professionalism submitted -- in submitting
13 the briefs early so that the Court can review them.

14 I have reviewed the motion, the memorandum attached
15 to the motion from SCDC. I reviewed the responsive
16 memorandum from the plaintiffs. We are ready to proceed.

17 Mr. Lindemann, will you be arguing on behalf of the
18 Department?

19 MR. LINDEMANN: Yes, Your Honor.

20 THE COURT: Please do.

21 MR. LINDEMANN: Your Honor, can I be at counsel
22 table?

23 THE COURT: Certainly. You can be there. You can
24 move around if you wish, whatever your purpose is.

25 MR. LINDEMANN: Thank you.

1 May it please the Court. Again, Andrew Lindemann on
2 behalf of the defendants, South Carolina Department of
3 Corrections, and the -- I believe it's still styled -- I
4 believe it's still styled with Judge Byars, William R.
5 Byars as the other defendant.

6 Your Honor, as you indicated, we are at this time
7 moving this Court to alter or amend your order that came
8 out in early January in this matter.

9 The reason for the motion to alter or amend or to
10 reconsider is primary -- primarily to request that the
11 Court address a number of legal grounds that have been
12 asserted, some of which were asserted actually pretrial
13 and some of which we have had rulings on, interlocutory
14 rulings, some we have not.

15 Certainly, all of the issues that we are asking this
16 Court to rule on were raised during the trial and were
17 argued extensively to Your Honor at the close of the
18 evidence during the closing arguments that you held back
19 on March 23rd, 2012. It's hard to believe we are just
20 past the two-year anniversary of that date.

21 It is -- it is our position, Your Honor, that these
22 legal issues, particularly the issues that -- dealing with
23 justiciability, jurisdiction, standing, whether or not
24 there is a private right of action, they are all critical
25 issues that must be decided.

1 They haven't been decided by this Court, and
2 obviously, as part of the process of preserving issues for
3 appellate review, we were required to come before Your
4 Honor under both Rule 52(b) and Rule 59(e) and to request
5 the Court to address those specific issues.

6 After Your Honor issued your -- a -- or received a
7 proposed order back in November from plaintiff's counsel,
8 you had asked for comments from the defendants. We at
9 that time sent to you a letter that raised these same
10 issues and asked the Court to -- because they weren't
11 addressed in the proposed order that Nelson Mullins sent
12 you and that ultimately, I think, for the most part with a
13 few modifications you ultimately signed.

14 These issues were not addressed. We sent you a
15 letter which is Exhibit 1 to our motion back on
16 November 11th, 2013 asking the Court to rule on those
17 issues. With all due respect, Your Honor still has not
18 done so.

19 The email that I received from your -- your law clerk
20 on the day you issued the decision, January 8th, 2014, it
21 was stated -- and again, this is from Mr. Scruggs. He
22 said, "From reading the proposed order, you'll notice that
23 Judge Baxley did not include the issues you suggested
24 given his preliminary rulings throughout the progress of
25 this case."

1 Even if you did make preliminary rulings during the
2 progress of the case -- and I would submit that many of
3 these issues we got had no rulings on. Some we had
4 preliminary rulings. It is still absolutely necessary, as
5 Your Honor is well aware, to have a final ruling issued by
6 this Court.

7 I know Your Honor is familiar with cases such as
8 Ballinger vs. Bowen as the McClendon vs. South Carolina
9 Department of Highways and Public Transportation case,
10 both of which have held that any type of ruling by a court
11 on a motion for summary judgment or on a motion to
12 dismiss, which denies those preliminary dispositive
13 motions, any rulings by the Court on those motions do not
14 establish the law of the case. They are not rulings on
15 the merits.

16 Those issues are preserved and continue through the
17 trial of the case. In this particular matter, we raised
18 preliminary issues dealing with standing. We raised some
19 issues preliminarily dealing with separation of powers,
20 and whereas Your Honor issued rulings on those points,
21 those were preliminary rulings. They were interlocutory
22 orders, and they are not final orders for purposes of
23 appellate review. So we are before Your Honor to ask you
24 to rule on those.

25 Now, there are other issues that came up for the

1 first time, legal defenses and legal issues, that we
2 raised during the course of the trial that Your Honor made
3 preliminary rulings on, such as during the motion for
4 involuntary nonsuit, but your rulings based on -- for a
5 motion for involuntary nonsuit are just like rulings on a
6 motion for directed verdict in a jury trial case.
7 Obviously, this is a nonjury case where Rule 50 doesn't
8 apply, but they are not final orders. They are not final
9 rulings.

10 I believe it's very important for two reasons:
11 Number one, we continue to believe that these issues,
12 particularly the important issues of justiciability and
13 jurisdiction are dispositive; number two, if Your Honor
14 disagrees with our position, you need to state your
15 position. You need to state the legal basis to allow for
16 appropriate appellate review before the South Carolina
17 Supreme Court.

18 So with that, what I thought I would do -- and I
19 don't know how Your Honor wants to handle it. There are
20 numerous grounds and numerous issues. I don't know if you
21 want to take them one at a time and go back and forth
22 between counsel or you want me to present the entire
23 argument on behalf of the defendants. I'm happy to do it
24 however the Court believes it is -- it would work the
25 best.

1 THE COURT: All right, sir.

2 It appears to me that on the grounds for the motion,
3 you had eight specifically which you denominated as A
4 through H in your memorandum, and if you believe that the
5 record would be more clear for us to take those one at a
6 time and take a response as we go to each one, then that
7 is satisfactory to the Court.

8 MR. LINDEMANN: I'm happy to do it that way, Your
9 Honor, and obviously, I'll leave that to your call in your
10 discretion.

11 THE COURT: Well, let's do -- let's do it in that
12 fashion so that for purposes of review, it's laid out in
13 your memo on pages one and two.

14 You have point one and then you list under there A
15 through H, the specific points that you believe the
16 State -- or the Court failed to state and address in the
17 order. So let's take those up in the order they're
18 offered, if you wish.

19 MR. LINDEMANN: Thank you, Your Honor.

20 The first ground deals with the standing and whether
21 or not their -- the lone remaining class representative
22 has established standing in this case.

23 On this particular issue, we argue that during the
24 trial of the case, this is an issue that you then required
25 subsequent briefing from the parties after the trial, and

1 you did not -- you never issued an actual written order.

2 Instead, what is attached as Exhibit 3 to our motion
3 is a letter we received from the Court dated July 27th,
4 2012, and in that letter, you say the Court has
5 preliminarily determined that the plaintiff class,
6 including SC PNA and TR, has standing to pursue their
7 claims.

8 You also state in that letter -- you say based upon
9 the above without making any final decisions and thus
10 declining to issue any partial or final order at this
11 time, the Court is of the opinion that the class has
12 sufficiently survived the trial process, and you set the
13 additional hearing at that point to address issues of
14 remedy, even though you indicated that simply because you
15 were having an additional hearing on the remedy, you have
16 not issued yet or made a final decision on the liability
17 issues.

18 THE COURT: Well, Mr. Lindemann, let's come forward a
19 little bit. Of course, we remember that history, but how
20 is it that SC PNA, which has a statutory directive,
21 doesn't meet the definition of providing standing for all
22 of the plaintiffs in this case?

23 MR. LINDEMANN: Well, for several reasons, Your
24 Honor: First of all, the case was brought as a class
25 action. It was not brought by PNA in a representative

1 capacity. It wasn't pled that way.

2 In fact, the fifth amended complaint, which is the
3 complaint that's operative at this point was operative at
4 the time of trial, does not establish that PNA was serving
5 in any type of representative capacity. I'm looking for a
6 copy of the complaint, Your Honor. Forgive me.

7 (Pause).

8 Oh, it's right here.

9 The only reference to PNA in that particular
10 complaint, Your Honor, is in paragraph eight. It simply
11 says, "Plaintiff, Protection and Advocacy for People with
12 Disabilities, Inc. is a private, not-for-profit South
13 Carolina corporation established as the Protection and
14 Advocacy System for the State of South Carolina and
15 charged by state and federal law to protect and advocate
16 for the rights of people with disabilities in South
17 Carolina. That's the extent of the reference with PNA in
18 this particular complaint.

19 In addition, Your Honor -- and I'll touch on this in
20 more detail when we talk about standing for TR. The case
21 of Lewis vs. Casey is the dispositive case from the United
22 States Supreme Court on that.

23 Lewis v. Casey talks about what is required to
24 establish standing. To establish standing, you've got to,
25 obviously, show some type of actual injury or that an

1 injury is -- is imminent.

2 Well, there is absolutely no evidence in this case,
3 Your Honor, that PNA sustained any type of injury, so
4 clearly, constitutional standing does not apply. They
5 have not met that.

6 In addition, Your Honor, we would submit that
7 statutory standing has not been met in this case because
8 number one: As I've already alluded to, it wasn't pled
9 that way.

10 There is no assertion of standing in that complaint
11 for PNA based upon a statutory scheme. It's not cited.
12 It's not part of the plaintiffs' case in chief.

13 In fact, if Your Honor remembers the testimony, there
14 was none from PNA, nobody from PNA. The presumptive
15 plaintiff never took the stand. They never testified.

16 THE COURT: Well, did you move to dismiss them?

17 MR. LINDEMANN: We moved to dismiss them
18 preliminarily, and Your Honor denied that motion.

19 THE COURT: All right.

20 MR. LINDEMANN: But as Your Honor remembers from
21 Lewis vs. Casey, the fact that there was a preliminary
22 motion on standing doesn't mean that there's not a
23 requirement of the plaintiff to prove their standing at
24 trial.

25 In fact, if I could reference this from Lewis vs.

1 Casey from the United States Supreme Court, they actually
2 say, talk about the fact that at different stages of the
3 litigation, there is still a requirement to prove standing
4 even though the level of proof ratchets up until you get
5 to trial.

6 In fact, they talk about the fact that during a
7 pleading stage, standing is met -- the element of standing
8 may be supported simply by making appropriate allegations
9 of it.

10 The Court then just goes on to say, "In response to a
11 motion for summary judgment, the plaintiff can no longer
12 rest on such mere allegations but must set forth by
13 affidavit or other evidence specific facts which for the
14 purpose of the summary judgment motion will be taken to be
15 true."

16 Here is the key point: "And at the final stage,
17 those facts, if controverted, must be supported adequately
18 by the evidence adduced at trial."

19 So one of the key elements that's totally missing in
20 the proof that was presented to this court for TR, for
21 PNA, for any plaintiff, there was no evidence presented by
22 the plaintiffs to support a finding of standing. Standing
23 is the first threshold element that must be proven.

24 We didn't raise those issues at the close of the
25 evidence during the closing arguments before Your Honor.

1 We raised the fact that not only TR didn't have standing
2 as the sole remaining class representative but also that
3 PNA didn't have standing.

4 THE COURT: Well, please refresh my memory on this.
5 Why did you raise it at closing argument as opposed to
6 raising it at the end of the State's case? Did you raise
7 it there?

8 MR. LINDEMANN: No. I did not need to raise it at
9 the end of the State's case, because number one, all the
10 evidence wasn't in.

11 THE COURT: I meant plaintiffs' case.

12 MR. LINDEMANN: Yes, I knew what you were saying.
13 There is -- you know, one of the problems in this case is
14 a misunderstanding, certainly by the plaintiffs and I hope
15 not the Court, that there are different standards that are
16 required for a nonjury trial. I think we can all agree
17 this was a nonjury trial.

18 Rule 50 does not apply to that. It absolutely
19 doesn't apply to that. If you need authority for that
20 proposition, I'll be happy to cite you some. Water Pointe
21 Property Owners Association vs. Paragon, 536 S.E.2d, 878.

22 We note initially while Paragon's motion at the close
23 of the evidence was counsel's directed verdict motion
24 governed by Rule 50. This was a nonjury action.

25 Rule 50 by its nature is applicable to a jury trial

1 to the proper motion that Paragon had made, was a motion
2 for involuntary nonsuit under Rule 41.

3 Once a Rule 41 motion is made and denied, it's of
4 no -- no future purpose. What is required then of a trial
5 judge who is sitting without a jury is at the close of the
6 case, all of the legal issues that have been framed by the
7 pleadings that have been raised during the trial, are
8 required to be determined by the Court.

9 THE COURT: Well, yes, sir. I understand that, but
10 Mr. Lindemann, you set an impermissibly high bar. First
11 of all, we have TR. We have other individuals who came in
12 and testified.

13 Some of the named individuals, apparently, are no
14 longer incarcerated but nevertheless may have claimed some
15 injury during their incarceration, many of whom are not
16 competent represented by SC PNA in -- in their statutory
17 capacity brought on behalf of these individuals.

18 How would you ever get standing? How would standing
19 occur to bring this group of individuals, not competent,
20 similarly situated, in corrections claiming constitutional
21 maltreatment? How would they get standing under the bar
22 the way you set it and argued it?

23 MR. LINDEMANN: Well, I'm not setting any bar. The
24 law on this, the justiciability rules, are well set out by
25 Lewis v. Casey. They are adopted by the State of South

1 Carolina. I mean, the rules of standing are no different
2 between federal jurisprudence and state jurisprudence but
3 it's very easy.

4 I mean, Your Honor did not treat this case as a PNA
5 was bringing the case in a representative capacity for
6 particular named inmates. PNA didn't plead it that way.
7 It wasn't presented at trial that way.

8 The way this case was framed, Your Honor established
9 this case as a class action. A class action is governed
10 by Rule 23. Rule 23 is very specific as to how you go
11 about establishing a class action in the State of South
12 Carolina just like it is in the federal rules of Civil
13 Procedure. You have to have a class representative or
14 multiple class representatives.

15 Those class representatives have to have actual
16 injury, an actual injury related to the issues that you
17 are litigating. If you are litigating multiple issues and
18 that class representative has not been implicated or
19 harmed by all of them, you need multiple class
20 representatives.

21 You need a class representative who has -- can show
22 actual harm for each of the issues that was raised. So
23 we're going back to TR here, and I'm happy to do that
24 because when the plaintiffs originally brought this case,
25 there were three class representatives. When the case --

1 and a fourth one was later added. Every one but TR had
2 left the Department of Corrections by the time of trial.

3 The plaintiffs, if they did not believe TR was an
4 appropriate class representative at that time -- it's
5 their client. They're responsible for the class. It's
6 not our responsibility to tell the plaintiffs how to
7 properly present their class action lawsuit to this court.
8 In fact, I have an ethical obligation to defend that.

9 The plaintiffs chose for whatever reason -- if it was
10 deliberate, if it was malfeasance, I don't know. They did
11 not add a class representative prior to trial. They
12 proceeded forward with one class representative. His name
13 is TR, and during the course of this trial, Your Honor,
14 they never presented one stitch of evidence about TR.

15 As I argued to you in closing argument -- you might
16 remember this -- I argued to you, "Your Honor, you don't
17 even know who TR is based on the record in this case."

18 THE COURT: But doesn't the Department bear some
19 responsibility for that, counsel?

20 MR. LINDEMANN: How do we have responsibility for
21 that?

22 THE COURT: Well, TR is in your custody, is he not?

23 MR. LINDEMANN: We did not prevent TR from
24 testifying. We didn't prevent them from asking their
25 experts about TR. We didn't prevent them from putting in

1 medical records about TR. We didn't prevent them from
2 calling witnesses to testify about TR.

3 Your Honor, if you run a search, a word search, of
4 the 5,000-plus page transcript in this case or search it
5 for TR or search it for his name, do you know what comes
6 up? References to the title page in each volume of the
7 transcript, a reference to a couple of times during the
8 trial when you announced the name of the case.

9 There is one reference where Mr. Davidson is arguing
10 the motion for sanctions pretrial involving the failure
11 for the plaintiff to have a representative at the
12 mediation, and then there are multiple references in the
13 closing argument. There is no testimony about TR.

14 In fact, when we raised this issue to Your Honor --
15 because it's crippling for the plaintiffs. I recognize
16 that. They had an obligation to establish standing. I
17 don't think anybody can deny that.

18 If you deny that, Casey V. Lewis certainly tells you
19 otherwise -- or Lewis V. Casey. They had an obligation to
20 do that. They scoured the record to look for any evidence
21 of TR.

22 The only thing they could come up with, Your Honor,
23 was Plaintiff's Exhibit 9 which was notes from an
24 interview that was conducted by Dr. Patterson with TR back
25 in August of 2010 more than a year-and-a-half prior to

1 trial. That was an exhibit that was put into evidence
2 over objection because it's hearsay. That is the sole
3 evidence of anything to do with TR.

4 Do you know what those notes say? Those notes say TR
5 is at Gilliam and TR is doing well, in essence; that he is
6 receiving the care that is necessary for someone of his
7 nature.

8 There is no reference to TR ever being subjected to a
9 restraint chair. There is no evidence of TR ever being
10 gassed. There is no evidence of TR ever having his
11 medication missed. There is no evidence of TR ever not
12 having a counselor timely follow up with him. There is no
13 evidence of TR not having a psychiatrist properly follow
14 up with him.

15 There is no evidence of all the core issues of this
16 case that implicate TR, and what does Lewis vs. Casey say?
17 Lewis vs. Casey says in almost an identical situation --
18 the only difference between Lewis vs. Casey and this case
19 is this is a First Amendment access to the Court's case,
20 and this is an Eighth Amendment -- or the state equivalent
21 of an Eighth Amendment cruel and unusual punishment case.

22 What the United States Supreme Court did, they looked
23 at a district judge's widespread injunctive order. In
24 fact, if you looked at -- with all due respect, Judge
25 Muecke in this case, it looks very similar to this Court's

1 order.

2 Judge Muecke tries to establish all kinds of policies
3 and procedures for the Arizona Department of Corrections,
4 and what did the United States Supreme Court do? They
5 looked at the class representative, and there were
6 multiple class representatives in this case. They found
7 that there was not sufficient actual injury for any of
8 those -- any of those persons except on two very remote
9 issues.

10 In this particular case, I would submit there are no
11 issues that evidence has been presented that TR has
12 sustained any actual harm or is in imminent harm, none.

13 Your Honor, I very much disagree with the Court, most
14 respectfully, if you suggest that or attempt to shift the
15 burden of proof to the defendant that we have an
16 obligation to somehow prove standing for the plaintiffs.

17 Standing is universally in the jurisprudence from the
18 United States Supreme Court, the jurisprudence from the
19 South Carolina Supreme Court. Standing is an element of
20 proof that the plaintiff has.

21 THE COURT: No, sir. I'm not shifting the burden. I
22 just saw in the plaintiff's reply that TR was supposed to
23 brought here under your custody and under your control.
24 He wasn't here, and then whenever he got here, apparently
25 through some incident or dispute that occurred, he refused

1 to testify, if I understand correctly what I saw.

2 There was some implication in the plaintiffs'
3 response -- again, this is for the plaintiff to argue, but
4 I'm just asking you while you're standing, whether or not
5 there was some problem in his transport that occurred
6 within SCDC that prevented him from being a witness.

7 Do you have any knowledge of that, Mr. Lindemann?

8 MR. LINDEMANN: Well, Your Honor, first of all, there
9 is nothing in the record, nothing in the record that
10 establishes what the plaintiffs are contending.

11 As I understand it, on the day of transport, TR
12 refused to leave. He did not want to come, and what's
13 important for this Court to understand is they proceeded
14 with other witnesses.

15 They never asked this Court for any type of relief on
16 that. They never went to their client. That was two
17 weeks before the case ended. That was during the
18 plaintiffs' case in chief. So it was actually probably
19 more than two weeks. We can probably try to figure out
20 the date.

21 They never, during that interview -- or I think it
22 was two weeks, actually, before they rested is what it
23 was, because their case took four weeks as Your Honor
24 might remember. Never did they attempt to put TR up.

25 If TR was refusing to testify, Your Honor, they had

1 Dr. Patterson on the stand for three-and-a-half days.
2 They didn't ask Dr. Patterson the first question about
3 their own client.

4 They asked Dr. Patterson about a bunch of other
5 inmates. He focused on, I think it was Damon Howard
6 probably for half a day. Damon Howard isn't a class
7 representative.

8 THE COURT: All right.

9 MR. LINDEMANN: They were not precluded from talking
10 to their own experts and questioning them about the care
11 of TR. I don't know why they didn't do it. It's an
12 element of their proof. They failed on that element of
13 proof.

14 THE COURT: All right. Well, very good. Let's do
15 this. I think that's fairly and fully argued on standing.

16 Let me hear from the State about that.

17 MR. LINDEMANN: Can I -- I actually haven't finished
18 the points for PNA because we went back to TR. Can I make
19 just a couple requests?

20 THE COURT: You may.

21 MR. LINDEMANN: All right.

22 Your Honor, even if this Court post hoc -- because
23 they attempt to try to save this case because of failure
24 to present -- evidence of standing for TR was to go back
25 and say PNA is doing enough.

1 Well, let's focus, if we could -- and I'll be very
2 quick. I know Your Honor wants to move on to this issue.
3 This is probably the most important issue, and I don't
4 know what I did with my stack. Just give me one second.

5 THE COURT: Take your time. That's fine.

6 MR. LINDEMANN: It's a lot of paper.

7 (Pause).

8 Your Honor, the concept of statutory standing is
9 based upon the statutory scheme that creates the South
10 Carolina Protection and Advocacy system for the
11 handicapped.

12 What Your Honor relied on in the preliminary order
13 finding that the PNA has standing, even though you
14 indicated in that particular order, they had standing in
15 conjunction with the fact that it was a class action and
16 there were class representatives.

17 You never made a ruling that PNA could have standing
18 in absence of a class representative. I would strongly
19 suggest that there is no authority for that, but PNA --
20 you relied on this particular section, 43-33-350, which
21 lays out the powers and duties of PNA.

22 It says it shall protect and advocate for the rights
23 of all developmentally disabled persons, including the
24 requirements, and then gives three federal statutes, all
25 as amended and for the rights of other handicapped persons

1 by pursuing legal, administrative and other appropriate
2 remedies to ensure the protection of the rights of these
3 persons.

4 So what that does, it says they can protect and
5 advocate for the rights of two types of people:
6 Developmentally disabled persons, and handicapped persons.

7 Well, both of those persons are defined by the
8 statute. Developmental disability is defined in section
9 43-33-340, and a developmentally disabled person means a
10 person who has a developmental disability and who receives
11 or is entitled to receive treatment, services, or
12 habitation within the state.

13 Developmental disability is defined to mean a severe,
14 chronic disability of a person which -- it has to meet all
15 four -- all five of these criteria, several of which we
16 don't know whether any of these class representatives meet
17 these criteria.

18 Certainly, if PNA was bringing this lawsuit in a
19 representative capacity, they would be required to
20 identify who they were bringing the case on behalf of.
21 Then you could look at those persons. You could look at
22 Bill Smith and Joe Smith. You could look at them and see
23 if they qualify, one of which is that the development
24 disability had to have been manifested before a person
25 attains the age of 22. I know Your Honor has dealt with

1 that issue recently in the Linkhorn.

2 THE COURT: So very, very much.

3 MR. LINDEMANN: That is a different statutory scheme
4 in which you dealt with there, and you cannot -- as much
5 as the Court may wish to, you cannot read that requirement
6 out of it.

7 These are very fact-intensive criteria. The reason I
8 say that's important, if PNA is coming in and advocating
9 for developmentally disabled people, we need to know who
10 they are and to know whether they qualify for these five
11 criteria to know whether or not PNA has standing.

12 PNA may also may advocate for handicapped persons.
13 That's a defined challenge. It's defined in the statute
14 to mean any person defined by section 2-7-35.

15 2-7-35 defines a handicapped person as someone who
16 has a physical or mental impairment which substantially
17 impairs -- excuse me, substantially limits one or more
18 major-life activities, including but not limited to caring
19 for himself, performing manual tasks, walking, seeing,
20 hearing, speaking, breathing, learning and working.

21 Those are ADA type of major-life activities. In
22 fact, it goes on to say or meets any other definition
23 proscribed by federal law, but again, without knowing who
24 PNA is coming into court and saying we want standing as an
25 advocate for this person, he is a handicapped person, and

1 we are going to prove he is a handicapped person because
2 we're going to prove he has a physical or mental
3 impairment that affects one or more of these life
4 activities.

5 It requires proof. You can't just do it in a vacuum.
6 You can't just go poof at the end of a trial and say PNA
7 can take a representative capacity for thousands of
8 inmates at the Department of Corrections. That is not how
9 the principles of standing work.

10 You certainly can't do it after the fact to try to
11 save -- to try to save a situation where there is an
12 absolute failure of proof within the context which this
13 case was brought, which was as a class action lawsuit with
14 class representatives.

15 It's not our fault the plaintiff was down to one
16 class representative, and it's not our fault they
17 presented no evidence about that person.

18 THE COURT: Okay.

19 MR. LINDEMANN: They cannot correct it by saying PNA
20 all of the sudden can magically represent thousands of
21 inmates when we haven't any proof to show they can
22 advocate on those persons.

23 THE COURT: All right. Thank you.

24 Mr. Westbrook.

25 MR. WESTBROOK: Thank you, Your Honor.

1 Your Honor, so there are two separate sort of
2 standing arguments here that Mr. Lindemann has made. One
3 was with respect to class rep, TR; one was with respect to
4 PNA.

5 THE COURT: I'm going to get you to speak up a little
6 bit, sir, so our court reporter can hear you. Thank you.

7 MR. WESTBROOK: Sorry about that.

8 Mr. Lindemann has made two arguments about standing:
9 One with respect to the class representative, TR; the
10 second with respect to PNA.

11 Now, of course, there are two plaintiffs in this
12 case. It's not just a class action. There is a class --
13 there is a class of plaintiffs for whom TR was the class
14 rep, and then there's PNA.

15 So if either of those plaintiffs is knocked out of
16 the case for lack of standing or for any other reason, the
17 other plaintiff remains.

18 Now, having said that, I don't think -- I'm not
19 concerned about the standing of either one of those
20 plaintiffs, and let me explain any position, why I say
21 that.

22 Let me start with TR. There -- well, let me start
23 more fundamentally than that. Just as an overview,
24 something that -- that I'm sure you know and SCDC counsel
25 knows, as well, in South Carolina, there are three means

1 by which a court can confer standing on a plaintiff:
2 There's statutory standing; there's what's called
3 constitutional standing, and there is the public
4 importance exception to standing. Those are the three
5 grounds.

6 Now, the focus with TR in Mr. Lindemann's argument
7 has been on what's known as constitutional standing which
8 has three elements. The only element that he argued was
9 injury, in fact. That's an essential element of
10 constitutional standing, of course.

11 Injury, in fact -- his argument, in essence, with TR
12 is that we didn't show any evidence that TR had suffered
13 injury in fact. What Mr. Lindemann is confusing or what
14 he is neglecting is your standards order from way back
15 in -- whenever that was, 2007 maybe.

16 Early on in the case, just to jog your memory and
17 everyone's memory, early on in the case, maybe midway
18 through the case, you asked the parties what was the
19 appropriate standard of liability in a case like this, and
20 surprisingly, we didn't agree.

21 So you asked us to brief them, and we both briefed it
22 extensively. This was a big deal that took a long time,
23 as you may recall.

24 You issued a fairly lengthy order, a very
25 comprehensive order that addressed the standards of

1 liability in this case.

2 The fundamental principle, the sort of starting point
3 was for a case under Article 1, Section 15 of the South
4 Carolina Constitution alleging cruel and unusual
5 punishment, the same standard would apply as that the
6 federal courts used for the -- in analyzing the Eighth
7 Amendment of the US constitution, the counterpart
8 provision is cruel and unusual punishment. That is the
9 deliberate and different standard with its objective
10 component and its subjective component.

11 You laid that out extensively in your standards
12 order, and you laid it out again in your final order, too.
13 Not in this direct detail, but you referenced the standard
14 order in the lineup.

15 What the standard is, and what you determined it is,
16 consistent with Eighth Amendment law is that for the
17 objective component to prove liability, what the
18 plaintiffs have to prove, is in a systemic deficiencies
19 case that plaintiffs are exposed to the risk of future
20 harm, more specifically to a substantial risk of serious
21 future harm. Remember the Helling case that you relied on
22 in that, in that order, the US Supreme Court case where an
23 inmate smoked four or five packs of cigarettes a day and
24 his roommate, his cellmate, filed a lawsuit saying, "You
25 know, this is dangerous to my health."

1 The lower court said no, you've got to show actual
2 past injury before you have got a lawsuit and dismissed
3 the suit. It went up the chain of appeal. Ultimately,
4 the US Supreme Court said -- reversed saying no, you don't
5 have to show past injury in a case like this.

6 You've got to show -- the sentence was -- I'm
7 probably paraphrasing it, but my memory is an unsafe
8 condition need not await a tragic result.

9 All you have to do is exposure to a substantial risk
10 of serious future harm. That's the standard in this case
11 under the objective component that we had to -- we had to
12 follow.

13 So in order to show actual injury in this case, we
14 don't have to show past harm by TR or by anybody else.
15 All we have to do -- and your order made this crystal
16 clear, your standards order which they insisted all the
17 way and never accepted even after you issued the order.
18 At the time of trial, they were still trying to argue it
19 doesn't apply and even today they're trying to argue it
20 doesn't apply.

21 The standard is exposure to a substantial risk of
22 serious future harm, and in your final order, you found
23 that conditions top to bottom in your mental health
24 program create a substantial risk of serious future harm
25 to everyone who was seriously mentally ill, every inmate

1 who was seriously mentally ill. That's what your order
2 found.

3 So to show actual injury, what we did and what we had
4 to do was to show that, to show the risk of future harm.
5 That's how you show actual injury. We presented evidence
6 that TR was a seriously mentally ill patient. He was
7 incarcerated at SCDC.

8 Therefore, he is exposed to that risk and therefore
9 has suffered actual injury. That's one of the problems
10 with the Lewis case that Mr. Lindemann likes to cite.

11 The Lewis case is a US Supreme Court case. It
12 applies federal rules of standing and, of course, in
13 federal courts, federal courts as we all know are courts
14 of limited jurisdiction unlike South Carolina courts of
15 general jurisdiction. Federal court standing -- that's a
16 presumption against standing.

17 It's not the same in South Carolina, but Lewis is
18 distinguishable on its facts. There, it's not -- it's not
19 an allegation of systemic deficiencies. It's not an
20 Eighth Amendment allegation at all. It's an argument
21 about individual defendants being denied access to the
22 courts.

23 It's brought under the First, Sixth and Fourteenth
24 Amendment. It's not the Eighth Amendment, so that
25 standard, that risk of future harm doesn't apply. It's

1 past harm. For example, the past harm that they alleged
2 in that case was inability to meet filing deadlines
3 because it was all about access to the courts. It wasn't
4 about systemic deficient -- a systemically deficient
5 mental health system. The case is easily distinguishable
6 from the one that we're dealing with.

7 Now, having said that, that the issue here that all
8 we had to do to meet the -- show actual injury was to show
9 the risk of future harm. In fact, we did present evidence
10 about TR's past harm.

11 Mr. Lindemann made mention of it but minimized it.
12 There was a report. The report that was presented into
13 evidence, entered into evidence. It was over his action,
14 his hearsay action, but that was a spurious objection, and
15 you overruled the objection.

16 It was admitted into evidence. It was a report by
17 our two psychiatric experts, Jeff Metzner and Ray
18 Patterson when they conducted an inspection of Gilliam and
19 interviewed a lot of inmates, including TR, and Ray
20 Patterson's report about his interview or a summary of his
21 interview with TR was in there. He said TR had a history
22 of extended solitary confinement.

23 Well, there was lot of testimony in this case and a
24 lot of findings by Your Honor about the extended solitary
25 confinement at SCDC and the filthy conditions and

1 dehumanizing conditions of solitary confinement and the
2 lack of access to medical care and mental health care in
3 solitary confinement.

4 Dr. Patterson's report on TR also noted that he was
5 in Gilliam and had formerly been in ICS. There was a lot
6 of testimony from Dr. Patterson and Dr. Metzner and
7 findings by Your Honor in this case that mental healthcare
8 at Gilliam and ICS is constitutionally deficient.

9 There was a note from Dr. Patterson that -- about his
10 mental -- TR's mental health assessments were conducted
11 without any aspects of confidentiality, and he talked a
12 lot about that with respect to a lot of inmates and how
13 that was systemic deficiency in this mental health
14 program.

15 So that was the evidence of past harm of TR that was
16 introduced, even though it wasn't necessary. All we had
17 to do was introduce evidence of the risk of future harm.

18 Finally, I just want to address your question
19 about -- and clarify about TR. The issue of TR's standing
20 was raised for the first time during Mr. Lindemann's
21 closing argument.

22 We litigated the case for six-and-a-half years, tried
23 it for six weeks, and the first time we heard an argument
24 an argument about TR's lack of standing was in his
25 closing.

1 On the day that TR was scheduled to testify, we
2 called, I believe, around 15 or so mentally ill inmates,
3 and we named TR as one of those. We spread those out over
4 about three days, as I recall.

5 The day that TR was scheduled to interview -- to
6 testify, we were told by SCDC that he did not want to
7 come. That was -- those were the words he used, "He did
8 not want to come." So they hadn't brought him, even
9 though they were under an order to bring him. We went
10 ahead and put up the other witnesses.

11 Now, at some point -- and we didn't bother to call TR
12 back because we had plenty of other inmate witnesses
13 whether they were designated as class representatives or
14 not.

15 As you recall, many, many or all of those inmate
16 witnesses testified about the past harm they had suffered,
17 present harm they were suffering, and we had experts who
18 testified how they were exposed to the risk of serious
19 future harm.

20 Now, if the standing argument had been raised by SCDC
21 anytime prior to closing, it would have been a simple
22 matter for us to say, "Your Honor, we wanted TR to come.
23 They didn't bring them, even despite their being ordered
24 to do so. Bring him back." That was never raised. No
25 issue was ever made of TR's standing.

1 I feel sure if that issue had been raised, Your Honor
2 would have let us call TR out of order, if necessary, even
3 though he -- you know, the time that we had told you the
4 inmates were going to testify had already passed.

5 So that's the story about the day that TR came to
6 testify or did not come to testify, rather. That's TR --
7 that's the issue with respect to TR's standing. Let me
8 talk about PNA's standing.

9 Back in 2005, the Department of Corrections filed a
10 motion to dismiss. On June 27th, 2006, you denied that
11 motion. I'm just going to quote the language from that
12 order.

13 "A review of South Carolina law reveals that SC PNA
14 was specifically created pursuant to the dictates of
15 United States public law 94-103 for the expressed purpose
16 to protect and advocate for the rights of developmentally
17 -- developmentally disabled and handicapped persons by
18 quote, pursuing legal, administrative and other
19 appropriate remedies to ensure the protection of the
20 rights of such persons", SC Code Ann., section
21 43-33-350(1).

22 The defendants argue that under this mandate, SC PNA
23 may facilitate litigation but may not be a party. The
24 court finds no controlling precedent to support the
25 defendant's position.

1 A plain reading of the statute which is entitled
2 powers and duties of system states that the organization
3 is authorized to pursue legal remedies. The filing of
4 lawsuits and seeking of legal remedy, and therefore, the
5 defendant's motion to dismiss plaintiff SC PNA for lack of
6 standing is respectfully denied.

7 We submit that PNA has standing under the South
8 Carolina statute, also under the federal statute, the
9 acronym of that federal statute is hanging.

