

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

C.B. BY AND THROUGH HIS NEXT
FRIEND, CHARLESTON DePRIEST, ET AL.

PLAINTIFFS

VS.

CIVIL NO. 3:10CV663-CWR-FKB

WALNUT GROVE CORRECTIONAL
AUTHORITY, ET AL.

DEFENDANTS

MOTIONS HEARING
VOLUME 1 OF 3

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
APRIL 1ST, 2015
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFFS: MS. MARGARET WINTER
MR. JODY E. OWENS II
MR. ROBERT B. MCDUFF

FOR THE DEFENDANTS: MR. GARY E. FRIEDMAN
MR. WILLIAM T. SILER, JR.
MR. HAROLD E. PIZZETTA, III
MS. KRISSY CASEY NOBILE

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR
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1 (COURT CALLED TO ORDER)

2 THE COURT: You may be seated.

3 THE CLERK: Before the court this morning is *CB, by*
4 *and through his next friend, Charles DePriest, et al. v. Walnut*
5 *Grove Correctional Authority, et al., civil action number*
6 *3:10cv663CWR-FKB.*

7 THE COURT: Good morning.

8 (NOT ALL RESPONDED "GOOD MORNING")

9 THE COURT: Good morning.

10 (ALL RESPONDED "GOOD MORNING")

11 THE COURT: We're here today, let's -- sort of some
12 housekeeping measures. I understand that there was a call
13 placed yesterday with respect to who could bring in laptops or
14 telephones. Obviously the attorneys. Attorneys always have
15 the right to bring in laptops, cell phones or anything that
16 might assist you in carrying out your duties. Obviously,
17 you're responsible for making sure it doesn't disrupt the court
18 in any way. I think there might have been some confusion this
19 morning with respect to that.

20 We're here for this hearing on -- this hearing will
21 serve dual purposes, I think. One is whether the State has --
22 is in breach of its obligations under the consent decree, as
23 I -- that's a matter that we have been working on for several
24 months, and the State has recently filed its motion to
25 terminate the consent decree. That may not be the proper term

1 as its styled, but basically that's it.

2 So we will proceed, again, sort of dual purposes. In
3 response to e-mail from -- I understand counsel might have
4 other obligations. This hearing is going to last probably a
5 full three days. I do encourage the parties to always
6 reevaluate your positions throughout the course of any hearing
7 and at breaks, overnight, while you're considering moving
8 forward on your case, consider reevaluating your positions to
9 see if anything could be worked out. And, obviously, the court
10 will allow you to do that.

11 And I do know attorneys have other obligations. So
12 you'll be permitted to take care of those other obligations if
13 you're not in court. I've received an e-mail in that regard.

14 I've also received correspondence about making sure
15 that this hearing proceeds as efficiently as possible, and I'm
16 going to do the best that I can to make that happen. However,
17 I'm not going to -- the time of my law clerks and staff is
18 better utilized trying to work on other cases. So I won't have
19 anyone here. And I'm certainly not going to put a stopwatch on
20 anything. We do know this matter is set for three days of
21 hearing. And, of course, it's obviously the court's -- my
22 policy that we go until the court is satisfied with making sure
23 the court has before it everything that the court needs. So
24 we'll proceed in that way.

25 Is there any other -- any preliminary matters, any

1 other things we need to take care of before we begin the
2 hearing?

3 MS. WINTER: Your Honor, we have two prisoners here,
4 class representatives, Jeremy Evans and Charles Owens, who are
5 being held in a holding cell. We would like to have the class
6 reps present in the courtroom throughout the proceeding.

7 THE COURT: That might take a minute for us to do it.
8 We have to -- the court will need to get with the marshal
9 service -- with the marshal service and CSO's, because the two
10 gentlemen are in custody. Right?

11 MS. WINTER: Yes.

12 THE COURT: They're currently in custody?

13 MS. WINTER: Yes, they're currently in custody. And I
14 believe they're in a holding cell right adjacent to this room.

15 THE COURT: Okay. Is there anything else?

16 MS. WINTER: I'm not sure that it's even pertinent
17 this morning, but plaintiffs would like to invoke the rule on
18 witnesses and have any nonparty excluded who is on either
19 side's witness list who might be expected to testify other than
20 a representative for MDOC, who's the only party in this case.

21 THE COURT: You'll be responsible for monitoring your
22 own witnesses. In addition to representatives, the expert
23 witnesses will be allowed to stay in through the proceedings as
24 well, whether they're monitors or anyone's designated expert.
25 That will be Mr. Vail, I believe, and Mr. Roth, I think, and

1 some others.

2 MS. WINTER: Yes, of course -- not the experts here,
3 your Honor.

4 THE COURT: I'm sorry? Not the experts?

5 MS. WINTER: No, I wasn't referring to the experts.

6 THE COURT: So each party is responsible for making
7 sure that there are no witnesses other than class
8 representatives or representatives of the respective defendant.

9 MS. WINTER: Could we ask the defendants to identify
10 who their representative is for MDOC?

11 THE COURT: Okay. Mr. Friedman?

12 MR. FRIEDMAN: We're not going to have one.

13 THE COURT: Okay. All right.

14 MS. WINTER: Thank you.

15 THE COURT: All right.

16 MR. FRIEDMAN: Procedurally, am I correct that we will
17 do post-hearing briefs to the court?

18 THE COURT: In all likelihood, yes. And that
19 timetable will be set forth at the conclusion of the hearing.

20 MR. FRIEDMAN: Okay. I'm not talking about timing
21 right now. I just wanted to make sure that's the way we're
22 going to proceed. I would prefer to brief this.

23 THE COURT: To brief what?

24 MR. FRIEDMAN: I'd prefer submitting post-hearing
25 briefs.

1 THE COURT: Yes. In all likelihood, the court
2 generally allow its parties to submit post filing briefs in
3 bench hearings. So in all likelihood you will be given that
4 right.

5 MR. FRIEDMAN: Okay. Great. Thank you.
6 One other thing, I want to make sure what we're here to try.
7 As the court has recognized, we filed a motion to terminate the
8 entire consent decree. However, it is my understanding we're
9 not here to try the medical portion of it. Frankly, I don't
10 have anything to do with the medical portion of it anyway. I
11 couldn't try it. But as I appreciate things, this is just the
12 nonmedical part of the consent decree, that we're here on the
13 motion to terminate at this point. Is that correct?

14 THE COURT: I can't necessarily say that because I
15 haven't gotten all the papers -- I have not gotten through all
16 the papers on your motion to terminate. So I -- you know, and
17 I don't know what all your grounds for the termination are.

18 MR. FRIEDMAN: Well, we filed a motion -- we filed two
19 motions. One was a motion to terminate. The other was a
20 motion to consolidate and continue this hearing to consolidate
21 the term -- motion to terminate and the -- their motion to
22 reopen and enforce. But -- or modify and enforce, but -- which
23 would include the medical end.

24 And the reason we had asked to continue was because
25 the medical end, we're not -- we don't represent MDOC regarding

1 medical, and we assumed that that would take a whole another
2 set of experts than -- who aren't here. So I assume neither
3 one of us are -- I mean, we're here to try the rest of it, but
4 I assume neither one of us are prepared to try the medical end
5 of it at this point.

6 THE COURT: Well, I'll hear from the plaintiffs, but I
7 do want to say this. The motion to continue the hearing is
8 denied.

9 MR. FRIEDMAN: Well, I'm not -- I figured that one
10 out.

11 THE COURT: I have not ruled on it specifically,
12 but -- but that portion of it is denied. This is a hearing
13 that we've planned for several weeks. So we're going to move
14 forward with the hearing. I went back and looked at the
15 transcript from January the 28th, and I think medical at least
16 was not an issue with respect to the contempt -- the
17 plaintiffs' current motion that -- to be heard and tried today.
18 Is that a fair statement? Is that where we are?

19 MS. WINTER: Yes.

20 THE COURT: Okay. So no medical.

21 MR. FRIEDMAN: I just wanted to make sure I knew what
22 the ground rules were here.

23 THE COURT: Okay. I'm going to take a short break so
24 that we can work out the logistics of having the class reps in
25 the courtroom. They are parties, and they do have a right to

1 be here. That's one thing. And the parties then should be
2 prepared to begin their hearing, and I'm going to ask that the
3 parties be prepared to do an opening.

4 I'm sitting up like a jury, because I need to know
5 what your -- what your road map is and how is it -- what do you
6 intend to prove. That's going to help me in looking at the
7 issues during the trial as well as posttrial, your plan of how
8 you intend to prove your case. I need that road map. I'm sure
9 I can glean from all these papers here what your road map is,
10 but I prefer a little shorter map.

11 MS. WINTER: We're prepared with a short road map,
12 your Honor.

13 THE COURT: Okay. All right. So we'll be in recess,
14 say, 10 minutes; and, hopefully, we'll work out the logistics
15 of having the class reps in the courtroom.

16 (RECESS)

17 THE COURT: Are we ready to proceed?

18 MS. WINTER: Plaintiffs are ready, your Honor.

19 THE COURT: Plaintiffs. Defendant ready to proceed?

20 MR. FRIEDMAN: Defendant is ready.

21 THE COURT: All right. Plaintiffs, I'll hear from you
22 then with the opening.

23 MS. WINTER: Shall I come to the podium?

24 THE COURT: Yes. Make sure the green light is on.

25 MS. WINTER: It is.

1 THE COURT: All right.

2 **OPENING STATEMENT BY THE PLAINTIFFS**

3 MS. WINTER: Your Honor, eight months ago the
4 plaintiffs asked the court for an evidentiary hearing so that
5 we could present evidence of dangerously violent conditions at
6 Walnut Grove. And ever since then the Mississippi Department
7 of Corrections and its private prison contractor, Management
8 and Training Corporation, has done their best to prevent this
9 evidentiary hearing from taking place.

10 In three years, plaintiffs will show, MDOC has never
11 yet been in compliance with the consent decree in this case.
12 And yet on the very eve of this hearing to enforce the consent
13 decree, MDOC and MTC have moved to terminate the consent decree
14 and to postpone the hearing indefinitely. This is part of a
15 long pattern of their conduct in this case. It's to postpone,
16 delay, deny and avoid disclosure of the evidence.

17 But finally here we are, and the evidence will finally
18 come to light. The court will finally be able to evaluate not
19 only the documentary evidence but also the credibility of the
20 witnesses in this case. Plaintiffs will prove that MDOC is
21 subjecting the prisoners to a current and ongoing violation of
22 their right under the Eighth Amendment to be protected from
23 violence and excessive force.

24 We will also prove that MDOC has been violating the
25 consent decree in this case ever since the court entered it

1 three years ago. And at the conclusion of the presentation of
2 the evidence, plaintiffs will ask the court to find that MDOC
3 is violating the prisoners' Eighth Amendment right to
4 protection from a substantial risk of serious injury from
5 violence.

6 And we will ask the court to determine based on the
7 record of this hearing what are the least intrusive and most
8 narrowly tailored remedies necessary to correct current and --
9 current and ongoing violations of the Eighth Amendment rights
10 of the Walnut Grove prisoners to reasonable protection from
11 violence.

12 Plaintiffs' correction expert -- excuse me, your
13 Honor.

14 (PAUSE)

15 MS. WINTER: Plaintiffs' corrections expert, Eldon
16 Vail, is the former secretary of Washington State Department of
17 Corrections, the highest position in that state's department of
18 corrections. He has 35 years' experience working in and
19 administering prisons.

20 Mr. Vail will testify that MDOC and MTC are woefully
21 unprepared to respond to security emergencies at Walnut Grove,
22 and the result -- as a result, there is a current, ongoing risk
23 to prisoners at Walnut Grove of serious injury from violence.

24 The evidence will show that in 2014 there were two
25 serious riots at Walnut Grove within seven months of each

1 other. These outbreaks involved hundreds of inmates. Many
2 received serious injuries, fractured bone, collapsed lungs,
3 multiple stabbings, and puncture wounds. And as you will see,
4 your Honor, today from video recordings, those riots could
5 easily have resulted in loss of life. It was pure luck that it
6 didn't.

7 The evidence will show that MDOC and MTC learned
8 nothing from the New Year's riot. And as a result, the July
9 riot, a few months later, was even worse than the New Year's
10 riot. MTC was no better prepared to respond, and the serious
11 harm that occurred was completely preventable harm.

12 We will be showing the court excerpts from the
13 surveillance videos of the July riot. These video recordings
14 are deeply disturbing. They show how shockingly violent that
15 riot was. It's impossible to convey in words. You have to
16 actually watch the event unfold, as you will.

17 The video recording shows how very wrong things can go
18 when a prison is not equipped to respond to an emergency.
19 Mr. Vail will use these video recordings to explain to the
20 court how and why this emergency got so horribly out of
21 control. And we will present proof that MDOC and MTC are no
22 better prepared today to respond to that kind of emergency than
23 they were in the New Year's riot or in the July riot last year.
24 Mr. Vail will testify that the level of shocking incompetence
25 revealed in these videos still hasn't been cured.

1 This court will also hear the testimony of a young
2 man, Jeremy Evans, who is currently a prisoner at Walnut Grove.
3 Mr. Evans is a licensed pharmacy technician and a licensed
4 certified nursing assistant, and he has been a prisoner worker
5 in the medical department at Walnut Grove for the last three
6 years.

7 He will testify about the sexual harassment and abuse
8 that he has witnessed and experienced at Walnut Grove. He will
9 testify about the ongoing gang violence, about the dangerous
10 staffing deficiencies, and he will testify about staff
11 involvement in bringing contraband to Walnut Grove. Mr. Evans
12 will also testify to the horror he witnessed in the aftermath
13 of each riot last year, with bodies on the floor and the stench
14 of blood in the air.

15 The court will also hear from another inmate at Walnut
16 Grove, Charles Evans -- excuse me, Charles Owens. Mr. Owens is
17 a former sheriff's deputy officer and fireman. Mr. Owens will
18 testify about staff corruption at Walnut Grove, including the
19 daily supply of drugs that flows into Walnut Grove and how MTC
20 security staff not only deliver the drugs to the prisoners but
21 also hide from view the bodies of unconscious inmates who have
22 passed out on the floor from drugs.

23 The evidence will show that the doors at Walnut Grove
24 are still not secure. They can easily be jammed by the
25 inmates. This is the very same problem that the

1 U.S. Department of Justice Civil Rights Division found at
2 Walnut Grove in 2011 and sternly reprimanded MDOC for this
3 problem in DOJ's 2012 report.

4 Within the last couple of months with this hearing
5 looming, MDOC did finally fix some of the doors, but only in
6 two of the housing units, and they left the hinged doors --
7 which, by the way, housing units are not currently occupied.
8 They left the hinged doors throughout the majority of the
9 housing areas as insecure as ever.

10 MTC even rejected plaintiffs' modest request that they
11 bring in an independent technical security expert simply to
12 diagnose the problem and to report on possible solutions. It
13 is truly incredible that MTC and MDOC have allowed such a
14 fundamental security breach to go on for years, to this day.
15 The public should be able to expect that the millions of tax
16 dollars that go into the pockets of private prison operators
17 should at least result in cell doors that can be securely
18 locked.

19 The evidence will show that thanks almost entirely to
20 the efforts of plaintiffs' expert, Eldon Vail, and the court's
21 monitors to enforce the consent decree and their constant
22 watchfulness, there have been significant changes in the
23 composition of the prisoner population at Walnut Grove which
24 has helped reduce the level of violence since last July.

25 What are these changes? There are no longer long-term

1 segregation inmates at Walnut Grove. Why is that? That's
2 because after the July riot, the monitors persuaded MDOC that
3 MTC is simply incapable of managing long-term segregation
4 prisoners at Walnut Grove. Furthermore, there are no longer
5 close custody inmates at Walnut Grove. And why is that?
6 That's because MDOC finally agreed with plaintiffs' expert
7 Eldon Vail and the monitors that MTC is simply incapable of
8 handling a close custody population at Walnut Grove.

9 And then within the last several days, MDOC and MTC
10 agreed to pop -- to cap the population at Walnut Grove at a
11 third of its rated capacity. And these are changes that do
12 make the prison somewhat less dangerous than it was in July.
13 But as you will hear from the testimony of high-level MTC
14 corporate officials, these changes could be reversed at the
15 drop of a hat.

16 MTC Vice President Odie Washington and MTC's Region IV
17 Vice President Marjorie Brown say that the corporation is
18 ready, willing, and able to take back those close custody and
19 long-term segregation inmates whenever MDOC wants. After all,
20 MTC is a business, and MDOC is a customer. But if you watch
21 those videos of the riots that we're going to be showing the
22 court today and you see the damage to human lives, you know
23 that operating a prison has got to be about more than business
24 and profits.