10 Now, if you have statutory standing, you don't need
11 to go any further. You don't need to look at the other
12 grounds for standing. All it takes is one ground for
13 standing, but PNA has constitutional standing, as well.

14 Now, when you look at constitutional standing in the
15 context of an organization like PNA, the doctrine that is
16 applied by courts is the doctrine of associational
17 standing.

18 That concept is -- there are lots of cases that
19 discuss the concept of associational standing, federal
20 court, state court, South Carolina court.

21 Three that we cited in our brief and three good
22 places to start, the Hunt case, which is the US Supreme
23 Court case, the Beaufort Realty case, which is the South
24 Carolina State court which relies and quotes from Hunt and
25 the University Legal Services case which we cited in some

1 of our past briefs which is a federal court case. I don't
2 remember which circuit, but the facts are similar to ours.
3 That's why it's good to look at.

4 What those -- what the doctrine of associational
5 standing says is there is a three-part test to determine
6 injury in fact. This is how you determine injury in fact
7 from an organization like PNA: First of all, do their
8 constituents have standing?

9 I think that -- and in this case, again, there's
10 already been a finding by Your Honor that all seriously
11 mentally ill inmates in this system are exposed to a
12 substantial risk of serious harm.

13 Secondly, are the interests at stake germane to PNA's
14 purpose? I just think it's beyond dispute that that is,
15 in fact, the case here. And finally, individual
16 participation is not necessary. You wouldn't have to have
17 another class of plaintiffs, in other words, because the
18 relief requested enures to the benefit for those
19 constituents.

20 So, again, under associational standing, which I
21 didn't hear Mr. Lindemann talk about, that's how you prove
22 constitutional standing for an organization like PNA.

23 Finally, the public importance exception to the
24 standing doctrine. If you -- if you don't have standing,
25 statutory standing, if you don't have a constitutional or

1 in this case associational standing, there is a public
2 importance exception that is well recognized in this state
3 and other states, as well.

4 Now, we've argued this before, and we've briefed it
5 before. So I want to be -- I just want to try to be
6 succinct about what this is. If the issue -- and there
7 are a lot of South Carolina cases. The case I'll refer to
8 is the AT South case. I think it's maybe a 2011, 2012
9 Supreme Court case, case South Carolina Supreme Court case
10 which lays this out. There's more recent case law, as
11 well that discusses the same concept, uses the same
12 principles.

13 If the issue is of such public importance as to
14 require resolution for future guidance, then it doesn't
15 have to meet the statutory or constitutional standing
16 requirements. Standing is conferred by the court.

17 I would argue, Your Honor, this case is of great
18 public importance. I can't imagine a case of greater
19 public importance than this one.

20 Resolution is required for future guidance because
21 without resolution, these horrible conditions that you've
22 detailed so well in your order continue forever as they
23 have continued for decades before now.

24 Resolution is certainly required for future guidance.
25 The Sloan v. Sanford case, South Carolina Supreme Court

1 case, applies the public importance exception in a -- to
2 standing and allow -- holds the plaintiff has standing in
3 that case.

4 It discusses how, not surprisingly, in a case when
5 you're dealing with public importance, you have to balance
6 competing interest and determine whether -- whether in
7 this case because -- I mean, I'm paraphrasing here, but
8 obviously, you don't let the exceptions swallow the rule.

9 While there are some times when the case is of such
10 public importance, you make an exception for standing.
11 You balance competing interest.

12 Here, let's think about the interest that you're
13 asked to balance: Six-and-a-half years of litigation, six
14 weeks of trial, the time, the resources, judicial and the
15 resources of the parties, and much more importantly than
16 any of that, you're finding that -- that this kind of --
17 these horrible conditions, this -- this wretched program
18 has been in existence for well over a decade since at
19 least, you know, these reports started coming back in
20 2000.

21 So when you balance the competing interest, when you
22 look at the need for future resolution, surely -- and when
23 you look at the public importance of what's going on,
24 what's at stake here, surely the public importance
25 exception would apply even if the other standing criteria

1 did not.

2 THE COURT: All right. Thank you, Mr. Westbrook.

3 MR. WESTBROOK: Thank you.

4 THE COURT: Just a moment, gentlemen and ladies.

5 MR. LINDEMANN: Can I be heard on reply, Your Honor?

6 THE COURT: Well --

7 MR. LINDEMANN: These are all new issues.

8 THE COURT: Well, Mr. Lindemann, this is -- this
9 case -- this matter has been well briefed, well argued.
10 So I respectfully would decline to allow you to reply. I
11 have an understanding of what you will say.

12 MR. LINDEMANN: Well, the public importance exception
13 was not raised until just now. I didn't have a chance to
14 discuss that, and there are some points I'd like to be
15 able to make to make my record complete certainly for
16 appellate purposes.

17 THE COURT: Well, then I --

18 MR. LINDEMANN: I'd ask the Court's indulgence to
19 allow me to do so, please.

20 THE COURT: We'll give you that, that ability then.
21 Of course, that was briefed, Mr. Lindemann, but go ahead.

22 MR. LINDEMANN: All right.

23 Particularly with the public importance exception,
24 Your Honor, I did want to make a couple of points: First
25 of all, if you look at the type of cases where the public

1 importance exception has been used by the South Carolina
2 Supreme Court, it has been used in cases for declaratory
3 relief.

4 Generally, to determine specific issues of law, not
5 issues of fact such as what we have here, issues of law.
6 In fact, I think there are about 13 or 14 appellate
7 decisions where that's been used, and I don't believe
8 there is any case that turns on factual determinations
9 rather than legal determinations.

10 The question such as whether holding this position
11 and that position constitutes dual office holding, whether
12 or not the governor can also be in the military reserves,
13 those sorts of questions.

14 Most of them are Ned Sloan cases. Sloan is -- cases
15 that Mr. Sloan brought that challenge statutes or
16 challenge actions by boards such as the Hunley board,
17 things of that nature, not cases such as this one.

18 In fact, if you look at the decisions, none of them,
19 none of them provide for mandatory injunctive relief. A
20 few of the cases provide for a prohibitory injunction
21 essentially saying that statute is unconstitutional. You
22 can't enforce it. Well, that's not what this court has
23 awarded in this particular case.

24 You've awarded a mandatory injunction and one of
25 tremendous breadth, so I challenge the Court and I

1 challenge the plaintiff to find a case where the public
2 exception -- the public importance exception applies;
3 number two, this is not the type of case that satisfies
4 the public importance exception as the Supreme Court lays
5 out.

6 Lastly, let me call the Court's attention to a very
7 important -- now, this is granted in Justice Pleicones'
8 dissent, but it's a very important point and one I would
9 submit that I would imagine all of the justices would
10 agree on, and I submit that this Court should agree to.

11 Justice Pleicones says public importance should be
12 invoked only where the challenge cannot be otherwise
13 raised and should not be used to evade the application of
14 well-established standards. That's from the Bodman vs.
15 State of South Carolina Department of Revenue case, should
16 not be used to evade the application of other
17 well-established standards.

18 What do we have here? We have a complaint, Your
19 Honor. We have a complaint that has never alleged the
20 public importance exception as the basis of standing.

21 We went through tremendous pretrial discovery, and
22 then suddenly for them to say they didn't know standing
23 was an issue until closing arguments, we raised it in our
24 answer.

25 That's how you raise defenses. We argued it in a

1 preliminary motion. That's how you raise these defenses.
2 It was an issue for this Court to determine. It was an
3 issue. It was an element of their proof.

4 They never once put up any evidence at trial to
5 support a finding of a public exception standing. They
6 never made that argument in their case in chief. They
7 didn't present any evidence. It was all done post hoc.

8 What was it done for? It was done to evade the
9 application of other well-established standards,
10 constitutional standing. They can't prove constitutional
11 standing because they didn't present any evidence about
12 TR, and incidentally, the records from Dr. Patterson says
13 nothing about being in solitary confinement.

14 By the way, it's not a spurious objection. It's an
15 out-of-court statement submitted in court for the truth of
16 the matter asserted. If that's not the case back then,
17 it's certainly what they're using it for now.

18 They want this court to believe everything that
19 Dr. Patterson wrote in this out-of-court written
20 statement, but back to my point, the public importance
21 exception simply does not apply in a case like this.
22 There is no issue of law that's at stake. It is primarily
23 a factual based case.

24 All you have to do is look at your 45-page order and
25 tell that there is practically no law in that order. It's

1 all facts. Second of all, there is no case where that
2 exception has been used to confer standing on a court to
3 decide to issue any type of mandatory injunction.

4 THE COURT: All right.

5 MR. LINDEMANN: Prohibitory injunctions, yes,
6 mandatory injunctions absolutely not, and certainly none
7 with the breadth that this case involves.

8 I would find it very, very -- I believe the chances
9 of the Supreme Court agreeing that the public importance
10 exception applies in a case like this would be practically
11 nil.

12 THE COURT: All right. Thank you.

13 Just a moment, ladies and gentlemen.

14 (Pause).

15 I'm going to go ahead and rule on these as we go
16 through, and -- so there will be a clear decision at the
17 end of each of these points.

18 With regard to standing, I'm going to deny your
19 motion, Mr. Lindemann, on the issue of standing for the
20 following reasons: First of all, I find that SC PNA under
21 its statutory directive has standing to bring this claim.

22 The definitions that you discussed that have to do
23 with developmental disability, as well as quote
24 handicapped individuals and whether or not there is proof
25 in this record that the various folks within the

1 Department of Corrections and those who are -- were at one
2 time or who ended up being named plaintiffs meet that
3 definition, the Court finds that, first of all, this is,
4 as you are aware because you made a reference to the Rocky
5 Linkhorn case which is a reference to an un-appealed
6 decision, madam court reporter, that arose in Lexington
7 County that was before this Court in this Court's capacity
8 of responsibility assigned by the Chief Justice to have
9 oversight over the forensic operations of the Departments
10 of Mental Health, which of course, involves mental illness
11 and the Department of Disabilities and Special Needs which
12 involved developmental disability or intellectual
13 disability.

14 This Court has ruled in the Linkhorn case that those
15 narrow definitions you raised, Mr. Lindemann, do not apply
16 to a person who is determined to be mentally ill or
17 intellectually disabled under Title 44 and sent into the
18 general sessions process for competency purposes and thus,
19 I reject the definition that -- the narrow definitions you
20 would apply.

21 I just would simply say rather than get lost in all
22 these weeds, it's just strained review to stay to the --
23 to those folks who came in here and testified who were
24 profoundly mentally disabled -- or not -- some of them
25 were profoundly mentally disabled were not handicapped.

1 They are handicapped in every meaning of the rule whether
2 it be a word, whether it be statutorily or the plain
3 meaning that we use here in enforcement of our general
4 sessions laws with regard to individuals who have mental
5 health issues. So I find that SC PNA has, again, by
6 statutory directive standing.

7 I also find that TR has standing. There is
8 sufficient reference in the record to TR. There is a
9 definition which has been provided by this court to have
10 standing -- or excuse me, the triggering event for the
11 individuals who were defined in the class is that they are
12 -- first of all, they have -- that as is defined in the
13 standard order that -- excuse me, as defined in the
14 standards order, that they are exposed to a serious risk
15 of harm, that is the injury in fact.

16 The Court finds this has been met in this case, and
17 respectfully, we deny your motion with respect to standing
18 because I find that there is standing.

19 Furthermore, if you wish to have the record fully
20 complete on this issue, I would further find, although
21 it's not necessary to reach it, that the reason we have
22 the public importance standing exception -- although you
23 say this is out of the ordinary, this is a case in point
24 for this very concept that this is a publicly important
25 procedure and one that has great implications for everyone

1 whether they're in the Department of Corrections or not.

2 Thus, the Court finds that this also meets the
3 exception for the public importance to confer standing,
4 but again, I don't find it necessary to reach that.

5 Now, let's stand down. We're going to take
6 approximately a ten-minute break, but let's do this: When
7 we come back, I'm going to impose some limitations, just
8 respectfully, that we argue no more than ten minutes on
9 each point on either side so that we'll let you structure
10 your arguments a little bit when we go forward to point B,
11 which is our second matter, and we're going to stand down
12 for about ten minutes.

13 Thank you.

14 MR. LINDEMANN: Thank you.

15 (WHEREUPON, a short break was taken.)

16 THE COURT: Mr. Lindemann, if I follow your outline
17 correctly, we actually covered A and B, the first two
18 points in the -- I believe in the first argument. We're
19 now down to the absence of a private right of action.
20 Would that be correct in your opinion?

21 MR. LINDEMANN: That is correct, Your Honor.

22 THE COURT: All right, sir. Go ahead.

23 MR. LINDEMANN: If I could just note one thing for
24 the record. You mentioned your length in order. I don't
25 know if Your Honor is aware, the writ of supersedeas has

1 been issued by the South Carolina Court of Appeals. So I
2 submit that that is -- should not be a basis of any ruling
3 in this case since there is a supersedeas that has been
4 issued.

5 THE COURT: All right. Now, let me just ask you.
6 I'm learning while I'm listening to you. How did that
7 happen? It was on appeal by the Department of
8 Disabilities and Special Needs, I am told, because I
9 inquired about that. What -- is there an appeal pending?

10 MR. LINDEMANN: You got incorrect information. We
11 appealed it for DDSN. That appeal is -- is pending. We
12 petitioned for a writ of -- you were copied on the order.
13 I guess you didn't get it.

14 THE COURT: No, sir.

15 MR. LINDEMANN: The Court of Appeals issued a writ of
16 cert. We had agreed -- for a superseadeas. We had agreed
17 that we would keep Linkhorn in Geo Care until the probate
18 court made a decision that he should be moved elsewhere,
19 but as far as all the rest of your order which was
20 enjoining DDSN from being able to argue the definition
21 that you adopted for intellectually disabled and related
22 disabilities, that -- those decisions by Your Honor are
23 all stayed pending the appeal.

24 THE COURT: So you're telling me that you moved for a
25 writ of superseadeas, and this is the first I'm hearing

1 about it today? Is that what I'm hearing, Mr. Lindemann?

2 MR. LINDEMANN: We moved in the Court of Appeals.

3 THE COURT: I see.

4 MR. LINDEMANN: Your Honor, I'll be happy to send you
5 a copy of the order. You were copied on the order. I
6 assumed you got it.

7 THE COURT: No, sir. I did not receive that,
8 Mr. Lindemann.

9 All right. Let's move forward to your next issue.

10 MR. LINDEMANN: I'll be happy to.

11 This is a point that's been argued to you a couple of
12 times before, Your Honor. I don't believe we ever
13 received any type of even preliminary ruling on this.

14 It's the -- it's the issue based on whether or not
15 there can be a private right of action brought under the
16 South Carolina Constitution.

17 As Your Honor is well aware, even though Your Honor
18 borrowed federal law and borrowed the jurisprudence
19 dealing with the Eighth Amendment which is the cruel and
20 unusual punishment clause, this case was tried under
21 Article 1, Section 15 of the South Carolina Constitution,
22 which is the South Carolina cruel and unusual punishment
23 clause.

24 So we raised the issue at trial. We raised the issue
25 also in closing arguments about whether or not there is a

1 private right of action that can be brought under the
2 South Carolina Constitution given the absence of enabling
3 legislation.

4 The comparison was drawn to federal law where prior
5 to the Klu Klux Klan Act of 1870, there was no private
6 right of action for a violation of Bill of Rights for any
7 federal constitutional provision.

8 The Klu Klux Klan Act came about at the same time the
9 states ratified the Civil War Amendments, Thirteenth,
10 Fourteenth, and Fifteenth Amendment. So it's important to
11 have a private right of action, and what was adopted as
12 part of the Klu Klux Klan Act is what is today known as
13 Section 1983, 42 USC Section 1983.

14 I know Your Honor probably hasn't dealt with that too
15 much since most of those cases are in federal court, but
16 that is enabling legislation that allows a private party
17 to bring a lawsuit for damages or injunctive relief or
18 declaratory relief against a governmental entity for a
19 violation of either a federal statute or a federal
20 constitutional provision.

21 In the State of South Carolina, we -- our General
22 Assembly has never adopted any type of enabling
23 legislation that allows for a private right of action
24 under the South Carolina constitution.

25 The one case that we can cite to this Court -- I

1 fully admit it's an unpublished decision from the Court of
2 Appeals, so it's not binding precedent, but at the same
3 time, I believe it's highly persuasive.

4 It's the Gibbs vs. South Carolina Department of
5 Probation, Pardon and Parole Services case issued in May
6 of 2002. I handed up a case, a copy of that case, Your
7 Honor, which is in your notebook that we submitted to you,
8 as well. I'll be happy to get you an additional copy, but
9 we have also given you a copy of the Supreme Court's
10 denial of cert in that particular case.

11 So we have an unpublished decision, but I believe
12 it's entitled to tremendous persuasion because in that
13 particular case after we prevailed, I actually represented
14 the Department of Probation in that case. After we
15 prevailed on that particular issue, the plaintiffs did
16 petition for a writ of cert, and it was denied.

17 Now, what that case says, there was a claim for a
18 violation of various constitutional provisions. All of
19 the equipment -- and I mean, I think it was a search and
20 seizure Fourth Amendment equivalent case, if I remember
21 correctly.

22 In fact, it says here, "Among the rights he claims
23 were violated were his rights to due process, speedy trial
24 and protection from unreasonable searches."

25 It says, "On appeal, Gibbs argues that the circuit

1 court erred in finding no private cause of action for
2 damages made from the version of the South Carolina
3 Constitution for violations of his state civil rights."

4 The South Carolina Court of Appeals affirmed that
5 ruling, and they go and give the explanation I just gave
6 to Your Honor that section 1983 provides for enabling
7 legislation under the federal constitution, but as I said,
8 "There is not a similar statutory provision in South
9 Carolina which enables a citizen to bring a private right
10 of action for civil damages under the State constitution.
11 Whether a private right of action can be implied from the
12 state constitution has never been addressed by our
13 courts."

14 They go on, and then at the end of that section, they
15 say, "We agree that no viable cause of action exists,
16 whereas here, the state constitution does not provide for
17 a private cause of action for civil rights violations, and
18 the legislature has not enacted a statute enabling this
19 type of action."

20 Now, the only response that the plaintiff has ever
21 made to this argument is -- other than the fact that Gibbs
22 is unpublished is that Gibbs specifically dealt with a
23 claim for money damages.

24 I fully concede that. They drew that distinction.
25 They simply said, "This opinion is not intended as a

1 comment on all private causes of action pursuant to the
2 state constitution."

3 However, we raised the issue that remains after
4 Gibbs, and my argument to this Court -- we've never gotten
5 this Court to rule on this issue -- and I'm respectfully
6 asking you to rule on this issue -- is it seems logical to
7 me that if there is no enabling legislation that allows a
8 party to bring a private right of action for money damages
9 under the state constitution, there is equally not any
10 enabling legislation that allows a private party to bring
11 a private cause of action for prospective relief under the
12 state constitution.

13 I cannot think of why there would be a rationale that
14 would explain that the mode of relief makes a difference
15 as to whether or not a private right of action exists.

16 I have never -- and I researched this. I can find no
17 authority in any other setting, any other jurisdiction,
18 including South Carolina or any other jurisdiction, where
19 the mode of relief makes a difference as to whether or not
20 there is a private right of action based upon the
21 existence or nonexistence of enabling legislation.

22 So what I have asked this Court is if this Court
23 finds contrary to Gibbs that there is a private right of
24 action for injunctive relief because that's what we're
25 faced with here, it's purely a state constitutional claim,

1 what is the rationale? What is the authority?

2 I know the plaintiffs have presented none that I'm
3 aware of that have allows for a private right of action
4 simply because there is prospective relief. I would
5 submit to Your Honor that clearly there is not.

6 As my arguments, I know my ten minutes is probably
7 coming to a close. I didn't time myself, but I know all
8 of these judiciability arguments work together. You might
9 remember in my closing argument, I pointed out how all of
10 these points work together. They work together -- this
11 again, ties into the separation of powers, I think I
12 discuss it next, because there is no need for the Court to
13 entertain a private right of action in a situation such as
14 this because of other issues of judiciability, which
15 again, I won't go into until we get to that very point but
16 that's my argument.

17 My argument is there is no enabling legislation. The
18 Gibbs court agrees. The Supreme Court denied cert. They
19 did limit that decision to money damages, but they didn't
20 comment on any other forms of relief.

21 This case raises that issue. My argument is there is
22 no enabling legislation that would allow a private right
23 of action for money damages. There is no enabling
24 legislation to allow a private right of action for
25 injunctive relief, and if there is such enabling

1 legislation, I would ask the Court to cite it and for
2 plaintiffs' counsel to cite it to the Court and for the
3 Court to issue a decision indicating what that enabling
4 legislation is.

5 Thank you.

6 THE COURT: All right. Thank you.

7 Do you wish to respond, Mr. Westbrook?

8 MR. WESTBROOK: Yes, sir. This -- this issue was
9 raised early on in their motion to dismiss in 2005. You
10 denied it. It was raised in their Rule 41(b) motion.

11 THE COURT: I'm going to get you to speak up just a
12 little bit.

13 MR. WESTBROOK: I'm so sorry. I'm sorry. I had
14 forgotten.

15 THE COURT: That's okay.

16 MR. WESTBROOK: This issue was raised back in 2005
17 with their motion to dismiss. You denied it. It was
18 raised again in their Rule 41(b) motion halfway through
19 the trial. They raised it again in closing and now raise
20 it again.

21 The Gibbs case is their only authority. It is an
22 unpublished Court of Appeals opinion from 2002. The fact
23 that cert was denied, I frankly don't see how that makes
24 it any more persuasive than any other unpublished case.

25 The Gibbs case, Mr. Lindemann made my argument for

1 me. It is limited to money damages, and it doesn't even
2 contemplate anything other than money damages.

3 It starts off, that paragraph, by saying -- although
4 it compares it to Section 1983, although that provides a
5 method for obtaining monetary damages, violations of civil
6 rights. There is not a similar statutory provision in
7 South Carolina.

8 The whole discussion was about monetary damages.
9 They rely in footnote three on an ALR article that is
10 entitled implied cause of action for damages for
11 violations of provisions of state constitution. That's
12 the only thing they are even discussing in Gibbs is
13 monetary damages.

14 The -- certainly, there have been other state court
15 cases that -- where -- where similar to ours and many
16 federal court cases, of course, but a few state court
17 cases, as well, the one in West Virginia that we cited in
18 our brief: Crain v. Bordenkircher comes to mind.

19 This issue wasn't, you know, raised but, you know,
20 the court found for the plaintiffs in that case. It was a
21 case alleging constitutional violations similar to ours
22 involving systemic deficiencies in prison. Factually
23 dissimilar cases but the cases where private actions were
24 allowed and challenging constitution were one of the Sloan
25 cases. Actually, it was the Sloan v. Sanford case where

1 Sloan -- Mr. Sloan challenged, said that Governor
2 Sanford's commission in the Air Force Reserve violated the
3 constitution. He brought a civil action on that.

4 The court, first of all, found that he had standing
5 because of the public importance exception, and then they
6 went on to rule against him. But nobody said he didn't
7 have the right to bring the action. That issue wasn't
8 even raised.

9 So the -- so again, I say that the Gibbs case which
10 is their only authority is a case of little persuasive
11 authority. It seems to me Mr. Lindemann couldn't find a
12 distinction between monetary damages and injunctive
13 relief.

14 Well, you know, you would think that you might want
15 a -- the state might -- they might -- for public policy
16 reasons limit anybody suing for monetary damages on the
17 basis of constitutional provision, but injunctive relief
18 is the kind of -- the kind of relief that seems
19 appropriate for the constitution.

20 This is a perfect case, an example of what we sued
21 here for was not monetary damages. We sued to change a
22 bad system to try to fix massive problems that had been
23 going on for decades without being addressed. That's what
24 this court did. That's why a private right of action in
25 this case is not only important but necessary.

1 Thank you.

2 THE COURT: Do you wish to reply?

3 MR. LINDEMANN: Yes. Real quickly, Your Honor.

4 The fact that Mr. Westbrook has been able to identify
5 cases, including one from West Virginia where he admits
6 the issue wasn't raised, I assume those are cases where
7 some type of injunctive relief was awarded in a -- for a
8 violation of a state constitution.

9 If the issue wasn't raised, it's not a dispositive
10 case. I quote to Your Honor, Chief Judge Sanders once
11 wrote -- it's often quoted in appellate decisions.

12 Appellate courts -- I'll probably mess this up. I
13 usually do. Appellate courts are like obedient children.
14 They only speak when spoken to. So if the issue was not
15 raised to the appellate court, the appellate court cannot
16 address it.

17 So the fact that you may have cases where a defense
18 lawyer did not raise the argument that there is no private
19 right of action in the state constitution, the simple fact
20 that a state court then goes ahead and issues an
21 injunctive ruling doesn't mean that there is a private
22 right of action. That issue has got to be raised for an
23 appellate court to be able to rule on it.

24 In this case, we are raising it just like we did in
25 Gibbs. In Gibbs, we prevailed in the circuit court. It

1 was upheld. In this court, we're asking this court to
2 rule as Gibbs did.

3 Again, I'm going to ask the same -- well, let me make
4 one other point before you get to that. If you look at
5 section 1983, section 1983 -- I'm not going to read you
6 the whole language, but it ends by talking about an
7 action, a lawsuit, equity or other proper procedure for
8 redress. Section 1983 was adopted by the United States
9 Congress, dealt with injunctive cases. There is enabling
10 legislation.

11 So I asked the question. I still haven't heard it
12 from Mr. Westbrook. If there is enabling legislation that
13 allows this court to hear a suit under a private right of
14 action for injunctive relief under the state constitution,
15 where is it? What is it? It's got to be in those blue
16 books back there.

17 I submit to the Court there is no such statute. As a
18 result, the reasoning of Gibbs is sound. If there is no
19 enabling legislation, there can be no private right of
20 action. If there can be no private right of action, this
21 case should be -- should have been dismissed.

22 We would ask the Court to rule on that issue and
23 dismiss this case on that basis.

24 THE COURT: And please give me your thinking as to
25 why Gibbs would have been specifically issued as a

1 non-published opinion if this is such an important point
2 and precedential in nature, Mr. Lindemann.

3 MR. LINDEMANN: Well, Your Honor, obviously, I can't
4 tell you that. The decision was issued by -- at the time
5 Chief Judge Hearn who is now on the South Carolina Supreme
6 Court, Carol Connor who is deceased, and Judge Duane
7 Shuler who is no longer on the bench.

8 Obviously, I can't speak for those three jurists. I
9 have no idea why it was unpublished but, you know, a win
10 is a win. I certainly wasn't going to -- going to contest
11 it after they ruled in my favor.

12 I do think it's probative, certainly that the Supreme
13 Court -- it's not precedential. I mean, I'll be the first
14 to admit that, but the Supreme Court had the opportunity
15 to step in, and they denied cert on it.

16 THE COURT: Very good.

17 MR. LINDEMANN: So again, the issue before this Court
18 of whether there is any precedent or not, this Court --
19 and I would ask, respectfully, that this Court rule on
20 this issue. Because number one, we believe that we
21 prevail on the issue; number two, we certainly want that
22 issue preserved to be able to take it up on appeal to the
23 South Carolina Supreme Court if you disagree with it.

24 THE COURT: Thank you.

25 MR. LINDEMANN: Thank you.

1 THE COURT: All right. Well, I believe you
2 crystallized the issue well, and it is preserved at this
3 point for review if the appellate court wishes to review
4 it.

5 I simply would say that this Court declines to apply
6 the reasoning in Gibbs vs. Department of Probation, Parole
7 because the Court of Appeals made it limiting and actually
8 severely limited it by issuing it as an unpublished
9 opinion but also providing limitations within the
10 community that it applies only to the claim for monetary
11 damages.

12 For these reasons, the Court does not recognize it as
13 a precedent that is controlling here and declines to
14 dismiss this case based upon that reasoning for the
15 reasons that have just been stated, so that is
16 respectfully denied.

17 Let's move next to separation of powers, please.

18 MR. LINDEMANN: Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. LINDEMANN: Your Honor, again, the separation of
21 powers issue has been an issue that's been addressed by
22 this Court from probably the first -- the first filing by
23 the South Carolina General Assembly that was an initial
24 party in this particular case.

25 Separation of powers has continued to be a big issue

1 throughout the trial of this case. It is the one legal
2 issue that I believe that you have at least touched on. I
3 don't believe that you have addressed it, addressed all of
4 the points that we have raised, but it is touched on in
5 your 45-page order.

6 But the argument that we had made that Your Honor has
7 not addressed is this: Our argument on separation of
8 powers -- I mean, we're certainly not abandoning the
9 argument that, obviously, you have three coequal branches
10 of government and that what Your Honor is doing -- in
11 particularly given the fact that you have now ruled and
12 the relief you have awarded -- is impinging upon the
13 executive branch's power. It is a violation of the
14 separation of powers.

15 But the real issue that I have that this Court hasn't
16 addressed is the fact that in your order early in the
17 case -- let me make sure I reference it for the record.
18 In the order you issued on August 18th -- well, it's filed
19 August 18th, 2006, you granted the South Carolina General
20 Assembly's motion to dismiss.

21 You granted the motion to dismiss on the basis that
22 suing the South Carolina General Assembly, IE the
23 legislative branch, was a violation of the separation of
24 powers doctrine. The separation of powers doctrine, as
25 you know, is a constitutional provision. It's part of

1 Article 1, Section 8.

2 Your Honor -- and I agreed with your reasoning. Your
3 reasoning was that separation of powers would not allow
4 this court to issue any type of relief against the
5 legislative branch.

6 Your Honor said the following: The doctrine has
7 squarely implicated this case because the plaintiffs'
8 amended complaint is premised on the following intentions:
9 That this Court may exercise jurisdiction over the
10 legislative branch of government; that the legislative
11 process itself was a judicable basis for a finding in
12 plaintiffs' favor and that this court possesses the power
13 to order the Senate and the House to design, maintain,
14 fund and provide resources for a reasonable and adequate
15 system of mental healthcare. Each such contention in the
16 amended complaint violates the separation of powers
17 doctrine.

18 Now, what's significant about that ruling on the fact
19 I believe you were absolutely correct in finding that you
20 could -- the plaintiffs could not sue the legislative
21 branch is this order, unlike any other order in this case,
22 those rulings are final, because this order dismissed the
23 South Carolina General Assembly as a party in this case.

24 As Your Honor well knows -- and I'll cite you the
25 case I was involved in -- Olsen vs. Faculty House over at

1 the University of South Carolina, that in South Carolina
2 when a party -- and it's our procedural rules, both
3 appellate and civil, that when a party gets dismissed from
4 a case, judgment is immediately entered in their favor.

5 If you are going to appeal that decision, you have 30
6 days to do so, totally contrary to the federal system
7 where a -- when a party gets out of a case, if there's
8 still issues or claims that continue against other
9 parties, judgment doesn't get entered until all of the
10 case is disposed of at the trial level, and then an appeal
11 can be filed. South Carolina is totally opposite.

12 So when the General Assembly got dismissed by this
13 Court in August 2006, the plaintiffs had 30 days in which
14 to appeal this order. They did not do so.

15 Those rulings are the law of the case. Those rulings
16 cannot be reversed, and all the parties -- and Your Honor
17 knows the law of the case. Right or wrong, the law of the
18 cases governs, and we believe you were right. What we
19 disagree with, Your Honor, is you haven't taken that
20 correct ruling and applied it to the other coequal branch
21 of government.

22 You applied it to the legislative branch and said,
23 "My hands are tied. I do not have the authority to grant
24 relief against the legislative branch because of the
25 separation of powers doctrine." You are correct.

1 What Your Honor has not done is give due
2 consideration, the same consideration, to the other
3 coequal branch of government, the executive branch, which
4 is part -- what SCDC is part of.

5 The same principles apply. The law of the case
6 applies. There is no way to distinguish it, I would
7 submit. If the plaintiffs cannot sue the General Assembly
8 because of separation of powers, the plaintiffs cannot sue
9 the South Carolina Department of Corrections because of
10 separation of powers.

11 Your Honor, again, we raised this issues numerous
12 times. Your Honor has not ruled on it. While you have
13 touched on a couple of ideas about separation of powers in
14 your existing order, you have never addressed specifically
15 issued a final ruling.

16 Now, in the same order, you denied the motion to
17 dismiss for SCDC, but again, as we talked about at the
18 beginning of the case, this is a preliminary interlocutory
19 order. We need a final ruling from the Court on this
20 issue, and that's what we're respectfully asking with this
21 52(b) motion.

22 I believe this logic is unassailable. I mean, maybe
23 that's a little strong. I haven't seen how the plaintiffs
24 get around that. It's the law of the case whether it's
25 right or wrong.

1 I think you were right. I think you were only wrong
2 that you haven't also applied your correct reasoning to
3 the other coequal branch of government which has just as
4 strong separation of powers privilege, for lack of a
5 better word, in the General Assembly.

6 There is no reason you should be treating with more
7 deference the legislative branch than the executive
8 branch. There is no authority for your doing that, and I
9 don't think that's your intention to do it.

10 So I'm asking you to apply the law of the case. I'm
11 asking you to rule on this issue. I'm asking you to
12 dismiss the Department of Corrections and former Director
13 Byers based on separation of powers.

14 THE COURT: Thank you.

15 And from the plaintiffs?

16 MR. WESTBROOK: Yes, Your Honor.

17 First of all, I think your final order does more than
18 touch on a few ideas related to separation of powers, and
19 I would stand on pages 36 and 37 of the final order in
20 addressing the separation of powers argument by SCDC.

21 I will say in that 2006 order that Mr. Lindemann
22 referenced in which you granted the General Assembly's
23 motion to dismiss based on separation of powers, you did,
24 in fact, as Mr. Lindemann said deny the Department's
25 motion based on separation of powers.

1 I don't have that order in front of me, and I don't
2 trust my memory closely enough to -- to describe exactly
3 the distinction. But I do recall you making -- spending
4 some care distinguishing between those two entities and
5 why the separation of powers applied to the General
6 Assembly and not the Department of Corrections.

7 Thank you.

8 THE COURT: All right. Just -- go ahead,
9 Mr. Lindemann.

10 MR. LINDEMANN: Just briefly on reply, Your Honor. I
11 do have a copy of the order. I'm happy to share it with
12 Mr. Westbrook.

13 If Your Honor looks as to your reasoning as to why
14 you denied it to the Department of Corrections -- it's
15 something I failed to mention -- but it's actually quite
16 telling because what you focused on in your decision was
17 the Article 12, Section 2 claim.

18 As Your Honor will recall, when the suit was first
19 brought, they brought claims under two different
20 provisions of the Constitution: The cruel and unusual
21 punishment laws and the prisons clause.

22 After Your Honor issued your standards order, we
23 petitioned the Supreme Court for a writ of certiorari to
24 challenge that portion of your standards order, and the
25 Supreme Court granted that writ of certiorari in order to

1 avoid that immediate appeal before the South Carolina
2 Supreme Court on issues dealing with the prisons clause.

3 The plaintiffs petitioned the Supreme Court and said,
4 "We will abandon that claim." They abandoned that claim.
5 Jurisdiction was returned to this court. That claim was
6 gone.

7 Now, I know there was some confusion. I believe
8 because when you first issued your ruling in this
9 particular case, your letter ruling, you thought that that
10 issue was still in the case.

11 We made a lot of -- we discussed that numerous times
12 during the trial because our contention was they were
13 trying, still, a prisons clause claim instead of a cruel
14 and unusual punishment claim because there's clearly
15 different standards.

16 We'll get into later at a later point. It's farther
17 down the list, and I don't mean to go into that. It's
18 significant why found that there was not a separation of
19 powers problem for SCDC was because you're relying on the
20 prisons clause. The prisons clause claim is gone.

21 So I would submit that the logic that you relied on
22 no longer -- that certainly doesn't carry today. It's not
23 the law of the case to us, because obviously, we're still
24 in the case. So this is something that Your Honor can
25 still revisit anyway.

1 One additional point, you know, what's interesting is
2 Your Honor granted dismissal to the General Assembly
3 because of problems with separation of powers doctrine.
4 Yet, if you read your order in this particular case, in
5 order for the Department of Corrections which cannot
6 generate their own funds; they have no way to do that, and
7 they certainly can't print money. They can make license
8 plates, but they can't print money. They have to rely on
9 the General Assembly for money.

10 So the only way that the Department of Corrections
11 can meet the remedial order this court has put in place to
12 the extent that it requires more money, and obviously, it
13 requires more money.

14 Your Honor put a number of editorial comments in
15 there that indicates that. In an indirect way, your order
16 has violated the separation of powers doctrine because the
17 only way the Department of Corrections can get to -- can
18 reward the relief or pay for the relief that you're
19 ordering is to get the money from the General Assembly
20 which Your Honor indicated that they couldn't sue directly
21 and you didn't have the order -- you didn't have the
22 authority to order that directly.

23 But in essence, in a warped sort of way, your order
24 is going to require the General Assembly to pay money or
25 to appropriate funds to SCDC in order to comply with the

1 order which again shows, with all due respect, a violation
2 of separation of powers doctrine.

3 It all goes back to this overwhelming point that
4 these sorts of claims are just not judicable. There is no
5 private right of action as we've already touched on,
6 causes separation of powers problems. That's why you
7 don't see -- there is no precedent for this in South
8 Carolina. I know Your Honor is well aware of that.
9 Certainly, your order has cited no precedent in South
10 Carolina for a court to take on this type of action, and
11 again, that's our -- that's our point.

12 Bottom line is the law of the case, which I believe
13 you were correct when you cut the General Assembly loose,
14 we're entitled to the exact same deference.

15 The statute -- separation of powers doctrine applies
16 equally to all three branches of government, and if this
17 court doesn't have the ability to award relief against the
18 General Assembly, you don't have the ability to award
19 relief against the Department of Corrections particularly
20 when the Department of Corrections then has to go to the
21 General Assembly to get money.

22 Thank you.

23 THE COURT: Mr. Westbrook, if you wish, I'll let you
24 respond on one point that was brought up, the new point
25 which is the strategic or tactical decision to dismiss one

1 of the claims that the implication may be that -- from
2 Mr. Lindemann that it may have been done because of the
3 merits of the claim or lack of merit. If you wish to be
4 heard on that, I'll be glad to allow you to do so.

5 MR. WESTBROOK: All right.

6 Your Honor, what you're referring to, what
7 Mr. Lindemann referred to, was at one point in time after
8 the standards order was issued, as he said, there was a
9 cert petition granted by the South Carolina Supreme Court.

10 The South Carolina Supreme Court's focus seemed to
11 be -- and I can't remember why I didn't include this in my
12 memo, but we felt at the time -- it was on the minimally
13 adequate claim, not the cruel and unusual punishment
14 claim.

15 We didn't feel that we have needed that claim. We
16 felt it was a strong claim. They were both strong claims.
17 It was sort of like I was talking about the plaintiffs
18 earlier. As long as you have one plaintiff, you don't
19 need two plaintiffs. As long as we had one of those
20 claims, we didn't need both of them.

21 The case by that time had been going on for five
22 years or so. It had been -- that would have been around
23 probably 2010 or so.

24 The -- there had been the horrible injustices that
25 inmates had been suffering at the Department of

1 Corrections so-called program for mental health had been
2 documented since 1999 by then.

3 We felt that the better course of action for our
4 clients was to try to pursue speedy relief and that if we
5 waited for the Supreme Court to -- to address those
6 issues, we didn't feel that the Supreme Court would rule
7 against us.

8 We just thought like -- we know that anytime
9 something gets in front of the Supreme Court, it takes
10 some time. We thought the quicker way to address our
11 clients' concerns were -- would be to drop that issue and
12 go forward with cruel and unusual punishment, so that's
13 what we did.

14 THE COURT: All right. Thank you. Just one moment,
15 please.

16 (Pause.)

17 All right. Mr. Lindemann, I'm going to respectfully
18 deny your relief based on this. I would comment to you
19 that I believe that separation of powers issue is fully
20 discussed on pages 36 and 37 of the final order in this
21 case which I'm looking at even as I speak.

22 The Court makes several comments in that about the
23 separation of powers doctrine, and it's well established
24 not only in the states but various states and also in the
25 United States that is federal litigation that the issue of

1 the separation of powers is not some immutable doctrine
2 that just stands and cannot be invaded at any time.

3 In fact, there's a history of judicial intervention,
4 if you wish to call it. I'm going to use what I perceive
5 to be your term. That's not exactly the word but -- that
6 you've used, but it's the theory of the judiciary reaching
7 into, and in effect, making decisions that affect the
8 operations of the executive branch.

9 The fact that the branches of government are equal
10 doesn't mean that the courts discharge their
11 constitutional mission do not have the authority to
12 comment upon and at times invade the province of the
13 executive.

14 I will tell you, just from a practical standpoint, I
15 distanced the legislature in this case for this reason:
16 Number one, while it is true that the Department receives
17 its funding from the General Assembly -- I've had the
18 privilege to serve in the General Assembly, have some
19 understanding of the funding process and mechanisms for
20 funding and that every dollar received by the Department
21 does not come with a directive as to how to spend that
22 dollar from the General Assembly.

23 The General Assembly, the legislature, provides
24 funding for the Department, and the Department has some
25 discretion of -- within certain parameters as to how to

1 spend that money.

2 So the Court felt that the problem here was not
3 necessarily with the legislature, because the legislature
4 is not over there micromanaging this executive agency.

5 I remember on the claim of executive ruling, this is
6 an agency. This is not the governor herself or himself,
7 and the Court felt that there is a distinction between the
8 legislative -- legislature, which is at the top of the
9 legislative chain coequal to this court, and an agency of
10 the executive.

11 It may be inartfully stated, but in its application,
12 the Court felt that it had the authority -- and as I said
13 in the order where it was required to do so because of the
14 factual findings made in this case to ensure that the
15 constitutional -- the Constitution was followed.

16 Now, I stand upon the cases cited in this order at
17 pages 36 and 37 for the principle that this Court has the
18 authority to do that, and that may be stated
19 inarticulately here from the bench.

20 This is the basis as to why we released the General
21 Assembly but retained the agency, Department of
22 Corrections in the lawsuit. For that reason, I'm going to
23 respectfully deny relief on this claim.

24 Let's move to the next issue.

25 MR. LINDEMANN: Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. LINDEMANN: The next issue involves the public
3 policy of the State of the State of South Carolina as
4 enunciated by several cases of the South Carolina Supreme
5 Court about having a hands-off approach.

6 The Courts should not micromanage prisons in this
7 particular instance or any type of executive type agency.
8 Let me refer the Court to a couple of cases.

9 I would note, again, that I was a bit surprised that
10 Your Honor didn't cite to any South Carolina Supreme Court
11 case law regarding anything that would suggest that there
12 was authority to issue this type of decision that Your
13 Honor issued but --

14 THE COURT: Well, let's just stop right here,
15 Mr. Lindemann.

16 MR. LINDEMANN: Sure.

17 THE COURT: I'm going to ask you to respond to
18 something for me.

19 MR. LINDEMANN: I'll be happy to.

20 THE COURT: The evidence in this case -- and I stated
21 it clearly in the order -- is that people are dying at the
22 Department of Corrections because they have a lack of
23 basic mental healthcare. This happened. It was proved in
24 this case.

25 MR. LINDEMANN: We refute that, obviously.

1 THE COURT: Well, I -- okay, and we went into this
2 case on a burden of proof that was by a preponderance of
3 evidence, and the Court found against you.

4 So I hear what you say that there is a lack of
5 authority cited in this order and this rule and that case.
6 What would you have the Court do, sir?

7 MR. LINDEMANN: Well --

8 THE COURT: Would you have the Court simply walk away
9 and leave it as it is?

10 MR. LINDEMANN: Well, I'm asking the Court -- that's
11 the whole purpose. I mean, obviously, I haven't succeeded
12 so far, but my point, Your Honor, and why we raised these
13 issues all along is we believe there are very strong legal
14 defenses for the Department to prevail on in this case.

15 With all due respect to Your Honor, despite your
16 decision -- and we disagree with your decision -- disagree
17 with a vast majority of the factual findings. We disagree
18 with the Court's methodology.

19 We can't -- we disagree with the fact that Your Honor
20 looked at this case and obviously tried this case as a --
21 as a minimally adequate case based upon the incorrect
22 ruling that you made where you thought the prisons clause
23 claim was still a part of the case.

24 THE COURT: Yes, sir. And respectfully, sir, you
25 tried this case as if it was a slip and fall at the

1 Department of Corrections, and you have all sorts of tort
2 claims protections and have lost the vision of what's
3 happening at the Department of Corrections with respect to
4 people who were suffering and dying within the Department,
5 sir.

6 MR. LINDEMANN: With all due respect, this is not a
7 tort claims case. We are aware of that.

8 THE COURT: Well --

9 MR. LINDEMANN: And we haven't raised any Tort Claims
10 Act defenses. We've raised issues of justiciability.
11 We've raised constitutional defenses.

12 The point I'm going to make right now, I mean, the
13 bottom line is, Your Honor, the South Carolina Supreme
14 Court has taught the issues like this.

15 The South Carolina Supreme Court adopted a whole
16 scheme under the Al Shabazz case to be able to allow
17 appellate review of grievances from the South Carolina
18 Department of Corrections inmates.

19 It started -- not to belabor this point, but it
20 started where any grievance could be appealed to the ALC,
21 and over time, that's developed into if it involves a
22 liberty which, of course, is a constitutional
23 significantly protected right.

24 In Al Shabazz, the Supreme Court was very, very
25 careful to say, "We are not micromanaging the Department

1 of Corrections." That is not the intent of this.

2 Then one of the cases that came out after Al Shabazz
3 which is a case I was involved in called Sullivan vs. the
4 South Carolina Department of Corrections, a 2003 decision.
5 Certiorari was actually applied from the United States
6 Supreme Court. They denied it on this particular case.

7 In this case, which was a prisons clause case, but
8 it's important because it shows the hands-off approach
9 that the Supreme Court is telling the judiciary to use.

10 The Supreme Court in this particular case says to
11 interpret the Constitutional mandate in Article 12,
12 section two is requiring SCDC to provide this specific
13 program.

14 It was a sex offender who was being delayed to be
15 able to get into a sex offender treatment program. He
16 briefed it, went to the Supreme Court, and they said, "To
17 interpret the constitutional mandate as requiring SCDC to
18 provide this specific program would make the
19 administrative" -- the ALJD at the time -- the
20 administrative -- oh, Judicial Department, I guess. I
21 don't know. It's called the ALC now, and then the
22 judicial branch micromanagers of the prison system.

23 They go on to say, "In addition, such a holding would
24 conflict with the hands-off approach that this Court has
25 taken towards internal prison matters" and cites the Al

1 Shabazz case.

2 So there is a public policy that the South Carolina
3 Supreme Court had given to lower courts, including this
4 one, not to be micromanagers, have a hands-off approach.

5 I would respectfully submit that the order that this
6 Court has issued is not a hands-off approach, and as
7 you're clearly coming in and attempting, with all due
8 respect, to micromanage affairs in the executive branch.

9 We would ask the Court to consider these sorts of
10 principles. To take that a step further, Your Honor,
11 these sorts of principles are also discussed in the
12 Abbeville case, the education case.

13 The Supreme Court in that case discussed what the
14 education clause means, and they set out in that case few
15 points that should be part of a minimally adequate
16 education.

17 They stopped at that point. That's, of course, in
18 the initial decision. I know the final decision from
19 Judge Cooper is still on appeal in front of the Supreme
20 Court at this point unless something has been issued the
21 last few days and I'm not aware of it.

22 The bottom line is they said, "We do not intend to
23 dictate the programs used in our public schools." That
24 also shows a hands-off approach by the judiciary. This
25 court has not followed those principles, I would submit.

1 Lewis v. Casey, Your Honor, if you'll indulge me to
2 mention Lewis v. Casey again, the United States Supreme
3 Court touches on these same very points.

4 They say it is the role of the Court to provide
5 relief to claimants in individual class actions who have
6 suffered or eminently suffer actual harm. It is not the
7 role of courts but that of the political branches to shape
8 the institution for government in such fashion as to
9 comply with the laws and the Constitution.

10 In the context of the present case, it's for the
11 courts to remedy past beneficial interference with
12 individual inmates, presentation points to the Court.

13 It is for the political branches of the State and
14 federal government to manage prisons in the fashion that
15 official interference with the presentation of claims
16 would not occur.

17 It is the -- essentially they're saying the same
18 thing the South Carolina Supreme Court has said. It is
19 not the purpose of the courts to step in and micromanage
20 it.

21 With all due respect to Your Honor, what we have in
22 this particular case is a management review of the entire
23 mental health system of the South Carolina Department of
24 Corrections. That's what this Court has done. That's
25 what this Court's remedial order points to.

1 It is -- in fact, in your 45-page order -- I say this
2 with all due respect, in your 45-page order, you didn't
3 cite one stitch of evidence of anything beneficial that
4 you found that the Department of Corrections does.

5 I would submit to this Court and the fact finder --
6 that the Supreme Court will review this de novo, so we'll
7 see. There is a substantial amount of evidence showing
8 that there are a lot of people working very hard in the
9 mental health area in the Department of Corrections
10 providing good care to these inmates.

11 I'm going to touch on this issue again in a little
12 bit when we talk about the federal case law and how this
13 case conflicts with the federal case law on these same
14 issues, but to give you one point: The evidence in this
15 case was overwhelming that South Carolina has one of the
16 best, best suicide rates in the country.

17 We presented this Court with an exhibit. It was from
18 the South -- it was from the National Bureau of Judicial
19 Statistics, part of the Justice Department that
20 accumulated statistics from all 50 states that runs the
21 Federal Bureau of Prisons from 2001 to 2009, most of the
22 operative period for this Court's decision.

23 In that period of time, there were 20 suicides total
24 in nine years. Of course, that's 20 too many, but you
25 compare that to other states, we were in the top ten as

1 having one of the best suicide rates in the country.

2 Your Honor, credit to the testimony of
3 Dr. Patterson -- and I fear that you're going to try to
4 point Dr. Patterson as a -- as a monitor in this case.
5 Dr. Patterson was involved in the class action in
6 California.

7 Well, let's look at what happened in California.
8 California had the highest rate, twice the suicide rate of
9 the State of South Carolina. There's testimony in the
10 record. I'll be happy to point it to you. I pulled it.

11 I asked Dr. Patterson on cross-examination, these
12 statistics came about after Dr. Patterson put his suicide
13 prevention program in place in California.

14 They had twice the suicide rate of South Carolina
15 during that period of time. We had a year. I want to say
16 it was 2009. It's in the record. I think it was 2009 or
17 2010.

18 The Department of Corrections had zero suicides, and
19 I know that's the goal. Obviously, that's the
20 Department's goal. One suicide is too many.
21 Unfortunately, in a prison setting, even under the best
22 circumstances, look at it nationally, look at it
23 nationally, and those statistics do that.

24 Did Your Honor mention that in your order? No. You
25 didn't put one piece of evidence that you heard in six

1 weeks of anything beneficial that those hardworking people
2 did in the Department of Corrections, not one. That would
3 be a very easy point for you to have raised because their
4 effectiveness in dealing with suicide prevention is
5 extraordinary.

6 THE COURT: Mr. Lindemann, I will respond to you, if
7 I may, directly on those points because you've raised them
8 here. I appreciate the comments that you made.

9 First of all, there were two suicides at the
10 Department of Corrections while this case was being tried.
11 Secondly, this order was not the time to praise the
12 hardworking folks at the Department of Corrections in the
13 mental health services.

14 I recognize that there are many who day in and day
15 out through difficult circumstances and understaffed, and
16 underfunded and working as hard as they can to do the best
17 that they can, that they do the best they can.

18 But this document, this order, was not the place to
19 praise those individuals. Perhaps there will be another
20 day and another time. This order, sir, respectfully, had
21 to be straightforward and it had to be blunt because of
22 what this Court is going to term the completely
23 recalcitrant position of the Department with regard to
24 this litigation from day one which was just a constant
25 fight and struggle over every issue from the big issues to

1 the tiny issues and the minutia of discovery pushed back,
2 fight, opposition, agree to nothing, and continually,
3 continually challenge the authority of the plaintiffs to
4 investigate the case, as well as this Court to order any
5 relief. And thus, the strength of this order is based
6 upon the response of the Department from day one in this
7 litigation.

8 This is why you have the hard and direct and
9 comprehensive order that you had. If the Department had
10 come in here with a more cooperative attitude and a basis
11 to -- as you may well recall, we talked before we began
12 this case.

13 Let's all go to the General Assembly. Let's
14 recognize there's a problem here. Let's go see if we
15 cannot resolve this. That was not a position. The
16 position of the Department was, "You can't make us do
17 this," speaking to the plaintiffs.

18 The Court sat as a witness to all of these things.
19 So this is the result of where the Department has placed
20 us, respectfully, sir.

21 I would not have brought that up today but for the
22 position that you've just taken that the Court has -- I'm
23 going to paraphrase what you say, has leaned backwards to
24 try to present this evidence in a way that puts the
25 Department in a bad light, doesn't recognize the good

1 things that the Department has simply found against you, I
2 guess for the sake of making negative findings. That's
3 not been the role of this Court in this case, sir.

4 Now, Mr. Westbrook, do you wish to respond to
5 anything further?

6 MR. WESTBROOK: Thank you, Your Honor.

7 Mr. Lindemann -- first, I don't know if this is an
8 important comment, but it's a comment Mr. Lindemann made I
9 do want to respond to; that this case was tried as a
10 minimally adequate case or that Your Honor maybe said --
11 Your Honor ruled that it was a minimally adequate case,
12 and that was stated.

13 We dropped the minimally adequate claim. There are
14 two separate standards here, and I thought that Your Honor
15 went to a great deal of effort in the standards order to
16 articulate what the standard was for the cruel and unusual
17 punishment claim. That's certainly how the plaintiffs
18 tried to present the evidence.

19 And again, without going into a lot of detail,
20 wasting time and going over territory we've already been
21 over, they're spelled out in the order.

22 The plaintiffs have the burden of proving an
23 objective component and a subjective component, and the
24 plaintiffs presented evidence along those lines, expert
25 testimony along those lines, and the Court found that the

1 plaintiff satisfied the objective component by proof that
2 in the Department of Corrections mental health program, it
3 systemwide exposed all inmates with serious mental illness
4 to a substantial risk of serious harm.

5 The subjective component the plaintiffs met by
6 proving that the Department of Corrections had actual
7 knowledge of that risk for years and years and took no
8 meaningful steps to correct it. That's what we proved.
9 That's not a minimally adequate case. That is a cruel and
10 unusual punishment case, and that is what Your Honor
11 found.

12 Now, with respect to -- just a couple of other
13 things. The Sullivan case, Al Shabazz case are highly
14 distinguishable from the -- from the case at hand. Those
15 weren't class action.

16 Sullivan is laughingly distinguishable. It's a case
17 where a guy, an inmate, demanded that he had a right to a
18 specific program immediately, and the Department said no.
19 You have to get on a waiting list. You get on the waiting
20 list, we'll get around to it.

21 He said no. I have a right to do it now. Well, it's
22 not surprising that the Court said no, no you don't.
23 That's a completely different kind of case than what we're
24 talking about here. It's a systemic deficiencies case
25 involving the failure of the Department to provide basic

1 mental health services to thousands of inmates.

2 The hands-off public policy: So if I understand the
3 Department's position, the Department's position is that
4 there should be -- the Court should keep its hands off
5 their mental health program.

6 A mental health program -- since the Court found
7 since 1999 at least has exposed, to their knowledge,
8 thousands of seriously mentally ill inmates to a profound
9 risk.

10 Now, I'm -- the order, I believe, makes a finding
11 about the risk of profound mental decompensation or
12 profound mental illness, a substantial risk of serious
13 harm at the very least that for years that's been going
14 on.

15 The Department has made, taken no meaningful steps,
16 and I realize Mr. Lindemann wants to retry the case here.
17 That's through this Court's findings after six weeks of
18 trial.

19 The Department has taken no meaningful steps to fix
20 those problems, and yet, the Department takes the
21 shockingly callous position that the Court should keep its
22 hands off and let SCDC fix those problems that -- which
23 have -- they have failed to address since 1999.

24 I think that's an absurd position, and I don't think
25 that's the public policy of the State of South Carolina.

1 This is not a micromanaging order, and I'll tell you
2 why. What Your Honor did in this case, was -- there's
3 really one specific directive out of this order, and that
4 is that they need to come up with a written remedial plan
5 by July 8th. That's really all you asked them to do at
6 this point.

7 You asked the Department, not the plaintiffs. You
8 don't do it. You say Department. You draft -- here are
9 the problems. You haven't addressed these for years and
10 years. Draft a plan, then we'll discuss it. We'll figure
11 out whether it's a good plan. That's what you're asking
12 them to do.

13 Micromanaging with you -- would be for the Court to
14 go in there, shove them aside and say, "Okay. This is
15 what you're going to do." You didn't do that. You asked
16 them to come up with a plan, and that's what they objected
17 to.

18 Thank you.

19 THE COURT: Thank you.

20 MR. LINDEMANN: Real quickly on reply, it's not a
21 callous point. It's a point of law on the constitutional
22 law. It's part of this whole idea of separation of
23 powers. That's why the Supreme Court did what they did in
24 Sullivan and Al Shabazz.

25 The Supreme Court recognizes that when they say a

1 hands off -- I mean, that's not my words. That's not my
2 words. That's the Supreme Court's words.

3 The Supreme Court said we're taking a hands-off
4 approach. We are not to be micromanagers of this
5 Department of Corrections. We're not to be micromanagers
6 of the Department of Corrections because the judiciary,
7 because of the separation of powers doctrine, is not to
8 take that role in another department, another coequal
9 branch of government.

10 So to suggest that that's callous, those aren't my
11 words. I'm quoting to you Supreme Court case law. I'm
12 not quoting to you Supreme Court case law from years and
13 years and years ago.

14 This is a case from 2003 that the United States
15 Supreme Court also denied cert. It's a decision that's
16 written by Chief Justice Jean Toal. Those are her words
17 and this present Supreme Court's words. Well, not all of
18 the members but Judge Pleicones and then three justices
19 that are no longer on the court.

20 So it's not callous from the Department. It's a
21 Constitutional provision which is recognized in the public
22 policy that's been laid down by the South Carolina Supreme
23 Court as having to deal with this.

24 I also quoted Lewis v. Casey which is the United
25 States Supreme Court. These aren't my words that I'm

1 asking the Court to follow. These are the words of the
2 highest courts in both South Carolina and the United
3 States.

4 THE COURT: All right. I'm respectfully denying your
5 relief on the public policy exception. The Court
6 recognizes and accepts your argument, Mr. Lindemann, that
7 the theory of judicial restraint is an important one; that
8 the courts are not to micromanage without some compelling
9 necessity the operations of any governmental agency except
10 the courts themselves, perhaps their own agency but not
11 through a judicial authority but just through an
12 administrative authority what we do in our own house that
13 -- that Rule number one says that the rule should be
14 construed to secure the just determination of every
15 action.

16 The purpose of the courts to do justice is an old
17 maxim. We have a saying among the lawyers that bad cases
18 make bad law. You say I gave you bad law. I say that the
19 body of the facts were -- were bad facts, and this Court
20 responded, saw wrong. The Court perceived it to be a
21 Constitutional violation.

22 Even taking the Constitution out of it, the Court
23 just saw a very troubling situation and has remedied it or
24 attempted to, and that is the role of the Courts.

25 I respectfully deny your request that this case be

1 dismissed or the order rescinded upon the public policy
2 exception; that the Courts typically are not to invade the
3 province of, in this case, an executive agency.

4 Now, let's move to the next issue, please.

5 MR. LINDEMANN: Thank you, Your Honor. The next
6 point deals with one specific party order. That was the
7 findings regarding the use of force and your reliance on
8 Steve Martin's testimony.

9 Again, this is a point that we made during the trial
10 of the case. Your Honor didn't make any note of it or
11 refute it in your decision.

12 We would ask that the Court, number one, reconsider
13 those portions of your order that deal with use of force
14 in light of this argument. Number two, if you are not
15 willing to accept the premise that's cited here to give us
16 an explanation why as to allow for appropriate appellate
17 review.

18 This is actually a point that I think is actually
19 very significant. The State of South Carolina -- the
20 issue -- the underlying issue, of course, is the left --
21 the amount of force that's used, the fact that SMU units
22 are used in certain respects, maximum security unit is
23 used, chemical munitions may be used on inmates that are
24 not following orders, being disruptive, being disciplinary
25 issues.

1 Your Honor has essentially found that that is not
2 appropriate to use force because -- on a mentally ill
3 inmate following the reasoning of Steve Martin that I
4 would submit is contrary. Again, that's jumping ahead but
5 contrary to many, many cases that we have from the federal
6 courts that govern within this district and the Fourth
7 Circuit.

8 But be that as it may, Mr. Martin said he never
9 looked at case law. He doesn't care about precedence,
10 so -- but I would suggest that this Court should follow
11 precedence, but the precedent that this point raises is --
12 is the Wilson vs. South Carolina -- the State of South
13 Carolina vs. James Wilson case, a 1992 case. This is
14 actually a criminal case. This was -- involved Jamie
15 Wilson in Greenwood who back in, I think it was 1988, '89,
16 went into an elementary school and, you know -- it's
17 unfortunately South Carolina's version of what happened in
18 Connecticut last year and shot up an elementary school in
19 Greenwood.

20 Jamie Wilson pled guilty but mentally ill, and that
21 plea was accepted. He gave up his right to a jury trial
22 on the punishment phase and the trial judge, the circuit
23 court judge, heard the penalty phase, excuse me, and
24 sentenced him to death.

25 The argument that James Wilson made in his appeal to

1 the South Carolina Supreme Court -- and it's a decision
2 from 1992. It's, I think, another decision authored by at
3 the time Justice Toal, now Chief Justice Toal, where he
4 challenged his -- his sentence to the death penalty based
5 on the fact that he was guilty but mentally ill.

6 The reason why this is significant is it shows the
7 public policy in the State of South Carolina is that the
8 State, whether you agree with it or not, it's the law of
9 the State.

10 The State says if you're guilty but mentally ill, you
11 can be sanctioned with the ultimate sanction and that
12 being death. Yet, by following what Mr. Martin says if
13 you're in the Department of Corrections and you're
14 mentally ill and you're guilty but mentally ill for
15 whatever disciplinary violation you have, punitive action
16 to the extent of use of force cannot be used under
17 circumstances -- under such circumstances that are
18 discussed in Your Honor's order, I would suggest is
19 inconsistent with these principles of state law.

20 South Carolina, as it's discussed by the Supreme
21 Court, we have adopted the M'Naghten test for the insanity
22 defense, and therefore, if a person knows right from wrong
23 regardless of whether they're mentally ill, they can be
24 sentenced to death in the State of South Carolina.

25 If you don't know right from wrong, I would submit

1 that there's a real problem because a circuit court
2 shouldn't be sending people like that to the Department of
3 Corrections. They should be going to the Department of
4 Mental Health.

5 So the circuit court is sending people who do know
6 right from wrong to the Department of Corrections. The
7 Department of Corrections should be able to take
8 disciplinary action consistent with -- consistent with the
9 Eighth Amendment, consistent with the jurisprudence that
10 has come down for years from the United States Supreme
11 Court, the Fourth Circuit District Courts of this state,
12 and that Your Honor's decision, number one, doesn't follow
13 what is clearly the public policy in the State of South
14 Carolina, inconsistent with that; number two has a point
15 that I'm sort of jumping ahead to is inconsistent with
16 federal jurisprudence on the same issue.

17 THE COURT: All right.

18 Ladies and gentlemen, let's take a break,
19 approximately ten minutes, but just so we'll all know
20 where we stand, there are two more issues after this.

21 I'd like to just work through and finish, and then
22 take our lunch break but be done at that point so that the
23 morning hours will conclude these hearings. That would be
24 my intention. So if you want to grab a little bit of a
25 snack, you may wish to do that. We will be in recess for

1 10 minutes before we hear the response to that.

2 MR. LINDEMANN: For the Court, the next one is
3 essentially enveloped in what we already talked about, so
4 we may only have one more. There are a few additional
5 points that are numbered points, but we should be able to
6 finish pretty quick.

7 THE COURT: Okay. We'll be in recess now
8 approximately ten minutes.

9 (WHEREUPON, a short break was taken.)

10 THE COURT: All right. Mr. Westbrook, we were
11 getting ready to hear from you in response.

12 MR. WESTBROOK: Thank you, Your Honor. SCDC has
13 mischaracterized, I believe, your order and Mr. Martin's
14 testimony. I do not believe that your order says, and I
15 don't believe that Mr. Martin testified, that you cannot
16 punish mentally ill inmates.

17 What Mr. Martin testified to and what your order
18 goes, makes findings about go to some length with is that
19 at SCDC, the use of force both in the form of pepper spray
20 and in the form of restraint chairs is used
21 disproportionately on mentally ill inmates to non-mentally
22 ill inmates to a significant degree.

23 It's also -- in addition to being disproportionate,
24 it's excessive and unnecessary. It's not that they can't
25 be punished. It's used disproportionately, excessively,

1 and unnecessary and in violation of SCDC's own policies.

2 That was Mr. Martin's testimony.

3 That, I believe, is what your order finds on pages 16
4 through 21 of the order. The Wilson case is -- it's not a
5 public policy case. It's a case with a very specific
6 legal finding that doesn't have any application to this
7 case at all.

8 It finds that someone who is sentenced guilty but
9 mentally ill can also be sentenced to death. It has no
10 bearing on this case.

11 Thank you.

12 THE COURT: All right.

13 Do you want to respond to that, Mr. Lindemann?

14 MR. LINDEMANN: Just one quick point. I mean,
15 suggesting that Wilson is not a public policy case, I
16 would suggest otherwise. It reaffirms that we adopted the
17 M'Naghten Rule in South Carolina, and simply because
18 somebody is mentally ill doesn't mean that they can't be
19 held accountable for inappropriate actions, including
20 criminal actions. That's the point that I'm making.

21 I believe that's -- again, a principle that's clearly
22 understood in the federal judiciary, and I don't believe
23 that that's -- and again, Mr. Martin said what he said,
24 but you may remember -- I distinctly do -- that when I was
25 -- when he was being cross-examined, he says he doesn't

1 look at case law. He doesn't care what various
2 jurisdictions, what the authority is from the state courts
3 and the federal courts, what the law is.

4 The law is what matters. The law counts, and again,
5 with no disrespect to Your Honor, I believe Your Honor's
6 order is a little short on the law, and I think relying on
7 an expert who doesn't even look at or care what the status
8 of the law is in the jurisdiction that he is offering
9 these opinions makes those opinions not probative.

10 That's why I'm asking the Court to consider as part
11 of your decision-making process the Wilson case. I think
12 it's a -- it's a critical case because the Wilson case,
13 maybe I didn't mention this earlier, the Wilson case
14 examined this issue under the cruel and unusual punishment
15 clause of the South Carolina Constitution, the very clause
16 that Your Honor is ruling on.

17 In addition to that, the Wilson case stands for the
18 proposition that, in fact, the South Carolina Supreme
19 Court specifically said that the application of the state
20 cruel and unusual punishment clause shall be the same as
21 it is in the federal constitution.

22 It doesn't give any greater rights than the federal
23 constitution. So the Wilson case is very significant, I
24 would submit. It is a policy case, and I think it's
25 something that the Court should have considered as a

1 matter of law in assessing the order, your decision in
2 this case. It is -- I believe, and I may be incorrect,
3 but I don't believe it's mentioned in your order.

4 THE COURT: All right. Very good.

5 The Court accepts your position that the Wilson case
6 is a public policy or enunciates a public policy, but it's
7 not applicable to this case.

8 The Court does not take exception to the Department's
9 ability to punish by, first of all, incarcerating and then
10 perhaps through some disciplinary action, a mentally ill
11 inmate.

12 The question is whether or not what has happened in
13 the Department of Corrections rises to the level of cruel
14 and unusual punishment as defined by the Court, and the
15 Court found that it did.

16 The Court does not find that State v. Wilson would
17 somehow require this order to be amended or rescinded in
18 any fashion. Thus, I deny your relief under the State v.
19 Wilson argument.

20 Let's move to your next argument.

21 MR. LINDEMANN: Thank you, Your Honor.

22 In essence, the next argument is pretty quick. As I
23 mentioned, it's probably been covered already. I
24 certainly don't want to give the impression that we're
25 waiving it because it's a -- it's part of the whole

1 judiciability umbrella, for lack of a better word.

2 As Your Honor knows, there are certain types of
3 issues that are non-judicable. Again, this is not
4 something I'm making up. This is the law of the State of
5 South Carolina, the law of the country. The United States
6 Supreme Court holds the same way.

7 This Court has raised -- this case has raised some
8 political questions, not political in terms of election
9 questions but political in terms of issues that are policy
10 decisions that should be decided by the legislative
11 branch.

12 This is -- sort of goes back, is tied into the
13 separation of powers and goes back to also the reason why
14 there is no private right of action, because it raises
15 political issues that deal with the proper administration
16 of justice, the proper administration of the Department of
17 Corrections, the agency, the executive branch, proper
18 funding of the executive branch and the Department of
19 Corrections.

20 Those are issues that involve the General Assembly as
21 we say here in our motion. It involves budgetary decision
22 making and priorities made by the General Assembly as to
23 that they're going to fund and what they're going to put
24 money to. Obviously, Your Honor found there is a
25 separation of powers problem and let the General Assembly

1 out of the case.

2 We believe that this case raises political issues
3 that implement that -- implicate not only the separation
4 of powers but also are non-judicable as political
5 questions.

6 THE COURT: All right. Thank you.

7 Mr. Westbrook.

8 MR. WESTBROOK: Just briefly, Your Honor. This --
9 this -- this issue has been argued and briefed before, and
10 I would refer Your Honor to our briefing back in response
11 from their 2005 motion to dismiss.

12 Simply put, for this to be a political question,
13 these would have to be policy judgments by the General
14 Assembly that -- that excessive and disproportionate use
15 of force, excessive and disproportionate length of stays
16 in solitary confinement, filthy conditions for crisis
17 intervention and suicide prevention cells, filthy
18 conditions for solitary confinement cells, understaffing
19 of clinical psychiatrists and counselors and the like, and
20 all of these other facts that you found, those would have
21 to be policy judgments by the General Assembly. Those are
22 appropriate and correct for this to be a political
23 question. We don't think the General Assembly made those
24 policy grounds.