25 Mr. Vail will testify that MDOC and MTC still haven't

1 addressed the root causes of the violence that has plagued this
2 prison for years. And what are those root causes? Management
3 and Training Corporation, like its predecessor, GEO, and
4 then -- and before that Cornell, is operating the prison based
5 on its interest in profits, not simply on sound correctional
6 decision-making. And, furthermore, another root cause is that
7 MDOC is not vigorously monitoring the performance of its
8 contractor. It is not demanding that MTC do the right thing.
9 MDOC is not holding its contractor, MTC, accountable.

10 Finally, Mr. Vail will give his opinion based on the
11 current record as to what remedies are needed to minimize the
12 excessive risk of violence at Walnut Grove. Mr. Vail will go
13 through the current consent decree paragraph by paragraph
14 regarding substantive remedies; and he will explain to the
15 court which ones he thinks are necessary, not all of them are
16 still necessary, but which ones are still necessary to address
17 a current and ongoing violation of the Eighth Amendment. And
18 Mr. Vail will also explain what additional remedies the court
19 should enter, the most narrowly tailored remedies to address
20 the ongoing violation.

21 Thank you, your Honor. That's all I have for opening.

22 THE COURT: One quick question for you. You indicated
23 the monitors -- that MTC -- you would expect to prove that MTC
24 made some changes because it's recommended by the monitors.

25 MS. WINTER: Yes.

1 THE COURT: No long-term segregation, for example, and
2 no longer close custody inmates.

3 MS. WINTER: Yes.

4 THE COURT: And they agreed to decrease the
5 population. Was that because -- you did not tie that to a
6 recommendation by the monitors. But did that come -- the
7 reduction in prison population, did that come because the
8 monitors had recommended that?

9 MS. WINTER: Your Honor, I'm -- the monitors will be
10 available to you, at least Mr. Martin will. And I think you
11 should ask him. It is my understanding that that --

12 THE COURT: That's fine. I just --

13 MS. WINTER: Yes.

14 THE COURT: -- I just noticed when you were tying the
15 monitors --

16 MS. WINTER: Yes. I don't -- I believe that that was
17 spontaneous in response to this looming hearing. But --

18 THE COURT: Okay. That's fine.

19 MS. WINTER: Thank you.

20 THE COURT: Thank you, Ms. Winter.

21 (PAUSE)

22 **OPENING STATEMENT BY THE DEFENSE**

23 MR. FRIEDMAN: May it please the court.

24 THE COURT: You may proceed.

25 MR. FRIEDMAN: As always, Ms. Winter can make

1 something by -- something sound terrible when it's not. We've
2 moved to terminate the consent decree pursuant to the Prison
3 Litigation Reform Act. Consequently, the plaintiff has the
4 burden of showing a current and ongoing violation of the Eighth
5 Amendment.

6 A current and ongoing violation is not a violation
7 that occurred in the past or that may occur in the future. So
8 when Ms. Winter says they're going to show that, you know, they
9 may bring people back in the future, that's irrelevant to our
10 hearing here today. What may happen in the future is
11 irrelevant. It is -- what we're here today is to talk about a
12 violation that exists at the time of this inquiry, according to
13 the PLRA.

14 As you've heard, the plaintiffs want to focus on
15 incidents -- the incidents back in December of 2013 and July of
16 2014. First, those obviously aren't current. Many things have
17 happened since then. Many significant changes have taken
18 place. Ms. Winter alluded to many of them. Regardless of why
19 they took place, they've taken place. It doesn't matter.

20 Close custody and long-term seg are no more. And by
21 the way, the two incidents that they keep referring to happened
22 in close custody. It would be impossible for it to happen
23 today, because there is no close custody. You can't have a --
24 as they call, a riot in close custody today at Walnut Grove
25 because there's no such thing as close custody at Walnut Grove.

1 The population is down by approximately 300 inmates.
2 Part of that, quite frankly, is now there's only minimum/medium
3 security at Walnut Grove; and, as a result, there are just not
4 enough minimum and medium security people to put there in the
5 system. In any event, the current population today is 962 or
6 less, maybe less. I'd have to get -- we will give you the
7 exact number.

8 There have been many security upgrades. There's been
9 netting put up, body scanners, several of them, package
10 scanners, several security upgrades, significant amount of
11 training, significant amount of revisions to policies, all
12 after July of 2014. In short, it is just not the same place
13 that they will show you videos about. Just remember when you
14 see the videos, they happened in close custody. The videos are
15 what they are, but they couldn't happen again; and the place
16 has changed radically. Ms. Winter, I think, even admitted that
17 just a minute ago.

18 The court only need look at its sixth monitors'
19 report. It doesn't describe a facility that is unreasonably
20 unsafe and in violation of the Eighth Amendment. Now,
21 understand, these are the court's monitors. These aren't hired
22 guns by either side. In fact, the monitors -- and your sixth
23 monitors' report state, quote, This significant reduction in
24 the facility population combined with limiting the population
25 to more manageable minimum/medium custody inmates bodes well

1 for the future safe operation of WGYCF. There's no youth there
2 anymore. So I'm not sure that they -- end quote. That's on
3 page five.

4 That is not to say that there's going to be no
5 incidents at all ever at Walnut Grove. There will be. It's a
6 prison. And I'm sure that the plaintiffs will come up with
7 whatever they can come up with about any incident they can
8 find. But as Mr. Vail said on page five of his report, quote,
9 no one suggests that you can run a prison without problems.
10 Bad things happen in prisons and always will, end quote. It's
11 not perfect. There's no perfect prison. Things are going to
12 happen because of the kind of people you're dealing with.
13 They're in prison for a reason.

14 So there will be times when they -- when things
15 happen. However, if you look at your sixth monitors' report,
16 which is really all you have to do, it does not describe an
17 unreasonably unsafe facility in violation of the Eighth
18 Amendment. It simply does not. And, therefore, we ask the
19 court to deny the plaintiffs' motion and grant the defendants'
20 motion to terminate the consent decree in all respects except
21 for the medical, which is not part of this particular hearing.

22 THE COURT: Let me ask you something, Mr. Friedman.

23 MR. FRIEDMAN: Yes, sir.

24 THE COURT: Plaintiffs filed this motion, I think,
25 back in August on the heels of the July --

1 MR. FRIEDMAN: Yes, sir.

2 THE COURT: -- or some time shortly after the July --

3 MR. FRIEDMAN: Yeah.

4 THE COURT: -- riot. And the court has worked with
5 the parties. We tried to find appropriate hearing dates, and I
6 think at some point in time the defendants -- well, the parties
7 knew that they had to work through some issues through the
8 magistrate judge.

9 MR. FRIEDMAN: Yes, sir.

10 THE COURT: If the court accepts what your theory is
11 right now that you can't look back, you can only look at the
12 point where we are right today and not even look forward.

13 MR. FRIEDMAN: Well, you can't look -- I mean, the law
14 is clear you can't look forward, because there's no way --
15 nobody has a Ouija board to determine what's going to happen.
16 As far as looking back, I'm not saying that it's got to be
17 today; but, you know, a reasonable period is current and
18 ongoing. But, like I said, July of 2014 is not current because
19 it's an entirely different place now for a lot of the reasons
20 Ms. Winter brought up. It is not the same place.

21 THE COURT: Does the court take -- should the court
22 take responsibility for that then with the delay that has
23 occurred then from hearing the initial motion? The motion was
24 filed close to the time that it happened.

25 MR. FRIEDMAN: I understand, but let's -- you know,

1 this brings up an interesting issue that has intrigued me,
2 frankly. The plaintiffs have argued now that they need this
3 hearing because MTC and MDOC keep making changes and it's a
4 moving target. Now, understand that we've been making changes
5 to improve the place and to address many of the issues that
6 have been brought up. So, yes, changes have been made.

7 But if we had stood up here and said we hadn't made
8 any changes, what would you think then? So we're in a box. If
9 we make changes, we're a moving target and they're going to run
10 out of issues. And if we don't make changes, we hadn't done
11 what we were supposed to do. So what are we supposed to do?
12 That was the argument they made to the magistrate, that they
13 need this hearing right now because we keep making changes.
14 Yes, we will always make -- they know it. They always make
15 changes. That's just the nature of the beast.

16 They're going to always make upgrades and change
17 policies and address issues as they come up. That's just what
18 they're supposed to do. In fact, that's what the consent
19 decree says they're supposed to do. That's what -- and they're
20 supposed to work with the monitors to address these problems.
21 That's what they've been doing. That's how we got to the sixth
22 monitors' report that says -- that bodes well the changes --
23 the changes bode well for the institution.

24 And I want to stress to you, the monitors are the
25 court's monitors. They're not here to make either one of us

1 happy. They're the court's monitors. So it would seem to me
2 that that ought to carry some weight with this court.

3 Now, the issue is not -- you know, if you look back on
4 how we got here today, it's laid out in one of our briefs; and
5 it was not that, as Ms. Winter keeps saying, we just keep
6 stalling. We had a hearing -- and I may have this a little
7 wrong. I can probably read it to you out of our brief because
8 we have it laid out in there, the procedural history. But we
9 got together in January to set this hearing. Originally, I
10 think it was going to be first of March.

11 And then we got to looking at the experts and how long
12 that would take and also the sixth monitors' report. And I
13 think it was the court -- you can look back at your text
14 orders. I think it was a couple of text orders here. I think
15 it was the court that said -- well, I know that you decided
16 that we'd have this hearing today, starting today -- I think it
17 was postponed one day because of logistics, but today.

18 And then I believe the decision was made also to wait
19 and see what the sixth monitors' report was going to be. I
20 think that was again the court's decision. Again, there are
21 text orders and it's laid out for you. I'm doing this by
22 memory, which at my age probably isn't the thing to do. So
23 this isn't a question of postponing, just trying to string
24 things out from the defendants' standpoint.

25 But the fact of the matter is, you can't try this

1 based on what was going on in July, because that place doesn't
2 exist anymore. It just doesn't exist. And to go back and say
3 we're going to try it on what was going on in July in close
4 custody when there is no close custody, I mean, it just defies
5 logic to me. And it also defies the Prison Litigation Reform
6 Act which requires current and ongoing.

7 Now, current and ongoing, I'm not saying it is --
8 we've got to do just today. I think the law is -- I'm going to
9 have to defer to Ms. Nobile over here. I believe the law is
10 some reasonable amount of time close to the present day, but
11 not the future. The future has nothing to do with this
12 hearing. What may happen, what could happen is irrelevant
13 under the PLRA.

14 So what we're saying is this court ought to look at
15 the condition of that prison as it is today and has been for
16 the last two or three months. And that is covered by your
17 monitors' report, that is without the close custody and the
18 long-term seg, that is with the reduction in population and
19 the -- all of the improvements that have been made that
20 obviously were made after July.

21 So if we want to go back and try something in July,
22 we're going to be trying something that doesn't exist today.
23 We'll be trying a situation that has nothing to do with reality
24 today. Wouldn't make any sense.

25 THE COURT: One of the things that would be looming

1 over the court's head then and so that the parties will be
2 aware, I understand that the State has filed its motion to
3 terminate filed on March 13th. Is that the first -- is that
4 when the State first became aware that they believed they were
5 in full compliance with the consent decree and that it was
6 time -- it was now time for the court to get out of the
7 business of monitoring this particular prison?

8 MR. FRIEDMAN: The thought process was -- I mean, we
9 obviously -- MTC and MDOC thought they were in compliance, you
10 know, sometime after July of 2014. But the reason for the
11 timing of our motion was, once we got the sixth monitors'
12 report -- we already -- that reinforced what we were thinking.
13 Now, if the monitors had come back and said this is just a
14 terrible -- I shouldn't talk with my hands. If the monitors
15 had come back and said this is a terrible place, we would have
16 second thoughts about filing that motion. But the monitors
17 came back and didn't say that at all.

18 The monitors came back and said there have been
19 tremendous improvements and, as I quoted from them, it bodes
20 well for the future of the facility. That and several other
21 things they said in their report made us scratch our head.

22 Now, the report -- the report is dated March 5. And
23 we filed our motion, you know, approximately a week later,
24 which is as fast as we could -- well, as fast as Ms. Nobile
25 could knock it out, quite frankly. But, you know, it wasn't

1 like we were dragging our feet. As soon as we got the final
2 report, we started having discussions because we were pretty
3 pleased with what they were saying. Obviously, you know, we
4 would have been pleased if they said we were just in complete
5 compliance across the board. But with what we've got here, it
6 certainly doesn't describe an unreasonably unsafe facility, and
7 that's what prompted us to file our motion.

8 So it wasn't like we were trying to wait and ambush
9 everybody. It's just because of the timing of this, the
10 monitors -- you know, they were supposed to have the report
11 back in -- whenever it was. We thought it was going to
12 February 1st I think, to begin with, and it just didn't happen
13 for whatever reason. But that's how it goes.

14 THE COURT: Okay. Thank you. Is the plaintiff
15 prepared to call its first witness?

16 MS. WINTER: Yes, we are, your Honor. Plaintiffs call
17 Eldon Vail.

18 (WITNESS SWORN)

19 MS. WINTER: May I proceed?

20 THE COURT: Yes. Mr. Vail, the disk before you is the
21 microphone. You don't have to speak directly into it. Just
22 speak loudly and clearly enough for us all to hear you and
23 speak at a pace at which the court reporter can keep up with
24 you. And allow the attorneys to complete their questions
25 before you begin to answer. And try to avoid using uh-huh

1 (indicating yes) and unh-unh (indicating no) and make sure all
2 responses are verbal.

3 THE WITNESS: I appreciate the guidance, sir.

4 THE COURT: Thank you. You may proceed.

5 **ELDON VAIL,**

6 having first been duly sworn, testified as follows:

7 **DIRECT EXAMINATION**

8 BY MS. WINTER:

9 Q. Would you state your name for the record, please.

10 A. My name is Eldon Vail.

11 Q. Have plaintiffs retained you to serve as their corrections
12 expert in this case?

13 A. Yes, they have.

14 Q. Was that in July 2013?

15 A. I believe it was.

16 Q. What task did they assign you?

17 A. They asked me to take a look at the operation of Walnut
18 Grove relative to the consent decree and the risk of harm from
19 violence at that facility.

20 Q. Would you very briefly summarize your background in
21 corrections?

22 A. I retired as the secretary of the Washington State
23 Department of Corrections, the position I held for about four
24 years. Prior to that, I was the deputy secretary for seven
25 years. So for over a decade, I was either number one or number

1 two in the Washington State Department of Corrections. I had
2 some other administrative positions prior to that, but
3 superintendent of three different institutions, two of them
4 housing maximum --

5 Q. Is superintendent -- excuse me. I'm sorry. Is
6 superintendent the equivalent of a warden?

7 A. Yes, it is. I'm sorry. Superintendent of three
8 facilities, two of them housed maximum security inmates.

9 THE COURT: Make sure you keep your voice up,
10 Mr. Vail.

11 BY MS. WINTER:

12 Q. The last thing you said was maximum/medium --

13 A. -- security inmates, maximum security inmates, and medium.

14 Q. Are you also serving as plaintiffs' corrections expert in
15 the class action case involving conditions at the East
16 Mississippi Correctional Facility?

17 A. I am.

18 Q. Plaintiffs' Exhibit 1, do you have that in front of you?

19 A. Yes, I do.

20 Q. Is this a copy of your current résumé?

21 A. Yes, it is.

22 MS. WINTER: Plaintiffs move Exhibit 1 into evidence.

23 THE COURT: Any objection?

24 MR. FRIEDMAN: No objection.

25 THE COURT: All right. Exhibit 1.

1 (THE COURT AND COURTROOM DEPUTY CONFERRED)

2 MR. FRIEDMAN: Are they marking their exhibits as P-1?
3 We marked ours as D-1. And I'm trying to keep up with how
4 they're marked.

5 THE COURT: Yeah, Exhibit -- this will be P-1?

6 (COUNSEL CONFERRED)

7 MS. WINTER: It's a small type at the bottom of the
8 page, your Honor.

9 MR. OWENS: It's Bates labeled at the bottom of the
10 document Plaintiffs' 1, Exhibit 1.

11 (COUNSEL CONFERRED)

12 THE COURT: P-1 will be -- could you give it to the
13 court reporter so she -- I mean the courtroom deputy so she
14 could docket it.