25 THE COURT: Okay.

1 MR. WESTBROOK: Thank you.

2 THE COURT: The Court is prepared to rule on the
3 issue. The Court does not find that this case involves a
4 nonjusticiable political question. I have commented on
5 that throughout the existence of the case and several
6 orders have been issued. There is no need to revisit it
7 at this point further other than to deny your relief under
8 that argument, Mr. Lindemann.

9 MR. LINDEMANN: Thank you, Your Honor.

10 THE COURT: Please proceed.

11 MR. LINDEMANN: The last point that is part of
12 paragraph one is this issue that I touched on several
13 times and, in fact, I just did.

14 One of the other things that's significant about the
15 Jamie Wilson case, State vs. Wilson, is when the South
16 Carolina Supreme Court in a decision issued by Justice
17 Toal addressed the State constitution cruel and unusual
18 punishment clause.

19 The Court recognized that our cruel and unusual
20 punishment clause in the state constitution should be
21 interpreted the same way but consistent with the Eighth
22 Amendment which contains the cruel and unusual punishment
23 clause of the United States Constitution.

24 Why that's significant is because there are some
25 constitutional provisions that appear in both the state

1 constitution and the federal constitution, and they're not
2 necessarily interpreted the same way.

3 The state constitution can be sometimes more liberal,
4 can't be more conservative but can be more liberal, in
5 its -- in its provision of rights.

6 In this particular case, what's significant is the
7 Eighth Amendment and Article 1, Section 15 are supposed to
8 be interpreted the same way, according to the Supreme
9 Court.

10 With all due respect to Your Honor, we don't believe
11 you've done that. Now, again, I don't mean to keep
12 harping on this, but your 45-page order contains very
13 little law.

14 You have cited absolutely -- I know plaintiffs'
15 counsel prepared a proposed order for you, but there is
16 absolutely no cases that are cited involving similar
17 issues within the Fourth Circuit or from the United States
18 Supreme Court.

19 What's important about that from my perspective is
20 there are lots of them. We, in fact -- I handed up to
21 Your Honor a notebook just like this with many, many
22 cases, and I'm not going to go through them all. I went
23 through a number of them in closing argument.

24 I encouraged the Court -- I don't know whether you
25 had an opportunity to do it, but I encouraged the Court to

1 look at those cases because as I indicated to you in
2 closing arguments, the Department of Corrections gets sued
3 all the time by inmates. It's part of what inmates do.

4 In fact, the federal courts are set up to deal with
5 prisoner litigation, and the United States magistrate
6 judges in particular, that's probably a large part of what
7 they do, is adjudicate prisoner lawsuits.

8 They don't hold hearings like this. They do it based
9 on -- based on briefs, and occasionally, a case will be
10 tried by the federal courts, but the federal courts deal
11 with these issues on a routine basis.

12 Inmates file these Constitutional claims not in state
13 court. They file them in federal court because it
14 involves federal issues. Many of these cases deal with
15 the cruel and unusual punishment clause. I know Your
16 Honor doesn't probably get a whole lot of these sorts of
17 cases as a state court judge. I know I handle a lot of
18 these cases and very rarely are they ever in State court.

19 But what's critical here, and the point that we're
20 trying to make is in our motion, is that by the way Your
21 Honor issued your order, you have created two standards
22 for the South Carolina Department of Corrections to
23 follow.

24 There is the federal standard, the Federal Court's
25 interpretation of the cruel and unusual punishment clause,

1 and then there's Your Honor's interpretation of the cruel
2 and unusual punishment clause.

3 That is our contention that that's error, with all
4 due respect, because as the South Carolina Supreme Court
5 has said, these principles should be -- these two
6 constitutional provisions should be interpreted the same
7 way.

8 There are numerous cases, as I indicated that I
9 provided. This case was tried two years ago. In fact,
10 the closing arguments just hit the two-year anniversary
11 four days ago.

12 In those two years -- and I won't belabor you with
13 the numerous cases, but in those two years, there have
14 been numerous decisions from our federal courts dealing
15 with mental health issues, dealing with use of force
16 issues, dealing with restraint chair, use of gas.

17 If you look at those cases, with few exceptions, the
18 federal courts have found no violation of the cruel and
19 unusual punishment clause.

20 I'll give you an example. One of the things Your
21 Honor asked for when you issued your letter ruling, and
22 you told the plaintiff's counsel put in ten examples to
23 support my rulings.

24 One of the examples they gave was Baxter Vinson, and
25 I'm sure you remember Baxter Vinson. You saw the video of

1 Baxter Vinson being placed in a restraint chair after he
2 had self-mutilated himself.

3 I won't belabor the point about that video, but the
4 bottom line is Baxter Vinson also filed an action in
5 federal court, and that case was before Judge Cameron
6 Currie, one of our federal judges, an excellent judge, I
7 would say.

8 Judge Currie looked at the decision, and he is
9 represented by counsel, and Judge Currie granted summary
10 judgment. She found no violation of the Eighth Amendment
11 by any of the correctional personnel.

12 Now, the medical personnel, she found that there was
13 an issue of fact in dispute and indicated that the case
14 should be set for trial on one very, very remote issue
15 dealing with liberty indifference.

16 Now, we filed and I got involved for the appeal. Jim
17 Parham was actually representing the medical personnel,
18 and Jim got me involved to help with the -- you can file
19 an interlocutory appeal to the Fourth Circuit if it
20 involves an issue of qualified immunity.

21 We filed that appeal, and in fact, it was heard by a
22 panel of three judges from the Fourth Circuit here at the
23 South Carolina law school just two days ago. It's kind of
24 been a busy week for me.

25 And, obviously, we don't a decision from them yet,

1 but the reason I bring this up is for the correctional
2 side of it, we do have a decision from Judge Currie, and
3 she found no deliberate indifference. She found no
4 constitutional deprivation. Yet, you used that case as
5 one of your ten examples in your decision, so there's a
6 disconnect.

7 The one case that we called the Court's attention
8 during the trial -- I think it was mentioned by
9 Mr. Woodington in his opening. I know I mentioned it in
10 the close. It's a case right on point with this one other
11 than the fact that instead of the South Carolina
12 Department of Corrections, it involved the North Carolina
13 Department of Corrections.

14 It's a case of Williams v. Branker, and I won't go
15 through it in the detail I did previously. But again, I'd
16 ask the Court in reconsideration to review that decision
17 if you haven't already done so, because that decision is
18 on all fours with this case with many of the aspects of
19 this case.

20 It involves a -- let me look at my highlighted copy.
21 It involves someone who -- with a serious mental illness.
22 They indicate he suffers from psychotic disorders,
23 schizophrenia, borderline personality disorder,
24 intermittent explosion disorder. He has thoughts of
25 suicide. He has a history of self-mutilation.

1 He -- as I indicated, he is in the Department of
2 Corrections in North Carolina. He has been in segregated
3 confinement for ten years because of disciplinary
4 problems.

5 The decision from the Fourth Circuit from Judge
6 Wilkinson, Judge Duncan, and Judge Gergel -- Judge Gergel
7 was sitting by designation. He has been one of our new
8 federal judges in South Carolina.

9 They described the cell. It was very comparable to
10 what we have in South Carolina; describe restrictions that
11 are in place while you're in segregation, talked about
12 issues dealing with mental healthcare, allegations of
13 deliberate indifference and inadequate mental healthcare,
14 and ultimately very, very similar facts to what you heard
15 in some of the examples that you had in -- during the
16 trial of this case.

17 What did the Fourth Circuit rule? The Fourth Circuit
18 found no violation of this individual's Constitutional
19 Rights, no violation of the Eighth Amendment.

20 They went on to say, "The fact that the conditions to
21 which Williams were subjected aggravated his mental
22 illness is an unfortunate but inevitable result of his
23 incarceration. This is particularly so given the twin
24 responsibilities of prison officials to limit the
25 opportunities for Williams to both harm himself and

1 others. Accordingly, we cannot conclude that such
2 aggravation amounts to a denial of a minimal civilized
3 necessity. Especially when the conditions alleged to have
4 caused that aggravation clearly meet or exceed minimal
5 standards. Because Williams' allegations do not show an
6 extreme deprivation resulting in the denial of the minimal
7 necessity of life, his claim must fail."

8 It's an Eighth Amendment case. It goes back to my
9 point earlier and one of the points that we made
10 throughout the trial of this case.

11 They brought two claims initially. They dismissed
12 the prisons clause claim. That is the claim that dealt
13 with whether or not there were minimal -- whether or not
14 they met the minimum adequacy...

15 I need to find one thing, Your Honor.

16 (Pause).

17 And I'm sorry. I lost my track of thought.

18 THE COURT: That's all right. If you need to find a
19 document, take a moment. That's fine.

20 MR. LINDEMANN: Give me one second, Your Honor. I
21 apologize to the Court.

22 (Pause).

23 THE COURT: And, Mr. Lindemann, our timekeeper tells
24 me we have two minutes remaining in this argument.

25 MR. LINDEMANN: Thank you.

1 In your standards order, you addressed the
2 differences between those two claims, the fact -- again,
3 the cruel and unusual claim versus the minimally adequate
4 claim.

5 Your Honor indicated the plain meanings of the terms
6 cruel and unusual and minimally inadequate denote
7 disparate concepts that subjective and objective tests of
8 the Eighth Amendment are not identical to the obligations
9 imposed by Article 12, Section 2. Otherwise, the language
10 of Article 12, Section 2 would have no meaning, and its
11 enactment would be purely superfluous. I agree with Your
12 Honor on that.

13 The problem is what they tried was a minimally
14 adequate case which Your Honor initially ruled on based on
15 your letter order was a minimally adequate case.

16 The evidence that you cite in your order goes to a
17 minimally adequate case. It doesn't go to a cruel and
18 unusual punishment case. If that's not more evident, I
19 would encourage the Court to look at these federal cases.
20 These federal judges deal with these issues every day.
21 The Eighth Amendment is supposed to be interpreted the
22 same way as the state constitution cruel and unusual
23 punishment clause.

24 With all due respect, Your Honor, you haven't done
25 that. That's what we're asking this Court to reconsider.

1 You don't cite any of these cases. You don't cite any
2 cases actually dealing with the issues that you have dealt
3 with, such as use of force, gas, restraint chair.

4 There are many, many, many cases, including mental
5 health cases, that have addressed those issues by our
6 federal courts, by the Fourth Circuit, and in a vast, vast
7 majority of them, almost all of them, those distinguished
8 federal courts have found no violation of the cruel and
9 unusual punishment clause.

10 That is different. Cruel and unusual is different,
11 as Your Honor has already said, and you're right, it's a
12 different concept than minimally adequate.

13 By essentially construing the South Carolina cruel
14 and unusual punishment clause is the equivalent of the
15 prisons clause which I submit that Your Honor did. By
16 tacking on that standard, the minimally adequate standard
17 in place of the cruel and unusual punishment standard,
18 what you've done is created two different standards for
19 the South Carolina Department of Corrections.

20 They each would have to follow a state standard, and
21 they would have to follow a federal standard. They're not
22 the same thing, and that violates what the South Carolina
23 Supreme Court said should occur in the State v. Wilson
24 case.

25 Thank you, your Honor.

1 THE COURT: Thank you.

2 Any response?

3 MR. WESTBROOK: Mr. Lindemann is in denial on the
4 application of the standard -- of the standards you apply.
5 The order is replete with references to the cruel and
6 unusual punishment standard as the Court has laid out in
7 the standards order.

8 The -- there aren't, you know, I don't know if
9 there's any Fourth Circuit case law cited in the -- in the
10 order. I don't know why the Fourth Circuit case law is
11 any more relevant than case law from another federal
12 circuit. In fact, it would not be as relevant because the
13 facts are different.

14 Now, I'm not aware of any Fourth Circuit case
15 involving an Eighth Amendment claim in systemic
16 deficiencies. I'm not aware of that case.

17 Mr. Lindemann talks about the Branker case, Williams
18 v. Branker. That's a case brought by an individual
19 defendant. It's not a class action. It does not involve
20 any allegations of systemic deficiencies.

21 It's an unpublished case, as well and, you know, it
22 was -- what happened in that case was judgment was awarded
23 on the pleadings. That was affirmed by the Fourth
24 Circuit, and the reason it was -- that the defendants were
25 awarded judgment on the pleadings was because this was --

1 although nonsystemic deficiencies case, it was an Eighth
2 Amendment case, and the deliberate and different standard
3 applied.

4 As Your Honor went to great length in the standards
5 order and the final order to -- to note, there are two
6 components to a deliberate and different standards:
7 Objective and subjective.

8 In his pleadings, Mr. -- I don't know who -- whether
9 the plaintiff was Williams or Branker but it -- whoever it
10 was, he failed to plead anything about the subjective
11 component.

12 The basis for the Fourth Circuit's ruling was that he
13 had failed to allege that the defendants had knowledge of
14 the conditions that he was complaining of. So, obviously,
15 that's a lot different from our case.

16 Your Honor found, made specific finding -- one of the
17 fundamental findings of your order was that the Department
18 of Corrections, the South Carolina Department of
19 Corrections, knew of these problems for years and failed
20 to take adequate measures to abate them.

21 You know, the Baxter Vinson case, I'm simply not
22 familiar with. I mean, I know generally, I know who
23 Baxter Vinson is. I know what you say about him in this
24 order, but I wasn't there for the oral arguments in front
25 of the Fourth Circuit. I haven't read Judge Currie's

1 order.

2 I do know that in your order, what you are discussing
3 about Baxter Vinson, you quoted Dr. Patterson's testimony
4 that it was a medical emergency that was -- that should
5 have been held in a sterile environment after he
6 eviscerated himself and the nurse is on video pushing his
7 guts back into his abdomen without any sterile environment
8 there.

9 He was kept there for two or three hours, at least,
10 before being transported to a medical facility. It was a
11 medical emergency. That's what you found, and that's what
12 Dr. Patterson testified. Again, I'm not familiar with the
13 federal case that's pending, but it sounds like that
14 medical issue is what was on appeal with the Fourth
15 Circuit.

16 There is plenty of case law cited in your order
17 from -- you know, just one page alone I see cases that are
18 similar to this case, cases involving cruel and unusual
19 punishment that are Wellman v. Faulkner; Flynn v. Doyle;
20 Madrid v. Gomez; Neiberger v. Hawkins. These were the
21 various federal courts; Ruiz v. Estelle, the Ruiz case
22 which we get the Ruiz factors.

23 I know the Coleman case from California was cited in
24 your order, as well. The Crain v. Bordenkircher case from
25 West Virginia, the Blaney case from Massachusetts. Those

1 are all cited in your order. Those are cases that are a
2 lot more on point in this case than Williams v. Branker.

3 Thank you.

4 MR. LINDEMANN: Real quickly, Your Honor. First of
5 all, pointing out that Williams v. Branker was decided on
6 the pleadings just strengthens our point.

7 I mean, they have three very accomplished federal
8 judges who the State, based on the pleadings themselves,
9 they can rule as a matter of law that there is no
10 constitutional violation here.

11 In fact, as Your Honor probably is aware -- as you've
12 had the opportunity to read Williams v. Branker, but the
13 recitation that was given to you by Mr. Westbrook is
14 incorrect. They decided the case based on the objective
15 finding not the subjective finding.

16 In fact, I should have mentioned this to Your Honor,
17 because it's probably the best point in the case and sort
18 makes my point, they say here, "Williams points to no
19 authority for the proposition that the Eighth Amendment
20 entitles him to effective treatment or that the DOC is a
21 guarantor of mental health."

22 They also go on to say, "We cannot hold that the lack
23 of effective mental health treatment deprives Williams of
24 a basic human need." It's Fourth Circuit case law.
25 Incidentally, unpublished decisions can be cited since

1 2007 in the Fourth Circuit according to their own rule.
2 The rule -- it's a 2012 decision. In fact, it came out,
3 as Your Honor might remember, about a week-and-a-half
4 before we started the trial in this case.

5 So Williams v. Branker, I submit, should have been
6 cited in your order, as should have been Fourth Circuit
7 case law. Unbelievably, Mr. Westbrook says there is no
8 difference between the circuits.

9 Your Honor had relied on ninth circuit authority
10 primarily in this case: Gomez, Coleman, Plata, California
11 cases; South Carolina is not California. South Carolina,
12 I don't think wants to be California, and I can tell you
13 South Carolina doesn't want the mental health program that
14 California has where thousands of inmates had to be just
15 discharged because of overcrowding.

16 Now, the ninth circuit is historically, and I don't
17 think I'm telling Your Honor something you don't know,
18 even though being on the state bench, you don't have to
19 deal with federal court. The ninth circuit is by far, the
20 most liberal court. In fact, they are overturned on a
21 regular basis by the Supreme Court.

22 In fact, one of the cases I cited Wednesday was a
23 qualified immunity case where the south -- the United
24 States Supreme Court called out the ninth circuit.

25 They said -- because the ninth circuit refuses to

1 decide qualified immunity cases using the liberal
2 particularity that's required for determining an
3 established -- a clearly established right.

4 They actually said -- and this is a case you can look
5 at. It's Ashcroft vs. Al-Kidd. It's a 2011 case, and
6 they say we have constantly been cautioning the ninth
7 circuit about this.

8 Of course, that was the ninth circuit case. As you
9 can probably guess, it was reversed. So there is a
10 tremendous difference between the circuits.

11 That's -- I'm glad he made that point. That
12 triggered my memory on something we argued to you in
13 close, that's part of the problem.

14 Your Honor is relying on ninth circuit case law.
15 You're relying on a case from the 1970s from the fifth
16 circuit. You're not relying on cases from this very
17 circuit.

18 With all due respect, you disregarded the existing
19 case law that has addressed a myriad of the same issues
20 that you have had to deal with, from this district court
21 in South Carolina from the 4th Circuit in Richmond, the
22 cases that govern the South Carolina Department of
23 Corrections conduct under the United States Constitution.

24 I submit to Your Honor, based on State v. Wilson that
25 this Court should have applied consistently the federal

1 jurisprudence that applies in this circuit.

2 The United States Supreme Court case law, fourth
3 circuit case law, District of South Carolina case law, you
4 don't cite any of those cases. You don't cite Williams v.
5 Branker. You cite California cases, and there is a
6 tremendous, tremendous difference.

7 THE COURT: Thank you.

8 And again, I will respectfully deny your relief under
9 this argument for several reasons: Number one, I
10 respectfully disagree that I jumbled the various claims
11 that the plaintiff has brought and impermissibly mixed the
12 level of proof required.

13 I will point out to you, as you pointed out,
14 Mr. Lindemann, that in the Court's letter, we initially
15 sent out announcing the decision that it did contain
16 relief on a claim that had been withdrawn by the
17 plaintiffs.

18 I would also point out to you that at the top of that
19 letter, I noted in bold and capital letters that it was
20 not a final decision; that the letter was not intended to
21 be perceived as a court order, and the court reserved the
22 right to correct it. I did correct that misstatement in
23 the letter.

24 These -- these cases you cite, Mr. Lindemann, as
25 federal precedent, these are not systemic deficiency

1 cases. These are one individual, one situation, and the
2 Court just simply declines to be controlled by that
3 precedent, because for one thing, in many instances, the
4 issues were different.

5 The focus of the case was different, and the decision
6 based on different analyses within that particular case.
7 So I respectfully decline to grant relief to you under
8 this argument and would ask that we move on now to further
9 issues, if you have further issues you wish to discuss.

10 MR. LINDEMANN: Two, two very quick points, and Your
11 Honor, we would ask, obviously, for the record that our
12 entire motion be considered. We're not waiving any of the
13 grounds, but I think some of those other grounds have
14 already been touched on and some are other arguments.

15 Just two quick points: Point number two on page five
16 of the motion, we ask the Court to clarify the order,
17 amend your order. You could actually probably do it by
18 form order if you want to, the dismissal of the plaintiffs
19 PR and KW as party plaintiffs. They are not class
20 representatives any longer.

21 Plaintiffs have already conceded that they are --
22 they were dismissed from -- not dismissed. They were
23 released from the South Carolina Department of
24 Corrections. Therefore, any injunctive relief claim that
25 they would have would be moot.

1 They certainly -- I know there was a suggestions and
2 response to our motion by plaintiff's counsel that they
3 still should be considered class members given the fact
4 that the way you described the class didn't actually
5 account for when people were released from the Department
6 of Corrections, they are no longer a member of the class.

7 We know, quite frankly, that's something all of us
8 should have thought of back then because with an
9 injunctive relief claim, once you leave the Department,
10 you don't have -- it's moot. There is no relief that the
11 Court can grant. Those would have been the class members,
12 but these are class representatives.

13 I don't care if the Court continues to consider them
14 class members. It doesn't make any difference, but it
15 does make a difference that they shouldn't be class
16 representatives.

17 THE COURT: Okay. Do you want to be heard on that?
18 Is there an objection to that, Mr. Westbrook?

19 MR. WESTBROOK: They -- just because they're
20 released, they're still members of the class. I agree
21 that they're not class representatives.

22 THE COURT: I would ask that that be included in any
23 order that results from this. I think that's by
24 agreement, the Court agrees, as well.

25 MR. LINDEMANN: Thank you, Your Honor.

1 THE COURT: Those individuals are not class
2 representatives.

3 MR. LINDEMANN: Thank you, Your Honor.

4 The last point, again, not waiving any of the other
5 points, but I think they were covered. The last point --
6 and I just want to protect the record on this.

7 Your Honor -- and this is point eight on page eight
8 of the motion. Your Honor made a comment in your order,
9 something that was not raised prior to your order, but
10 your order coming out indicating that you believe or took
11 the position in your order that the circuit court has the
12 inherent authority to issue relief regarding the
13 conditions of confinement of inmates in the custody of
14 SCDC -- at SCDC because the circuit court is the judicial
15 body that actually sentences them to the Department of
16 Corrections, and that somehow -- that gives the circuit
17 court some sort -- you used the term inherent power and
18 responsibility.

19 Our position is it's set forth in the brief, and we
20 cite some federal cases that dealt with the same issue
21 that courts don't have -- sentencing courts do not have
22 inherent authority to deal with post -- post-criminal,
23 post-sentencing issues dealing with the conditions of
24 confinement for inmates.

25 I mean, that's something obviously separate from

1 having PCR responsibilities which, obviously, deals with
2 something totally separate from the issues combined, but
3 we -- to preserve our record on that, we definitely take
4 exception to this Court finding that there is inherent
5 authority in the circuit court to essentially issue
6 rulings that affect inmates after they have been
7 sentenced, and again, specifically dealing with conditions
8 of confinement as opposed to issues that actually deal
9 with the criminal justice system, and that there is no
10 authority in South Carolina for you to even have taken the
11 position that you have inherent authority.

12 In fact, we cited some statutes that indicate quite
13 clearly the Director of the Department of Corrections by
14 statute is -- is the entity that has the inherent
15 authority over the South Carolina Department of
16 Corrections and custody of inmates, not the courts.

17 Thank you, Your Honor.

18 THE COURT: Without taking argument from the other
19 side, Mr. Lindemann, sir, I specifically reject that
20 argument. Let the record so reflect.

21 Someday, perhaps, we'll be able to change seats, and
22 if you sit here, you will know that it was a circuit
23 judge's signature that sends someone to the Department of
24 Corrections. They don't get in there otherwise.

25 And this Court -- when a case is brought and the

1 issues are appropriately brought forth with an opportunity
2 to be heard and defend by the defendants and brought to
3 this Court in a way that is ripe and available for
4 adjudication, and it is the responsibility of this Court
5 and the inherent power of this Court to ensure that what
6 happens at the Department of Corrections is
7 constitutional.

8 Thus, I do not -- and for whatever appellate purpose
9 or review there may be here, I cannot accept your theory
10 that this Court does not have the inherent power in
11 circumstances such as these and in a case such as this to
12 do justice, and thus, I decline any relief under that
13 argument.

14 Now, is there anything further with regard to this
15 entire matter we have before us today on either side?

16 MR. WOODINGTON: Your Honor, could we confer just a
17 minute before we close up?

18 THE COURT: Say it again.

19 MR. WOODINGTON: Could we confer for just a minute?

20 THE COURT: You may.

21 (Pause.)

22 MR. LINDEMANN: Your Honor, I do have one
23 housekeeping matter.

24 THE COURT: Okay.

25 MR. LINDEMANN: I know Your Honor and I have been

1 through that with the Ashenfelder case. I would ask this
2 Court that if you were intended to -- and it sounded like
3 you probably are -- that there would be a written order
4 issued so that I don't run into the same problems I ran
5 into in the Ashenfelder case.

6 THE COURT: Just one moment.

7 (Pause).

8 Yes. I noted, Mr. Lindemann, on page four of your
9 memo in citing Ashenfelder, you pointed out, and it was
10 your position that the appeal was dismissed after the
11 Court, which happened to be me in that case, as well,
12 failed to memorialize oral rulings in a written order.
13 Thus, your position may have been the Court's
14 responsibility to have done that as opposed to the lawyers
15 who were -- who were prosecuting the case.

16 But be that as it may, I'm going to ask Mr. Westbrook
17 if he would prepare an order with respect to what
18 decisions have been made today, the responses to the
19 issues. If you wish to include both sides but
20 specifically what the Court has ruled on each and every
21 one of these.

22 I would ask you to submit that to me, if you are able
23 to do so within five days of today's date, Mr. Westbrook,
24 realizing of course, that my time on the bench is drawing
25 to a conclusion.

1 I would ask you to send it to Mr. Lindemann at the
2 same time you send it to me so that you'll have an
3 opportunity to weigh in, but it would be my full intention
4 to issue a written order prior to -- obviously, prior to
5 departure from the bench which will occur on April 15th.

6 If you would do that then, please send it
7 electronically to jbaxley1c@sccourts.org, and we will
8 review it, revise it, download it, sign it and return it
9 to you for filing and service.

10 MR. LINDEMANN: Can I have one moment to consult with
11 counsel?

12 THE COURT: Yes, sir.

13 (Pause.)

14 And Mr. -- anything you need to reply after that
15 consultation?

16 MR. LINDEMANN: Nothing.

17 MR. WESTBROOK: No, Your Honor.

18 THE COURT: All right. There is one other thing I
19 wanted to mention, and I sent an emissary. During the
20 course of this trial, my law clerk came and mentioned to
21 you, Mr. Lindemann, and to the members of your group that
22 if Mr. Sterling -- we welcome him in the courtroom. He
23 has a difficult job.

24 I appreciate the fact he has remained here throughout
25 this hearing. I certainly don't require it. He sat

1 quietly and patiently as the Director of this agency
2 throughout these proceedings.

3 If he has something he wishes to say, sir, we would
4 be glad to recognize you and will give you that
5 opportunity. We don't require it but make that
6 opportunity available to you. Sir?

7 MR. STERLING: Yes, sir. If it pleases the Court.
8 My name is Brian Sterling. I'm the Director of the
9 Department of Corrections. I was confirmed roughly about
10 a month ago in that post.

11 I have been serving as interim since the governor
12 asked me to go over October 1st. So first of all, I just
13 want to thank you for allowing me to address the court.

14 I know this is not -- not normal to allow the
15 plaintiff to address the Court, so I appreciate that --
16 defendant, I'm sorry, defendant.

17 Last time I was here, I was actually here for a grand
18 jury case a few years ago when I was in the Attorney
19 General's Office. It's like old times.

20 As the Court knows, I wrote a letter to the
21 plaintiffs asking to reopen mediation. I wrote that
22 letter soon after the judge issued the order.

23 Trials, by design, are an adversarial process.
24 That's our system of law. My hope with mediation was not
25 a traditional mediation, as I told the plaintiffs in this

1 case. My hope was to get everybody at the table to work
2 together, to have an open dialogue about how we can move
3 forward with this very important matter to the State of
4 South Carolina.

5 My goal in mediation is that it's going to be a
6 productive process for both sides. So far I have found
7 that to be true in this case, and I see no reason that
8 will not continue when we move down the road. That is all
9 I have to say in this matter.

10 I do want to take a moment and thank you for your
11 service to this state and the General Assembly. Thank you
12 for your service as a judge. I wish you luck with your
13 new job.

14 My old roommate in law school was a gentleman from
15 Harstville. He is now a family court judge, Michael Holt.
16 I saw him go through the process of being elected. I keep
17 up with him, so I don't think the general public generally
18 understands how much work y'all do and how much travel you
19 do and how much time you have to spend away from your
20 families. Thank you for your service and good luck to
21 your new endeavor.

22 THE COURT: Thank you for your kind words,
23 Mr. Sterling, and for the -- just for the perspective you
24 bring to this matter. I wish you well, sir, even as I
25 exit this process and continue on. We are grateful for

1 your service, too.

2 MR. STERLING: Thank you, sir.

3 THE COURT: Thank you.

4 All right. Ladies and gentlemen, there being nothing
5 further, this Court declares this hearing adjourned and
6 this term adjourned.

7 Sine die.

8 (Whereupon, the proceedings were concluded.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 28th day of March,
2014.

April 9, 2014

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

December 30, 2010

Nelson Mullins Riley & Scarborough, LLP
Attn: Daniel Westbrook
Keenan Building, Third Floor
1330 Lady Street
Post Office Box 11070(29211)
Columbia South Carolina 29201

Re: South Carolina Department of Corrections
Gilliam Psychiatric Center

Dear Mr. Westbrook

During August 26, 2010, we site visited the Gilliam Psychiatric Hospital (GPH) (also known as the Gilliam Psychiatric Center) along with Steven Martin, Esq. We had previously assessed treatment services at GPH during a 2006 visit.

During August 26, 2010 in addition to the 32 hours per week reportedly provided by Dr. Wood, the three contract psychiatrists were providing a total of approximately 17 hours per week of on-site coverage to GPH. Dr. Frierson (four hours/week) had a caseload of 15 inmates, Dr. Johnson (five hours/week – each Saturday) had a caseload of 18 inmates, and Dr. Jones (two days per week for a total of eight hours per week) had a caseload of nine inmates. The total hours reported for psychiatric time at GPH therefore were approximately 49 hours per week.

During the morning of August 26, 2010, we received a tour of the housing units and programming areas (e.g. recreational yard, group room by James Page (Hospital Administrator II). This facility remains licensed by the S.C. Department of Health and Environmental Control. A Wing consists of 44 beds and B Wing consists of 43 beds. Eight cadre inmates live on these two units (four on each side). All the cells were single celled. A Wing has 9 camera cells and B Wing has three camera cells. The cameras in A Wing had good video resolution.

The count during August 26, 2010 was 53 inmates with 8 of these inmates being on I-R status and 10 inmates in SMU (I-A) status.

An outside yard provided adequate space for recreational purposes.

The staffing pattern was as follows:



PLT.1034

Position titles	Allocated	Filled	Vacant
<i>Program coordinator II</i>	1	1	0
Hospital administrator	1	1	0
Human services coordinator	8	7	1
Human services specialist	5	5	0
Psychiatrist/physician	1*	1	0
<i>Administrative</i>	2	2	0
<i>Health care Authority</i>	1	1	0
<i>Registered nurse</i>	10	4	6
<i>Licensed practical nurse</i>	3	2	1
<i>Temporary nurse</i>	3	0.5	2.5
<i>Medical assistant technician</i>	1	1	0

Note: nursing personnel assigned to GPH also provide services at R&E, MSU and ICS.

* Dr. Wood, the chief psychiatrist, was reported to provide 32 hours per week on-site services to Gilliam Psychiatric Center. Her caseload during our site visit was 10 inmates.

* *Italicized* positions need to be updated from the 2006 report.

MSU inmates were treated as supermax inmates throughout their stay at GPH. They did not have access to group treatment but did meet with their mental health clinician and psychiatrist on a weekly basis. They did not have access to group yard and were in cuffs while in the yard.

SMU inmates had access, SMU inmates had access to group yard five days per week for one hour each day, two groups per week with other SMU inmates and weekly sessions with their mental health clinicians and psychiatrists. The groups are conducted with one or two officers in the room at the time of the group, scheduled between 9 am-12pm and 1p-3p each day except Fridays. The current number of inmates on SMU status at the time of the site visit was 11.

Other GPH inmates are either at privilege level I, II or III. The only distinguishing features of these levels are increasing phone privileges and plans for discharge during level III. There is also an I-R privilege level that applies to inmates determined to have some risk factors. I-R status inmates require cuffs and are not eligible for groups – they are essentially on lock up status.

PLT.1035

A treatment team meeting for GPH inmates was described as occurring on a weekly basis, although the psychiatrists did not attend these meetings. Inmates at GPH attend the treatment plan meeting that occurs prior to their discharge.

During the morning of August 26, 2010, we interviewed 25 inmates in a group setting within Wing A. These inmates reported being locked in their cells, on average, 20 hours per day. They described individual sessions with their mental health clinicians on a weekly basis, weekly sessions with their psychiatrists and most inmates reported attending about 2 groups per week (one hour per group). In addition, these inmates described access to the recreational yard on a five day per week basis (one hour per day) with a maximum of ten inmates in the yard at the same time. The therapeutic groups were reported to generally involve about 8-10 inmates.

The group and individual sessions with the mental health clinicians were done in a setting that allowed for adequate confidentiality. However, inmates were in handcuffs when seeing the psychiatrists and at least one correctional officer was in the office during the meeting with the psychiatrist.

Inmates indicated that it generally took about 2 weeks post admission to GPH before they were assigned to one or more group activities. Very few inmates were aware of the treatment planning process or with their treatment plan. The inmates in this group when asked about their diagnoses endorsed diagnoses at the following frequency: schizophrenia – 8, depression -8, bipolar – 5, substance/alcohol abuse – 5, anxiety disorder – 4, personality disorder – 3, psychotic -1. This totals to more than 25 thus several inmates endorsed more than one diagnoses. Six of the inmates in this group endorsed they were currently being prescribed medications involuntarily.

When these inmates were asked to describe their experiences within GPH, they said several things were good including the following: (1) groups, (2) seeing a psychiatrist on a regular basis, (3) being able to discuss their problems with staff, (4) staff are professional and treat us like persons, (5) every time I've been here they help us, I've been real sick, (6) suicide precautions are more humane here, we are getting a mattress, blanket and although no clothing, one inmate was given shorts and pants. They added however that the unit staff do not walk around the tier making q 15 minute checks but rather sit at their desks and do charts. They described this process as much better as compared to suicide precautions in a crisis cell environment in a SMU. More specifically the inmates reported that when they are placed on suicide precautions in the CI in the SMUs, they are stripped naked with no smock, blanket or mattress, and can't sleep on the cold concrete. They also reported that at GPH the doctors try to get to know you as compared to the psychiatrists in the institutions where they may be seen for five minutes

PLT.1036

and their medications changed without meaningful discussions of the reasons or indications.

Other areas that they felt were not particularly good included: (1) too many changes of psychiatrist and the lack of consistency, (2) too much down time and not enough programmatic activities, (3) inmates do not have access to the dayroom floor but are only out of their cells for specific activities, and (4) a lack of community meetings like the meeting they were having with us at the time of the site visit.

We also interviewed a group of 4 SMU inmates. They confirmed the accuracy of the information previously summarized re: SMU inmates at GPH. They were generally very critical re: care they received while in the SMU at the sending institution, especially concerning placement in crisis cells. They reported that they were not provided any property in the crisis cells during their initial placement.

These inmates also reported that all of them go to three groups that have six inmates in each group. There is one officer present in each of the groups. They also reported there is always a counselor in the bay area near the door on the unit. In addition, the case workers call them out of the cell and they are seen in an office with no officer present although they are cuffed. When they see the psychiatrist once a week, there is an officer present. When asked what suggestions they had to improve the program at GPH, the inmates indicated that the staff could be more respectful, the program is not run like a hospital, and there should be a padded room rather than steel and concrete for inmates in crises.