15 (COMPLIED WITH REQUEST)

16 (EXHIBIT P-1 MARKED)

17 BY MS. WINTER:

18 Q. Exhibit 2, Mr. Vail --

19 THE COURT: Hold on one second, Ms. Winter. Are you
20 ready, Ms. Smith?

21 THE CLERK: Yes.

22 THE COURT: Okay. Thank you. P-1 is admitted. You
23 may proceed.

24 MS. WINTER: Thank you.

25 BY MS. WINTER:

1 Q. Mr. Vail, could you look at Exhibit 2, the consent decree
2 in this case?

3 A. Yes.

4 Q. And I'd like you to look at page four headed Protection
5 from Harm. Quote, At all times prisoners will be provided with
6 reasonably safe living conditions and will be protected from
7 violence and other physical or sexual abuse by staff and other
8 prisoners, unquote.

9 Are defendants in compliance with this provision?

10 A. I do not believe they are.

11 MS. WINTER: Your Honor, of course, the consent decree
12 is already in the record in the docket of the case. For the
13 sake of completeness of the record, I was intending to move it
14 in evidence.

15 THE COURT: I think you should so that it would be
16 consistent with what the parties submitted as their exhibits
17 yesterday. So P-2, the consent decree, which obviously is
18 already part of the record, will be admitted as Exhibit 2 to
19 this hearing.

20 (EXHIBIT P-2 MARKED)

21 MS. WINTER: May I proceed?

22 THE COURT: You may proceed.

23 BY MS. WINTER:

24 Q. Mr. Vail, I'd like you to look at page 12 of the consent
25 decree, the section that's headed Contract Monitoring.

1 A. Yes.

2 Q. And I'd like you to look at this language, quote, MDOC will
3 develop comprehensive contract monitoring policies and
4 procedures and will monitor the contracts with the operator of
5 Walnut Grove in compliance with these policies and procedures,
6 unquote. Is MDOC in compliance with this provision on
7 monitoring?

8 A. I do not believe they are.

9 Q. In your opinion, are MDOC and its private contractor MTC
10 prepared today to effectively respond to security emergencies
11 at Walnut Grove?

12 A. I do not believe that they are.

13 Q. As a corrections professional, do you have an opinion as to
14 whether there is a current ongoing risk to prisoners at Walnut
15 Grove of serious injury from violence?

16 MR. FRIEDMAN: Your Honor, I'm going to object. That
17 is the ultimate issue here I believe.

18 THE COURT: Objection overruled.

19 A. Could you ask it again, please? I'm sorry.

20 BY MS. WINTER:

21 Q. Do you have an opinion as to whether there's a current
22 ongoing risk to prisoners at Walnut Grove of serious injury
23 from violence?

24 A. Yes, there is.

25 Q. What is the magnitude of that risk?

1 A. I think it's substantial.

2 Q. In your view, has MDOC taken reasonable measures to
3 minimize the risk of serious injury?

4 A. For the most part, no.

5 Q. Is Walnut Grove being operated by a for-profit private
6 contractor?

7 A. It is operated by Management and Training Corporation, also
8 known as MTC.

9 Q. And they are acting as an agent of MDOC --

10 A. Yes.

11 Q. -- at Walnut Grove?

12 A. Yes.

13 Q. And is that also the case at East Mississippi Correctional
14 Facility?

15 A. It's the same, yes.

16 Q. Does MDOC have any responsibility for the treatment of
17 prisoners in Mississippi prisons that are operated by private
18 contractors?

19 A. They remain prisoners of the Mississippi Department of
20 Corrections. Ultimately, it is the responsibility of MDOC.

21 Q. Have there been any major outbreaks of violence at Walnut
22 Grove in the past 15 months?

23 A. Yes, there has been. There was the riot that happened that
24 began on New Year's Eve and lasted into New Year's Day in
25 2014 -- 2013-2014 crossover. And then on July 10th, 2014,

1 there was another significant, in my opinion, more serious
2 riot.

3 Q. How serious were these outbreaks?

4 A. There were people that were severely injured requiring
5 outside medical care.

6 Q. And how many did -- did they involve hundreds of inmates?

7 A. While the riots themselves involved hundreds of inmates, I
8 think if I remember correctly that there were 16 who went to
9 outside hospitals.

10 MR. FRIEDMAN: Your Honor, I'm going to object on
11 relevance for the reasons I stated in my opening. The riots
12 and incidents, however you want to describe them, back in July,
13 and December -- December of 2013-14 and July 2014 are
14 irrelevant to whether there's a current and ongoing violation
15 at that facility.

16 THE COURT: Objection will be overruled.

17 MR. FRIEDMAN: Could I have a continuing objection?

18 THE COURT: Yes, yes.

19 MR. FRIEDMAN: Okay.

20 BY MS. WINTER:

21 Q. From what you know of those riots, was there a likely --
22 was there a strong possibility they could have resulted in loss
23 of life?

24 A. There was a very strong possibility that someone could have
25 lost their life.

1 Q. Do you remember what kind of injuries were involved that
2 sent these inmates to an outside hospital?

3 A. There were fractures. There were stabbings that resulted
4 in puncture wounds. There was surgery. One individual had
5 surgery to their eye. There were serious injuries.

6 Q. Do you remember whether there was a collapsed lung?

7 A. I believe there was.

8 Q. Do you remember whether an officer was trapped in a cell
9 with four inmates for the duration of the disturbance?

10 A. I think that happened in July, yes.

11 Q. As a result of the July riot, inmates also in addition --
12 besides the New Year's riot, the July riot also resulted in
13 inmates requiring outside medical care. Is that correct?

14 A. I think there was nine, yes.

15 Q. Were these two riots the first instances of serious
16 violence at Walnut Grove?

17 A. No, they were not. The history of the facility there has
18 been an awful lot of violence.

19 Q. In 2012 the Department of Justice issued a report finding
20 that Walnut Grove was a very violent facility that violated
21 inmates' Eighth Amendment rights to safe living conditions. Is
22 that correct?

23 A. Yes, it is.

24 Q. And did the DOJ find that Walnut Grove was deliberately
25 indifferent to widespread excessive force?

1 MR. FRIEDMAN: Your Honor, I'm going to object again
2 on the grounds of relevance. This is back in 2012, I believe.

3 THE COURT: Yeah, I'm going to just -- for purposes of
4 background information, I know MTC would have an objection to
5 that because I don't think MTC even had the contract with
6 Walnut Grove at the time. But for background purposes, I'll
7 allow the testimony.

8 MR. FRIEDMAN: Okay.

9 BY MS. WINTER:

10 Q. Was the New Year's 2014 riot foreseeable?

11 A. The possibility of violence of that magnitude was
12 foreseeable, I believe.

13 Q. What is the basis for that opinion that --

14 A. I started working on this case in the middle approximately
15 of the year 2013, and some of the first records that I got to
16 look at were video surveillance tapes of incidents of violence
17 that were occurring at the facility. And after I watched the
18 first couple, I was troubled because it made no sense to me.

19 I could watch the violence occurring with a clear view of
20 the living unit and there were no staff in that living unit.
21 If you're not in the living unit, it's much more likely that
22 bad things are going to happen. They were not properly
23 supervising the inmates or attending to the basics of
24 correctional supervision.

25 Q. Did you watch tapes where the violence went on for some

1 period of time without staff intervention?

2 A. Yeah. There was different ones I looked at that, you know,
3 20 minutes had gone by and there's no staff coming into the
4 unit and the incidents would continue.

5 Q. You testified earlier that there's the substantial risk
6 that serious violence will recur at Walnut Grove. On what do
7 you base that opinion?

8 A. I am still not of the belief that staff are routinely and
9 regularly expected to stay in the units and supervise the
10 inmates. That's one reason. I also don't think that they are
11 prepared to respond to any kind of serious group disturbance or
12 riot such as the ones that they had.

13 Q. Could you -- do you have an opinion of what the root causes
14 are of this ongoing lack of preparedness?

15 A. I think that there's two broad categories. As I suggested
16 I think already, I'm -- I do not see that MTC is making
17 consistently good or even occasionally good correctional
18 decisions about how to manage the institution.

19 Everything seems to be done -- if it's done, if something
20 happens that is consistent with good correctional operations,
21 it's not done at their own initiative. And, usually, it's not
22 done until there's considerable pressure and repeated warnings
23 from the monitors or myself for significant changes to occur.
24 They're a business and I think that ultimately they are looking
25 at how to --

1 MR. FRIEDMAN: Objection. That's speculation. He
2 keeps saying *I think this* and *I think that*. That is pure
3 speculation.

4 THE COURT: I'll allow the expert to testify based on
5 his experience. That's overruled.

6 A. So there's that set of issues. The other significant issue
7 I think is I don't see any effort to meaningfully monitor the
8 place by MDOC.

9 BY MS. WINTER:

10 Q. Haven't MDOC and MTC been making some significant changes
11 recently?

12 A. Well, the court's heard about some of the most significant
13 ones already and I won't repeat them --

14 Q. Well, wait. Mr. Vail, what you've heard so far was coming
15 from me and that doesn't have any weight on the record. For it
16 to be in the record, you need to tell the court what these
17 changes were, changes or promised changes.

18 A. Well, what has been significant is getting the long-term
19 segregation inmates out of there, no longer housing close
20 custody inmates and also reducing the population.

21 Q. Have there also been other very recent changes that you
22 would characterize as less significant?

23 A. In the last few weeks I received a number of documents
24 and -- that talk about very recent changes that have happened
25 at the institution. For the most part, they're pretty

1 cosmetic. They don't go very deep and they aren't systemic.

2 Q. Have MDOC and MTC had any advice or counsel from the
3 monitors, the court-appointed monitors, over the past three
4 years on how to make Walnut Grove safer?

5 A. Yes, they have.

6 Q. And have you been making any similar recommendations?

7 A. I haven't always agreed with the monitors, but for the most
8 part I do. And I started written documentation of my
9 recommendations I think first in March of 2014.

10 Q. And you have -- how have MDOC and MTC responded to the
11 advice and recommendations of the court-appointed monitors and
12 of yourself as plaintiffs' expert?

13 A. Well, it would depend on which recommendation; but the big
14 ones, like getting long-term segregation inmates out of there
15 and recognizing finally that they weren't capable of managing
16 the close custody population, didn't take place until after the
17 July riot.

18 Q. Do you have any concerns about the accuracy of information
19 that MTC has provided or their trustworthiness in fulfilling
20 promises?

21 A. Yes, I do.

22 Q. Mr. Vail, I'd like to talk now first about the New Year's
23 2014 riot. Do you have any knowledge about how the two recent
24 riots at Walnut Grove unfolded?

25 A. Yeah. I have some knowledge how both of them unfolded.

1 Yes.

2 Q. And what are the sources of your information?

3 A. I have visited the facility after both incidents and had a
4 chance to speak with the prisoners there. I have spoken with
5 the staff of MTC and staff of MDOC. I've had access to certain
6 documents and I have seen the video surveillance tapes of both
7 incidents.

8 Q. Have you conferred with the court-appointed monitors, Steve
9 Martin and James Austin, about those riots.

10 A. I have talked with both of them. And, in addition, I speak
11 somewhat regularly with the attorneys and the investigators
12 that are there much more frequently than I am; and I rely on
13 their observations as well.

14 Q. So the investigators, you're talking about the plaintiffs'
15 counsels' investigators who go into the prison?

16 A. Yes.

17 THE COURT: And what attorneys are you talking about?

18 THE WITNESS: A list of them, for example --

19 THE COURT: I mean attorneys.

20 THE WITNESS: SPLC attorneys --

21 THE COURT: Thank you.

22 THE WITNESS: -- if that clarifies.

23 BY MS. WINTER:

24 Q. So what you're talking about is their observations in their
25 visits to Walnut Grove.

1 A. Yes.

2 Q. Do you believe that your information on the New Year's riot
3 is complete?

4 A. No, I don't. They completed an after-action report, and it
5 caused -- it addressed some issues, but I had lots of questions
6 that weren't answered by that report. And to this day I don't
7 know, you know, what happened with that. If there was any
8 structured follow-up to it that showed specific actions taken,
9 I haven't seen it.

10 Q. What about the July riot? Is your information about the
11 July riot complete?

12 A. Less so. There was no after-action report completed after
13 the July riot.

14 Q. Will you explain to the court what is an after-action
15 report?

16 A. Well, whenever you have a serious incident in a prison, it
17 is typical to document what happened, get the facts, put them
18 in writing. And then the next step of that process is that you
19 look at your own performance. How did you -- how did you do?
20 How did your staff do? Do the policies you have in place work?
21 Did the training that you've delivered -- was it effective when
22 the moment came when you needed to deploy?

23 So you start off documenting the facts, identifying
24 problems, and then you develop what are you going to do about
25 the problems that you found, a list of corrective actions. And

1 then, finally, you need the last piece, the fourth piece, to
2 make sure that you actually did complete those actions so that
3 you can learn from the experience and perform in an improved
4 manner in the future.

5 Q. Is there any need for those four steps that you've
6 described to be documented?

7 A. Absolutely. You can't hold people accountable if you don't
8 document what you're doing.

9 Q. Are there any foreseeable consequences to not preparing a
10 written after -- a written after-action report?

11 A. There are several, but probably the primary one is that
12 you're just simply much more likely not to learn anything from
13 what went wrong last time.

14 Q. Is there any policy that requires an after-action report?

15 A. Yes, there is.

16 Q. And what is that policy?

17 A. It's in MTC's safety policy.

18 Q. Do you know why no after-action report was prepared for the
19 July riot?

20 A. I never received an adequate answer to that question. No,
21 I don't know why. Simply, they refused to do one.

22 Q. Did MDOC instruct MTC to prepare an after-action report?

23 A. They did not.

24 Q. Could you explain to the court what is an emergency
25 response plan or an emergency plan using those -- are those

1 terms sometimes used interchangeably?

2 A. Yeah. The problem with corrections is nomenclature.
3 People use different words for different things. But an
4 emergency response plan or emergency plan or emergency action
5 plan are basically the same things. And it's in my opinion the
6 most critical document that a facility has to keep prisoners
7 safe. It provides a structure and some detail about how the
8 institution is going to respond should an emergency occur. It
9 usually includes contingency plans for a variety of
10 emergencies, including riots and insurgencies.

11 Q. Do MDOC and MTC have an emergency response plan for Walnut
12 Grove?

13 A. Yes, they do.

14 Q. Have you reviewed it?

15 A. Yes, I have.

16 Q. Is it an adequate plan?

17 A. No, it is not.

18 Q. What is wrong with it? And in telling us what's wrong with
19 it, I don't want specific details, but generally.

20 A. Well, generally, it's disorganized. It's not specific
21 enough. It leaves out very important items. It's not a
22 document that would -- I've done this work for a long time --
23 that I would find useful if I was running a facility and
24 something serious kicked off. There's not much there that
25 would be able to guide me. I would probably get confused in

1 the confusion of the document itself.

2 Q. Is it -- is that document specific enough?

3 A. Overall, no. There are some exceptions to that; but
4 overall, no.

5 Q. Did MTC update their emergency response plan after the
6 riots?

7 A. They did not.

8 Q. Is it significant -- did they eventually update their
9 emergency response plan at any point?

10 A. I received a little bit of updated information I think it
11 was last week actually.

12 Q. Is it significant that they did not update their emergency
13 response plan after the riots until last week?

14 A. Yes, it is.

15 Q. And what is the significance of that lapse?

16 A. If you accept and understand your charge as a correctional
17 administrator is to keep people safe, I'm completely baffled
18 why that document wasn't completely reworked after the
19 January 2014 riot, let alone the July riot. It illustrates to
20 me a lack of seriousness about -- and MTC's commitment to keep
21 people safe at the prison.

22 Q. Is there anything that required them to update it for some
23 periods of time, annually or any other period?

24 A. The policy itself requires annual updates.

25 Q. When did the 2014 New Year's riot actually begin?

1 (PAUSE)

2 Q. What day --

3 A. Yeah. I'm sorry. It took me a minute to get the right
4 riot in my head. I think it was around 7:00, maybe a little
5 bit after, on New Year's Eve, July (sic) 31st, 2013.

6 Q. And did it then continue until sometime early in -- on New
7 Year's Day?

8 A. Staff were still responding to the incident as late as 3,
9 4 a.m. on New Year's Day, yes.

10 Q. Can you summarize for us briefly what happened in that
11 riot?

12 A. The living unit design at Walnut Grove, like all living
13 unit designs, has some pluses and minuses. The minus here I
14 think contributed to the outbreak of that situation. There
15 was -- and you have this hub, this sort of vestibule area. And
16 then you have these zones that come off of it, and you've got a
17 pretty good view from each of the zones into the other zone.