Appendix I summarizes our records review of selected GPH inmates.

Summary and Opinion

There have been minimal changes in the treatment program at GPH since our 2006 site assessment. The main changes include the following:

1. less restricted property when placed on suicide precautions (a mattress is provided unless contraindicated),
2. better access to the psychiatrists, although not in a confidential setting, and
3. improved video monitoring technical capabilities.

Significant problems remain re: the mental health services at GPH. They included, but were not limited to, the following:

PLT.1037

1. inadequate out of cell time for all inmate/patients at GPH—averages less than 4 hours per day,
2. an inadequate amount of therapeutic programming for GPH inmates, and
3. clinical contacts with the psychiatrists that are provided in a setting that does not allow for sound privacy or confidentiality.
4. inmates meet with the treatment team only when they are being considered for discharge and at privilege level three, rather than meeting with the treatment team during the course of their hospitalization.

The essentially locked down status and inadequate treatment was especially apparent for inmates on SMU or MSU statuses. As previously summarized, SMU inmates had access to group yard, only two groups per week, and weekly sessions with their mental health clinician and psychiatrist. MSU inmates were treated as supermax inmates throughout their stay at GPH. They did not have access to group treatment but did meet with their mental health clinician and psychiatrist on a weekly basis. They did not have access to group yard and were in cuffs while in the yard.

Many of these inmates were in need of a psychosocial rehabilitation approach, which could only be partially implemented due to the very restricted out of cell time available to inmates. It was unclear to us how much the restricted out of cell time was due to correctional officer allocations, security policies and procedures or practices, mental health staffing allocations, limited programming space and/or other reasons. Regardless of the cause, the end result was the same—inadequate mental health services being offered to inmates with serious mental disorders.

Please call us if we can answer any further questions.

Sincerely,

Jeffrey L. Metzner

Raymond Patterson, M.D.

PLT.1038

Appendix I

PLT.1039

Appendix I

Inmates Interviewed Gilliam Psychiatric Center

1. Inmate 1

This inmate reported that he has been at GPH for the past month and has not yet been assigned any group therapies. The AMR of this inmate was reviewed.

A July 7, 2010 GPH admission note was reviewed. This inmate was noted to be psychotic upon admission with clear delusional thinking. He was disheveled in appearance. He was placed on I-R status.

Invega was noted to have been prescribed during July 10, 2010. He continued to demonstrate delusional thinking during July 15, 2010. During July 22, 2010, Dr. Wood described his presentation to be consistent with schizophrenia by history. Inmate 1 was reviewed by the treatment team the following day. His I-R level was continued.

During August 5, 2010, Inmate 1's contingency management level was increased to level I. The staff continued to utilize the attitudinal approach of kind but firm. His diagnosis was changed to delusional disorder, mixed type. He was scheduled to max out during September 10, 2010.

During August 11, 2010 Inmate 1 was noted to be refusing his medications. His contingency management level had been increased to level II. Inmate I during August 19, 2010 continued to deny the presence of any mental health problems.

There was no documentation in the AMR of participation in any group therapeutic activities.

The GPH healthcare record was reviewed. The treatment plan included attending group counseling as needed. An application for involuntary emergency hospitalization for mental illness was present in the healthcare record.

There was no documentation in the healthcare record relevant to this inmate's participation in any group activities, which was consistent with information provided by him.

Assessment: It is unclear why this inmate was not participating in any type of structured therapeutic activity. He clearly is in need of inpatient psychiatric care and should be encouraged to be more actively involved in treatment, especially in the context of his impending release date during September 2010.

PLT.1040

2. Inmate 2

This inmate reported he was admitted to GPH related to his self-mutilating behaviors. However, he stated that he has infrequently met with the psychiatrist and was recently determined to meet criteria for discharge. He was very unhappy about his planned discharge from GPH because he felt that there had been little change for him since admission.

The AMR of this inmate was reviewed. A June 30, 2010 note indicated that the sending prison indicated no diagnosis on Axis I. His SMU time would be ended during June 11, 2010. His self-injurious behaviors prior to coming to GPH appeared to be mainly to avoid going to Chesterfield dorm at Lee. The working diagnosis continued to include no diagnosis on Axis I.

A July 15, 2010 note documented his participation in an assertiveness group. The following day this inmate was referred to several counseling groups as his level was increased to level I from level I-A. This inmate also expressed safety concerns if returned to Lee CI, which had been previously discussed with a classification counselor.

The treatment team assessed Inmate 2 to be ready for discharge during July 14, 2010.

His caseworker listed his diagnosis during July 23, 2010 to be borderline personality disorder and antisocial personality disorder.

As documented in the healthcare record, this inmate continued to participate in 2-3 groups per week. By August 2, 2010 this inmate was on level III and was awaiting discharge from GPH.

An August 20, 2010 treatment team meeting indicated that the discharge diagnoses were polysubstance dependence and borderline personality disorder. He continued to struggle with discharge issues.

The GPH healthcare record was reviewed. Updated treatment plans were present in the chart but were not very specific in addressing his self-mutilating behaviors. Inmate 2's report re: infrequent contacts with the psychiatrist was confirmed by review of the AMR. His concern re: unresolved issues related to his self-mutilating behavior were consistent with my review of his treatment.

Assessment: This inmate appears to have clinically improved since his admission to GPH related to a more therapeutic milieu. However, there appears to be minimal intrapsychic change re: issues related to his self-mutilating behaviors, which places him at high risk of recurrence of such behaviors when discharged from GPH.

3. Inmate 3

This inmate was initially admitted to GPH during June 2, 2010 on an involuntary basis due to exhibiting grossly psychotic behaviors related to medication noncompliance. This

PLT.1041

inmate subsequently began taking his medications and responded very well to the structure of the treatment program. He reported being unable to recall the behaviors he displayed while he was psychotic prior to his transfer to GPH.

This inmate was clinically discharged around July 7, 2010. Discharge diagnoses were schizoaffective disorder, bipolar type and antisocial personality disorder. Medications included Prolixin decanoate, lithium, and Klonopin.

A July 30, 2010 note indicated that this inmate's planned transfer to ICS was not allowed due to a separation issue from an employee at ICS. Subsequent progress notes indicated that he would continue to program within GPH until more concrete discharge plans could be finalized. He was hoping to be transferred to Perry CI.

Assessment: This inmate received significant benefit from his treatment at GPH. It is concerning that at ICS level of care was not available to him.

4. Inmate 4

This SMU inmate reported that he was not meeting with the psychiatrist or his mental health clinician on a weekly basis. He also complained about the medications that he was receiving, which he thought were not needed. The AMR of this inmate was reviewed.

Progress notes that documented the most recent appointments with the psychiatrist were dated August 25 (first visit with Ashley Jones, M.D.), 13 (Robert Poiletman, M.D.), July 8 (Beverly Wood, M.D.), 2, 2010.

Progress notes documented the most recent appointments with his case manager were dated August 20, 13, July 30, 15, 7, 2, 2010.

This inmate was admitted to GPH during June 24, 2010.

The GPH record of this inmate was reviewed. A treatment plan was present in the chart.

This inmate had been referred to GPH during June 23, 2010 after slowly decompensating related to a gradual tapering off of his Prolixin decanoate and Depakote. His presentation was consistent with a bipolar disorder and polysubstance abuse disorder.

Assessment: This inmate was in need of an inpatient psychiatric hospital level of care. It does appear that he has been showing clinical improvement since being restarted on his medications. He continued to have little insight into the nature of his problems. In addition to the need for psychotropic medications, this inmate needs a psychosocial rehabilitation approach, which has been provided to him in a limited manner due to his SMU status and associated out of cell security related limitations.

This inmate has not been meeting with a psychiatrist on a weekly basis and has had appointments with three different psychiatrists since his admission to GPH during June 2010.

PLT.1042

5. Inmate 5

This inmate was interviewed and his AMR reviewed during the September 2008 site visit at Lee CI (see Appendix I of the September 2008 Lee CI report-Inmate 12). The September 2008 report included the following information:

Discharge diagnoses [at GPH] include[d] a delusional disorder, persecutory, alcohol dependence by history, cannabis dependence by history, antisocial personality disorder, and history of asthma and history of hypertension.

Assessment: It was unclear why Inmate 12 was not seen by a psychiatrist until almost 4 months following his discharge from GPH to Lee CI. His conditions of confinement clearly exacerbate [his] mental health problems. His treatment plan is inadequate. He is in need of treatment in an inpatient psychiatric setting. He is also in need of medical consultation regarding his eye complaints. We informed staff about this latter need.

The AMR of this inmate was reviewed again during the August 2010 GPH site visit. An August 31, 2009 progress note indicated that this inmate was willing to be admitted on a voluntary basis to GPH and resume taking his medications. He would be allowed to return to ICS once he becomes stable and completes his lockup time.

Inmate 5 was described as having a delusional disorder, persecutory type.

The August 31, 2009 admission note described delusional thinking. He was currently serving lockup time due to threatening to inflict harm on an employee. He was noted to be disheveled in appearance. He was placed in the SMU component of the GPH program.

A September 29, 2009 note referenced his eye problems related to his past history of having been pepper sprayed. During October 2, 2009 he was noted to be attending his lockup groups. He continued to demonstrate grandiose and psychotic thinking.

This inmate completed his lockup time by October 30, 2009 and was placed in regular groups. He was noted to remain psychotic at that time with fixed delusions.

During November 5, 2009 Inmate 5 was noted to be doing well with all daily activities with normal thinking unless he begins talking about his delusional beliefs. It was also reported that he would begin receiving increased privileges (e.g., phone privileges) during January 2010.

An optometry consult was apparently initiated during November 11, 2009.

Subsequent progress notes indicated that this inmate continued to actively participate in a variety of different group activities. He remained medication compliant.

PLT.1043

This inmate was temporarily placed on I-R status during January 2010 following a confrontation with a correctional officer.

Delusional thinking during January 28, 2010 continued to be present. His participation in group therapy was described as being active during February 2010. This inmate was assigned some light duty work by his case manager during February 11, 2010, which seemed to be embraced by the inmate. He also had an appointment with the eye clinic in order to obtain glasses.

This inmate was finally able to talk to his mother by telephone during February 17, 2010. It was reported during March 2010 that his visitation privileges would resume during April 2010. He was anticipating a visit from his mother and sisters.

His Risperdal was decreased by Dr. Wood to 1 mg po hs. During March 2010, he continued to participate in weekly meetings with his case manager and various group therapies.

During April 13, 2010 further adjustments were attempted relevant to his contact lenses. His case manager also spoke with his mother, who was with other family members in town to visit with this inmate during the weekend. Inmate 5 was excited about the visit with his family. During April 15, 2010, Inmate 5 was noted to have participated very well in group.

During April 28, 2010 this inmate was on level III. Inmate 5 was noted to continue to have problems with his new contacts during May 12, 2010. A June 2, 2010 caseworker note indicated that she was trying to get Inmate 5 approved for a job on the yard.

A June 4, 2010 progress note indicated that he had been approved for discharge by the treatment team back to the ICS program.

He was noted to have regressed clinically during August 6, 2010, which was thought to have perhaps been related to the discharge plans. Inmate 5 was being held for further observation.

During August 17, 2010 he was upset because his visits with his mother were revoked due to her having a cell phone on her person. He did not know how long her visits with him would be revoked. During August 20, 2010 his clinical regression continued.

I briefly talked to Inmate 5 during the morning of August 26, 2010. He had a makeshift job, which allowed him to have increased out of cell time. He reported that he was scheduled to have surgical correction for his eye difficulties.

Mr. Page indicated that the decision had been made to not discharge Inmate 5 from GPH based on his history of doing well at GPH but eventually decompensating in other correctional settings.

PLT.1044

Assessment: Inmate 5 is a very good example of the significant improvement that can occur when an inmate receives an appropriate level of healthcare. It is not coincidental that an increased rate of improvement was noted related to better access to group therapies following completion of his SMU time, as well as improvements related to increased privileges that included both phone and visitation privileges. It is also encouraging that GPH staff has recognized the benefits of continued treatment at GPH for this particular inmate.

6. Inmate 6

This inmate was a 25-year-old male who has been incarcerated in the SCDC for the past seven years. He was admitted to GPH on 6/25/10 from Lieber. He had been admitted to Lieber in November 2009 from the Broad River Cutter's Program.

The inmate reported he first received mental health treatment at age 11 or 12 and was diagnosed with bipolar disorder, borderline schizophrenia and reportedly had physical outbursts and anxiety. He was in the Broad River Cutter's Program for one year and a few months the first time and the second time for three months from August through November 2009.

The inmate reported that after his transfer to Lieber he stabbed himself with a paperclip and spent three months in lockup. He then cut himself again "to relieve pain in my stomach" and was on CI status for periods of time with a range of three weeks, five weeks, and two months. The inmate reported that he was in the restraint chair for 12 hours and then transferred to GPH.

The inmate described his stay at GPH as "alright". He was currently prescribed Geodon 80 mg bid which was stopped. Zyprexa was prescribed for one week and then that was stopped. He reported he is currently prescribed Seroquel, Klonopin, Neurontin, Haldol and Cogentin and that these medications are helping him.

The inmate reported that he is on the 1-R level which means that he has restrictions that require cuffs except when he goes to the rec yard and he is not eligible for groups.

Review of the inmate's record indicates he was admitted on 7/29/05 to SCDC. A medical screening on 11/17/09 when he was transferred to Lieber described his problems as being a cutter and a diagnosis of borderline schizophrenia. He was prescribed Haldol, Seroquel, Klonopin and Inderal.

On 3/31/10 he was transferred to GPH and prescribed Seroquel, Haldol and Cogentin. He returned to GPH from 5/12 - 5/19/10 with diagnoses of psychotic disorder NOS, antisocial personality disorder and cannabis dependence. His medications at that time were Seroquel, Klonopin and Geodon.

He returned to Lieber and appeared to be compliant with his medications however was returned to GPH on 6/25/10 because he had re-opened his abdominal wound. A GI

PLT:1045

consult at that time indicated that the abdominal wound could only be covered rather than closed by sutures because of his repeated cutting.

A treatment plan of 7/21/10 indicated no diagnosis and the staff approach to the problem restated the inmate having cut his abdominal area and his hearing voices of a "little girl". He was described as angry and demanding and passing medications to other inmates. The objective was 100% medication compliance, to refrain from self-injurious behavior and to develop coping skills. An update on 7/28/10 was to continue the current treatment plan and an update on 8/25/10 noted the inmate had been refusing Geodon but the objectives and approach were the same.

A note by the case worker on 8/26/10 reiterated the inmates' non-compliance with Geodon and discussed his discharge readiness. He was noted to continue to have auditory and visual hallucinations as well as conflicts with another inmate such that these two inmates could not be in the same lockup groups. A note by the psychiatrist indicated the inmate was manipulative with Wellbutrin such that it needs to be crushed. Wellbutrin was discontinued however it did not appear that there was any discussion with the inmate regarding his trading or abusing medications or the potential for acting out based on his refusals of medications.

Assessment: This inmate's care and treatment appear to be problematic. He has had multiple admissions to GPH because of his self-injurious behaviors and has been non-compliant with medications. It does not appear that there has been multidisciplinary treatment planning to include mental health staff as well as medical and nursing staff to address his SIB as well as the requirements for wound care and the seriousness of his repeated cuttings on his risks of infection and poor treatment response. There also appears to be a need for custody involvement in discussing the inmate's conflicts with another inmate which compromises both of their participations in the lockup groups.

7. Inmate 7

This inmate was a 49-year-old male who reported he had been in prison for 24 years. He stated he had been at GPH for the past 10 months.

The inmate reported that he had been in the ICS program before coming to GPH and that "other inmates were beating on me." He reported that these inmates would wait until nightfall and then they would beat him. The last time it occurred was approximately one year ago. He stated that he had been taking Prolixin injections twice per month for the last year or eight to ten months, he wasn't sure. The inmate also reported he had been in the ICS for approximately seven years and that he is being treated with Prolixin by Dr. Wood in the ICS program.

On observation, the inmate had tremulous movements of his body, shifting up and down on the chair and frequently was rubbing his head in a repetitive manner, suggestive of possible tardive dyskinesia.

PLT.1046

This inmate stated that he usually goes to group therapy particularly current events where inmates would read U.S.A. Today then talk about the content. He stated his parents are from Mexico and he reported that his parents traveled from Mexico to France, then to New Mexico and finally to South Carolina. The inmate stated that he was "real little in France" and he liked it and likes reading about Russia. The inmate noticed a book shelf in the office that we were meeting and got up to get a book about Viet Nam. He then shifted his statements to talking about Viet Nam and that he was in the service for a "pre-conscious". He made a reference to 11 bullets but did not state how that related to his history but went on to state that he had been involved in Panama with a nurse that knew about it and made \$11,000.

This inmate was actively psychotic during the course of the interview and made tangential, irrelevant and loosely associated statements as referenced above. He frequently was distracted by his surroundings including the bookcase, a computer in the room, and made a number of statements out of context to our discussion related to his perceptions of the immediate environment.

The inmate reported he had been taking Loxitane in the past prior to his prescription of Prolixin. The inmate continued in a rambling, loosely associated, tangential manner speaking with numerous irrelevant references.

I reviewed the inmate's record and it stated he began his sentence on 12/11/86 with two life terms plus additional years. A medical screening of 10/20/09 when he arrived at GPH made reference to the inmate's complaint of hearing voices and his having psychotic symptoms. "Consent for neuroleptic medications" was signed on 10/26/09 which was a generic version of medication consent without specific qualifiers as to the particular medication although it did include references to the potential for tardive dyskinesia from antipsychotic medications.

A treatment plan update dated 8/11/09 had signatures of 11 team members including one nurse however it did not appear a physician was in attendance. Diagnostic impressions were schizophrenia paranoid type chronic. The staff approach to the problem of schizophrenia included a description of his crime, the inmate's current symptoms and a history of extensive lockup. The objectives were to maintain compliance with medications to decrease delusions, to remain disciplinary free and the approaches were to maintain the current medications of Seroquel, Haldol, and Vistaril, group therapies including anger management and medication management, and to monitor compliance. The inmate was approved for involuntary medications because of his inability to care for himself and danger to others. A treatment plan update of 7/7/10 indicated the inmate continued to deal with auditory hallucinations and isolation and the objectives were for 100% medication compliance and reporting of a decrease in the intensity of the auditory hallucinations with the approach to promote medication compliance and counseling. Treatment plans each successive week at GPH were identical, however his medications were subsequently changed to include Prolixin 25 mg by injection q 2 weeks. There was no Abnormal Involuntary Movement Scale (AIMS) in the paper record.

PLT.1047

The CRT record included group notes noting his attendance and participation in current events groups and others however it did not relate his participation to the identified symptoms of schizophrenia as identified in the treatment plan. The weekly nursing notes were of good quality and referenced the inmate spitting his medication into the cup and need for referral to the team for staffing to discuss his compliance with medications. Staffing appeared to have taken place however the inmate was not present.

Assessment: This inmate's care and treatment appear to be adequate for maintaining him at a fair level of adjustment to the inpatient unit. He has a history of severe and persistent mental illness and had been maintained in the ICS program for an extended period of time. He however appears to need the inpatient hospital level of care at this time to maintain him at the highest level of functioning possible. It is unclear as to whether or not the hospital can provide a full range of interventions to him including individual therapy and a multidisciplinary treatment approach. Based on review of the records and other information, individualized treatment by a psychiatrist in a confidential setting does not appear to be provided at GPH although I was able to interview the inmate without any custody staff present.

8. Inmate 8

This inmate was not interviewed however his record was reviewed. A medical screening dated 7/5/04 at GPH indicated the inmate was receiving Haldol, Dilantin and Benadryl although the inmate refused to sign the medical screening. The inmate was admitted to the ICS program on 10/5/04 and his Haldol was changed to Risperdal however his other medications remained as noted above.

The inmate was re-admitted to GPH on 2/23/05 for an involuntary commitment and refused to sign consent for neuroleptic medications at that time. A treatment plan dated the day before indicated a diagnosis of schizophrenia undifferentiated type chronic and identified the staff's approach to the problem that the inmate's insight was limited and he was experiencing hallucinations. The objective was for the inmate to put forth effort to gain insight and report symptoms in the approach for the counselor to conduct individual counseling, medication education and to monitor medication compliance. The most recent GPH treatment plan of 1/14/10 was signed by the case worker but had no diagnoses. The staff's approach was again for medication compliance to resolve delusions and for the inmate to cooperate with staff with the objective for 100% medication compliance again to reduce delusions. The approach was for monitoring of medication, individual sessions with a therapist and participation in group therapies. Treatment plan updates of 1/20, 2/2, 2/9, 2/24 and 3/5 essentially maintained the same treatment plan.

Review of the CRT indicated group notes where the inmate was refusing the majority of his anger management sessions although he did attend at least two. The weekly nursing notes indicated that he was compliant with medications but that he did not take Miralax

PLT.1048

medication to clear his colon for a colonoscopy. Case management notes indicated that the inmate refused individual sessions and was seen at the cell door.

Assessment: This inmate's care and treatment are adequate from a medication management standpoint as there are efforts to provide medication to treat his severe and persistent mental illness, however it has not resulted in his participation in group therapies and other activities including medical tests. The inmate is in need of more individual one-to-one sessions to promote his cooperation with treatment efforts, as well as multidisciplinary treatment planning to include medical and mental health staff meeting with the inmate simultaneously to discuss his treatment needs.

9. Inmate 9

This inmate was interviewed with three other inmates as a group of SMU inmates in a lockup group. We have commented elsewhere in this report on that group interaction. I reviewed the inmate's record which revealed he is a 37-year-old male inmate who had a medical screening conducted on 1/25/08 at Lee CI. No mental health issues were identified on that medical screening.

The inmate had a medical screening at GPH on 10/13/09 which again identified no mental health issues. A third medical screening was done at GPH on 2/2/10 when the inmate's complaints were identified as hearing voices. He signed a general consent form for neuroleptic medications on 3/6/09 and 2/2/10.

A GPH discharge summary for his admission from 10/13/09 - 1/6/10 noted the inmate had a diagnosis of schizophrenia paranoid type and antisocial personality disorder. His global assessment of functioning was noted as 55 and he was treated with a number of medications including Invega, Haldol and Geodon.

The inmate returned to GPH on 2/2/10 for a voluntary admission from lockup. At that time he was refusing medications and had an increase in paranoia, agitation and aggressive behavior. The record had a signed consent form dated 8/4/10.

The treatment plan of 2/3/10 indicated no diagnosis but noted the inmate was refusing medications at Lee CI and had an increase in paranoia. The objectives were for the inmate to reduce reports of auditory hallucinations, reduce reports of stressors and take medications with the approach being for the case manager to see the inmate individually each week and medication monitoring.

The treatment plan remained the same on 2/12 and 2/19 and on 2/26 the inmate was noted as fully compliant with medications. Additional treatment plans on 3/5, 3/11, and 3/18 indicated the inmate was compliant with medications but continued to have some paranoid thoughts.

The progress notes and updates were weekly through 8/18/10 with a significant change being the medications changed to Clozaril on 8/5/10. This is a curious change given the

PLT.1049

notes that indicated the inmate was improving prior to this change and there was not an adequate explanation as to why the inmate's medication was changed to Clozaril.

Review of the CRT however noted that a case worker who was seeing the inmate in group on 8/23/10 noted that after group the inmate was doing well on his medication. There was continued decrease in symptoms however the inmate reported that he was feeling "shaky" because of an increase in his Clozaril. He was encouraged to see medical and the psychiatrist regarding these concerns. On 8/25/10 the inmate did speak with a psychiatrist who discontinued perphenazine over the six day period and added propranolol while continuing the inmate's Clozaril.

Nursing and counseling notes indicate the inmate's condition improved markedly beginning in August 2010 after his medication was changed to Clozaril.

Assessment: This inmate's care and treatment were marginal for the first several months of his admission to GPH however based on his lack of improvement his medication was changed to Clozaril. It appears that after that time the inmate has demonstrated substantial improvement as documented in the notes by psychiatric, nursing and counseling staff. The inmate's care and treatment appears to be adequate for his current mental health needs.

10. Inmate 10

This inmate's medical record was reviewed. The inmate had a medical screening on 6/14/04 which indicated that he had a mental health history and that his medications were Stelazine and Cogentin. The inmate was transferred to GPH on 11/25/08 and subsequently admitted to the ICS program on 1/29/09. Medical records indicate that he was readmitted to GPH from 2/18/09 – 6/1/09 with diagnoses of schizophrenia undifferentiated type and antisocial personality disorder. He was prescribed Navane, Inderal and Haldol by injection. He was returned to the ICS program and readmitted to GPH on 8/11/09. The records indicate that the inmate did not sign a consent form for neuroleptic medications on 8/11/09.

A treatment plan of 8/19/09 indicated no diagnoses. The staff's approach to the problem in the treatment plan was his non-compliance with medication, verbally threatening, paranoia and delusional thinking. The objective was 100% medication compliance and participation in counseling and non-threatening manner and the approach was for medication monitoring as well as individual and group therapy. Updated treatment plans of 8/26, 9/2, and 9/9 were identical however a treatment plan of 10/8 noted that he was compliant with medications which was also reported in updates of 10/15, 10/21 and 10/28. The record indicates there was variable compliance with medications with some inconsistency, and that there were also periods when the inmate was smearing feces and reporting paranoid thinking.

On 6/4/10 the inmate had an inpatient medication staffing and involuntary medications were approved based on the inmate's inability to care for himself. At that time his medications included Haldol Decanoate and Geodon. The inmate appears to have

PLT.1050

improved since the institution of involuntary medications according to notes by his case worker, psychiatrist and nursing staff although the inmate was reported as consistently being "dissatisfied" with his treatment.

Assessment: This inmate's care and treatment were marginal during the first several months of his hospitalization at GPH however his condition appears to have improved since he has been placed on involuntary medications. This did not occur until June 2010 and it is unclear as to why it took such a long period of time to receive approval for involuntary medications given his non-compliance with medications and continuing active symptoms of severe and persistent mental illness.

11. Inmate 11

This inmate was seen during a group interview of SMU inmates in a lockup group. He reported that he had been in the Kirkland crisis intervention cell for a week and a half and that his transfer to GPH was "a whole lot better than SMU". He continued that he was able to see a counselor at GPH which was a marked improvement in the treatment that he was receiving while in the Kirkland CI.

Review of his record indicated that he had a medical screening on 5/24/10 which identified no mental health problems. He was transferred to GPH on 8/13/10 and the medical screening identified mental health problems and the inmate refused to sign consent for medications on that same date. Review of his MARs indicated that he was refusing medications which included Risperdal and Cogentin in July 2010.

A GPH treatment plan dated 8/17/10 indicated no diagnosis but the reason for referral was stated as the inmate was confused, agitated and had assaulted another inmate. The staff's approach to the problem included statements that the inmate was refusing all medications, had little to no insight, was hostile, threatening and with a blunted affect. The objective was for the inmate to take medications, to "show no agitation", to cooperate and to gain insight as well as deny auditory and visual hallucinations. The approach was for one-to-one counseling, medication monitoring of medication compliance and to use a matter-of-fact approach regarding the inmate's hostility.

Review of the CRT indicated that the case worker noted the inmate was seen by the psychiatrist on 8/24/10 and medication issues were discussed including changing him from pills to liquid medications. The psychiatrist discussed injections with the inmate as well as the inmate having written a letter to his mother and the potential for the inmate manipulating medications. A nursing note of 8/22/10 had made reference to the inmate being manipulative regarding his medications and this was discussed with the psychiatrist. The psychiatrist did write a note on 8/24/10 indicating that medications were discussed including side effects and changes in his medications for the upcoming weeks.

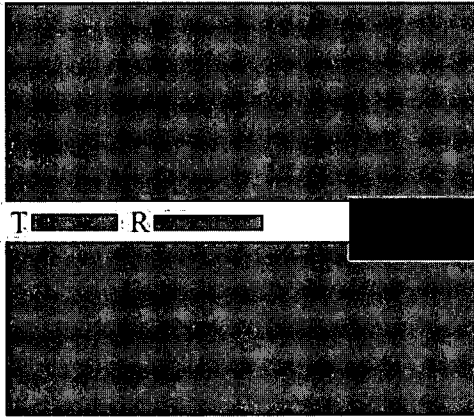
PLT.1051

Assessment: This inmate's care and treatment appear to be adequate however there is a need for integration and coordination of the treatment issues including medication management and group therapies for the inmate. Further need for ongoing discussion with the psychiatrist is clear from the problems identified in the record.

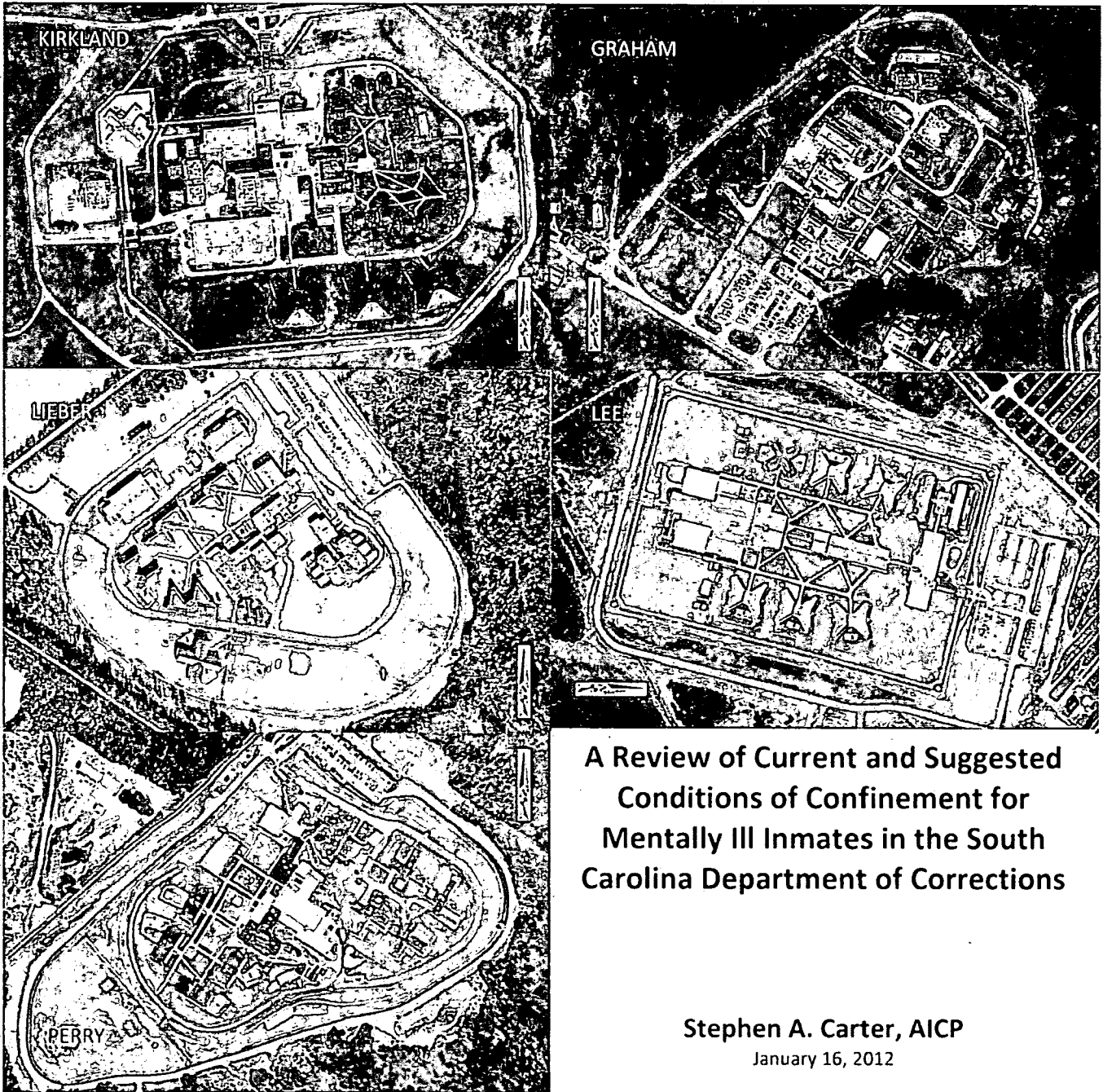
PLT.1052

**Key to Review of Records
Gilliam Psychiatric Center**

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.



**PLT.1053
CONFIDENTIAL**



**A Review of Current and Suggested
Conditions of Confinement for
Mentally Ill Inmates in the South
Carolina Department of Corrections**

Stephen A. Carter, AICP

January 16, 2012

**PLAINTIFF'S
TRIAL EXHIBIT**
2005-CP-40-02925

11

PLT.6282

Improving Conditions of Confinement for Mentally Ill Inmates

The focus of this assessment is to define cost effective means and methods to improve the physical conditions for inmates that have been classified by the South Carolina Department of Correction (SCDC) as acutely or chronically mentally ill. To determine potential methods of improving the physical conditions, an on-site review of current spaces assigned to Crisis Intervention Status (IC) and Intensive Care Services (ICS) inmates was conducted. In addition, spaces for inmates in acute care at the Gilliam Unit inside Kirkland were visited.

Spatial Basis for Recommendations

The intent of this review is to formulate improvement options associated with the need for therapeutic counseling spaces especially for ICS inmates that are being held in lock-up and CI inmates that are being held in housing units intended for administrative and disciplinary segregated inmates. During the facility tours, a range of physical conditions from good to very poor was apparent but, by far, the inmates held in segregation housing units experienced the worst living conditions. Not only were the conditions at the MSU in Kirkland deplorable, but the ability to provide recommended levels of treatment counseling is limited due to the lack of appropriate space. In general, supervised out-of-cell opportunities for recreation and counseling are severely limited due to both staffing and space issues.

Although inmates assigned to ICS housing units also lack access to group counseling opportunities due to space limitations, these inmates can and do receive counseling in a variety of spaces in the housing units. The difficulty, and focus of this analysis, is towards finding or creating counseling and living spaces for ICS and CI inmates that are being held in lock-up units.

The result of this review is organized into three basic options for improvement with an overarching recommendation that CI inmates be removed from segregation housing units. The in-cell and support spaces in these units, especially at the MSU, are not adequate for inmates in crisis. The three basic options include:

1. Adapting or retrofitting existing space within the four AMHC's (Lee, Lieber, Perry, and Graham), as well as Gilliam and MSU, for individual and group counseling spaces for high-security inmates and staff offices.
2. Creating "stand-alone" additions to these prisons that are purposely designed to create counseling for high-security inmates and support spaces for staff.
3. Construct new 10-bed CI Treatment Units for inmates requiring crisis intervention as well as a full range of therapeutic counseling.

In both the two immediate-term options and the third long-term option, the required space and cost has been estimated. A more detailed assessment of the buildings and systems would be necessary before validating the cost estimates of these options.