18 So what happened is that a gang fight broke out in one of
19 the zones, and there's pretty free movement in and out of that
20 vestibule. You can see people going to the different windows
21 and communicating. And very shortly, this same kind of gang
22 fights kick off in all four of the zones in the close custody
23 unit.

24 Q. Did the inmates arm themselves?

25 A. Very quickly with whatever they could find. They used

1 broom handles and trays and whatever they could get their hands
2 on to arm themselves.

3 Q. Did the court-appointed monitors make any finding as to the
4 cause of the riot?

5 A. Yes, they did.

6 Q. Could you turn to Plaintiffs' Exhibit 3, which is the
7 fourth report of the monitors, and turn to page 4.

8 A. I'm there. The monitors said that it was the supervision
9 of these inexperienced security staff members which was
10 revealed to be sorely deficient.

11 MS. WINTER: Your Honor, plaintiffs move admission of
12 Plaintiffs' Exhibit 3, which is the fourth report of the
13 monitors.

14 THE COURT: Any objection from the defendant?

15 MR. FRIEDMAN: No objection.

16 THE COURT: Exhibit 3 is admitted.

17 (EXHIBIT P-3 MARKED)

18 BY MS. WINTER:

19 Q. Did the monitors make any finding on the experience of the
20 staff?

21 A. They said that two of the housing unit officers assigned to
22 HU3 -- that was the pod that -- where that violence kicked off
23 I believe -- at the time of the December disturbance had less
24 than 60 days of service.

25 Q. Did they say anything about the percentage of the security

1 staff with less than one year's experience?

2 A. Yeah, they did; but, unfortunately, I'm not seeing that in
3 my copy here. It was a large number that had less than a year
4 experience. I'm not capturing it as I'm scanning this document
5 quickly.

6 Q. In October '12 -- in October 2012 when the monitors
7 submitted their second report, had the monitors told MTC and
8 MDOC that the inexperience of staff on the second shift was a
9 significant management problem?

10 A. Yes, they did.

11 Q. So this was sometime before they -- they did this in the --
12 in the second report and then again in the fourth report after
13 the riot?

14 A. Yes. It's a consistent theme.

15 Q. Did the monitors identify any other causes of the New
16 Year's riot in their fourth report that --

17 A. I believe they did.

18 Q. And what did they say were the other causes?

19 A. Well, they said -- they connected the inexperienced
20 security staff members as setting the stage for the outbreak of
21 the disturbance with the actual mismanagement of the event and
22 its aftermath. They also spoke to the issue of the close
23 custody inmates, having too many out at a time into the
24 dayroom, for example.

25 Q. Did they question the ability of MTC to safely manage close

1 custody inmates?

2 A. Not directly. They proposed a different solution that
3 perhaps the four different close custody pods should be further
4 stratified based on behavior and that privileges should be
5 adjusted accordingly. Be sort of like having a classification
6 system within close custody. You've got good close guys and
7 bad close guys, and the amount of time they got out of their
8 cell and how many would be let out at any given time would be
9 determined based on the sorting of those four different pods.

10 Q. Excuse me. You might have already mentioned this, but did
11 they mention serious staff misconduct as being a factor?

12 A. Yeah. There were seven people I believe that either were
13 terminated or resigned after the riot.

14 Q. I'd like to turn to January 2014. Shortly after the New
15 Year's riot, did you visit Walnut Grove?

16 A. I did. That was my first visit there.

17 Q. And what was the purpose of your visit?

18 A. Just to begin to understand the facility with my own eyes
19 and ears.

20 Q. And were you --

21 A. I wanted to understand the -- what happened there, the
22 causes of the riot and what they might be doing to improve the
23 situation.

24 Q. After your January 2014 meeting at -- you met at the prison
25 with prison officials in January 2014?

1 A. Yes. There was a large number of people. The monitors
2 were there. There was a number of high-ranking MTC officials
3 and MDOC officials.

4 Q. And you had discussions together?

5 A. We were able to ask some questions, yes.

6 Q. After that meeting did you submit a report with findings
7 and recommendations to MDOC about how to prevent such outbreaks
8 in the future?

9 A. I did.

10 Q. Mr. Vail, could you turn to Exhibit 4, Plaintiffs'
11 Exhibit 4, in your binder.

12 A. Okay.

13 Q. Is this your report following that January meeting?

14 A. Yes, it is.

15 MS. WINTER: Your Honor, this is docket number 100. I
16 would move the admission of this report.

17 MR. FRIEDMAN: What exhibit is this?

18 THE COURT: Exhibit 4? Is that Exhibit 4?

19 MS. WINTER: Yes.

20 THE COURT: Any objection from the defendant?

21 (COUNSEL EXAMINED DOCUMENT)

22 MR. FRIEDMAN: Yes, sir. We object on relevance.

23 Also, if you recall at our hearing in January, I requested that
24 we know the specific issues that were in play here. And,
25 consequently, the court instructed the plaintiffs to file an

1 amended motion to enforce or modify. And it's got Exhibit A in
2 there, which are their specific issues.

3 By introducing these other -- these other documents --
4 and this one goes back to I think March of 2014, which I would
5 say is irrelevant anyway from a timing standpoint, but you're
6 allowing them to introduce new issues after we were
7 specifically -- they were specifically instructed to let us
8 know exactly what all the issues were for this hearing. And
9 that's what I thought we could rely on, Exhibit A. So I would
10 object to this on grounds of relevance and also it goes beyond
11 Exhibit A.

12 THE COURT: When you say Exhibit -- you're saying
13 Exhibit A, as in apple?

14 MR. FRIEDMAN: A to the -- A to the amended motion to
15 modify -- Exhibit A is the list of their issues. They were
16 instructed to give you -- to list their specific issues, and I
17 believe Exhibit A to their amended motion is that list.

18 THE COURT: Let me hear from the plaintiffs. Any
19 response?

20 MS. WINTER: I need to see the document that
21 Mr. Friedman is talking about, but our position is this. This
22 is, of course, relevant because the -- part of the Eighth
23 Amendment requirements are that you show deliberate
24 indifference, which is shown by evidence that violations are
25 longstanding and well known to prison officials.

1 We were not required by the court to list every single
2 document that we would be relying on. All we were required to
3 do is put the defendants on notice of the general issues of
4 this hearing. I don't see how we possibly could have listed
5 for them far in advance every exhibit that we would be relying
6 on.

7 MR. FRIEDMAN: I'm objecting to the exhibit itself on
8 timeliness. Deliberate -- whether they were deliberately
9 indifferent back in March of 2014, again, is irrelevant for
10 purposes of this hearing. Again, the question is whether
11 there's a current and ongoing violation of the Eighth
12 Amendment, which would include the deliberate indifference part
13 of the analysis. That's current and ongoing. And March of
14 2014 is not current and ongoing.

15 As far as the issues, we went -- we were very specific
16 at that -- I thought the court was very specific after
17 listening to the argument of the parties that they were
18 supposed to list their issues so there was no misunderstanding
19 when we got here about what we were fighting about.

20 MS. WINTER: Your Honor, we will -- we certainly do
21 not agree that something that Mr. Vail talked to them about in
22 2014 is not relevant, but we are willing to withdraw this. We
23 won't go into any detail about it and we --

24 THE COURT: Does that -- well, let me ask you this.
25 Does Exhibit 4 touch on in any way the issues out -- what I'm

1 looking at is Exhibit A to the modification of the amended
2 memo -- modification of the consent decree, which is docket
3 entry 115, and Exhibit A is 115-1.

4 And it identifies those seven issues I think that we
5 discussed at the January hearing. Protection from harm being
6 one; physical plant security concerns being two; programming,
7 three; staffing, four; use of force, five; gang management,
8 six; and monitoring, seven. Now, does that exhibit that you
9 were just talking about touch on any of those topics in any
10 way?

11 MS. WINTER: Well, if I'm understanding correctly -- I
12 mean, this talks about staff behavior, physical plant, the New
13 Year's Eve event, programming deficits. I mean, it seems to me
14 that it's -- it's all about what we said this hearing would be
15 about.

16 THE COURT: The court will note the defendants'
17 objection, but the court will allow it in. The objection is
18 overruled.

19 MR. FRIEDMAN: Okay.

20 BY MS. WINTER:

21 Q. Mr. Vail, did you tell prison officials that the New Year's
22 disturbance was not an aberration but that it was the
23 predictable outcome of a number of systemic problems requiring
24 systemic solutions?

25 A. I did.

1 Q. Did you state that at a fundamental level MTC is not in
2 control of the living units or the facility in general?

3 A. I did.

4 Q. Did those turn out to be accurate statements that you made
5 then, in your opinion?

6 A. Yes, they did.

7 Q. At the January 2014 meeting, did the monitors make any
8 findings or recommendations about close custody inmates?

9 A. Yes. That's when they suggested that MTC should consider
10 that further stratification of the close custody population.

11 Q. Do you agree with the monitors' recommendation -- with that
12 recommendation of the monitors?

13 A. No. And that's reflected in this report as well. I had
14 some concerns with that, that just simply more suppression
15 without some other changes might lead to additional violence.
16 My recommendation was to get the close custody inmates out of
17 there.

18 Q. Could you keep your voice up?

19 A. Oh, I'm sorry.

20 Q. You said your recommendation was that they --

21 A. That they remove the close custody inmates.

22 MS. WINTER: My screen has gone blank. Is that right?
23 I was just checking. Yes. Okay.

24 BY MS. WINTER:

25 Q. Did the monitors agree that MTC was incapable of managing

1 close custody prisoners at Walnut Grove?

2 A. Not at that moment, no.

3 Q. Did they ever come to agree with you on that point?

4 A. After the July riot, yes.

5 Q. And did you ever see an after-action report of the New
6 Year's riot?

7 A. Yes, I did.

8 Q. Do you know when they prepared it?

9 A. Not exactly the date. It was after -- I think I got a copy
10 of it after I visited the facility in January of 2014.

11 Q. Was that after-action report on the New Year's riot
12 adequate?

13 A. No.

14 Q. What was wrong with it?

15 A. Well, it had some information, but it didn't answer lots of
16 questions that I had. And those questions are contained in
17 this report.

18 Q. Mr. Vail, could you turn to Plaintiffs' Exhibit 5, which is
19 an after-action report.

20 MS. WINTER: This also is in the record, your Honor.
21 It's docket number 101-2. Plaintiffs would move for admission
22 of this document.

23 MR. FRIEDMAN: I'm going to make a record by
24 objecting.

25 THE COURT: Okay.

1 MR. FRIEDMAN: On relevance.

2 THE COURT: Objection is overruled. Exhibit 5 will be
3 admitted.

4 (EXHIBIT P-5 MARKED)

5 BY MS. WINTER:

6 Q. Do you have it in front of you, Mr. Vail?

7 A. I do.

8 Q. Did MTC follow up on the recommendations in their own
9 after-action report on the New Year's riot?

10 A. Not to my knowledge, no. Well, let me amend that. I think
11 that they did follow up on some. I'm pretty certain they
12 didn't follow up on others. And there's a large category where
13 I simply don't know.

14 But what I didn't see is a follow-up document that -- from
15 the different 16 or 17 items that they listed they were going
16 to deal with. I never saw anything that said, *Here's what we*
17 *did and when we did it. We accomplished what we said we were*
18 *going to do.* So I have to reach that conclusion just based on
19 my ongoing review of the overall record.

20 Q. Did MDOC monitor MTC after the New Year's riot to make sure
21 that MTC had corrected the problems that they themselves had
22 identified in their after-action report?

23 A. I've never seen evidence of that. No.

24 Q. Did you make any key findings about the causes of the New
25 Year's riot?

1 A. I did.

2 Q. What was it?

3 A. Well, certainly that they were incapable of handling close
4 custody inmates, but also that the officers were not staying in
5 the zones and properly supervising the population there.

6 Q. Did you make any findings about the skill of the security
7 staff at Walnut Grove?

8 A. Yes. They -- you know, there's obvious exceptions; but,
9 generally, the skill level of the basic corrections staff was
10 not adequate to manage inmates from my experience.

11 Q. Did you make findings and recommendations about the lack of
12 security staff in the housing pods?

13 A. Yes.

14 Q. What were they?

15 A. That they -- you can't properly supervise the inmates
16 unless you're in the area in which they live. And whenever
17 inmates are out of their cells, you have to stay there. You
18 have to be there in order to identify when conflicts occur so
19 that you can intervene in those conflicts so that they don't
20 resort to violence. If you're not in the unit, then the
21 inmates control the unit.

22 Q. Did you make any findings about the close -- is what you
23 just said generally applicable, and then did you make any more
24 specific recommendations about close custody pods and what you
25 just said about the necessity of presence of security staff?

1 A. Well, realizing that it was unlikely that close custody
2 inmates are going to be removed based on my word, I said that
3 *If you're going to have them, you need to have two officers in*
4 *there so that that correctional officer has some backup.* Two
5 people can -- the multiplier effect is huge in terms of
6 managing a difficult population.

7 Q. And in other -- the housing pods that didn't have close
8 custody, you still were recommending a constant presence of
9 security staff?

10 A. Absolutely. Close should have two. But medium and
11 minimum, you could probably get away with one.

12 Q. Did you make any findings and recommendations at that time
13 about inmate idleness?

14 A. I did. From interviewing the prisoners and trying to
15 figure out what they did every day, there wasn't sufficient
16 programs to keep them productively occupied.

17 Q. What did you -- what did you make of the level of idleness
18 at Walnut Grove?

19 A. It was significant. It was rather profound. There were
20 some people that had things to do, but the vast majority of the
21 population it did not seem to me like they were productively
22 occupied. Left to your own devices with nothing to do here,
23 you're probably not going to sit quietly in the dayroom.
24 You're going to find other things to pique your interest.

25 It's fundamental good practice that you need to keep

1 inmates busy, working, going to school or in a program. And if
2 you do that, you'll have less violence. I did not and do not
3 see that that is the nature of Walnut Grove.

4 Q. Did you make any recommendations at that time regarding
5 gangs?

6 A. Yeah, I'm sure I did. The gang problem at Walnut Grove is
7 significant, and I haven't seen much of a comprehensive
8 strategy to manage it. It relates to the -- my answer to the
9 last question that if you don't have activities that inmates
10 value, like *I'm working on my GED* or *I've got a job* or *I'm*
11 *looking forward to this special program I'm going to earn*
12 *because I achieved something* and they're just sitting around in
13 the dayroom -- they're human. They need recognition. They
14 need activity. And the gang influence will fill that vacuum.

15 So my recommendation was that they add additional
16 incentives for inmates so that they've got something to weigh
17 and measure when they have to make decisions about *What am I*
18 *going to do today? Am I going to do what the gangs want me to*
19 *do, or am I going to school and get my education?*

20 Q. Did you make any observations at that time about physical
21 plant security?

22 A. I did. Also startling to me was the fact that the doors
23 were not secure. That was one of the -- that was the biggest
24 concern I have -- had and still have about the prison.

25 Q. Did you also report about furnishings and supplies in the

1 living room being unsecure in the living area?

2 A. Yes. Typically, in my experience in close custody you have
3 the mop buckets and the mops and the brooms locked up and not
4 readily available to be used as weapons should something occur.
5 From the videotapes you can see that the cameras weren't
6 properly defended. Some of them were destroyed. You could see
7 light fixtures get destroyed. They did not appear to me to be
8 of detention quality.

9 Q. Did you find any -- make any findings about the prevalence
10 of weapons among the prisoners?

11 A. Yes. There's -- there was far too many weapons available.

12 Q. And were the source of some of those weapons pieces of the
13 yard fence?

14 A. I had more than one prisoner tell me that it -- that -- I
15 have to talk about this here in a little bit again, but between
16 these zones there is an outdoor recreation area, outdoor in the
17 sense that there's no roof on it, but it's like cinderblocks,
18 maybe half the size of a basketball court, but there's
19 chain-link fencing in there.

20 And what a number of prisoners told me is that it was
21 relatively easy to break that chain link off and turn it into
22 shanks. Inmates were out there, like they were in the living
23 units, often unsupervised. So the ability to do that certainly
24 existed.

25 Q. And did you make any findings in your report on

1 unprofessional staff conduct?

2 A. Again, based on interviewing inmates, several told me that
3 sometimes when conflicts occur, the staff are advised to get
4 out of the unit so that the inmates could handle it themselves.
5 And that's exactly what would happen.