Providing more environmentally and spatially appropriate CI housing should be a priority but should be determined following a comprehensive assessment of how many are needed in the system and what

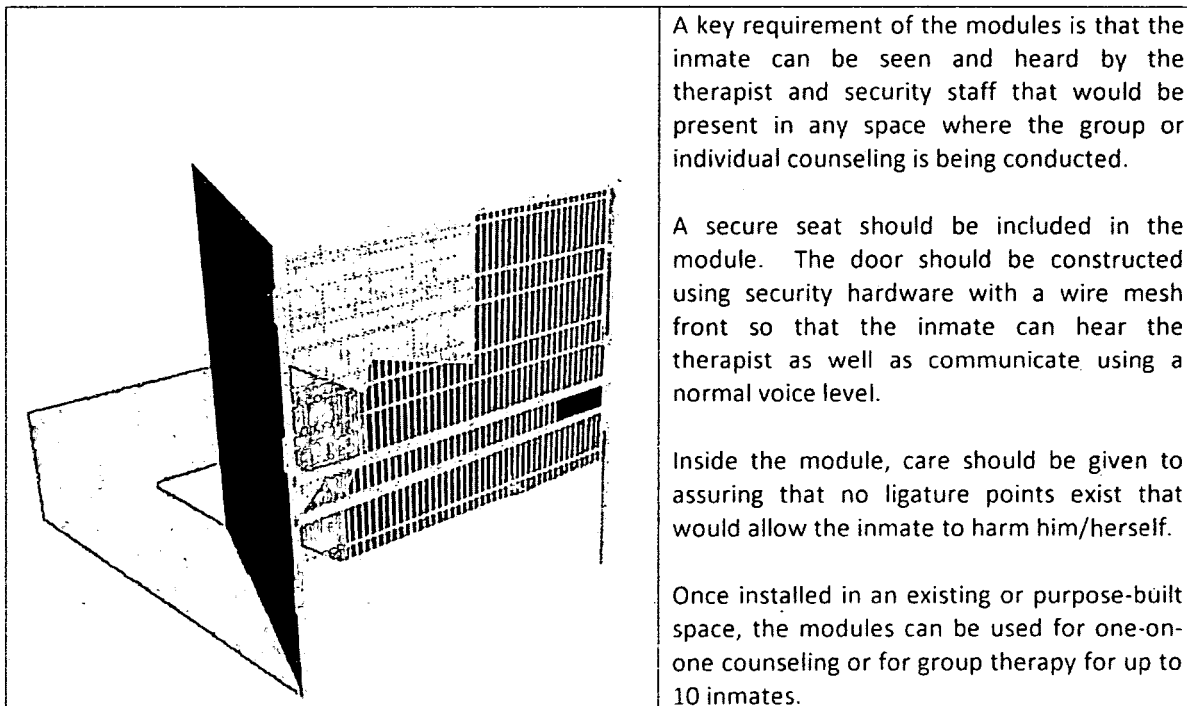
should be the space standards that dictate size, function, adjacencies, and location. While this review suggests a size and space allocation for special-built CI Treatment Units, a more thorough system-wide assessment and a review of recent court findings on the physical environment should be undertaken prior to the development of a prototype that could be adopted at the AMHC's.

Therapeutic Counseling Modules

Beyond the removal of mentally ill inmates from segregation housing units, the next highest priority should be the development of therapeutic counseling modules. This can be accomplished either through the retrofitting of existing space in candidate institutions or the construction of an addition at each of these institutions to accommodate the individual and group counseling modules with supporting staff spaces.

The purpose of the module is to provide a secure, humane space for a mentally ill inmate in segregation to participate in group counseling sessions while minimizing the risk to staff and other inmates. These modules are approximately 3' X 3' X 6'6" high. The commercial models are constructed of stainless steel or security gauge metal with an expanded metal front for viewing and communicating with the therapist. Portable versions of these modules are commercially available.

While these modules would permit casual arrangements of space (preferably in a semi-circle with the therapist in the middle), a more permanent arrangement is recommended. In this approach, the modules could be constructed of reinforced masonry block, pre-cast concrete, or steel and larger than 9 square feet (the commercial size) and be constructed with a floor drain capability. The following diagram illustrates a possible purpose-built module.



Ideally, the modules are a part of a cluster of spaces that provide staff offices and support the secure counseling capability provided through the arrangement of the modules. Table 1 provides a summary of the additional spaces that should be included in the development of the counseling cluster.

Table 1
Space Allocation for a 10-Module Therapeutic Counseling Cluster

Space Number	Space Designation	Space Standard	No. of Spaces	Total Sq. Ft.	COMMENTS
1.000	Therapeutic Counseling Module				
1.001	Security Vestibule	100	1	100	Glazed door
1.002	Interview Room	80	2	160	w/view panels in door
1.003	Multipurpose Room	150	1	150	Space for counselors; individual sec. modules
1.004	Individual Holding Modules	24	10	240	Individual secure modules w/sec. mesh fronts
1.005	Video Taping Room	80	1	80	Secure room w/taping equipment
1.006	Security Station	40	1	40	Open station in Multi-Purpose Room
1.007	Storage Room	80	1	80	Lockable room w/shelves
1.008	Inmate Toilet	45	1	45	Lockable and observable
1.009	Janitor's Closet	50	1	50	w/utility sink
Counseling Module Net SF				945	
Grossing Factor @ 55%				520	
Total Gross SF				1,465	

Therapeutic Counseling Staff

In addition to a need for counseling space, offices and interview spaces for staff should be located in close proximity to the treatment modules. In addition to the staff providing counseling and case management services to the CI inmates, additional AMHC mental health staff could be included in the staffing cluster. Table 2 illustrates the type of spaces for counseling/case management staff that should be included with each 10-module treatment cluster.

Table 2
Space Allocation for the Staff for a 10-Module Therapeutic Counseling Cluster

Space Number	Space Designation	Space Standard	No. of Spaces	Total Sq. Ft.	COMMENTS
2.000	Staff Area				
2.001	Lobby	200	1	200	Used for circulation to offices
2.002	Records Clerk	80	1	80	Part of Lobby area
2.003	Treatment Staff Offices	100	5	500	Private, lockable offices
2.004	Conference Room	160	1	160	Seating for 10
2.005	File Room	40	1	40	Lockable room w/shelves
2.006	Storage Room	80	1	80	Lockable room w/shelves
2.007	Staff Toilet	60	2	120	Accessible
Staff Counseling Offices Net SF				1,180	
Grossing Factor @ 35%				413	
Total Gross SF				1,593	

The total area required to construct stand-alone modules with support counseling staff spaces would be approximately 3,000 square feet and in all four of the AMHC's could be located adjacent to existing special management units. The estimated total cost for this new construction is approximately \$2.0 million including site preparation, design fees, equipment, and contingencies.

If available, existing spaces could be retrofitted for a treatment cluster. A study of available plans for the four AMHC's yielded no unutilized spaces that could be retrofitted. At Lee and Perry, existing food warming kitchens are approximately the correct size for 8-10 modules but would require a different food service approach. At Gilliam, space in the Treatment Administration building could be converted to a 10-module group counseling center that would serve the MSU and Gilliam CI inmates.

An example of a possible adaptation of these existing areas for the treatment modules is shown in the attachments. Using this retrofit approach, space for the treatment staff would have to be found in other parts of the institution. The cost of a "retrofit" solution would depend on what space is being "re-purposed" but based on the Lee, Perry, and Gilliam examples, the cost is in the \$400-\$800,000 range.

While a 10-module treatment cluster is most needed at the AMHC's, a 5-module treatment cluster should also be considered, especially for the MSU at Kirkland and perhaps at Graham for women. The space requirement for the modules and associated staff is 2,000 square feet at an estimated cost of approximately \$600,000 in retrofitted space and \$1.5 million for a stand-alone, purpose built cluster for the modules and treatment staff.

Treatment modules described above are needed to provide inmates in segregation the opportunity to participate in structured group and individual counseling sessions. Also, as noted previously, spaces would be available for the treatment team to work in close proximity to the spaces where the secure modules are located. This combination represents the "baseline" of improvements that are recommended to better the treatment services to high-security inmates. As noted, of the four AMHC's, only two, plus Gilliam, appear to have existing internal spaces that could possibly be re-purposed to house the 5-10 secure modules, but space does not seem to be available to accommodate much needed staff offices.

The optimum solution from a spatial perspective is to dedicate an area within the secure perimeter in each of the four AMHC's to construct a "stand-alone" Therapeutic Counseling Center for high-security inmates with associated staff spaces. In the Appendix, an aerial photograph of each institution illustrates a possible site for such a module.

10-Bed CI Treatment Unit

A third dimension, and the recommended approach, for improving the conditions for mentally ill inmates is to incorporate into the CI Treatment Module a short-term housing component for inmates placed on crisis intervention. The number of 10 purpose-built cells has been used to test the concept, but if the data suggests, this number could be increased to 20 or more. For purposes of conceptualization of the space required, a 10-bed unit has been used.

Based on the current conditions for CI inmates that are being held in spaces that are not conducive to effective treatment, a special-built unit that would include an appropriately configured (and staffed) area; an adjacent cluster for accommodating the 10-module group and individual counseling services; and support spaces for the dedicated treatment staff could vastly improve services for the CI inmates. The size of the staff area could be increased to accommodate other AMHC staff with duties beyond the CI population.

A cursory examination was made of each of the four AMHC's to determine if space is available within the secure perimeter to accommodate a 10-bed unit that would require approximately 8,500 square

feet. As is shown in the aerial diagrams in the Appendix, space appears to be available to incorporate such a unit in each location. In Table 3, the suggested space listing for this treatment unit is shown. While the types of spaces and allocation of square footage has been based on experiences in other jurisdictions, the numbers provide a basis for developing a preliminary cost estimate.

Table 3
Space Allocation for a 10-Module CI Treatment Unit

Space Number	Space Designation	Space Standard	No. of Spaces	Total Sq. Ft.	COMMENTS
1.000	Crisis Intervention Living Unit				
1.001	Single Cells	100	10	1,000	w/toilets and sink; 3-sided bed access
1.002	Dayroom	35	1	280	w/natural light
1.003	Officer's Station	80	1	80	Enclosed space/lockable
1.004	Outdoor Recreation Courtyard	25	10	250	Adjacent to and visible from dayroom
1.005	Accessible Shower	96	1	96	Observable; handicapped accessible
1.006	Showers	40	1	40	W/dressing area
1.007	Janitor's Closet	50	1	50	w/utility sink
1.008	Mechanical/Electrical Room	150	1	150	Lockable area
1.009	Storage	50	1	50	Lockable area
1.010	Interview Room	80	2	160	w/view panels in door
1.011	Inmate Toilet	45	1	45	Accessible; adjacent to Multi-Purpose Room
1.012	Food Service Station	80	1	80	Cabinet and sink
1.013	Staff Toilet	45	1	45	Lockable
1.014	Sallyport	120	1	120	Glazed door
1.015	Triage Room	120	1	120	Medical screening; meds distribution
1.016	Non-Contact Visiting Booths	30	2	60	Location dictated by design
1.017	Laundry	150	1	150	Flexible space use; haircare
Mental Health Segregation Unit Net SF				2,776	Outdoor courtyard not included in total
Grossing Factor @ 55%				1,527	
Total Gross SF				4,303	10 Inmates; grouped w/Seg. & PSU cluster
2.000	Therapeutic Counseling Module				
2.001	Security Vestibule	100	1	100	Glazed door
2.002	Interview Room	80	2	160	w/view panels in door
2.003	Multipurpose Room	150	1	150	Space for counselors; individual sec. modules
2.004	Individual Holding Modules	24	10	240	Individual secure modules w/sec. mesh fronts
2.005	Video Taping Room	80	1	80	Secure room w/taping equipment
2.006	Security Station	40	1	40	Open station in Multi-Purpose Room
2.007	Storage Room	80	1	80	Lockable room w/shelves
2.008	Inmate Toilet	45	1	45	Lockable and observable
2.009	Janitor's Closet	50	1	50	w/utility sink
Counseling Module Net SF				945	
Grossing Factor @ 45%				425	
Total Gross SF				1,370	
3.000	Staff Area				
3.001	Lobby	200	1	200	Central circulation area
3.002	Records Clerk	80	1	80	Workstation in lobby area
3.003	Treatment Staff Offices	100	5	500	Private, lockable offices
3.004	Conference Room	160	1	160	Seating for 10 staff
3.005	File Room	40	1	40	Lockable room w/shelves
3.006	Storage Room	80	1	80	Lockable room w/shelves
3.007	Staff Toilet	60	2	120	Accessible
3.008	Staff Break Room	120	1	120	Overhead and base cabinets
Staff Counseling Offices Net SF				1,300	
Grossing Factor @ 35%				455	
Total Gross SF				1,755	
Subtotal 10-Bed AMHC IC Unit				7,428	
Building Gross Sq. Ft. @ 15%				1,114	
Total SF Crisis Treatment Unit				8,542	
SF/Inmate				854.2	

Using today's construction cost for high security treatment facilities, the estimated total cost including site development, fees, equipment, and contingencies, the cost estimate is \$4-5.0 million. With greater specificity on space and site, this number could be reduced.

Regional Medical/Mental Health Center

Many mentally ill inmates have both medical and mental health problems. Typically, as is the case with SCDC, a correctional system does not operate facilities that are designed to meet the specific medical needs of the mentally ill population. As a final component of a comprehensive treatment environment, consideration should be given to the creation of a treatment environment that incorporates the medical and mental health services.

A preliminary space program was developed that provides for a 20-bed CI living unit; the previously discussed treatment modules and staff spaces; and a clinic/infirmary for six CI inmates that require medical separation. This stand-alone, purpose-built facility would require approximately 16,500 square feet and is estimated to cost between \$8-9 million.

The need for one, or more, of these specialized residential medical/mental health centers would have to be determined through a more extensive analysis of the number of dual diagnosis inmates in the system.

Specific Capital Improvement Recommendations

With input from mental health and security specialists, specific improvements for ICS and CI inmates have been advanced. Some of these recommendations (addressed in other testimony) include a capital dimension. The following is a summary of the capital requirements for these recommendations.

CI-Kirkland. Separate from ICS inmates currently housed in the F1 housing unit, the CI inmates currently housed in MSU should have access to any of the physical improvements. At Kirkland, three options are available that are demonstrated in the Appendix:

1. Convert the two conference rooms in the Treatment Administration building in Gilliam into a 10-module multipurpose room. The estimated cost for this internal improvement is \$500-\$600,000. Gaining space for the treatment staff will have to occur through double occupying the existing staff offices in the Treatment Administration building.
2. Construct a purpose-built treatment counseling cluster for both the 10 secure treatment modules and the associated staff on a site in close proximity to the MSU or Gilliam at an estimated cost of \$800-\$1,000,000.
3. Construct a 10-bed CI Treatment Unit that would not only include space for the secure counseling and the staff to support that function, but also a specially designed short-term residential unit for CI inmates. The estimated cost for this approach would be \$4-\$5,000,000.

The third new construction option is one that could become a prototype in all four AMHC's and eliminate the need to retrofit space in existing buildings as well as remove mentally ill inmates currently housed in lock-up units (MSU/SMU's).

ICS-Kirkland. Space should be created for 200 inmates (the number was closer to 150 at the time of the tours) to receive 10 hours of structured therapeutic activity per inmate each week, or 2,000 structured counseling hours per week. These inmates do not require the secure modules described above but do require group counseling rooms to meet this goal. Based on six hours available five days per week, one group counseling room could provide 60 inmates (6 hours X 10 inmates/session) an hour of structured counseling. However, 400 hours per day (2,000-inmate hours/5days) are needed to meet the needs of the target 200 ICS inmates. This translates to at least seven group therapy rooms to accommodate the need for the 400 counseling hours (6 hrs/day X 7 rooms X 10 inmates/room = 420 inmate counseling hours/day). Table 4 presents an estimate of the space requirements to meet this structured counseling goal for the targeted 200 ICS inmates at Kirkland.

Table 4
Space Allocation for an ICS Counseling Unit

Space Number	Space Designation	Space Standard	No. of Spaces	Total Sq. Ft.	COMMENTS
1.000	Therapeutic Counseling and Staff Offices for ICS Inmates				
1.001	Lobby	150	1	150	Glazed door
1.002	Interview Room	80	4	320	w/view panels in door
1.003	Group Counseling Room	200	7	1,400	Space for counselors and 10 inmates in chairs
1.004	Video Taping Room	80	1	80	Secure room w/taping equipment
1.005	Storage Room	80	1	80	Lockable room w/shelves
1.006	Inmate Toilet	45	1	45	Lockable and observable
1.007	Records Clerk	80	1	80	Open workstation
1.008	Treatment Staff Offices	100	7	700	Private, lockable offices
1.009	Conference Room	240	1	240	Seating for 12 staff
1.010	File Room	40	1	40	Lockable room w/shelves
1.011	Storage Room	80	1	80	Lockable room w/shelves
1.012	Staff Toilet	60	2	120	Accessible
1.013	Staff Break Room	240	1	240	Capable of seating 10
1.014	Janitor's Closet	50	1	50	w/utility sink
Counseling Module Net SF				3,625	
Grossing Factor @ 35%				1,269	
Subtotal ICS Counseling and Staff Unit				4,894	
Building Gross Sq. Ft. @ 15%				734	
Total SF ICS Counseling and Staff Unit				5,628	

If the number of ICS inmates is actually 150 rather than 200, the number of counseling rooms can be reduced to five and reduce the square footage requirement to 5,000. The estimated cost for this stand-alone counseling building to serve the Kirkland ICS inmates is \$1.5-\$2.0 million.

ICS/CI-Graham. Space should be provided for five CI women to receive 10 hours of structured therapeutic activity per inmate each week. No internal space was immediately apparent for retrofitting the secure counseling modules. Therefore, the purpose-built treatment counseling cluster is the most appropriate to meet the structured therapy needs for the CI women at Graham. Estimated cost is the same \$800-1,000,000 as with Kirkland.

Space for the ICS women to receive group counseling could remain the Blue Ridge housing unit, but would be better accomplished in a purpose-built attachment to the existing housing unit. The estimated size of this addition is approximately 4,000 square feet for counseling spaces and treatment staff and at a cost of \$1.0-\$1.4 million.

Regarding the need for a 40-bed ICS unit at Graham, Table 5 demonstrates a general space program. This purpose-built residential and counseling unit would replace the Blue Ridge building. The estimated cost is \$5.8-\$6.5 million for the special purpose housing unit, counseling, and staff spaces.

Table 5
Space Allocation for a 40-Bed Women's ICS Unit

Space Number	Space Designation	Space Standard	No. of Spaces	Total Sq. Ft.	COMMENTS
1.000: ICS Living Unit					
1.001	Single Cells	70	20	1,400	w/toilets and sink; 2 handicapped accessible
1.002	Double Cells	85	10	850	w/toilets and sink; bunks on the floor
1.003	Dayroom	35	40	1,400	w/natural light
1.004	Officer's Station	80	1	80	Open station in Multi-Purpose Room
1.005	Outdoor Recreation Courtyard	25	20	500	Adjacent to and visible from dayroom
1.006	Accessible Shower	96	1	96	Observable; handicapped accessible
1.007	Showers	40	4	160	W/dressing area
1.008	Janitor's Closet	50	1	50	w/utility sink
1.009	Mechanical/Electrical Room	150	1	150	Lockable area
1.010	Storage	50	1	50	Lockable area
1.011	Interview Room	80	2	160	w/view panels in door
1.012	Inmate Toilet	45	1	45	Accessible; adjacent to Multi-Purpose Room
1.013	Food Service Station	80	1	80	Cabinet and sink
1.014	Staff Toilet	45	1	45	Lockable
1.015	Sallyport	120	1	120	Glazed door
1.016	Triage Room	120	1	120	Medical screening; meds distribution
1.017	Laundry	150	1	150	Flexible space use; haircare
Women's ICS Unit Net SF				5,456	Outdoor courtyard not included in total
Grossing Factor @ 55%				3,001	
Total Gross SF				8,457	10 Inmates; grouped w/Seg. & PSU cluster
2.000: Therapeutic Counseling and Staff Offices					
2.001	Lobby	150	1	150	Glazed door
2.002	Interview Room	80	4	320	w/view panels in door
2.003	Group Counseling Room	200	2	400	Space for counselors and 10 women in chairs
2.004	Video Taping Room	80	1	80	Secure room w/taping equipment
2.005	Storage Room	80	1	80	Lockable room w/shelves
2.006	Inmate Toilet	45	1	45	Lockable and observable
2.007	Records Clerk	80	1	80	Open workstation
2.008	Treatment Staff Offices	100	5	500	Private, lockable offices
2.009	Conference Room	240	1	240	Seating for 12 staff
2.010	File Room	40	1	40	Lockable room w/shelves
2.011	Storage Room	80	1	80	Lockable room w/shelves
2.012	Staff Toilet	60	2	120	Accessible
2.013	Staff Break Room	240	1	240	Capable of seating 10
2.014	Janitor's Closet	50	1	50	w/utility sink
Counseling Module Net SF				2,425	
Grossing Factor @ 35%				848.75	
Total Gross SF				3,274	
Subtotal 40-Bed Women's ICS Unit				11,731	
Building Gross Sq. Ft. @ 15%				1,760	
Total SF Women's 40-Bed ICS Unit				13,491	

Gilliam. A solution for improving access to daily structured therapeutic activities for Gilliam CI inmates was proposed under the discussion of CI-Kirkland that involved a remodeling of space in the Gilliam Treatment Administration building or the addition of a stand-alone 10-module treatment counseling unit at a site convenient to the MSU and Gilliam buildings.

CI-Lee. Space for individual and group structured therapeutic activities is needed for CI inmates held in lock-up. Two options were considered:

1. Convert the food preparation area in the segregation building administrative area to a 10-module therapeutic counseling space at an estimated cost of \$400-\$550,000. This approach will require food to be transported directly from the central kitchen to the segregation housing units since the existing food preparation area in the segregation building would be re-purposed. In the Appendix a conceptual layout of this re-purposed space is shown.
2. Construct a stand-alone therapeutic counseling and staff support unit on a site adjacent to the prison administration building (see site diagram in Appendix). The estimated cost for this prototype counseling unit solution is \$800-\$1,000,000.

Similar to all four of the AMHC's, the optimum solution is to develop a 10-bed CI unit within the existing perimeter fence that would meet housing and counseling needs for all CI inmates that are currently held in segregation housing units.

CI-Lieber. The spatial requirements for CI inmates held in lock-up at Lieber are the same as in the other four AMHC's. No existing space that could satisfy the need for a 10-module counseling/staff unit was found during the site tour and the analysis of drawings. Therefore, a stand-alone unit for counseling and staff support is recommended at the prototypical cost of \$800-\$1,000,000. A preferred approach at Lieber would be the proposed 10-bed prototypical CI unit with counseling and staff spaces.

CI-Perry. Similar to Lee and Lieber, space is needed for the structured therapeutic counseling for CI inmates. These inmates are now often held in lock-up spaces that have little opportunity to incorporate secure counseling spaces. Through a review of the drawings for "B" housing unit (SMU housing), with internal renovations, the spaces currently used for food warming and a separate area for case management staff may be able to be renovated to accommodate 8-10 secure modules at an estimated cost of \$400-\$550,000. However, the space is not adequate enough to also accommodate offices for the treatment staff. In the Appendix, a concept for the re-purposing of this area is shown.

A better solution for the CI inmates at Perry would be to construct a prototypical 10-bed CI Treatment Unit at the estimated cost of \$4-\$5.0 million. A possible location for such a unit is shown on the aerial plan in the Appendix.

Comprehensive Solution

The suggestions offered in this report are based on a single tour of Kirkland, Lee, Lieber, Perry, and Graham facilities and the review of selected drawings of housing units. Observations from the tours suggest that to create a treatment-friendly environment for CI inmates to receive the desired level of structured therapeutic activity each week, much more and better space than can be "accumulated" within some of the existing buildings is required. An attempt has been made to find spaces for renovation assuming a lower cost would result. However, in the three instances where internal space could possibly be re-purposed (Gilliam, Lee, and Perry), only a part of the total spatial need could be satisfied.

Based on this limited analysis, a more effective and efficient solution would be to locate the suggested 10-bed CI treatment unit that includes 10 appropriately configured cells; housing unit support space; the

secure counseling modules; and treatment staff spaces at each of the four AMHC's and at Graham. The estimated size of this prototype is approximately 8,500 square feet and the cost range is \$4-\$5.0 million. Five such applications of this CI prototype would be in the range of \$20-\$25 million.

To find answers to the problems with conditions of confinement, developing a comprehensive assessment of the numbers of CI inmates in the system is a necessary base for then defining the most appropriate assessment of space needs.

Staffing

The development of staffing to meet the needs of the mentally ill population was based on data gathered from the Federal Court findings in California. The Coleman Report provides a comprehensive guideline for the type of staff that should be available to be in the range of acuity levels of the incarcerated mentally ill population. The Coleman findings were used to develop a comparison of the recommended positions by type and number to the current staffing levels within the SCDC system. The cost for salaries and benefits was derived by identifying comparable position descriptions within SCDC and other State agencies that employ medical and mental health staff. By using this approach the annual cost to meet the Coleman recommendations was estimated.

To apply the Coleman Staffing Plan to the current SCDC staffing the first part of the exercise is to determine the number of inmates in each of the Coleman category units. The base data utilized in this staffing analysis is based on the number of mentally ill inmates on September 1, 2011.

Table 6
Number of Mentally Ill Inmates by Classification, September 2011

Mental Health Classification	Inmates with Mental Illness
L-1	60
L-2	149
L-3	165
L-4	2,593
L-5	11
Total	2,978

In the absence of a report from SCDC identifying the total number of inmates with mental illness at any one point in time who are in lock-up, the most recent data (2008) SCDC has provided has been extrapolated to identify inmates in segregation management units (SMU) or maximum security units (MSU).

Male Institutions	Mentally Ill Inmates	Mentally Ill Inmates in Lock-Up
Perry	228	55
Lee	186	47
Lieber	252	44
Total	666	146/22%

Female Institutions	Mentally Ill Inmates	Mentally Ill Inmates in Lock-Up
Graham	271	18/6.6%

PLT.6292

10

Based on this data, it is assumed that 22% of mentally ill male inmates and 6.6% of female mentally ill inmates are in lock-up. The segregation rates are not applied to L-1 and L-2 inmates.

To translate the existing breakdown of SCDC staff into the Coleman Categories, the following assumptions were made.

- SCDC L-1 Hospitalization (60 inmates) is equivalent to Coleman Inpatient Hospitalization
- SCDC L-2 ICS (149 inmates) is equivalent to Coleman Enhanced Outpatient Program
- To breakdown L-3 through L-5 into Segregation ("Seg") and Other Area and Outpatient Mentally Ill/General Population ("MI/GP") the following computations were made:

○ Step 1: Determine Female Segregation

Leath	204
Graham	177
Female Total	381
Female Seg Rate	x 0.66
Total Female Seg	25

○ Step 2: Determine MI Inmates not in GP

Hospitalization	60
ICS	146
MSU	7*
Total MI Inmates not in GP	216

*MSU number identified in responding to various discovery reports.

○ Step 3: Determine Male Segregation

Total MI Inmates	2,978
Less Female MI/GP	- 381
Less MI not in GP	- 216
Male Total	2,381
Male Seg Rate	x 0.22
Total Male Seg	524

○ Step 4: Determine Total MI Inmates in Segregation

Female Seg	25
Male Seg	524
MSU	7
Total Seg Population	556

○ Step 5: Determine Total MI Inmates in General Population

Female Seg (Step 1)	25
Other MI/GP (Step 2)	216
Male Seg (Step 3)	524
Total MI Inmates not in GP	765

Total MI Inmates	2,978
Less Total MI Inmates not in GP	- 765
Total MI/GP	2,213

These calculations show that 556 inmates are currently classified as segregation and 2,213 are classified as mentally ill in the general population.

The table below summarizes inmates with mental illness into each of the Colman program categories.

Table 7
Inmates with Mental Illness Classification

SCDC Program	Coleman Program Equivalent	Inmates with Mental Illness
L-1 - Hospitalization	Inpatient Hospitalization	60
L-2 - ICS	Enhanced Outpatient Program (EOP)	149
L-3, L-4, L-5 - Segregation, including SMU/MSU ("Seg")	Administrative Segregation Unit and Condemned Unit	556
L-3, L-4, L-5 - Other Area and Outpatient Inmates in General Population (MI/GP)	Mentally Ill Inmates in General Population	2,213
Total MI Inmates		2,978

Utilizing the number of inmates with mental illness for each classification of the Coleman Report the following staffing calculations were established. All staffing numbers are based on the current SCDC Mental Health Staffing Program:

SCDC Mental Health Staffing Program

Clerical/Administrative	4.0
Program Administrators	2.0
Nursing/Med Tech (1)	13.0
Counselors/Counselor Supervisors	55.0
<u>Psychiatrist (2 FTE by contract)</u>	<u>5.0</u>
	79.0

(1) Not applicable to the mental health services staffing plan.

Staff numbers from each of these categories have been applied to the appropriate category below. Please note that the Nursing/Med Tech numbers are not applicable to the mental health services staffing plan.

Inpatient Hospitalization (SCDC equivalent L-1 – Hospitalization)

In the absence of an inpatient hospitalization staffing model in Coleman, the Reception Intake and Screening Staffing Plan to Gilliam Psychiatric Hospital has been applied.

Inmate Hospitalization	Coleman Staffing Ratios	Calculated Staff
Primary Clinician	1: 11	5.5
Staff Psychiatrist/NP	1: 33	1.8
Office Technician	1: 50	1.2
Senior Psychologist, Supervisor	1: 200	0.3

Enhanced Outpatient Program (SCDC equivalent L-2 – ICS)

The EOP provides the most intense level of outpatient mental healthcare to general population inmates with major mental illness.

Enhanced Outpatient Program (EOP)	Coleman Staffing	
	Ratios	Calculated Staff
Primary Clinician	1: 26	5.7
Staff Psychiatrist/NP	1: 120	1.2
Office Technician	1: 60	2.5
Senior Psychologist, Supervisor	1: 150	1.0
Recreational Therapist	1: 150	1.0

Administrative Segregation Unit and Condemned Unit (SCDC equivalent L-3, L-4, L-5 Segregation)

Clinical needs for the administrative segregation and condemned unit are very similar to the staffing needs for inpatient hospitalization inmates/patients.

Administrative Segregation & Condemned Unit	Coleman Staffing	
	Ratios	Calculated Staff
Primary Clinician	1: 25	22.2
Staff Psychiatrist/NP	1: 125	4.4
Office Technician	1: 175	3.2
Senior Psychologist, Supervisor	1: 150	3.7
Recreational Therapist	1: 150	3.7

Mentally Ill Inmates in General Population

Inmate/patients at this level of care have typically been diagnosed with a major mental illness, but are able to function in the correctional setting including vocational and education assignments with minimum intervention. The SCDC equivalent is inmates on mental health caseload, not in segregation or residential program (ICS, hospitalization) designed for the mentally ill.

MI/GP Population	Coleman Staffing	
	Ratios	Calculated Staff
Primary Clinician	1: 97	22.8
Staff Psychiatrist/NP	1: 280	7.9
Office Technician	1: 250	8.9
Senior Psychologist, Supervisor	1: 1200	1.8
Supervising Psychiatric Social Worker	1: 1200	1.8

Other Mental Health Professionals

The following table captures other staff requirements that are necessary regardless on inmate classification.

Other Health Professionals	Coleman Staffing Ratios	Calculated Staff
Pre-Release Staffing: Licensed Clinical Worker	1: 208	14.3
Rules Violation Analyst: Clinical Psychologist	1: 693	4.3
Suicide Prevention Specialist: Senior Psychologist	1: 500 (AMHC)*	1.9
Suicide Prevention Specialist: Senior Psychologist	0.3 /institution	1.2
QA/QI Specialist: Senior Psychologist	1: AMHC*	4.0
QA/QI Specialist: Health Program Specialist	1: 1300	2.3
QA/QI Specialist: Office Technician	1: 1300	2.3

A summary of all positions needed by category is provided in Table 8. The findings show a need for 89.8 additional staff.

Table 8
Staffing Deficit

	Need	Existing	Deficit
1. Primary Clinicians	56.2	55.00	(1.2)
2. Staff Psychiatrists/NP	15.4	5.00	(10.4)
3. Office Technician	15.7	6.00	(9.7)
4. Senior Psychologist, Supervisor	6.8	-	(6.8)
5. Supervising Psychiatric Social Worker	1.8	-	(1.8)
6. Recreational Therapist	4.7	-	(4.7)
7. Pre-Release Staffing: Licensed Clinical Worker	14.3	-	(14.3)
8. Rules Violation Analyst: Clinical Psychologist	4.3	-	(4.3)
9. Suicide Prevention Specialist: Senior Psychologist	1.9	-	(1.9)
10. QA/QI Specialist: Senior Psychologist	4.0	-	(4.0)
11. QA/QI Specialist: Health Program Specialist	2.3	-	(2.3)
12. QA/QI Specialist: Office Technician	2.3	-	(2.3)
Totals	129.8	66.0	(63.8)

Salary averages from the South Carolina Department of Corrections and Department of Mental Health were applied to the staffing deficit determined in Table 8. Fringe benefits at 30% were added to attain total compensation. Based on the results of this an annual operating cost of \$8,977,962 was estimated.