6 Q. Do the problems that you identified after the January 2014
7 meeting remain problems today?

8 A. Several of them do, yes.

9 Q. Are there any that don't that you want to identify?

10 A. Well, I think I also said they needed to -- and I might be
11 confused with EMCF. I'm sorry if I am. But bunks needed to be
12 bolted down, that the -- I think they replaced some mirrors.
13 That was a concern. I don't think they've done anything with
14 the fence. The doors they worked on in units -- in the two
15 units that have slider doors, but they didn't work on the
16 hinged doors. So some of that work was done; but for the most
17 part, I do not believe so.

18 Q. Well, the question was, do there remain problems today
19 so --

20 A. I'm sorry. Yes, there remain problems today. I answered
21 the question what did they fix.

22 Q. In this report that we're talking about, did you make
23 recommendations on MDOC monitoring of MTC?

24 A. Yes.

25 Q. What exactly did you recommend that MDOC should ask MTC?

1 A. If you were faced with exactly -- this isn't exact words,
2 but *If you are faced with exactly the same problem again,*
3 *losing control of pods, what did you learn from this event that*
4 *would cause you to manage it better the next time?* I think
5 that's a fairly simple question, and it probably should have
6 been recited over and over and over again until MTC was able to
7 say, *This is what I'll do.*

8 Q. Did you subsequently find out what, if anything, MDOC and
9 MTC did learn from the New Year's riot?

10 A. No, I did not.

11 Q. Did you -- did it ever become clear to you that they had
12 learned nothing?

13 A. Well, once the July riot started, that was my conclusion.
14 Yes.

15 Q. How did the July riot compare to the New Year's riot?

16 A. I think it was worse.

17 Q. Before we talk about the July riot, after you submitted
18 your March 2014 reports, did the court-appointed monitors then
19 submit their own report covering the same time period?

20 A. Yes, they did.

21 Q. And was that the monitors' fourth report? Well, could you
22 look at Exhibit 3, which is the monitors' fourth report.

23 A. Okay. So could you ask me again? I'm sorry.

24 Q. Could you look at Exhibit 3, the monitors' report -- fourth
25 report. Did they submit this report after your March 2014

1 report?

2 A. Yes, they did.

3 Q. And it covers more or less the same time period?

4 A. Yes.

5 Q. Did the monitors comment on MTC's inability to monitor
6 close custody inmates?

7 A. Yes, they did.

8 Q. Did they say that the New Year's riot exposed serious flaws
9 regarding the ability of prison officials to properly and
10 safely manage the close custody inmates?

11 A. Yes.

12 Q. Did the monitors also say that it was the sorely deficient
13 supervision of these inexperienced security staff members that
14 set the stage for the riot?

15 A. Yes.

16 Q. And not only the outbreak of the disturbance but the actual
17 mismanagement of the event and its aftermath?

18 A. Yes, they did.

19 Q. Do you agree with the monitors on those points?

20 A. I do.

21 Q. Did you -- do you believe that it was also part of the
22 picture that they didn't have an adequate emergency plan?

23 A. Yes.

24 Q. In their fourth report did the monitors make any findings
25 about the prisoners in long-term segregation?

1 A. Yes, they did.

2 Q. Did they find that MTC staff was totally ill-equipped?

3 A. I -- yes, ill-equipped or trained on how to operate a
4 long-term segregation unit. Yes.

5 Q. Or how to manage those inmates?

6 A. Yes.

7 Q. Do you agree with that finding of the court-appointed
8 monitors?

9 A. I do. It was a big issue for the monitors at that time.

10 Q. And do you have any personal knowledge or evidence about
11 MTC's inability to operate a long-term segregation unit apart
12 from what you've seen at Walnut Grove?

13 A. I do.

14 Q. And what is that?

15 A. I've also visited their segregation unit at EMCF.

16 Q. And is --

17 MR. FRIEDMAN: Objection.

18 BY MS. WINTER:

19 Q. -- when you say "their," you mean --

20 THE COURT: Hold on. You've got an objection on the
21 floor.

22 MR. FRIEDMAN: Objection. First of all, I object on
23 relevance. Whether they are capable of managing long-term seg
24 is irrelevant. There are no long-term seg or close custody
25 people there to manage, to begin with. And, second, what he

1 observed at some other facility is irrelevant to what happened
2 at Walnut Grove -- what's happened at Walnut Grove.

3 THE COURT: Any response from plaintiff?

4 MS. WINTER: Yes, your Honor. There's two prisons,
5 one right down the road from the other, within an hour's drive
6 from each other. Both of them are MDOC facilities,
7 maximum-security rated facilities. Both of them are operated
8 by the same prison contractor, MTC. It seems to me that
9 Mr. Vail has his own experience that I -- that's certainly
10 relevant if they are capable of managing a close custody
11 population at a prison right down the road.

12 MR. FRIEDMAN: What happened --

13 THE COURT: Hold on. What prison is that?

14 MS. WINTER: East Mississippi Correctional Facility.

15 THE COURT: In Meridian?

16 MS. WINTER: Pardon?

17 THE COURT: In Meridian?

18 MR. FRIEDMAN: Yes.

19 THE COURT: That's all --

20 MS. WINTER: Yes, in Meridian.

21 THE COURT: That's a whole different kind of facility,
22 is it not?

23 MS. WINTER: Yes, it is. But it is the same -- it's
24 the same Department of Corrections and the same operator. And
25 there are, you know, policies and practices that are obviously

1 corporate-wide. Mr. Vail has observed both prisons in the same
2 general time frame, and it seems to me that what MTC is doing
3 down the road at a prison in a neighboring county is relevant.

4 THE COURT: And what they were doing at that
5 particular time in April of 2014 or --

6 MS. WINTER: I believe in -- yes, March, April 2013.

7 THE COURT: 2013.

8 MS. WINTER: Yes.

9 THE COURT: Okay. Any response, Mr. Friedman?

10 MR. FRIEDMAN: Well, it's irrelevant in time. It's
11 the wrong prison. East Mississippi is for psychiatric
12 patients. I mean, those are the -- I think 70 some percent of
13 the folks there are on some kind of psycho -- psychiatric
14 drugs. So it's an entirely different animal to begin with and
15 has nothing to do with Walnut Grove. So it's irrelevant in
16 time. It's irrelevant -- it's irrelevant for what's going on
17 at Walnut Grove. It's just entirely irrelevant to our
18 discussion.

19 MS. WINTER: Your Honor, I'm sorry. I misspoke. It's
20 not 2013. It's 2014. It's a year ago. It's the same time
21 period.

22 THE COURT: Okay. I will -- I will hear the
23 testimony, but I'll allow vigorous cross-examination on that
24 particular point. I mean...

25 BY MS. WINTER:

1 Q. So what have you seen at EMCF about MTC's ability to
2 operate a long-term segregation unit?

3 MR. FRIEDMAN: Your Honor. I'm going to object for
4 another reason now. EMCF is subject to a different lawsuit
5 they filed that is ongoing.

6 THE COURT: Is there a consent decree in that case?

7 MR. FRIEDMAN: No.

8 THE COURT: Okay.

9 MR. FRIEDMAN: They have filed -- we're in briefing on
10 the class certification issue. Their brief is due here in the
11 next few days I think, their rebuttal brief. So to allow them
12 to come in here and litigate that is improper. That's an
13 entirely different case, and now they're getting into a
14 different case. We're not here to litigate EMCF.

15 THE COURT: As I appreciate the plaintiff, the only
16 issue is whether MTC can -- in 2014, whether MTC could provide
17 appropriate service for close custody inmates. Is that the
18 question?

19 MS. WINTER: Yes. I think actually, right, at this
20 moment we're talking about long-term segregation. But, yes.

21 THE COURT: Long-term segregation?

22 MS. WINTER: Long-term at this point. That's what
23 we're talking about.

24 THE COURT: Whether they could do it or whether they
25 can't do it?

1 MS. WINTER: Yes, what is their ability to do it.

2 THE COURT: Because right now Walnut Grove doesn't
3 have any of those type of inmates.

4 MS. WINTER: I understand. To me it goes to the
5 deliberate indifference question, your Honor.

6 THE COURT: That they are being deliberately
7 indifferent to the people at Walnut Grove vis-a-vis --

8 MS. WINTER: No. There is a long-term institutional
9 knowledge by MDOC of MTC's inability to manage a long-term
10 segregation population. And as the evidence will show, there
11 is nothing at any moment -- MTC officials will tell you that
12 they will happily manage a long-term segregation population
13 again at Walnut Grove just as they are doing now at East
14 Mississippi.

15 THE COURT: Okay.

16 MR. FRIEDMAN: Your Honor, we're -- this is where we
17 came in on the current and ongoing. They want to try a
18 facility that doesn't exist anymore. That's what this --
19 that's what you're hearing. That's what we've spent most of
20 the morning hearing about, and that's what this debate is
21 about. They want to try something that doesn't exist.
22 Everybody agrees it doesn't exist. Doesn't exist. Long-term
23 seg and close custody don't exist, and what happens in the
24 future possibly maybe is irrelevant under the PLRA. So --

25 MS. WINTER: What --

1 MR. FRIEDMAN: Excuse me. So to say that the MTC
2 people say, yeah, they'll manage them if they're sent, sure
3 they'll manage them if they're sent. But there's no plan to
4 send them. Nobody knows the future and it's irrelevant in the
5 future. What may happen is irrelevant.

6 So we're here now trying a situation that used to
7 exist and everybody agrees it's not the same place anymore, but
8 here we are trying it. This goes to current and ongoing. This
9 whole debate -- this whole -- or most of what you've heard here
10 is not current.

11 THE COURT: Does it also go to the State's motion that
12 the court ought to lift the -- ought to find that the State has
13 been in full compliance for a significant amount of time and,
14 therefore, there's no need to have a consent decree in place?

15 MR. FRIEDMAN: Our motion --

16 THE COURT: Or to terminate.

17 MR. FRIEDMAN: Our motion is to terminate, which once
18 we raised it, then it's the plaintiffs' burden under the PLRA
19 to show a current and ongoing violation of the Eighth
20 Amendment. We're back to exactly where we came in. That is
21 their current burden under both motions, theirs and ours, a
22 current and ongoing violation of the Eighth Amendment.

23 And we can keep talking about what used to be at a
24 facility that is no more. But that's -- that's a fairytale.
25 We're just wasting talking about something that doesn't exist

1 anymore.

2 And the fact that, you know, they say, you know, it's
3 possible it could exist in the future, we've -- we've briefed
4 that. We've put that in our briefing to you. That's
5 irrelevant. What may or possibly or could happen in the future
6 is irrelevant to this issue that we've got -- that the court's
7 got.

8 So it is irrelevant -- getting back to where we came
9 in here, it's irrelevant to be talking about something --
10 whether MTC can manage long-term seg back in March of 2014,
11 it's irrelevant because it's outside any -- it's not current.
12 Number two, there's no long-term seg to manage anymore and
13 everybody agrees with that. And, number three, what's going on
14 at East Mississippi is completely irrelevant to all that
15 because East Mississippi is an entirely different kind of
16 facility where they send the -- you know, the psychiatric
17 folks. It's an entirely different place. So, you know, we can
18 keep talking --

19 THE COURT: Let me follow up on that question,
20 Ms. Winter, with respect to comparing East Mississippi to
21 Walnut Grove. Does MTC have a contract to run any other state
22 facilities?

23 MS. WINTER: Yes, it does.

24 THE COURT: And, I mean, East Mississippi is different
25 in a significant way from most other correctional facilities in

1 the state, at least the population of inmates. I think that's
2 a fair statement. Is that a fair statement?

3 MS. WINTER: I'm not --

4 THE COURT: Not to tip your hand -- not to tip your
5 hand, but --

6 MS. WINTER: Yes.

7 THE COURT: -- they house persons who -- it's the unit
8 that provides medical care and treatment and facilities for
9 persons who's suffering medical, including mental issues.
10 Right?

11 MS. WINTER: Yes, but we're not talking about persons
12 who are housed -- and the comparison is not to people who are
13 housed in the medical unit. We're comparing it to people who
14 are housed in the long-term segregation unit. So we're
15 comparing apples to apples.

16 THE COURT: Is there one policy that MTC has in place
17 that would direct its officers in all of its facilities? I
18 know one of the points you made -- I believe Mr. Vail made is
19 that the after-action report, for example, is one of MTC's
20 policies that says that after an incident you are to complete
21 the report. And I think he testified that a -- he did not see
22 where a report was completed. Does that particular policy
23 apply to its other facilities?

24 MS. WINTER: I will have to ask Mr. Vail, or we should
25 ask him if he knows the answer to that question.

1 THE COURT: Okay. Because the question that's going
2 to be -- the questions I think, if you try to compare other
3 facilities, you're going to probably have to link up what MTC
4 policies are with respect to the other facilities and whether
5 or not different policies apply and for what reasons.

6 I mean, I am cautiously allowing you to go into these
7 areas. But, again, you say you have to prove your deliberate
8 indifference. And if MTC or MDOC -- I mean, proving up
9 deliberate indifference is going to take a number of different
10 ways, I believe, for you to try to prove that.

11 MS. WINTER: I'll just say one more thing, and that is
12 deliberate indifference is proved not just by writ- -- what
13 written policy says. It's proved by actual practice.

14 THE COURT: Right. That's why I said it's going to be
15 proved by a number of different ways.

16 MS. WINTER: Yes. Yes. Yes, exactly. And I was
17 trying to pick up on that. And it seems to me that the
18 practice that Mr. Vail has observed is relevant to whether MDOC
19 and its agent MTC, what kind of practices they are willing to
20 put up with, let's say, with regard to a long-term segregation
21 policy, their knowledge -- their knowledge of what is going on
22 and their -- their deliberate indifference, their failure to
23 take reasonable measures.

24 THE COURT: Well, I'll allow the witness to offer any
25 opinions or assessments based on what he's -- his experience

1 and what he has done in this particular case and wherever that
2 experience has come from. I mean, if it meant him going out
3 comparing it to other places, that's fine.

4 A. Your question?

5 THE COURT: You may proceed.

6 BY MS. WINTER:

7 Q. Let me see if I can find -- the question was, do you have
8 any other evidence about MTC's inability to operate a long-term
9 segregation unit?

10 A. I do.

11 Q. What is that?

12 A. I've been inside the segregation units at EMCF, and they
13 are the worst segregation units I have ever seen in my entire
14 career.

15 Q. To your knowledge, is MDOC still allowing MTC to operate
16 that long-term segregation unit at EMCF even though the
17 monitors found they were incapable of managing that population
18 at Walnut Grove?

19 MR. FRIEDMAN: Object. Irrelevant. We're now trying
20 EMCF. For the record, it's irrelevant.

21 MS. WINTER: Well, actually, this again goes to the
22 deliberate indifference of MDOC, because the question was is
23 MDOC still allowing MTC to operate -- to manage a long-term seg
24 population at East Mississippi even though the monitors at
25 Walnut Grove found them incapable of managing long-term

1 segregation.

2 MR. FRIEDMAN: If, in fact, this goes to any
3 deliberate indifference, it would be deliberate indifference at
4 EMCF -- and I'm not conceding it is -- not Walnut Grove.

5 THE COURT: But MDOC is the agency which oversees all
6 of its prisons. Right?

7 MR. FRIEDMAN: I understand. But we're talking about
8 Walnut Grove, which doesn't have long-term seg. Now they're
9 talking about whether MDOC is indifferent at EMCF, which is an
10 entirely different lawsuit. I made my record.

11 THE COURT: Okay. Thank you. If you can narrow down
12 the time and place -- the time --

13 MS. WINTER: Yes.

14 THE COURT: -- then it would be an appropriate
15 question.

16 BY MS. WINTER:

17 Q. To your knowledge, Mr. Vail, based on reports that you are
18 currently receiving from the Southern Poverty Law Centers'
19 investigators at East Mississippi, based on that information is
20 MDOC still allowing MTC to operate a long-term segregation unit
21 at EMCF and do the conditions -- are they similar to when you
22 were there?

23 A. The unit continues to operate, and I've not seen any
24 information that would cause me to believe the conditions have
25 changed.

1 Q. What significance, if any, does this fact have for you that
2 MDOC is still allowing MTC to operate a long-term segregation
3 unit at East Mississippi in this manner?

4 A. Well, what it says to me is there's not good corrections
5 going on here, that people are responding to the fact that
6 plaintiffs and monitors are involved at Walnut Grove and making
7 their decision upon the heat that that causes them, not good
8 corrections.