Table 8
Annual Staffing Costs

Position	Staffing Deficit	Total			
		Salary	Fringe 30%	Compensation	Total Cost
1. Primary Clinicians	1.2	\$ 68,286	\$ 20,486	\$ 88,772	\$ 110,055
2. Staff Psychiatrists/NP	10.4	\$ 165,790	\$ 49,737	\$ 215,527	\$ 2,243,942
3. Office Technician	9.7	\$ 63,991	\$ 19,197	\$ 83,188	\$ 807,964
4. Senior Psychologist, Supervisor	6.8	\$ 59,785	\$ 17,936	\$ 77,721	\$ 531,932
5. Supervising Psychiatric Social Worker	1.8	\$ 59,758	\$ 17,927	\$ 77,685	\$ 143,265
6. Recreational Therapist	4.7	\$ 68,349	\$ 20,505	\$ 88,854	\$ 417,612
7. Pre-Release Staffing: Licensed Clinical Worker	14.3	\$ 59,758	\$ 17,927	\$ 77,685	\$ 1,112,246
8. Rules Violation Analyst: Clinical Psychologist	4.3	\$ 68,286	\$ 20,486	\$ 88,772	\$ 381,475
9. Suicide Prevention Specialist: Senior Psychologist	1.9	\$ 67,604	\$ 20,281	\$ 87,885	\$ 164,697
10. QA/QI Specialist: Senior Psychologist	4.0	\$ 67,604	\$ 20,281	\$ 87,885	\$ 351,541
11. QA/QI Specialist: Health Program Specialist	2.3	\$ 67,604	\$ 20,281	\$ 87,885	\$ 201,325
12. QA/QI Specialist: Office Technician	2.3	\$ 68,449	\$ 20,535	\$ 88,984	\$ 203,841
Totals					\$6,669,895

PLT.6297

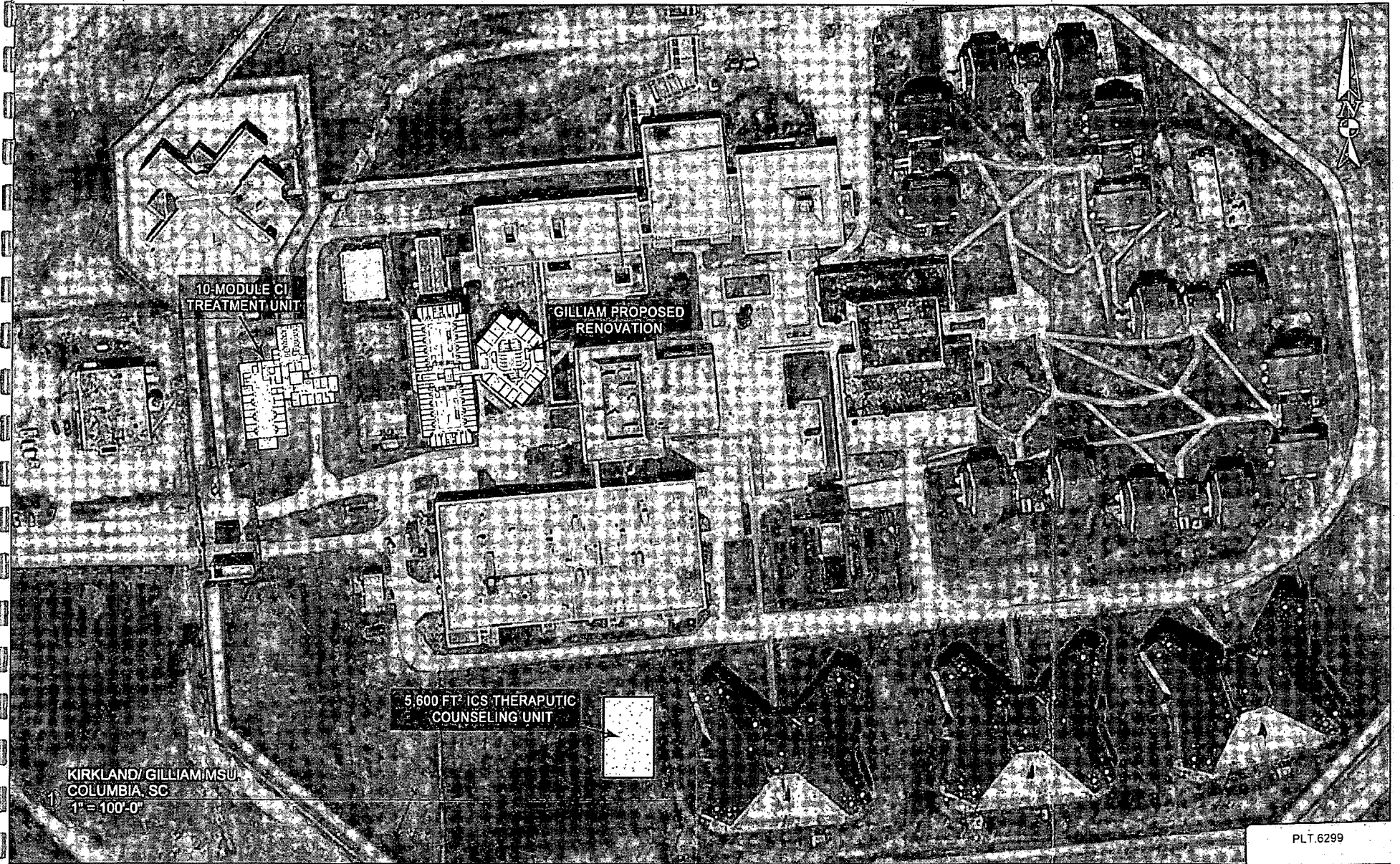
Appendix

This appendix contains site aerials and specifically prepared conceptual drawings to illustrate graphically the improvements that are suggested in the narrative report. The aerial maps were taken from "Bing Maps" available from the internet and converted to a scale that allowed a test of the ability to accommodate the recommended new buildings within the existing perimeter fences to be conducted. While a scale can be determined, the precise accuracy of these representations cannot be guaranteed.

The space programs shown in the narrative report were developed from experience of the author in developing plans for other jurisdictions, including the Coleman Court in California. They were prepared as a basis for developing the conceptual drawings that are included in this appendix and an estimated cost to construct the suggested improvements. Again, these are order-of-magnitude estimates using relevant experience for construction and project cost.

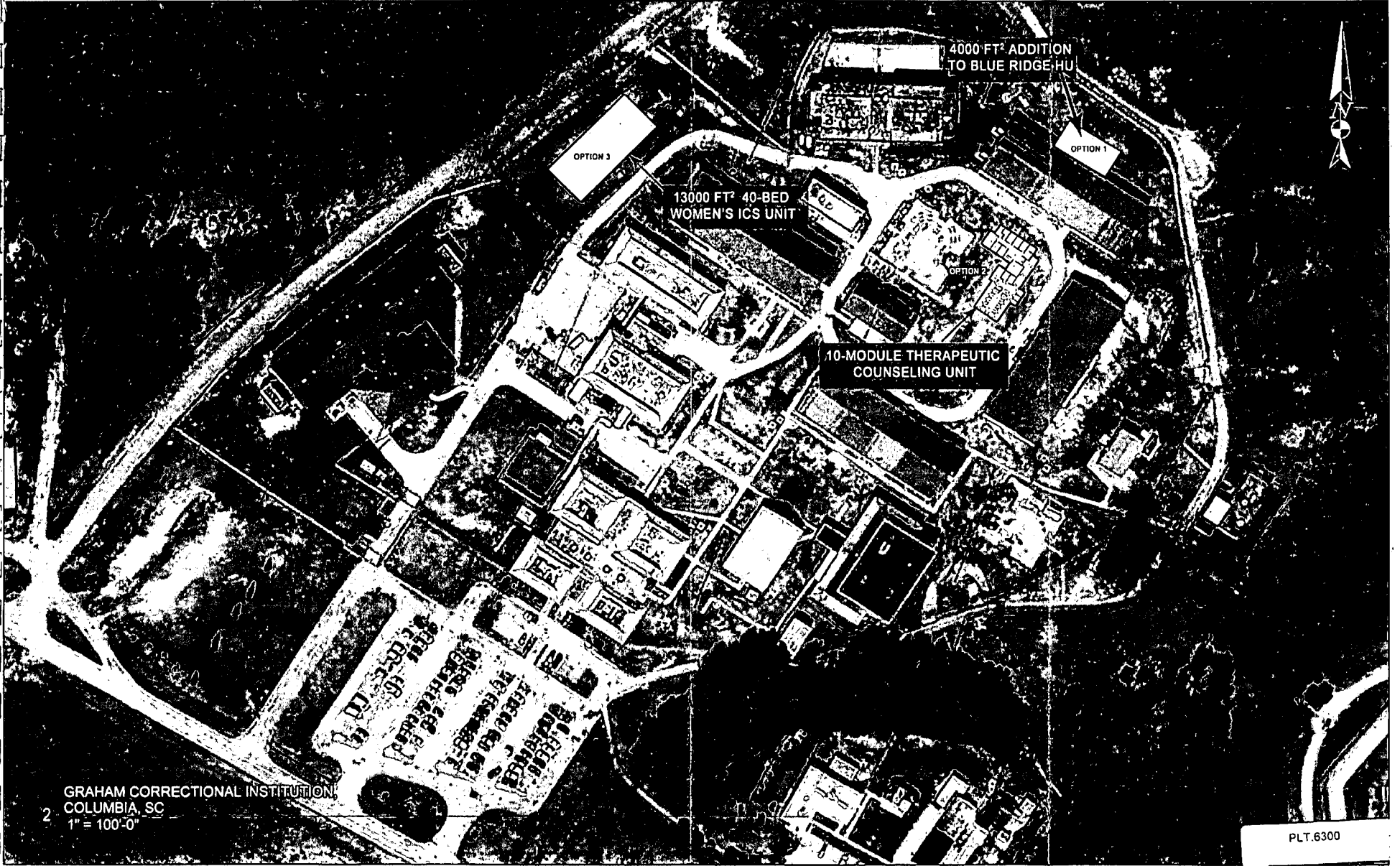
The following is a list of the illustrations included in the Appendix.

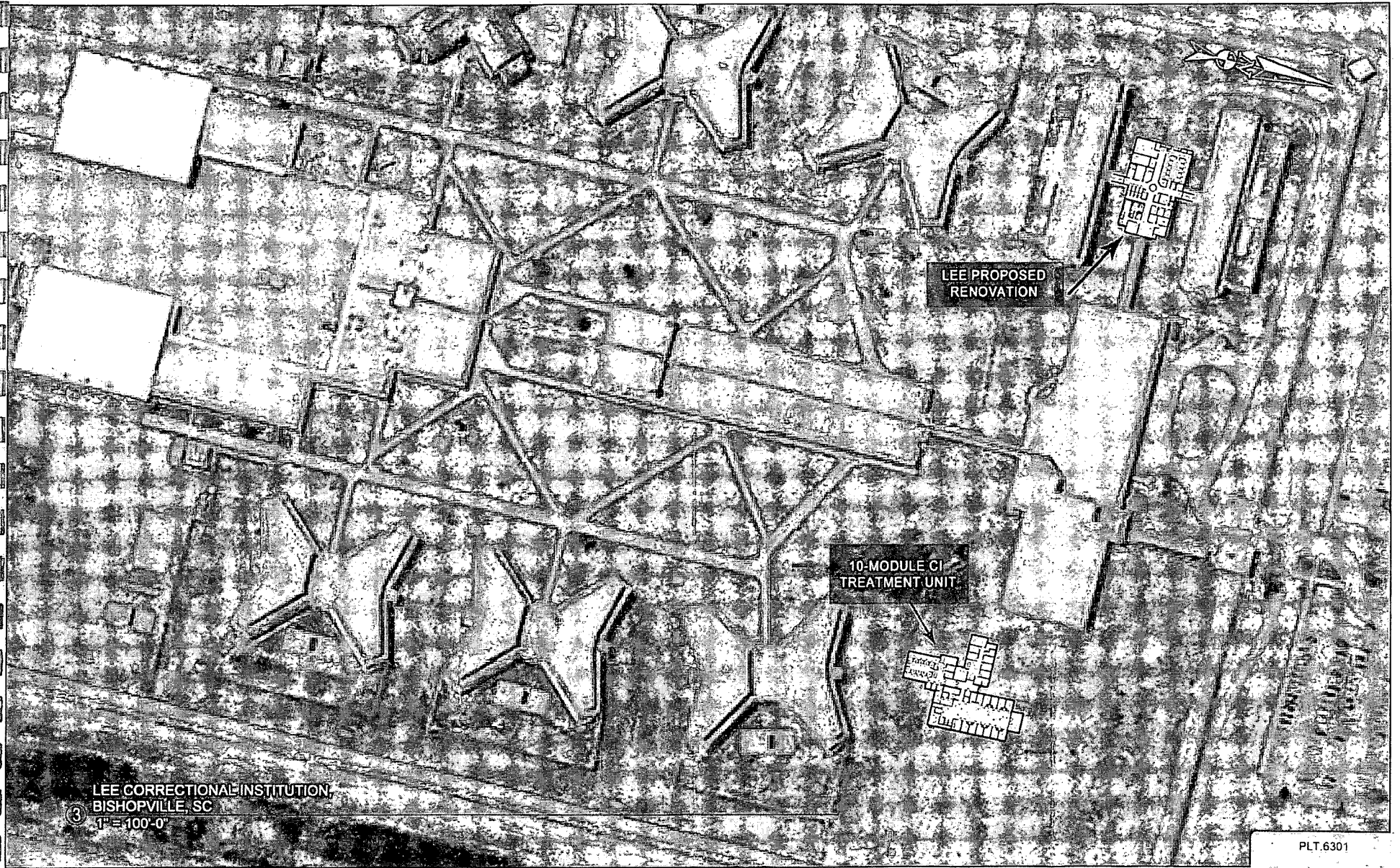
1. Aerial drawing of the Kirkland facility development options.
2. Aerial drawing of the Graham facility development options.
3. Aerial drawing of the Lee facility development options.
4. Aerial drawing of the Lieber facility development options.
5. Aerial drawing of the Perry facility development options.
6. A representation of a 10-module therapeutic counseling unit.
7. A representation of a 10-bed treatment unit.
8. A representation of the possible renovation of existing space in the Gilliam facility.
9. A representation of the possible renovation of existing space in the Lee facility.
10. A representation of the possible renovation of existing space in the Perry facility.

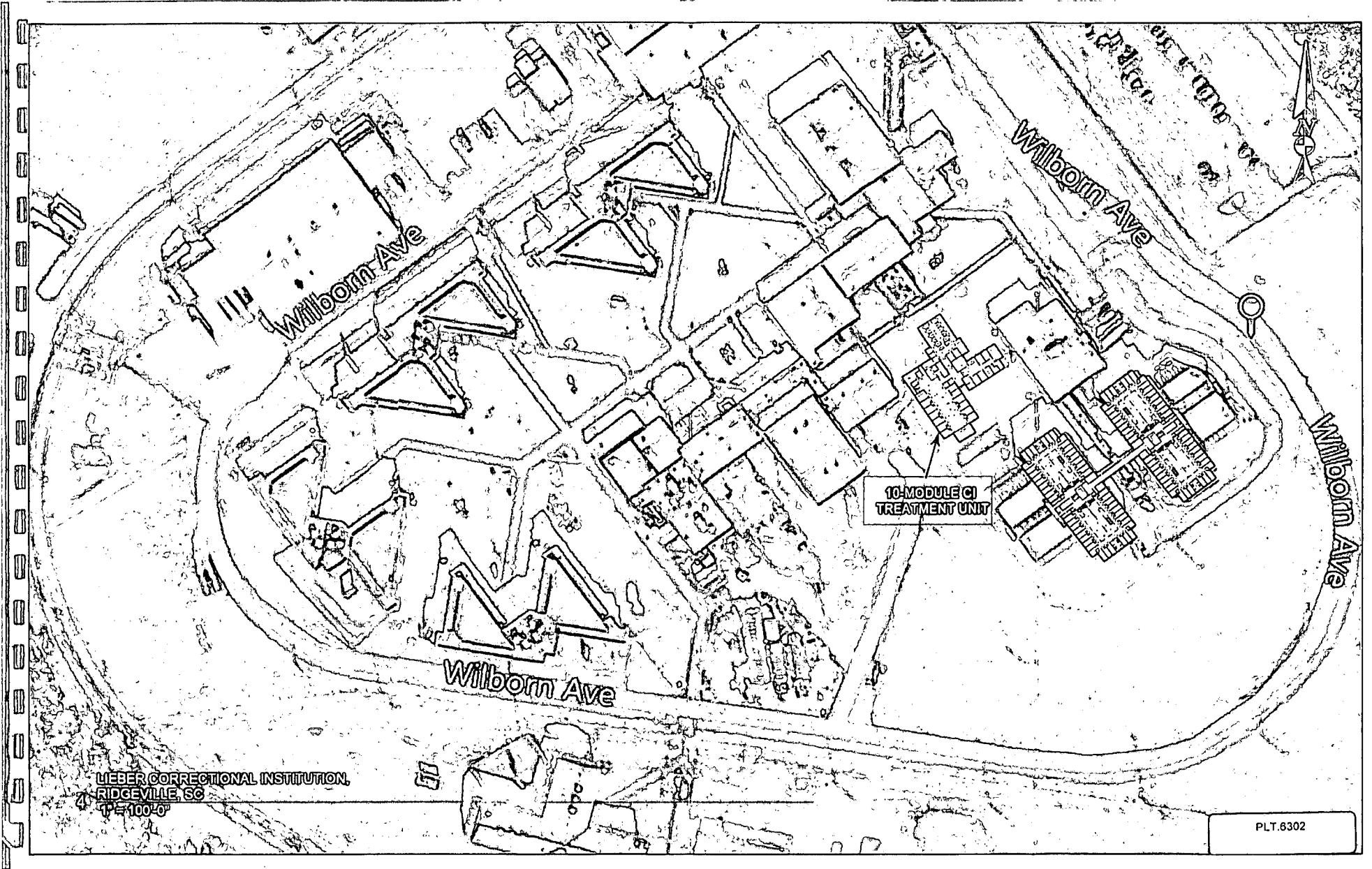


KIRKLAND/ GILLIAM MSU
COLUMBIA, SC
1" = 100'-0"

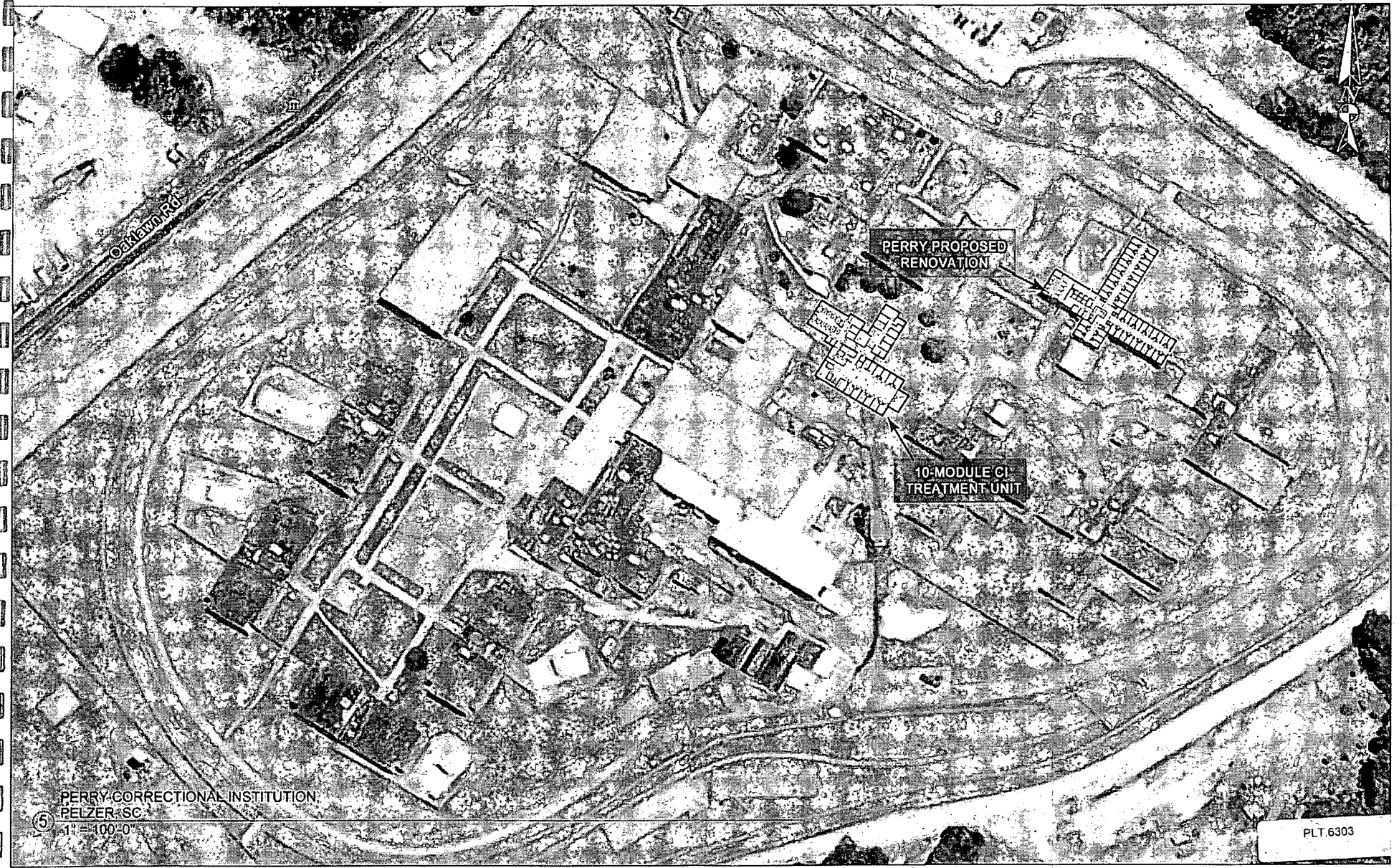
PLT 6299



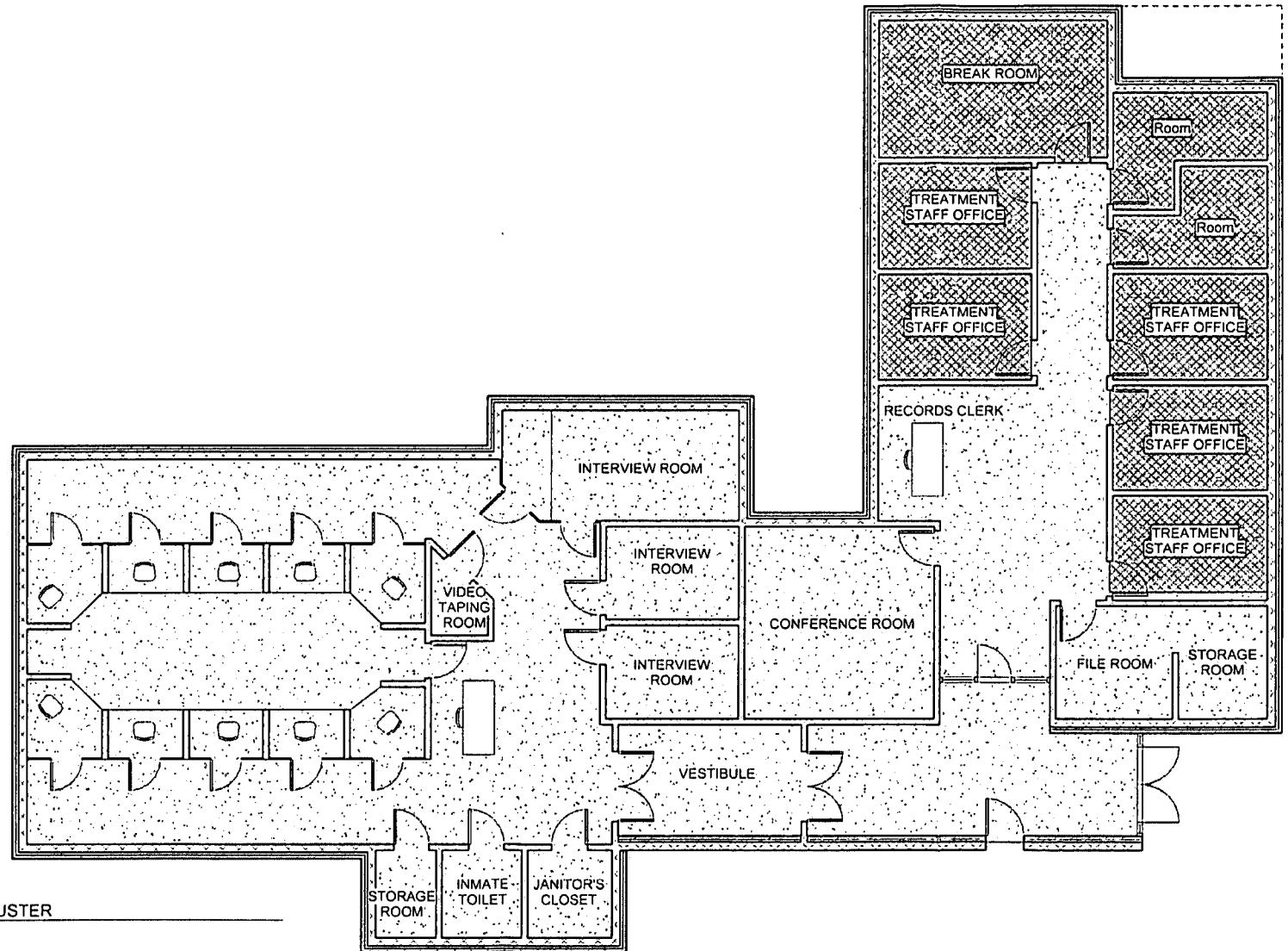




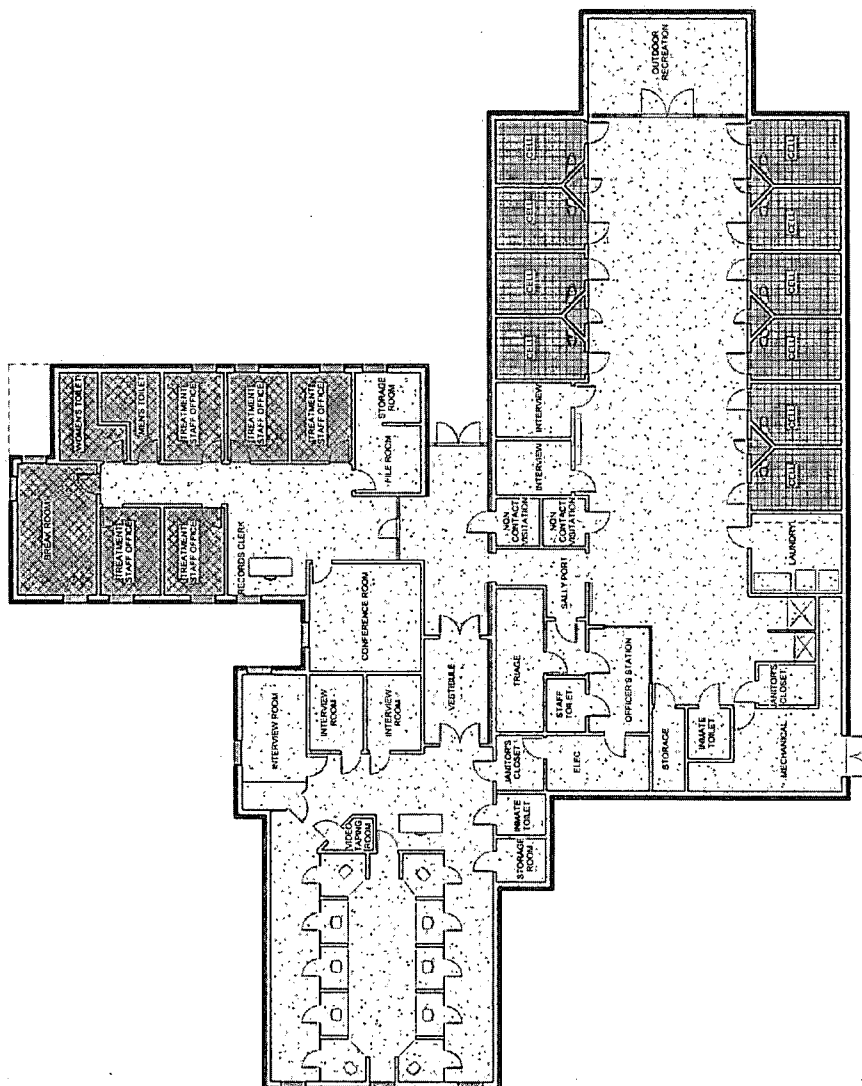
PLT.6302



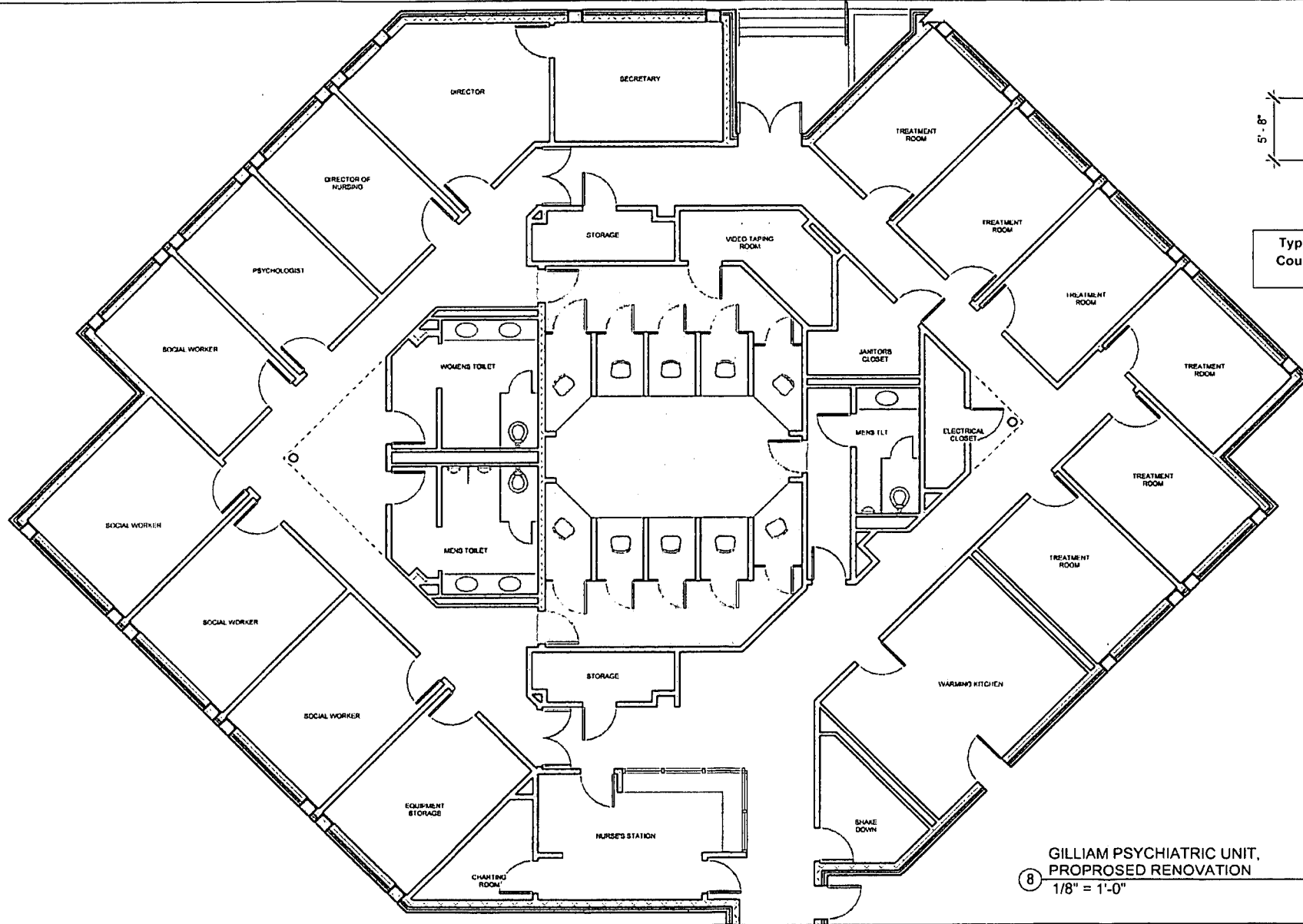
6 10 MODULE
THERAPUTIC COUSELING CLUSTER
1/8" = 1'-0"

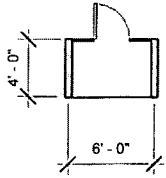


PLT.6304



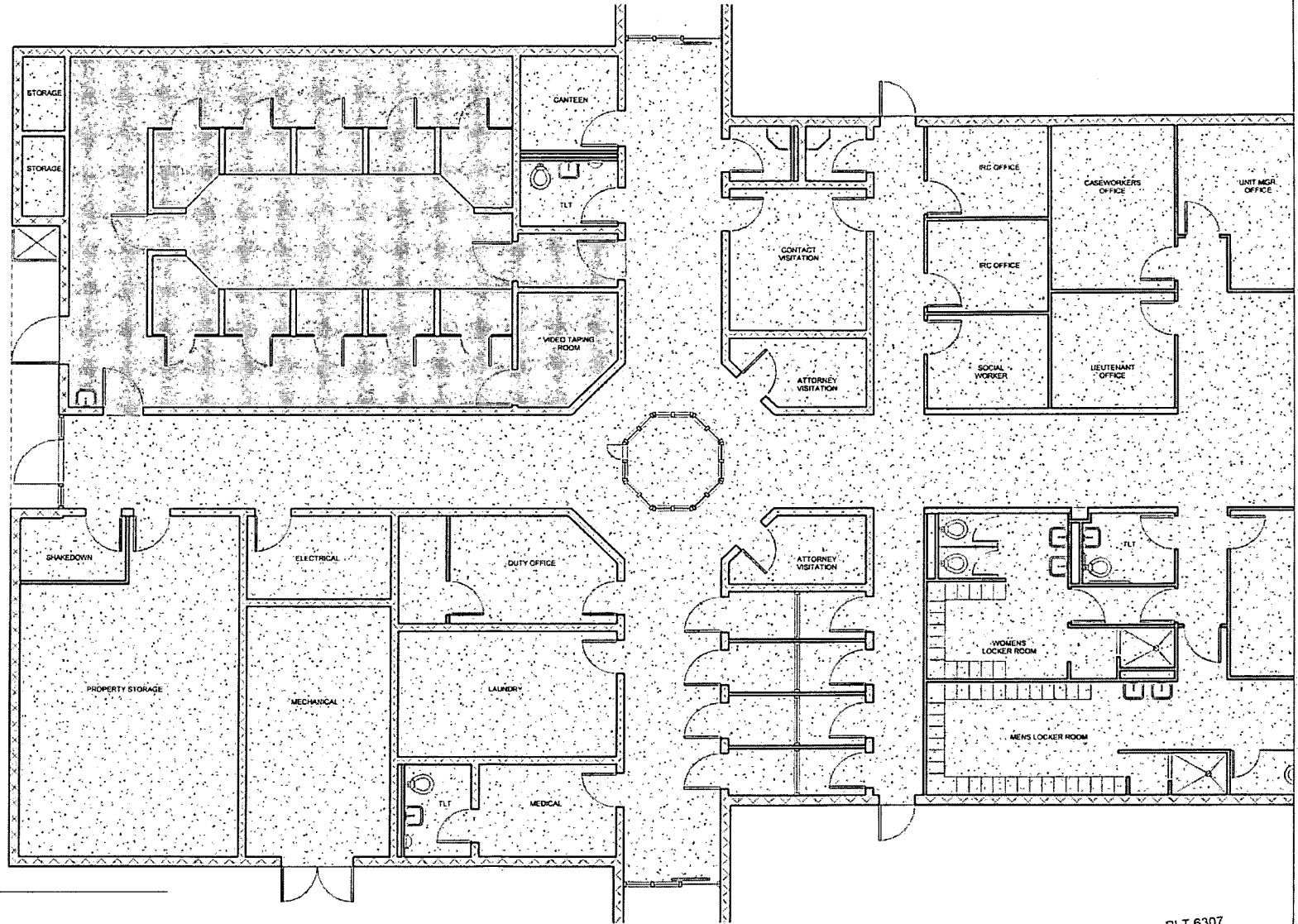
7 10-Module CI Treatment Unit
1/16" = 1'-0"





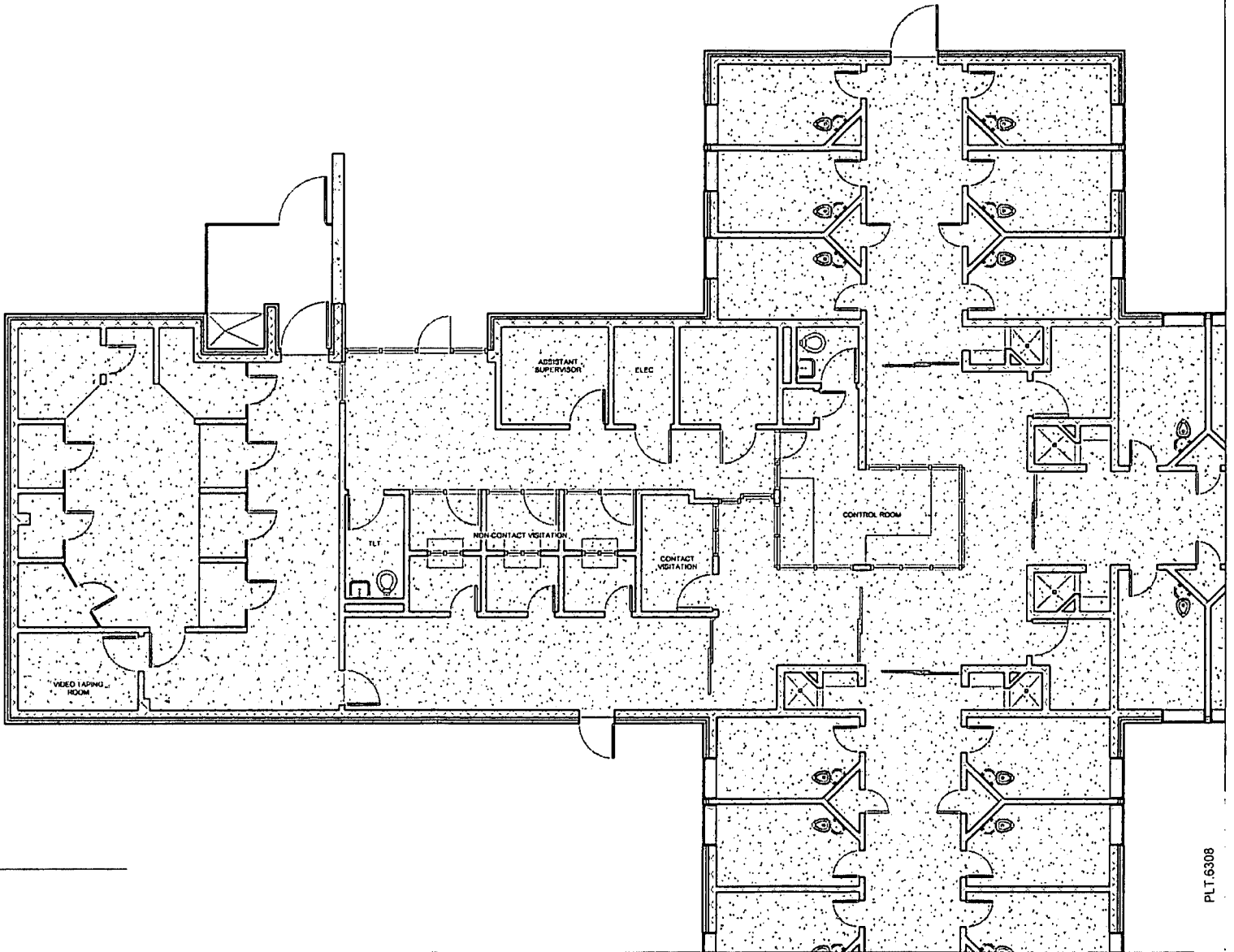
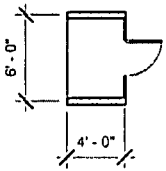
Typical Therapeutic Counseling Modules

LEE BUILDING "C",
PROPOSED RENOVATION
1/8" = 1'-0"



PLT.6307

Typical Therapeutic
Counseling Modules



10 PERRY HOUSING UNIT TYPE "M",
PROPOSED RENOVATION
1/8" = 1'-0"



State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL
BAXLEY
JUDGE

531 EAST CAROLINA AVENUE
HARTSVILLE, SOUTH CAROLINA 29550
TELEPHONE: (843) 383-4114
FAX: (843) 383-4116
E-MAIL: jbaxleyj@sccourts.org

August 23, 2013

Stuart M. Andrews, Jr., Esq.
Daniel J. Westbrook, Esq.
William D. Harter, Esq.
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, South Carolina 29211

J. Emory Smith, Jr., Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

✓ William H. Davidson, II, Esq.
Andrew F. Lindemann, Esq.
Kenneth P. Woodington, Esq.
Daniel C. Plyler, Esq.
Davidson & Lindemann, P.A.
Post Office Box 8568
Columbia, South Carolina 29202

Harry H. Stokes, Jr., Esq.
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, SC 29221

Re: T.R., P.R., K.W., et al. v. South Carolina Department of Corrections, et al.
C/A No.: 2005-CP-40-02925

NOTICE: THIS LETTER ANNOUNCING THE COURT'S DECISION IS NOT A COURT ORDER AND IS NOT TO BE CONSIDERED A FINAL DECISION WITH REGARD TO ANY ISSUE ADDRESSED HEREIN. THE COURT RESERVES THE RIGHT TO ALTER, AMEND, DELETE, OR ADD TO ANY PORTION OF THE DECISION OUTLINED HEREIN, AND NO PART OF THE DECISION IS FINAL UNTIL AN ORDER IS ISSUED.