9 Q. You mean the consent decree in this case and the monitors?

10 A. And the monitors' work, yes.

11 Q. And your work.

12 A. Yes.

13 Q. Mr. Vail, could you turn to Plaintiffs' Exhibit 6. This is
14 the Eldon Vail report.

15 THE COURT: Ms. Winter, for purposes of logistics
16 and -- how much longer do you think you're going to be with
17 Mr. Vail?

18 MS. WINTER: We have --

19 THE COURT: It may be a lot, I know.

20 MS. WINTER: It is a lot. It is a lot.

21 THE COURT: Okay. You won't be through with him
22 before lunch, I presume.

23 MS. WINTER: He will not be done by lunch, no. We
24 have a lot more.

25 THE COURT: Let's take a brief ten-minute recess.

1 MS. WINTER: Your Honor, before we recess, I made an
2 error in -- about this Exhibit 6. I just want to make sure.
3 This exhibit was submitted under seal. The court agreed -- we
4 requested -- and it's an EMCF report. It was submitted under
5 seal because it contains personal health information. And so
6 we don't want to put this in the record other than under seal.
7 We would like to move its admission but have it remain under
8 seal.

9 MR. FRIEDMAN: If she's moved for admission of
10 Exhibit 6, I'm going to object to that. This is Mr. Vail's
11 expert report in the other case involving East Mississippi. It
12 has nothing to do with Walnut Grove. This has to do with his
13 view of conditions at East Mississippi, not Walnut Grove.

14 THE COURT: I note your objection. I'll rule on it
15 after the break.

16 MS. WINTER: Thank you.

17 THE COURT: Brief recess. Ten minutes.

18 (RECESS)

19 MS. WINTER: Your Honor, before we start I'd like to
20 say that plaintiffs withdraw their offer of Exhibit 6 --

21 THE COURT: Okay. Is that --

22 MS. WINTER: -- we have just been talking about, the
23 report of Eldon Vail for EMCF. We withdraw it.

24 THE COURT: Okay.

25 MR. FRIEDMAN: I didn't hear that.

1 MS. WINTER: We are withdrawing Exhibit 6.

2 (OFF-RECORD DISCUSSION)

3 THE COURT: One point for housekeeping, with respect
4 to these exhibits that have been introduced -- I'm going to
5 make sure that the defendants know too -- we need clean copies
6 of the exhibits. No two-sided copies of the exhibit, because
7 when we -- when they are filed in this case, they'll have their
8 own ECF number. And if they are old -- if they are copies of
9 the old ECF numbers, you're going to have printing over that
10 and you won't be able to tell what it is.

11 MS. WINTER: All right. So we should white that out
12 or else find unfiled copies.

13 THE COURT: Right. I mean, just a clean copy of each
14 of the exhibits, and we'll put them in the record.

15 MS. WINTER: Yes.

16 THE COURT: All right. And no two-sided.

17 MS. WINTER: No two sides. No way. May I --

18 THE COURT: You may proceed.

19 MS. WINTER: -- proceed?

20 BY MS. WINTER:

21 Q. Mr. Vail, in May 2014, did you have another meeting with
22 MDOC and MTC officials and the monitors to discuss the causes
23 of the riot and remedies?

24 A. Yes. The monitors called for that meeting here in Jackson.

25 Q. And was MTC Vice President Odie Washington there?

1 A. Yes.

2 Q. And deputy -- then Deputy Superintendent Archie Longley?

3 A. Deputy Commissioner Longley, yes.

4 Q. And the monitors?

5 A. And the monitors --

6 Q. And --

7 A. -- other people.

8 Q. -- Marjorie Brown --

9 THE COURT: Just make sure you're not talking at the
10 same time.

11 MS. WINTER: I'm sorry.

12 THE COURT: Just be careful.

13 A. Yes, Marjorie Brown was there.

14 BY MS. WINTER:

15 Q. Did you tell --

16 A. You know, I honestly don't remember if Marjorie Brown was
17 there or not.

18 Q. Okay. Did you tell MDOC and MTC what you thought they
19 needed to do?

20 A. Yes, in a number of different ways.

21 Q. Could you just --

22 A. Well, regarding the riot, yes.

23 Q. And what was that?

24 A. That they needed to learn from their experience so that it
25 not be repeated.

1 Q. Did the monitors weigh in during this meeting on the
2 necessity to make change?

3 THE COURT: Go ahead. We have an objection.

4 MR. FRIEDMAN: Objection on hearsay. He can't testify
5 as to what nonparties said at the meeting back in 2014.

6 THE COURT: Is it part of his report?

7 MR. FRIEDMAN: It doesn't matter if it was part of his
8 report or not. It's still hearsay. He can put it in the
9 report, it doesn't -- it's still a hearsay problem.

10 THE COURT: I understand. Objection overruled.

11 BY MS. WINTER:

12 Q. Did the monitors weigh in during this meeting on the
13 necessity to make change?

14 A. Yes. Dr. Austin especially was -- spoke strongly about how
15 this cannot happen again.

16 Q. What was the MDOC-MTC response at this meeting?

17 A. Mr. Washington I think was -- well, what he said was that
18 bad things happen in a prison and they're always going to
19 happen in a prison and you can't make too much of it.

20 Q. Did Deputy Commissioner Longley express any disagreement
21 with Vice President Washington's statement?

22 A. He did not.

23 Q. Did you agree with Vice President Washington's view of the
24 situation?

25 A. Well, I'm on the record saying that bad things will happen

1 in a prison, but what concerned me about his statement is that
2 he took no responsibility for trying to learn from the event in
3 order to prevent another one from happening in the future.

4 Q. But you do agree that bad things can happen at any prison,
5 at every prison. Correct?

6 A. They can and will.

7 Q. Do you believe that it is acceptable for prison operators
8 to go through an event like a riot and then refuse to
9 acknowledge the urgency of understanding what happened?

10 A. I think it's irresponsible to do so.

11 Q. At this May meeting did you raise the problem of the
12 nonsecure doors?

13 A. I did. I had the opportunity to ask directly about the
14 problem with the doors.

15 Q. Did MDOC acknowledge that this was a problem?

16 A. Deputy Commissioner Longley stated that it is problem at a
17 number of facilities and that they were working on it.

18 Q. Did you find that response adequate?

19 A. No. In my estimation, not being able to know that your
20 cell doors are secure is an emergency situation and it needs
21 attention at the highest levels and it needs to be fixed.

22 Q. How long has MDOC been on notice of this problem?

23 A. Well, you can go back to the DOJ report from 2012 and they
24 were told then that it was a problem.

25 Q. I'd like you to turn to Exhibit -- Plaintiffs' 7, the

1 March 2012 DOJ report, and turn to page 20 of that report.

2 A. Yes.

3 Q. And would you read the highlighted language aloud?

4 A. "We also noted that youth are able to sabotage their cell
5 locking Mechanisms and get out of their cells, resulting in a
6 serious breach of security and safety to staff and other youth.
7 This deficiency results in a high incidence of youth-on-youth
8 violence and severe injury to unsuspecting youth. Either the
9 cell door locking mechanisms are inferior or security staff is
10 not inspecting the cell door locking mechanisms on a frequent
11 enough basis."

12 Q. Have you found this same problem at East Mississippi?

13 MR. FRIEDMAN: Objection. Objection. That is
14 irrelevant.

15 THE COURT: Okay. What's the response? Objection to
16 relevance, Ms. Winter. What's your -- what's the plaintiffs'
17 response?

18 MS. WINTER: It goes to deliberate indifference. The
19 Department of Justice raised this issue in a very serious way
20 more than three years ago and MDOC is operating both these
21 prisons. This is -- I mean, of course, it would be deliberate
22 indifference if it was only at MTC, but it seems to me it adds
23 to the issue if it's ongoing at another prison. It simply goes
24 to state of mind of MDOC.

25 MR. FRIEDMAN: It is entirely irrelevant to what's

1 going on at Walnut Grove.

2 THE COURT: I sustain the objection. Has there been a
3 finding that this -- has there been a court -- some sort of
4 judicial finding or other finding that --

5 MS. WINTER: There has not --

6 THE COURT: -- that the --

7 MS. WINTER: There has not been --

8 THE COURT: -- that this has occurred at EMCF?

9 MS. WINTER: There has not. And we will -- for the
10 sake of moving on, we will withdraw the question.

11 THE COURT: Okay.

12 BY MS. WINTER:

13 Q. After the May 2014 meeting with MTC and MDOC, did you
14 summarize your recommendations in a memo to the monitors in the
15 MDOC?

16 A. I did.

17 Q. Did they follow your recommendations?

18 A. Not to my knowledge.

19 Q. Mr. Vail, I'd like now to talk about the July 10th riot.

20 MS. WINTER: And, your Honor, just for the sake of
21 housekeeping, it's now almost noon. What plaintiffs would like
22 to do if we had our preference is to talk about now the
23 July 10th riot, but it may take as long as 45 minutes -- a half
24 an hour to 45 minutes to go through it without interruption.
25 Since there's going to be video, our preference would be if we

1 could go ahead now and not break for lunch until we're through
2 with this segment.

3 (THE COURT AND COURT REPORTER CONFERRED)

4 THE COURT: It's fine with me. I mean, yeah, it's
5 fine with me.

6 MS. WINTER: Okay.

7 THE COURT: I have to be concerned about my court
8 reporter and my courtroom deputy.

9 MS. WINTER: Of course. I don't think it will take
10 that long, but --

11 THE COURT: Okay. All right. You may proceed.

12 BY MS. WINTER:

13 Q. Mr. Vail, less than two months after your meeting with
14 prison officials, there was another major eruption of violence
15 at Walnut Grove. Correct?

16 A. Yes, there was.

17 Q. That was the July 10th riot.

18 A. Correct.

19 Q. You testified earlier that MDOC and MTC had not learned
20 anything from the New Year's Eve riot. And was this proved by
21 the July 10th riot a few months later?

22 A. I believe it was.

23 Q. What did you find about their level of preparedness for the
24 July 10th riot?

25 A. They demonstrated that they had not learned anything in

1 terms of how to take control of those pods once they lose
2 control.

3 Q. Could you describe how the July riot unfolded? And you can
4 refer to your August report to refresh your recollection.

5 That's Exhibit 8.

6 A. Well, from watching the videos what you can observe is that
7 activity seems to pick up in each of the pods about 9:40. And
8 you can see different inmates communicating from -- and I used
9 pods. Unfortunately, pods and zones, I'm mixing those up, but
10 it's the same thing. You can see them communicate with each
11 other.

12 Some prisoners were out of the vestibule going to the front
13 of different pods and talking. But the surveillance video has
14 no audio, so there's no way to know what's going on. At one
15 point there is a -- an inmate access -- accesses what appears
16 to be a staff telephone in that vestibule. And you just begin
17 to see that all of the pods kind of start to -- a lot more
18 movement, a lot more activity. You don't know exactly what's
19 going on, but you can begin to guess that something --
20 something's happening here.

21 Q. Was there any sign at that point of staff locking up any of
22 these pods?

23 A. No. And I learned from Mr. Martin in conversation with him
24 after the riot that in three out of those four zones, the
25 lockup time was 9:45 and for another one it was 9:15. So

1 there's activity starting to ramp up about 9:40. And then as
2 you watch the videos, there was very little, if any, effort to
3 get the inmates back in their cells for the night, which is
4 what the protocol would have called for.

5 Q. Should security staff have been on the housing zones at
6 that time of night?

7 A. Yes.

8 Q. And is that because the lockup time that you've described
9 was already happening?

10 A. Well, it was past in one of the zones, and it was right
11 about the time when you see the activity pick up that they
12 should have been moving towards lockup at 9:45.

13 Q. What does security officers' failure to lock up the
14 prisoners for the night at the proper time indicate to you?

15 A. It indicates to me that they're not in control of those
16 living units.

17 Q. Did the absence of staff in the housing pods play any part
18 in the riot?

19 A. Both the absence of staff and inattention to what's going
20 on, because there was some staff in the units, I think both of
21 those contributed, yes.

22 Q. And did allowing the inmates to be out of their cell past
23 lockup time play any part?

24 A. Yes.

25 Q. Looking again at Exhibit 8 at page 6, your analysis of what

1 happened during that riot, what did you observe about staff
2 presence in the housing units right before and during the
3 beginning of the riot?

4 A. Well, just to be clear, I've mentioned that the riot took
5 place in four zones in the close unit; but it also happened in
6 one of the zones in a medium unit. So there's five different
7 areas to cover.

8 Q. So the July 10th riot didn't just happen in close custody.
9 Is that correct?

10 A. That's correct. In that -- if I may. In that medium unit,
11 4 Unit Bravo, the video showed one officer in the unit for
12 about three minutes during the entire half hour before the riot
13 began. And during that time the video showed a fight between
14 two inmates in that zone that began and ended without any
15 response from the staff. And you -- I'm sorry.

16 Q. Well, during this time what's happening at -- in Unit 3
17 Delta?

18 A. There's one officer in the pod. He's sitting with his back
19 to the activity in the unit. At about 9:47 an inmate passes by
20 him twirling a broom handle. Officer doesn't make any effort
21 to correct the inmate or confiscate the broom handle. And the
22 officer gets up and leaves the unit at 9:52 p.m.

23 Q. What is happening in Unit 3 Charlie during this time?

24 A. An officer enters that unit at 9:41 p.m. and other officers
25 enter and then quickly exit about 9:54 p.m.

1 Q. What about in 3 Alpha? What's happening there?

2 A. That's the unit where the officer locked himself -- there
3 was an officer in that unit. He locked himself in a cell about
4 9:55.

5 Q. He locks himself into an inmate's cell.

6 A. Yes.

7 Q. So what is happening now in Unit 3 Bravo?

8 A. At 9:38 -- there was one officer there, and at 9:38 some
9 other officers came in with a medical cart and they left about
10 9:45. Officers came back in the unit, a number of officers.
11 And it looks as if they're trying to get the unit locked down.
12 But by that point the inmates had separated into two groups,
13 which I presume by gang affiliation. And about a minute later
14 they chase the officers out of the unit. And as we'll see on
15 the video, one of the groups, again I presume gangs, is stuck
16 in the vestibule and the other inmate --

17 MR. FRIEDMAN: Your Honor, I'm going to object to
18 him -- he's speculating and guessing. He said he presumed
19 gangs. That is speculation and he can't get up there and just
20 start presuming.

21 THE COURT: Objection sustained.

22 MS. WINTER: I believe that the court and opposing
23 counsel will be watching this in a few minutes and then the
24 court will be able to give whatever weight it wants to
25 Mr. Vail's interpretation of what was happening at that moment.

1 THE COURT: Okay.

2 BY MS. WINTER:

3 Q. So where were we? Were we in Unit 3 Bravo?

4 A. Yes.

5 Q. And were we at about -- we were at 9:54. Correct?

6 A. Yes. One of the groups winds up stuck in the vestibule,
7 and the other group is in the unit. And I think that's the
8 moment when control is lost in all four of the close custody
9 pods.

10 Q. So when they chase the staff in the unit and take command
11 of the vestibule, is that a turning point?

12 A. It's one of them, yes.

13 MS. WINTER: Your Honor, we would now like to show a
14 DVD which is Plaintiffs' Exhibit 9.

15 BY MS. WINTER:

16 Q. Mr. Vail, was Plaintiffs' Exhibit 9 a DVD that was prepared
17 under your direction?

18 A. Yes, it was.

19 Q. And what is on this DVD?

20 A. It shows a small part of the violence that occurred that
21 night.

22 Q. It's expert -- excerpts?

23 A. Excerpts, yes.

24 Q. Excerpts from the MDOC's surveillance videos?

25 A. Correct.

1 MR. FRIEDMAN: Your Honor, we've not seen this. It
2 was not produced to us until this morning. I assume it was in
3 here when we got to court. So I've never seen it.

4 THE COURT: How long is it?

5 THE WITNESS: 15, 16 minutes.

6 MS. WINTER: 15 minutes.

7 MR. FRIEDMAN: What I'm concerned about is
8 authenticity because now I'm told that Mr. Vail has put things
9 together. These -- I was under the impression that that was a
10 video taken off the cameras, but, apparently, it's not.

11 THE COURT: Do we have the video from MDOC? I think
12 the parties produced that to the court at some point. I may be
13 wrong.

14 MS. WINTER: Yes. Yes, we --

15 THE COURT: I may be wrong.

16 MS. WINTER: No, no, you're correct. We submitted
17 this as an exhibit earlier in the case.

18 THE COURT: A long time -- I mean --

19 MS. WINTER: Yes.

20 THE COURT: -- not -- was it this -- was it the
21 compilation of what Mr. Vail has done?

22 MS. WINTER: No, this is boiled down. There were a
23 long -- a long sequence that we gave to the court and to the
24 other side some several weeks ago, and this is excerpts, a
25 15-minute sample.

1 THE COURT: Okay. I guess my question, the MDOC --
2 this video came from the MDOC --

3 MS. WINTER: Yes.

4 THE COURT: -- cameras, MDOC files. Correct?

5 MS. WINTER: Yes.

6 THE COURT: And this video is a -- one that had been
7 spliced --

8 MS. WINTER: Yes.

9 THE COURT: -- and diced, whatever. Does the
10 plaintiff have the video -- a copy of the video that MDOC
11 produced to the plaintiff?

12 (COUNSEL CONFERRED)

13 MS. WINTER: We have it at SPLC's office a few minutes
14 away.

15 THE COURT: Okay.

16 MS. WINTER: The original that was produced to us by
17 MDOC. This is excerpts that were simply edited, extracted out
18 of it yesterday.

19 THE COURT: Okay. I think it's an appropriate time
20 for us to take a break to give the defendants an opportunity to
21 see this particular exhibit before it is introduced into the
22 record.

23 MS. WINTER: Yes.

24 THE COURT: The defendants are aware of and have a
25 copy of the full tape that they produced to the plaintiffs, but

1 I think this is an appropriate time for us to take a break for
2 lunch to give them an opportunity to see this particular video
3 before we see it and before it is admitted into evidence.

4 MS. WINTER: Yes.

5 THE COURT: So it's now 12:08. We should be ready to
6 start back up at 1:45. That should give the parties plenty of
7 time to get that information to each other and we'll proceed
8 from that point.

9 MS. WINTER: So are we to give the original MDOC tape
10 to them or --

11 THE COURT: No. They have the -- I assume they --
12 they --

13 MS. WINTER: They produced it to us, yes.

14 THE COURT: They produced it to you. So that's --
15 what I heard Mr. Vail say is that from that tape which was
16 produced to him, he put together Exhibit 9.

17 MS. WINTER: Yes.

18 THE COURT: And so I'm going to give the plaintiffs a
19 sufficient time to see Exhibit 9.

20 MS. WINTER: Thank you.

21 THE COURT: I'm sorry? Potential Exhibit --

22 THE COURT REPORTER: You said plaintiffs. You mean
23 defendants?

24 THE COURT: Oh, I'm sorry.

25 MS. WINTER: Before we break, I think I may have

1 forgotten to move into evidence a previous exhibit that we were
2 talking about.

3 THE COURT: Right. Dr. Vail's report?

4 MS. WINTER: Yes.

5 THE COURT: Exhibit 8?

6 MS. WINTER: And there was Exhibit -- yes.

7 Plaintiffs' Exhibit 8. And also there's Plaintiffs' Exhibit 7,
8 the DOJ report.

9 MR. FRIEDMAN: What are we doing now? What --

10 THE COURT: Plaintiff is suggesting that Exhibit 7,
11 the DOJ report, they want to enter that into evidence. What's
12 the -- what does the defendant say?

13 MR. FRIEDMAN: We object on relevance. This is from
14 March of 2012 and it deals with the Walnut Grove Youth
15 Correctional Facility which no longer exists. As the court
16 know, there's no youth there. They're at the YOU. So this --
17 even more than before, this deals with a situation that doesn't
18 exist at Walnut Grove.

19 THE COURT: I'm going to overrule the objection with
20 respect to Exhibit 7. I think it's, again, background
21 information. This is a document generated by DOJ, their
22 findings of what the facility was like in 2012. Although it
23 was a youth facility and there are no longer youth there, I'll
24 admit that, Exhibit 7.

25 (EXHIBIT P-7 MARKED)

1 THE COURT: Now, with respect to Exhibit 8?

2 MR. FRIEDMAN: We will object on relevance there.

3 THE COURT: Exhibit 8 will be admitted for ID purposes
4 for the most part. This is the expert report. He can testify
5 about everything that's said in there just like any other
6 expert. We generally --

7 MR. FRIEDMAN: Your Honor, this is not his expert
8 report.

9 THE COURT: Oh, I'm sorry.

10 MR. FRIEDMAN: This is another report that he put out
11 back -- I forget when, but it's not his expert report. I
12 forget when this is dated. August of 2014. His expert report
13 is --

14 MS. WINTER: I believe that's the report that we
15 attached to the motion for an evidentiary hearing.

16 MR. FRIEDMAN: That's February of 2015, February 10.

17 MS. WINTER: This report of Eldon Vail dated
18 August 4th, 2014, is what we attached in support of our motion
19 to enforce and modify the consent decree and for an evidentiary
20 hearing.

21 (PAUSE)

22 THE COURT: Objection will be overruled. Exhibit 8,
23 plaintiff represents that it was part of the motion to modify.

24 MS. WINTER: Yes. It was the supporting document on
25 the motion to modify and enforce.

1 THE COURT: When was that filed?

2 MS. WINTER: August 8th, 2014. That is -- this is the
3 document that precipitated this hearing. We filed our motion
4 on August 4th, 2014; and our support for that motion was this
5 report of Eldon Vail, this expert report of Eldon Vail.

6 MR. FRIEDMAN: Subsequently, there was the amended
7 motion with that Exhibit A that we've referred to.

8 MS. WINTER: Well, your Honor --

9 MR. FRIEDMAN: That really -- that the court
10 instructed the plaintiffs to file if they wanted to pursue
11 this.

12 MS. WINTER: What actually happened was when we were
13 having proceedings about is this hearing going forward, the
14 court said -- I believe it was in January -- said, *Look, just*
15 *look back. It's an old report now from August. Look back and*
16 *see if there's anything you want to add or whatever.* And I --
17 I think it was with respect to remedies. You said look and see
18 if the remedies are in any sense different or need to be
19 updated.

20 But this report, I believe, is the report that was
21 filed in support of the motion. It wasn't the report that was
22 amended. You asked us to amend our motion, just to update it
23 in case there was anything that had changed in all those months
24 from October -- from August to January.

25 MR. FRIEDMAN: Your Honor, what you actually

1 instructed the plaintiffs to do was to file an amended motion
2 and include in there the specific issues that they wanted to
3 pursue. And that is the Exhibit A.

4 THE COURT: And it's seven issues that -- the seven
5 issues that I mentioned before.

6 MS. WINTER: And those are the issues that we're
7 pursuing today.

8 THE COURT: Right. And those issues are encompassed
9 in some way in this report.

10 MS. WINTER: Yes. You also I believe asked us to file
11 a separate document, which we did. It was just a document on
12 proposed remedies.

13 THE COURT: Right. The objection will be overruled.
14 Exhibit 8 is admitted.

15 (EXHIBIT P-8 MARKED)

16 THE COURT: Now, at this time, again, we'll take a
17 brief recess. We'll be ready to go back up at 1:45, and we'll
18 proceed from that point. That will give the defendants an
19 opportunity to view -- to review Exhibit 9 and formulate any
20 objections that they might have.

21 MS. WINTER: Thank you.

22 THE COURT: You may step down, Mr. Vail.

23 (NOON RECESS)

24 THE COURT: You may be seated. Thank you. I
25 apologize for running over a little bit. I should have asked

1 the parties is there anything we need to take up before we
2 resume.

3 MS. WINTER: I don't think so, your Honor.

4 MR. FRIEDMAN: We were requested to view the video
5 during lunch. Do we need to take that up now?

6 THE COURT: Yes. Have you seen it?

7 MR. FRIEDMAN: We have seen the video. I have this
8 objection and this suggestion -- or this request. We object
9 because it obviously takes things out of context. It's just
10 slices of what happened. We would request, since we only saw
11 that at lunch today and there's no way for us to put together a
12 montage response during this hearing, we request that we be
13 allowed to supplement that with all the videos as an additional
14 exhibit.

15 Obviously, that would be -- you know, we can do it
16 next week to be submitted to the court so you can have a full
17 picture of what's going on. And at least during briefing we
18 can point out to you some things there rather than just have
19 slices of it.

20 THE COURT: When you say "all the videos" --

21 MR. FRIEDMAN: The July incident. We're just talking
22 about July.

23 THE COURT: Just the July incident which would consist
24 of videos from a bunch of different cameras or --

25 MR. FRIEDMAN: Well, we could -- you know, we can pare

1 them down some. But instead of splicing or cutting and
2 pasting, we'll just submit the full videos to you. And we can
3 either submit them all or we can submit certain ones. But
4 rather than you have a partial picture, just what they want you
5 to see, we would prefer to at least be able to supplement with
6 some more of it without cutting and pasting.

7 THE COURT: I'm willing to receive the video that was
8 produced to the plaintiffs. I assume that was a video -- a
9 complete video and --

10 MR. FRIEDMAN: This was taken, from my
11 understanding --

12 THE COURT: I said submitted -- what the plaintiffs
13 got from the defendants that the plaintiffs tendered to the
14 court some time ago.

15 MR. FRIEDMAN: The plaintiffs have all the videos.
16 Okay. I mean, we're not -- we wouldn't be submitting to you
17 anything they don't already have. They just took those and put
18 them into this video I assume you're about to watch.

19 THE COURT: Okay. I'll leave the record open for you
20 to submit --

21 MR. FRIEDMAN: Okay. It will just have to be a new
22 defense exhibit number, because we didn't anticipate this.

23 THE COURT: Okay.

24 MR. FRIEDMAN: I appreciate that. We'll supplement
25 that.

1 THE COURT: I'll give the plaintiffs -- you've sort of
2 heard how I'm going to rule, but I'll give you an opportunity
3 to --

4 MS. WINTER: Well, we, of course, have no objection to
5 the full tapes coming in.

6 THE COURT: Okay.

7 MS. WINTER: We wouldn't want a montage now to come in
8 after the hearing, because the defendants have had a long, long
9 time to do that. But, of course, we're happy for the court to
10 have the full videos available and they can argue from that.

11 THE COURT: Right. Okay. Are you ready to proceed,
12 Ms. Winter?

13 MS. WINTER: We are.

14 BY MS. WINTER:

15 Q. So, Mr. Vail, before the break you had said that Exhibit 9,
16 the DVD, was prepared under your direction and that it is
17 excerpts from the MDOC surveillance videos during the riot.
18 And we're about to play this DVD. Could you just tell us
19 briefly what it is that we're about to see.

20 A. Yes, I can. I spoke of the moment in 3 Bravo I believe it
21 was when two groups were fighting and they were separated a
22 bit. Some were upstairs, some were downstairs, kind of jawing
23 back and forth at each other. Officers come into the unit and
24 are quickly chased out of the unit.

25 They wind up in the vestibule. They -- they leave the

1 vestibule and run up the hallway. The vestibule door is
2 locked. One group of inmates is stuck in the vestibule and the
3 other is stuck in 3 Bravo. So there's a couple of small
4 segments that show us that happening.

5 MS. WINTER: And could we then play the first segment
6 of the video from 3 Bravo.

7 BY MS. WINTER:

8 Q. And, Mr. Vail, as it's played, will you tell court what
9 we're seeing?

10 (DVD PLAYED)

11 A. Well, I think it's pretty obvious the inmates are milling
12 around. There are -- as you watch it, I think you'll be able
13 to tell the distinction between the group upstairs and
14 downstairs. You see the officers here come into the unit.
15 They don't get very far into the unit. It speaks for itself in
16 some ways. There's a no man's land at the bottom of the
17 stairs. Officers begin to leave the unit.

18 Q. This is what you described as the crucial moment in the
19 evolution of the riot?

20 A. Yeah. That doesn't necessarily become clear until you see
21 a little bit more video, because it's also important to say --
22 or to pay attention to the time here. It's about five minutes
23 to ten. The officers have run out. The inmates are chasing
24 them. Then you see the other group come down the stairs. They
25 go to the door, peek out a little bit, but they don't follow.

1 Here is the same moment from a different view. This is the
2 vestibule outside of the unit.

3 I apologize about that X on there. I thought I learned how
4 to take it off, but I guess I didn't.

5 Here they come. They're going down the hallway through a
6 door that leads away from the unit. Inmates follow chasing --
7 chase them out of it. And you see the inmates return. So this
8 group now has a full view into each one of the pods in the
9 close custody unit.

10 Looking at this time -- it's a few minutes later. This is
11 into 3 Charlie. There's some activity there towards the back.
12 You see the fight begin. Others run over to join in. All
13 right. Fighting continues. We'll see this same time sequence
14 from a different camera in a moment. He's trying to get away
15 but can't.

16 Q. Can you describe what we're seeing?

17 A. Just the continued beating of a single inmate. At times
18 you can see -- it looks as if there are weapons or at least
19 some kind of clubbing device being used to hit the fellow who's
20 down on the ground.

21 (DVD CONTINUED)

22 Q. Mr. Vail, if you can describe what we're seeing as it's
23 happening, it's helpful for the record.

24 A. Yeah. My apologies. I -- this is always a little tough.
25 There's some activity going on the upper tier now. Some of the

1 violence that occurred in cells. And, of course, there's no
2 camera in the cells. But you'll see some congregation around
3 different cell doors up there.

4 Person in the bottom has been left alone for the moment,
5 but people will return to him later on or -- or maybe -- they
6 may have pulled him into the cell there. This isn't the best
7 camera angle, but it does begin to show you the degree of what
8 occurred that night.

9 Folks are moving across the top tier. You see some people
10 begin to start to cover their faces a little bit. Fellow on
11 the top tier is doing that right now. People running. Go back
12 to the cell door there in the middle. Then they drag -- they
13 strike some more. Then they drag him out afterwards.

14 Again, you can see the activity on the upper tier. It
15 looks as if they're trying to get a cell door open. More
16 people running on the upper tier. Some activity up -- up top.
17 You can't see too much on the bottom floor at this moment, but
18 you will. The vestibule into this unit is at the lower left of
19 the screen; and you'll see some prisoners go to that window,
20 remembering that one group is trapped in there.

21 Now people are back at the door where they -- the inmate
22 who had been beaten before had tried to retreat but it didn't
23 work, and now they drag him to the front of the tier.

24 He's -- okay. This is the same time frame from a different
25 camera at the back of the tier. You've seen this but from a

1 different angle. This shows you in more detail the nature and
2 the degree of the violence with the broom handle and the
3 strikes.

4 In the upper right corner you can see the window and you
5 can see some activity up there. That's the other group who's
6 trapped in the vestibule.

7 Q. Can you tell what that weapon was that they --

8 A. I could not tell what that weapon was. This one appears to
9 be a dinner tray. I don't know what that was. There are
10 milk -- there's a milk crate being tossed around in the upper
11 tier. He's left alone for a bit, but you can see what --

12 Q. The inmate who just got up from the beating, is that blood
13 on the floor?

14 A. I believe it is. And then they go and get him and they
15 drag him and they hit him again, drag him to the front, to the
16 front of the unit where he can be displayed to the other group.

17 Now, this is quite a bit later, and the time stamp is
18 important here because what has occurred between these two time
19 frames is that officers made it to the elevated booth and fired
20 some gas into the unit. And for the most part in this zone and
21 in other zones inmates were retreating to their cells. But the
22 gas stopped. And we'll talk about that later. And so the
23 violence resumes. And this is probably the longest clip here.
24 I think it goes about five more minutes.

25 Q. Those crates that they are beating the inmate with in the

1 lower --

2 A. Milk crates, some kind of stick. You see more folks with
3 towels around their heads at this point because they -- there
4 has been some gas thrown into the unit from the elevated booth.
5 Any number of people take their turn at inflicting strikes and
6 hits and et cetera on the guy who's down at the bottom right of
7 the camera.

8 That's a microwave oven being placed in the middle table
9 there. He's being struck with milk crates. He gets up
10 somehow, goes into a cell.

11 Q. Does it appear that he's followed into the cell?

12 A. Yeah. Yes. He's -- people are going in after him. So we
13 obviously can't see what happened in that cell during that
14 period of time. They're bringing another person over to the
15 door. They begin to assault him. Since I don't have an
16 after-action report, I can't identify these people by name.
17 And this violence is pretty gruesome here. It goes on for --

18 Q. Was that a microwave that was just thrown?

19 A. I believe it was. And if you watch closely, along with the
20 kicks and the strikes, you'll see stabbing motions. And since
21 there's been no written analysis of this incident, I don't know
22 the nature of those weapons; but we do know there were stabbing
23 victims from this riot.