Counsel:

It has been the privilege of this writer to serve the State of South Carolina as a general jurisdiction judge for fourteen years. At the time this case was heard, Court Administration reported there were more than 5,000 new case filings per year for each of our state's circuit court judges. Thus, over 70,000 cases of every imaginable sort have come to this Court over the years. This case, far above all others, is the most troubling.

The evidence in this case has proved that inmates are dying in the South Carolina Department of Corrections for lack of basic mental health care. As a society, and as citizen jurors and judges make decisions that send people to prison, we have the reasonable expectation that those in prison—even though it is prison—will have their basic health needs met by the state that imprisons them. And this includes mental health. The evidence in this case has shown that expectation to be misplaced.

Economic downturn and financial pressures have brought great change to our country. One of these is that the various state Departments of Corrections are now more than ever the collection place of the seriously mentally ill among the citizenry. The incidence of serious mental illness within the general population is less than one percent. In the typical Department of Corrections, it is between 15 and 20%. In South Carolina, the evidence in this case shows it to be approximately 17%, in spite of the Department's claim that it is 12.9%. If 17% of the prison population had advanced cancer, and there was inadequate and in some cases nonexistent treatment for cancer in prison, the public would be outraged. Yet this is the case for serious mental illness.

This litigation does not occur in a vacuum. What happens at the Department of Corrections impacts all of us, whether it be from the discharge of untreated seriously mentally ill individuals from prison into the general population, or tremendously increased costs for treatment and care that might have been prevented, or the needless increase in human suffering when use of force replaces medical care. The decisions of our Courts reflect the values of our society. To that end, our state can no longer tolerate a mental health system at the South Carolina Department of Corrections that has broken down due to lack of finances and focus.

While the Court finds the inadequacy of the mental health system at SCDC has not occurred by design, but instead by default, the Court further finds this decision in favor of Plaintiffs should not come as a shock to SCDC. Previous internal and external reviews of the SCDC mental health system have found multiple inadequacies and failures. The Court recognizes that the Department is underfunded and understaffed in many particulars, not just mental health services delivery. The operation of any state agency is a matter of competing priorities, and the General Assembly, as keeper of the public purse, is not in a position to excessively fund any entity. Thus, this decision will ultimately require an increase in priority for mental health services commensurate with the level of serious mental illness within the prison population.

DECISION

In its prior Order Setting Forth Applicable Constitutional Standards ("Order"), the Court delineated the standards of liability and burdens of proof applicable to Plaintiffs' constitutional claims under Article I, § 15 and Article XII, § 2 of the South Carolina Constitution. To prevail on the claim under Article I, § 15, the Court stated that Plaintiffs must prove that Defendant acted with "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). This deliberate indifference standard contains both an objective and subjective component. See *Farmer v. Brennan*, 511 U.S. 825, 834-37 (1994). To satisfy the objective component, Plaintiffs must demonstrate that the risk of harm to which they are subjected is sufficiently serious. *Id.* The subjective component is met by proof that a defendant "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* As to Plaintiffs' claim under Article XII, § 2, the Court held that the issue was whether the South Carolina Department of Corrections' ("SCDC") program for delivering mental health services is minimally adequate.

The Court stressed the different analyses applicable to each constitutional claim, and also noted the need for guideposts in ruling on Plaintiffs' claims. Accordingly, within these legal frameworks, the Court identified and articulated six factors¹ that would serve as benchmarks for determining whether SCDC provided minimally adequate mental health services. Stated succinctly, the evidence at trial should establish whether the SCDC mental health services system contained the following adequately functional components:

1. A systematic program for screening and evaluating inmates to identify those in need of mental health care;
2. A treatment program that involves more than segregation and close supervision of mentally ill inmates;
3. Employment of a sufficient number of trained mental health professionals;
4. Maintenance of accurate, complete, and confidential mental health treatment records;
5. Administration of psychotropic medication only with appropriate supervision and periodic evaluation; and
6. A basic program to identify, treat, and supervise inmates at risk for suicide.

¹ See *Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980).

Employing these factors in the context of the analytical frameworks applicable to each of Plaintiffs' constitutional claims, the Court finds by a preponderance of the evidence that the Plaintiffs have met the burden of proof with respect to each of their constitutional claims against the Defendant SCDC only. All other remaining Defendants are dismissed based upon the lack of evidence put forth against that particular party. Any remaining pending motions are hereby dismissed as moot. With regard to Plaintiffs' claims against SCDC, the Court makes the following threshold findings.

First, the mental health program at SCDC is severely understaffed, particularly with respect to mental health professionals, to such a degree as to impede the proper administration of mental health services. This deficiency has a substantial impact on every aspect of the mental health program, beginning at Reception and Evaluation, continuing into the treatment programs for mentally ill inmates, and ending with deficient discharge planning for seriously mentally ill inmates being returned to the general public.

Second, seriously mentally ill inmates are exposed to a disproportionate use of force and segregation when compared with non-mentally ill inmates. Segregation is often used in lieu of a treatment plan, an action that has severe consequences for inmates suffering from mental illness, particularly those in crisis, including concomitant behavioral issues that place all inmates and corrections officers at risk; disturbance in eating and sleeping cycles, disruption of medication administration, and deepening mental illness that has caused the death of multiple inmates; and, the stigmatization of mental illness as opposed to treatment that prevents many mentally ill inmates from participating in the mental health system.

Third, mental health services at SCDC lack a sufficiently systematic program that maintains an accurate and complete record to chart a mentally ill inmate's treatment, progress, or regression.

Last, SCDC's current policies concerning suicide prevention are inadequate and have resulted in the unnecessary loss of life among seriously mentally ill inmates.

As a result of the above findings, the Court grants judgment in favor of the Plaintiffs on both constitutional claims.

Below, the Court has separated the remainder of this letter into two sections. The first Section articulates the factual findings and conclusions underlying the Court's decision by examining each of the six *Ruiz* factors listed above. The findings made therein are by a preponderance of the evidence. Section Two then goes on to address the remedy the Court will grant in this case and the mechanism used to achieve it.

With regard to the factual findings and conclusions mentioned below in Section One, there are several references to individual circumstances involving specific inmates. The Department argued at trial that references to individual inmates and their particular situation was anecdotal and not indicative of the general administration of mental health services. Moreover, counsel for SCDC

essentially argued that some of the specific inmate situations were "outliers" in that such was a constellation of unique events and circumstances that brought about an unfortunate result. The Court specifically rejects that argument. While no system involving thousands of inmates is expected to be perfect, the Court finds that the individual circumstances referred to below are the result of a system that is inherently flawed in many respects, understaffed, underfunded, and minimally inadequate.

I. FACTUAL FINDINGS/DISCUSSION

A. A systematic program for screening and evaluating inmates to identify those in need of medical care.

As of 2011, 12 to 13% of the SCDC inmate population had been diagnosed by SCDC with a mental illness and were on the Department's mental health caseload. Based on that data, with a total inmate population at the time of trial of 23,306, a 12.9% fraction yields an approximate figure of 3,006 inmates that have been diagnosed as seriously mentally ill.² Based on universally accepted national statistics, evidence presented to the Court at trial strongly indicates this percentage should be much higher. Multiple studies conducted nationwide suggest that a more accurate percentage of inmates with a serious mental illness should be somewhere in the range of 15 to 20%. In addition, Dr. Raymond F. Patterson, M.D. testified that after detailed analysis his approximate figure for SCDC was 17%, and the Court finds the bases of his analysis to be credible. The Court further finds this low acknowledged percentage of mentally ill inmates at SCDC troubling because it indicates a high likelihood that there are hundreds of inmates with a serious mental illness at SCDC who are not receiving any treatment due to deficiencies in the process used to identify and classify those with a serious mental illness. This low identification of mentally ill inmates has a synergistic impact on the mentally ill population, as it leads to a reduction in mental health professionals, the further disproportionate cutting of costs in difficult economic times within the mental health system because of a perceived lack of need for services, and a skewed analysis as to the efficacy of the existing mental health system. Reception and Evaluation ("R&E") serves as the intake facility for inmates entering into SCDC. If inmates with mental illnesses are not identified and appropriately classified at R&E, the Court finds that these inmates face a substantial risk of serious harm.

In addition to the concerns mentioned above, there was also evidence presented to the Court of regular violations of SCDC mental health policy, two of which are particularly relevant to the Court as they relate to the screening and evaluation process at R&E. First, SCDC policy requires that inmates be seen within forty-eight hours after being assigned to a mental health counselor by intake personnel. At trial, there was evidence submitted to the Court of regular and persistent violations of this policy. Second, inmates are not being seen by a

² Exact numbers fluctuate due to the constant intake and release of inmates.

psychiatrist within thirty days of the initial assessment by that mental health counselor when a need for psychiatric treatment is indicated. Consequently, this results in inmates who are referred to a psychiatrist, but are transferred to the general population prior to assessment by a psychiatrist, creating a risk of harm for all inmates.

The Court finds, due to the concerns listed above, that the program used by SCDC for screening and evaluation fails to adequately identify and classify those inmates suffering from serious mental illness.

B. A treatment program that involves more than segregation and close supervision of mentally ill inmates.

The treatment program at SCDC places heavy reliance on segregation and use of physical force against seriously mentally ill inmates.

Mentally ill inmates are substantially overrepresented in Special Management Units ("SMU") within SCDC. As of 2011, the percentage of inmates diagnosed with a serious mental illness in the SMU's were as follows: 27% at Lee Correctional Institute; 42% at Lieber Correctional Institute; and 40% at Perry Correctional Institute. Dr. Janet Woolery estimated that approximately 40 to 50% of the inmates she sees from the SMU's are demonstrating active psychotic symptoms. Rather than placing mentally ill inmates into treatment programs, it appears that they are merely placed in SMU's. This heavy reliance on SMU's raises serious concerns for the Court. Risk factors and suicide rates increase while an inmate is in SMU. It is not uncommon for an inmate in SMU to develop depression and experience a disturbance in eating and sleeping cycles. Moreover, evidence in the case shows that the conditions of confinement in SMU's fall below what is acceptable for a twenty-first century correctional institute, with inmates "stripped out" for their own protection, naked and without blankets, in cells both extremely cold and inordinately filthy.

Not only are mentally ill inmates overrepresented in SMU's, they also spend long periods of time in the SMU's, and in some instances this period of isolation in SMU has lasted several years. The evidence revealed that inmate Rowland Dowling was confined in SMU for 2,565 consecutive days, from February 2001 to February 2008.

Mentally ill inmates also suffer from a disproportionate use of force. The Use of Force Chart from January 1, 2008 lists the thirty inmates who are most frequently subjected to the use of force. Twenty-six of the thirty inmates on the Use of Force Chart are on the mental health caseload. As to use of force events, there were 602 such events for the twenty-six mentally ill inmates compared with 68 events for the remaining four inmates. Lastly, inmates on crisis intervention ("CI") are not being assessed daily for mental health purposes. As of the date of trial, SCDC policy only required that inmates in CI be seen Monday through Friday, excluding holidays, and this policy is often violated.

A substantial contributing factor to the lack of an effective treatment program is the limited involvement by psychiatrists in creating and administering treatment plans for mentally ill inmates. Psychiatrists at SCDC have no administrative or policy-making duties, and there was evidence that they did not attend meetings to create and develop treatment plans. As the lead mental health professionals in the mental health program, the Court finds psychiatrists must be more directly involved in creating and developing treatment plans. Furthermore, deposition testimony of some psychiatrists revealed an alarming lack of knowledge of policies and procedures at SCDC, the levels of care and criteria for referral to a particular level of care, and the role of the counselor in the mental illness treatment process. Dr. Poiletman did not know what the terms SMU and CI stood for – meaning Special Management Unit and Crisis Intervention, terms inextricably tied to mentally ill inmates at SCDC. Likewise, Dr. Crawford could not describe the distinction between an Intermediate Care services patient and an area patient. The Court finds these examples both illuminating and disturbing. For psychiatrists and other mental health staff at SCDC to provide effective services, they must have a more intimate knowledge of the processes and procedures vital to the mental health services system they are expected to direct.

This Court finds that SCDC employees' excessive use of force against mentally ill inmates and segregation of mentally ill inmates in crisis as opposed to treatment creates a serious risk of harm to seriously mentally ill inmates.

C. Employment of a sufficient number of trained mental health professionals.

The Court finds that the mental health program at SCDC is substantially understaffed. This has a causal effect for many insufficient aspects of the mental health program and greatly inhibits SCDC's responsibility to provide effective services to its mentally ill inmate population.

At the time of this trial, psychiatric staff at SCDC was limited to 5.5 FTE. At Gilliam Psychiatric Hospital, there was 1.2 FTE for 62 patients, a 1:52 ratio. Dr. Patterson testified that a more appropriate ratio for an inpatient setting would be 1:20. Likewise, the ratio for counselors at area mental health centers as of February 2011 is also problematic: 1:45 at Graham Correctional Institute; 1:54 at Lee Correctional Institute; 1:75 at Lieber Correctional Institute; and 1:75 at Perry Correctional Institute. In response to this information, Dr. Patterson indicated that a more appropriate ratio for counselors at the area mental health centers is 1:40. In total, Dr. Patterson recommended that SCDC employ an additional twenty (20) counselors and fourteen and one half (14.5) psychiatrists. The Court accords great weight to Dr. Patterson's recommendations for staffing.

The Court finds that inadequate mental health staffing at all levels within SCDC represents a serious risk of harm to mentally ill inmates.

D. Maintenance of accurate, complete, and confidential mental health treatment records.

A treatment plan is intended to be a dynamic and fluid process that continues on a regularly scheduled basis, supplemented by constant updates and revisions. In order for such to be effective, treatment plans must be accurate, complete, readily accessible to professional staff, and confidential. During the trial, evidence was presented to the Court indicating that documentation and maintenance of these records is poor. The treatment plans and automated medical records ("AMR") do not clearly state problems, objectives, goals, or even the staff responsible.

The importance of maintaining accurate and complete treatment records is vital to any medical services delivery system. For mentally ill inmates in particular, treatment plans and AMR's are critical for assessing progress as well as the effect of medication and therapy. The evidence in this case shows that the record keeping system for SCDC is outmoded, poorly maintained, and not readily accessible to all staff.

The Court finds that SCDC's failure to maintain accurate and complete mental health treatment records represents a serious risk of harm to mentally ill inmates.

E. Administration of psychotropic medication only with appropriate supervision and periodic evaluation.

In evaluating this factor, some of the same concerns overlap with those of the previous factor – maintenance of accurate, complete, and confidential mental health treatment plans. The Court, however, will note two further instances that raise concerns. First, in the medical records of mentally ill inmates, nurses are required to sign their initials to confirm that medication was provided and administered. At trial, various medical records were introduced indicating the absence of those initials and absence of any record that medications were provided at all. This indicates that either the medication was not provided or that the nurses failed to maintain accurate records. The second instance concerns the suicide of Robert Hamburg. Mr. Hamburg's morning medications had expired – specifically his anti-psychotic medicine, Geoden, which he was supposed to receive twice a day. Nevertheless, his counselor was still recording that he was compliant with his medication – that he was receiving it in the mornings and evenings. Thus, Mr. Hamburg was only receiving half of his prescribed dosage of anti-psychotic medication. Mr. Hamburg committed suicide on June 9, 2010 at Perry Correctional Institute.

Pill lines at many institutions occur at 4:00 a.m., and mentally ill inmates are often left to their own devices to timely awake, stand in line, and then take their

medication. The timing, press of business, and lack of individual attention at the pill line lends itself to inmates failing to take psychotropic medications.

This Court finds that the failure to appropriately supervise, evaluate, and dispense psychotropic medications creates a serious risk of harm to mentally ill inmates.

F. A basic program to identify, treat, and supervise inmates at risk for suicide.

At trial, Dr. Patterson identified seven inmates at SCDC whose suicide deaths from 2008 to 2011 were both foreseeable and preventable. In his opinion, two common factors contributed to these deaths. First, CI cells are located in segregation units, not in a medical setting, and thus lack sufficient medical interaction and treatment. Inmates in CI cells spend the entire day in those cells, and are held for long periods of time – typically one to two weeks, but sometimes longer. As stated previously, the CI cells are cold and unsanitary, the inmates are stripped out, and often not given a mattress. In addition, most inmates in CI do not see a psychiatrist, and interaction with a counselor is brief, limited, and not confidential. Inmates in CI are not allowed to have group or individual therapy. Second, SCDC's policy does not require constant observation; rather, inmates in CI cells are checked on fifteen minute intervals. The evidence before the Court contained proven instances of fabricated observation logs. These practices create a substantial risk of serious medical harm to mentally ill inmates.

II. REMEDY TO ADDRESS CONSTITUTIONAL VIOLATIONS

In devising a remedy for the constitutional deficiencies at SCDC, the Court is required to balance two competing interests. First, it is not the role of this Court to micromanage the daily administration of the mental health program at SCDC. Second, under the separation of powers doctrine, this Court should be constrained and not usurp the authority and responsibility of other branches of government. Moreover, this decision comes in a time of economic recession and heavy scrutiny of governmental expenditures. However, the Court is bound to uphold the South Carolina Constitution and protect the rights of the mentally ill inmates at SCDC. *See Brown v. Plata*, 131 S. Ct. 1910, 1928-29 (2011). Finally, the Court is convinced that to view the evidence put forth in this case and then do nothing would be a great miscarriage of justice.

To address the constitutional deficiencies in the mental health system at SCDC, Plaintiffs have proposed a remedial plan comprised of three components. First, SCDC would be required to submit a written plan for remedying the systemic deficiencies identified by the Court. Second, in creating this plan, SCDC must rely upon factors and guidelines identified by the Court, which the Court will then review and either approve or disapprove. Third, the Court will retain jurisdiction of this case and appoint expert monitors and/or a special master who will report

periodically to the Court. SCDC has raised objections to this plan, arguing that it constitutes an impermissible burden shift and is violative of the separation of powers doctrine.

The Court denies SCDC's objections. It would be highly impractical for Plaintiffs to identify and create a plan to implement changes to the mental health system at SCDC. Rather, once the Court has ruled, SCDC is in the best position to propose steps and changes to its existing system. *See Alexander S. v. Boyd*, 876 F. Supp. 773, 804-04 (D.S.C. 1995). As a result, the Court adopts Plaintiffs' proposals and requires SCDC to submit a written plan to the Court within one hundred eighty (180) days of the date of the final Order in this case. In executing this remedial plan to be submitted by SCDC, the Court will retain jurisdiction, but also intends to appoint a monitor who will report periodically to the Court. The Court will provide the parties, through motions, an opportunity to suggest the appropriate appointee(s) to oversee this process.

In formulating specific factors and guidelines for SCDC's remedial plan, the Court will again utilize the *Ruiz* factors above, along with additional sub-factors and components listed thereunder. In devising a plan to remedy the constitutional deficiencies identified by the Court, SCDC shall be directed in the Order to prepare a written plan that includes, at a minimum, the following:

A. The development of a systematic program for screening and evaluating inmates to more accurately identify those in need of mental health care.

- i. Develop and implement screening parameters and modalities that will more accurately diagnose serious mental illness among incoming inmates at R & E with the stated goal of increasing the number of inmates recognized as mentally ill and being admitted to the mental health program by a minimum of two percentage points (14.9 % of the inmate population);
- ii. The implementation of a formal quality management program under which mental health screening practices are reviewed and deficiencies identified in ongoing SCDC audits of R&E counselors are corrected;
- iii. Enforcement of SCDC policies relating to the timeliness of assessment and treatment once an incoming inmate at R&E is determined to be mentally ill; and,
- iv. Development of a program that regularly assesses inmates within the general population for evidence of developing mental illness and provides timely access to mental health care.

B. The development of a comprehensive mental health treatment program that prohibits inappropriate segregation of inmates in mental health crisis, generally requires improved treatment of

mentally ill inmates, and substantially improves/increases mental health care facilities within SCDC.

1. Easier Access to Higher Levels of Care.
 - i. Significantly increase the number of area mental health inmates vis-a-vis outpatient mental health inmates and provide sufficient facilities therefor;
 - ii. Significantly increase the number of male and female inmates receiving intermediate care services and provide sufficient facilities therefor;
 - iii. Significantly increase the number of male and female inmates receiving inpatient psychiatric services, requiring the substantial renovation and upgrade of Gilliam Psychiatric Hospital, or its demolition for construction of a new facility;
 - iv. Significantly increase clinical staffing at all levels to provide more mental health services at all levels of care; and,
 - v. The implementation of a formal quality management program under which denial of access to higher levels of mental care is reviewed.
2. Segregation.
 - i. Provide access for segregated inmates to group and individual therapy services;
 - ii. Provide more out-of-cell time for segregated mentally ill inmates;
 - iii. Document timeliness of sessions for segregated inmates with psychiatrists, psychiatric nurse practitioners, and mental health counselors and timely review of such documentation;
 - iv. Provide access for segregated inmates to higher levels of mental health services when needed;
 - v. The collection of data and issuance of quarterly reports identifying the percentage of mentally ill and non-mentally ill inmates in segregation compared to the percentage of each group in the total prison population with the stated goal of substantially decreasing segregation of mentally ill inmates and substantially decreasing the average length of stay in segregation for mentally ill inmates.
 - vi. Undertake significant, documented improvement in the cleanliness and temperature of segregation cells; and,
 - vii. The implementation of a formal quality management program under which segregation practices and conditions are reviewed.

3. Use of Force Factors and Guidelines

- i. Development and implementation of a master plan to eliminate the disproportionate use of force, including pepper spray and the restraint chair, against inmates with mental illness;
- ii. The plan will further require that all instruments of force, (e.g, chemical agents and restraint chairs) be employed in a manner fully consistent with manufacturer's instructions, and track such use in a way to enforce such compliance;
- iii. Prohibit the use of restraints in the crucifix or other positions that do not conform to generally accepted correctional standards and enforce compliance;
- iv. Prohibit use of restraints for pre-determined periods of time and for longer than necessary to gain control, and track such use to enforce compliance;
- v. The collection of data and issuance of quarterly reports identifying the length of time and mental health status of inmates placed in restraint chairs;
- vi. Prohibit the use of crowd control canisters, such as MK-9, in individual cells;
- vii. Notification to clinical counselors prior to the use of planned force to request assistance in avoiding the necessity of such force and managing the conduct of inmates with mental illness;
- viii. Collection of data and issuance of quarterly reports concerning the use of force incidents against mentally ill and non-mentally ill inmates; and
- ix. The development of a formal quality management program under which use of force incidents involving mentally ill inmates are reviewed.

C. Employment of a sufficient number of trained mental health professionals.

- i. Increase clinical staffing ratios at all levels to be more consistent with guidelines recommended by the American Psychiatric Association, the American Correctional Association, and/or the court-appointed monitor;
- ii. Increase the involvement of appropriate SCDC mental health clinicians in treatment planning and treatment teams;
- iii. Develop a plan to decrease vacancy rates of clinical staff positions which may include the hiring of a recruiter, increase in pay grades to more competitive rates, and decreased workloads;

- iv. Require appropriate credentialing of mental health counselors;
- v. Develop a remedial program with provisions for dismissal of clinical staff who repetitively fail audits; and,
- vi. Implement a formal quality management program under which clinical staff are reviewed.

D. Maintenance of accurate, complete, and confidential mental health treatment records.

- i. Develop a program that dramatically improves SCDC's ability to store and retrieve, on a reasonably expedited basis:
 - a. Names of FTE clinicians who provide mental health services;
 - b. Inmates transferred for ICS and inpatient services;
 - c. Segregation and crisis intervention logs;
 - d. Records related to any mental health program or unit (including behavior management or self-injurious behavior programs);
 - e. Use of force documentation and videotapes;
 - f. Quarterly reports reflecting total use of force incidents against mentally ill and non-mentally ill inmates by institution;
 - g. Quarterly reports reflecting total and average lengths of stay in segregation and CI for mentally ill and non-mentally ill inmates by segregation status and by institution;
 - h. Quality management documents; and,
 - i. Medical, medication administration, and disciplinary records.
- ii. The development of a formal quality management program under which the mental health management information system is annually reviewed and upgraded as needed.

E. Administration of psychotropic medication only with appropriate supervision and periodic evaluation.

- i. Improve the quality of AMR documentation;
- ii. Require a higher degree of accountability for clinicians responsible for completing and monitoring AMR's;
- iii. Review the reasonableness of times scheduled for pill lines; and,
- iv. Develop a formal quality management program under which medication administration records are reviewed.

F. A basic program to identify, treat, and supervise inmates at risk for suicide.

- i. Locate all CI cells in a healthcare setting;
- ii. Prohibit any use for CI purposes of alternative spaces such as shower stalls, rec cages, holding cells, and interview booths;
- iii. Implement the practice of continuous observation of suicidal inmates;
- iv. Provide clean, suicide-resistant clothing, blankets, and mattresses to inmates in CI;
- v. Increase access to showers for CI inmates;
- vi. Provide access to confidential meetings with mental health counselors, psychiatrists, and psychiatric nurse practitioners for CI inmates; and,
- vii. Implement a formal quality management program under which crisis intervention practices are reviewed.

INSTRUCTIONS FOR PREPARATION OF ORDER

Attorney Andrews is requested to prepare an Order within sixty (60) days of the date of this letter detailing the decision stated herein and forward the same to opposing counsel. If additional time is needed, please advise this office. Attorneys for Defendant are not asked to agree or consent to this Order, but are requested to review it for mistake of fact or misstatement of their party's position. Thereafter, Attorney Andrews is asked to forward the finalized Order via email (JBaxley1c@sccourts.org) in Microsoft Word format to my office for signature, which will then be finalized, signed, and returned to him for filing and formal service on the parties.

The specific items contained in Section Two to be included in the remedial plan are not intended to be an exhaustive list. Plaintiffs' counsel may add any items referred to in the evidence and the Court will subsequently review such inclusions before the final Order is signed.

While not contained in detail in this letter, Plaintiffs' counsel is further requested to discuss within the Order the Court's authority to direct an agency of the Executive branch of government to take any particular action and the Court's prerogatives under the Separation of Powers doctrine.

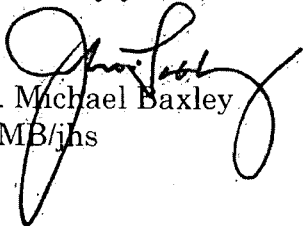
For purposes of illustration, Plaintiffs' counsel is also requested to include within the Order ten (10) specific examples from the evidence of this case where a seriously mentally ill inmate has suffered mistreatment, substantial injury, or death due to deficiencies in the SCDC mental health services system.

Due to the complexity of the requested proposed order, it is anticipated that counsel will need further communications and perhaps guidance from the Court as the Order is prepared. In that event, counsel is requested to put such

communications in writing and copy opposing counsel to avoid ex-parte communications.

This has been a complex case, both factually and legally, and I am grateful for the professionalism of all attorneys in advocating for their clients. It has been my pleasure to be associated with such capable and learned counsel.

Sincerely yours,



J. Michael Baxley
JMB/jhs

cc: Honorable Jeanette W. McBride (for filing)

Jennifer M. Baker

From: Baxley, J. Michael Law Clerk (James H. Scruggs, III) <JBaxleyLC@sccourts.org>
Sent: Tuesday, August 27, 2013 5:18 PM
To: Dan Westbrook; Daniel C. Plyler; stokes.harry@doc.state.sc.us; Andrew Lindemann; William H. Davidson II; Kenneth P. Woodington; Adam J. Bruyere
Cc: Stuart Andrews; Tammie Pope
Subject: RE: Mental health prison litigation

Counsel,

It has been brought to our attention that in their Fifth Amended Complaint, the Plaintiffs dropped their claim under Article 12, § 2. Therefore, to that extent, the Court's decision letter is amended to delete those references to the Plaintiff's prior claim under Article 12, § 2. The Court's decision as to Plaintiff's claim under Article I, § 15 is unaffected. Plaintiffs are still requested to provide an Order within sixty (60) days of the date of the decision letter which details the decision of the Court, excepting those portions, however, that refer solely to the Plaintiffs' previous claim under Article 12, § 2. We are aware that the evidence in the two constitutional claims is substantially similar. If I can be of any further assistance, please do not hesitate to contact me.

Best regards,
Jamie Scruggs

James H. Scruggs, III
Law Clerk to the Honorable J. Michael Baxley
Circuit Court of the Fourth Judicial Circuit
531 E. Carolina Avenue
Hartsville, South Carolina 29550
Telephone: 843.383.4114
Fax: 843.383.4116
jbaxleylc@sccourts.org

From: Dan Westbrook [<mailto:dan.westbrook@nelsonmullins.com>]
Sent: Tuesday, August 27, 2013 1:50 PM
To: Baxley, J. Michael Law Clerk (James H. Scruggs, III); dplyler@dml-law.com; stokes.harry@doc.state.sc.us
Cc: Stuart Andrews; Tammie Pope
Subject: RE: Mental health prison litigation

Jamie, here's another one I mistakenly sent directly to the judge.

From: Dan Westbrook
Sent: Monday, August 26, 2013 11:13 AM
To: 'Baxley, J. Michael'; dplyler@dml-law.com; stokes.harry@doc.state.sc.us
Cc: Stuart Andrews; Tammie Pope
Subject: RE: Mental health prison litigation

Jamie, I forgot to add something to my previous note below. It appears from the decision letter that Judge Baxley ruled in Plaintiffs' favor on our minimally adequate (Article 12, section 2) claim, as well as on our cruel and unusual punishment (Article 1, section 15) claim. In our 5th Amended Complaint, however, we dropped the Article 12, section 2 claim, so I wanted to call that to the judge's attention.

From: Dan Westbrook
Sent: Monday, August 26, 2013 10:51 AM
To: 'Baxley, J. Michael'; dplyler@dml-law.com; stokes.harry@doc.state.sc.us
Subject: RE: Mental health prison litigation

Jamie, can you tell us the status of the trial transcript? It would be useful to have in preparing the final order. Thanks,
Dan

From: Baxley, J. Michael [<mailto:JBaxleyJ@sccourts.org>]
Sent: Friday, August 23, 2013 5:04 PM
To: Dan Westbrook; dplyler@dml-law.com; stokes.harry@doc.state.sc.us; esmith@scaq.gov
Subject: Mental health prison litigation

Gentlemen:

Attached please find an electronic copy of the decision letter in the T.R., P.R., et al v. South Carolina Department of Corrections case. The original letter will be sent via U.S. mail today. This communication is not intended to effect service upon you and is provided solely for your information. Thank you for your patience while this case has been under advisement.

Mike Baxley

Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure.

If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

To ensure compliance with the requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including the attachments) is not intended or written to be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any transaction or tax-related matter[s]. To provide you with a communication that could be used to avoid penalties under the Internal Revenue Code will necessarily entail additional investigations, analysis and conclusions on our part.

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants certifies that the Appendix complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellants

Columbia, South Carolina

June 13, 2014