24 Again, this is close to the door where the inmates in the
25 vestibule can see what's happening. Again, the microwave, milk

1 crate, more milk crate.

2 Q. Beating with the milk crate.

3 A. Yes. I'm sorry. Stomping. Striking. That appears to be
4 a stabbing motion to me. Watch the guy who hands off that
5 weapon to someone else or -- I'm not sure what happened there.
6 It looked as if he handed it off to someone else. More
7 stabbing motions by a different inmate. Again stabbing
8 motions. Another microwave hit him again, hitting him with
9 a -- some sort of stick.

10 Q. Can you tell what the man in white standing on the table is
11 doing?

12 A. Not yet I can't, but he comes over on top of that table and
13 begins to tell the other inmates to get away, back off. They
14 do one more hit with the microwave. And I believe that he
15 urinates on the person on the ground. He's left lying there,
16 again, remembering that everyone in the vestibule can see this.

17 This is a camera at the back of that unit. At that point
18 it had been destroyed. And we won't watch this for long. This
19 is back at 3 Charlie front. A couple of minutes later, the
20 fellow is lying on the ground.

21 Q. What about in the back?

22 A. There's still activity on the upper tier. At the bottom of
23 the camera you see he's struck some more. It's just hard to
24 tell what's going on with that congregation at the top, whether
25 they actually breached that cell they were trying to breach

1 earlier and if so what's going on inside.

2 Q. But the beating is continuing on the --

3 A. The beating continues --

4 Q. -- body.

5 A. -- on the bottom floor. They drag him.

6 Q. Now, did you say earlier that they're doing the dragging to
7 the door to display the body to the other group?

8 A. That's my belief. And I think that this individual
9 urinates on him again. This is a different person I think,
10 but, again, we don't know because there's no report to describe
11 exactly what happened and who's responsible. He's kicked
12 again. And I think this segment ends pretty quickly here.

13 Now, this is -- look at the time, 10:26. This is in pod 3.
14 At 10:12 they had been pumping gas into each one of the zones.
15 And the zones -- you see back there a little bit. There's not
16 much movement. For the most part, the inmates' locked up and
17 you see the correctional officer there at the front of the
18 camera and he has a gas grenade. And it explodes into the
19 booth. And you very quickly will see this booth go dark.

20 Q. That's an error obviously, right, that exploding --

21 A. I presume he did not explode the grenade in the booth on
22 purpose, but the significance of it is that at 10:26 they
23 abandon that booth and stay out of it for about a half an hour
24 allowing the violence that we witnessed to occur from 10:30 on.
25 Had they been adequately equipped with gas masks, they probably

1 could have kept the inmates -- most of the inmates in their
2 cells and stopped some of this violence while they got a
3 tactical team together and entered the unit to control it.

4 Fairly quickly you see the gas start to clear, and then we
5 come back into it at 10:33. At 10:33 there's gas there, but
6 certainly not something that you couldn't withstand if you were
7 wearing an appropriate respirator. But we're looking at the
8 top of the screen here back into the same unit for some of the
9 same time frames that we saw previously, and you can see the
10 violence that you've already seen but this time from a
11 different perspective.

12 Q. So the beating that we -- some of the beating we just saw
13 is now appearing at the window at the back of the control
14 tower?

15 A. Right. And if -- you know, the officers have a port in
16 that window in order to shoot gas into that unit. And when
17 they did between 10:12 and 10:26, it was effective in keeping
18 the inmates in their cells. It wasn't perfect, but it was
19 pretty good. And it's not only true in this pod. It was true
20 in every pod in the close custody unit.

21 You can't see it as well here, but it's the -- you've seen
22 it a couple of times before. You can see it here. If the gas
23 grenade hadn't been exploded, there would have been a better
24 outcome. If the facility was prepared to respond and had
25 sufficient respirators and staff ready to use them, they would

1 have been down maybe a few minutes, not over a half hour. I
2 think it was 32 minutes when the booth is unoccupied. And
3 I'm -- well, I'll leave it at that.

4 This is -- I think there's about another minute of this.
5 The strobe light is the emergency beacon, the emergency alarm
6 that had been sounded as a result of the disturbance I'm sure.

7 Q. We're continuing to see beating?

8 A. It's the same inmate victim. You can see the motions
9 that -- of hitting him continue through the booth down into the
10 zone there. That's the extent of the video that we -- that we
11 brought.

12 (DVD CONCLUDED)

13 A. There was violence in the other zones as well and -- but
14 this was a representative sample. And I think it was
15 important -- I think it is important to know of the mistake
16 that was made in that booth that had it not occurred or had it
17 been handled differently could have stopped some of that most
18 serious violence from occurring.

19 Q. And you do see some violence in 3 Alpha?

20 A. Yeah. The timing is about the same. In 3 Delta you can
21 see around 10 -- or a little bit after 10:00 inmates can be
22 seen with a broomstick and coolers and buckets carrying like
23 weapons. And there's some entry into the cells with those
24 weapons and then people running out of the cells. But some of
25 that violence you can't see because it's not on camera.

1 There's again the same lull for a considerable period of
2 time. And then closer to 11:00, you can see people come out of
3 their cells, downstairs, covered in blood, chased by seven or
4 eight other inmates. And again they have the long sticks and
5 the weapons. The man who's getting chased grabs one of the
6 milk crates and tries to use it as a shield. Doesn't really
7 work. He's unsuccessful fending off that attack.

8 11:00 you can see a separate assault in the showers on the
9 bottom tier. You can see a milk crate being used as a weapon,
10 but there's not a clear view of the victim in the camera.
11 Another minute later the man who was being chased is left lying
12 on the floor directly in front of the pod door, again close to
13 the vestibule. You see some inmates come out of the shower.
14 Inmate by the cell is beaten some more.

15 About five minutes later, inmate who was left lying in
16 front of the pod door is still lying motionless. So that's a
17 synopsis of what was going on in 3 Delta at roughly the same
18 time.

19 Q. Would it be fair to say that gas was used more effectively
20 in Unit 4B, the privilege pod, than in Unit 3?

21 A. In Unit 4 Bravo, which is a medium unit, I don't believe
22 that we had access to the DVD for the first -- from 9:30 until
23 10:30 that night. I think what we had was from 10:30 on. And
24 in that unit you can see at 10:30 most of the inmates are out
25 in the dayroom and there is some fighting that begins.

1 But almost immediately from the tower gas is fired into the
2 unit; and about a minute later, like 10:32, the unit is fogged
3 up. There's still a little bit of skirmishing between the
4 groups. But at 10:35 the pod is cleared of inmates except for
5 that fog from the gas. For about three minutes there's no
6 visible inmate movement. And a minute after that, 10:39, the
7 officers come in and get the -- get the unit locked down by
8 making sure that all the doors are secure.

9 So the -- what could have happened in 3, having not had the
10 mistake or had they been in a state of better tactical
11 readiness, the way that they stopped it in 4 could and should
12 have happened in 3.

13 Q. And just -- I think you did mention it, but 4 Bravo is the
14 privilege pod, isn't it?

15 A. I know it was medium security. I don't know if it was a
16 privilege pod.

17 Q. But it's not close custody.

18 A. It is not close custody.

19 Q. Have you seen any evidence that MTC or MDOC considered the
20 difference between what happened that night in Unit 3 and what
21 happened in 4 Bravo the night of the riot?

22 A. I have not seen any evidence of that. No.

23 Q. Would it have been helpful for them if they had compared
24 and contrasted what happened in those two units?

25 A. The difference between what happened in 3 and 4 should be

1 central to their operation today, and staff should be trained
2 to have learned from this lesson and to know what to do and be
3 properly equipped and properly trained to handle this event
4 should it occur.

5 Earlier on I said there's good and bad depending on how the
6 unit's designed. The good part about this unit design is they
7 can have armed control, whether lethal or nonlethal weapons,
8 from that tower booth. That's an enormous advantage if things
9 start to kick off. They need to use that to their advantage.

10 You can push people back into their cells through the use
11 of the gas and give yourself enough time to get your team
12 together, fully suited up, have them go into the unit and make
13 sure those doors are secure and the units are locked down.
14 I've seen absolutely no evidence that they've learned that
15 lesson or taught it to their staff.

16 Q. Do you know whether upper -- Marjorie Brown or other upper
17 corporate management over Walnut Grove is -- was aware about
18 the OC grenade exploding in the tower?

19 A. I had the opportunity to look at Ms. Brown's deposition,
20 and she was not aware that the grenade had gone off in the
21 tower.

22 Q. And this was recently?

23 A. I think her deposition was last week.

24 Q. If that grenade hadn't gone off in the booth, what would
25 the impact have been on the violence that we just watched in

1 Unit 3 Charlie?

2 A. It's very likely that -- well, exactly what we saw would
3 have been prevented. Had something else happened, I don't
4 know. It would have depended upon their ability to mobilize
5 their resources and enter that unit in order to get it locked
6 down. It would depend on how much gas they had to clear it
7 right out.

8 We don't really know what would have happened if it hadn't
9 have gone off. But their chances of controlling that incident
10 would have been greatly increased if they could have maintained
11 a tactical presence in that elevated booth.

12 Q. Is this the kind of information and analysis that you would
13 expect to see highlighted and addressed in an after-action
14 report?

15 A. It's exactly what I would expect to see in an after-action
16 report.

17 Q. And what is your view of the fact that MTC has not done an
18 after-action report and that MDOC hasn't demanded an
19 after-action report from them?

20 A. Well, there's two different answers I guess. I mean, I am
21 dumbfounded that the organization that currently is running the
22 prison wouldn't want to do that, wouldn't want to learn from
23 something that went wrong in order to make the prisoners safer
24 and in order to make the staff safer.

25 I don't fault these officers. They're probably trying to

1 do the best that they can. I fault the administration for not
2 taking their obligations seriously enough to learn from their
3 mistakes and use that information to keep everybody safer.

4 MDOC, I'm kind of stunned, I mean, why you would not call
5 your contractor on the carpet and say, *This is not good enough.*
6 *I want to see what the plan is. And I'm going to come out and*
7 *do a surprise drill to see if your staff know what they're*
8 *doing.*

9 Q. Is it the rule at Walnut Grove that inmates can't go into
10 any cells in which they're not assigned?

11 A. I believe that is the rule, yes.

12 Q. And is that rule enforced?

13 A. It wasn't at this period of time. It was not being
14 enforced. No.

15 Q. Do these videos also confirm that officers were absent in
16 the close custody living units when inmates were out of their
17 cell?

18 A. Yeah. We talked about that a little bit earlier. Some
19 were in. Some were out. But there was not what I would expect
20 to see, which is a consistent presence of an officer in the
21 pod. And as I've also said earlier, in my opinion, there
22 should be two officers in a close custody pod when the inmates
23 are out.

24 Q. Has MDOC or MTC ever explained to you why gas masks aren't
25 provided to all the security staff?

1 A. They have not.

2 Q. Does it -- what is the importance of having those gas masks
3 available?

4 A. Well, I've been critical of the absence of respirators in
5 planned use of force situations. Obviously, I'm critical that
6 they weren't apparently available here in sufficient numbers to
7 retake control of that booth.

8 But in a planned use of force situation, if you go in
9 there, you might use gas. If you don't have a mask on and
10 something goes wrong, you don't have as much control over the
11 situation. It's very typical and very standard in my
12 experience for officers in a planned use of force to have a
13 correctly fitted respirator, know how to put it on, know how to
14 use it. It is a really important tool to keep everybody safer,
15 the inmates and the officers. I don't know why they don't have
16 that -- that practice in place like I've seen in many other
17 jurisdictions.

18 Q. Did they ever explain to you why they did not do an
19 after-action report on the July riot?

20 A. Well, we talked about it and they simply said that they
21 didn't -- I believe they said in a meeting that I was at that
22 they didn't feel like they needed to.

23 Q. I want to move forward in time now a few weeks after the --
24 approximately four -- three or four weeks after -- two or three
25 weeks after the July 10th riot. You submitted another report

1 dated August 4th, 2012, and that's Exhibit 8. Correct?

2 A. Correct.

3 Q. And we've talked about Exhibit 8. And in this August 2014
4 report did you reiterate the finding that you had made earlier
5 that MTC was incapable of controlling close custody inmates?

6 A. I did.

7 Q. Did MDOC thereafter move close custody inmates out of
8 Walnut Grove?

9 A. They did.

10 Q. They started in August?

11 A. Started in August and I believe they were all gone by the
12 middle of September.

13 Q. Did they actually physically move all of the close custody
14 inmates out of Walnut Grove?

15 A. No. What happened was they did a classification review of
16 the people who had been close custody and they kept about a
17 third of them there. They moved them to medium custody.

18 Q. So after -- when they were -- after this riot they went
19 back and looked at their -- how these inmates were classified,
20 if I'm understanding you, and then they reclassified them down
21 from close custody to medium?

22 A. Over 90 inmates, yes.

23 Q. So when they -- did they announce at a certain point in
24 September that there were no more close -- that there were no
25 inmates in close custody, publicly announce?

1 A. I don't know if they publicly announced. I think the first
2 time I saw it is in -- or I heard about it was from the
3 monitors.

4 Q. But, in any event, in September when supposedly there were
5 no more inmates in close custody, that included 90 inmates who
6 they had just down-classed from close custody to medium.

7 Correct?

8 A. That is correct.

9 Q. Did the monitors later discover that MDOC had -- well, let
10 me take that back. Did the monitors tell MDOC that MDOC had
11 better pay special attention to those inmates who had been just
12 down-classed from close custody to medium?

13 A. Yes. The monitors told me that and I know that they told
14 the MDOC and MTC that they should keep a close eye on that
15 group of inmates and should there be any violent behavior on
16 their part, they should be quickly identified and moved out of
17 the facility.

18 Q. Did MDOC, in fact, watch those inmates who had been
19 classified down from close to medium to make sure they weren't
20 committing violent infractions?

21 A. No. When the monitors came back and looked, they found 11
22 of them who had committed additional violent infractions who
23 were still in the population at Walnut Grove. As a result of
24 the monitors discovering that, those 11 inmates were moved.

25 Q. And did the monitors criticize MDOC and MTC and say that

1 they should have discovered those errors, that it shouldn't
2 have been left to the monitors?

3 A. Yes. That's exactly what they said in one of their
4 reports, that that kind of check-and-balance work and
5 follow-through needs to be occurring by the staff on the ground
6 and not rely on the monitors to discover those kinds of errors.

7 Q. And was that in the sixth -- monitors' sixth report, their
8 most recent report?

9 A. I believe it was in the sixth report, yes.

10 Q. The one that they submitted in early March of this year.

11 A. Yes, the most recent one.

12 Q. What conclusions, if any, do you draw from the fact that it
13 was the monitors, not MDOC or MTC, who discovered these errors
14 in classification a few weeks ago, in February or March?

15 A. That they're not paying attention to the correctional
16 basics that are necessary in order to keep people safe. This
17 was a very explicit warning. They couldn't have made it more
18 clear, and there's evidence they paid no attention to it.

19 Q. And does this speak to MDOC's monitoring as well as MTC's
20 performance?

21 A. I think it speaks poorly to both MTC's performance and to
22 the monitoring by MDOC.

23 Q. So in moving close custody out of Walnut Grove, when MDOC
24 decided that a third of the close custody population had been
25 overclassified and then downgraded them from close to medium,

1 does that fact -- does that incident raise any concerns for you
2 about the adequacy of the classification system at Walnut
3 Grove?

4 A. It raises questions. I mean, it was like a third of the
5 number of -- almost a third, I think, 30 percent, of the people
6 that they reviewed they found eligible for medium custody.
7 That's more than a small error rate. I think typically you'll
8 find as high as 15 percent error rate and you can still have
9 your classification system validated. That's about double that
10 amount. So it does cause me to be concerned, not so much about
11 the classification system that Mississippi has, but the way in
12 which it's actually being applied at Walnut Grove.

13 Q. Does it cause you in any way to question the integrity of
14 the classification, the way the classification system's being
15 implemented?

16 A. It certainly causes me to question the integrity of how
17 it's being utilized in actual practice.

18 Q. Does classification implicate safety issues, classification
19 of inmates?

20 A. Absolutely. All prisoners are not the same. Some are much
21 greater risk than others. And you need to sort your population
22 into -- you know, again, nomenclature's an issue. But whether
23 it's maximum, close, medium or minimum, you need to house like
24 inmates together so that the more vulnerable aren't preyed upon
25 by those who are likely to do that kind of behavior.

1 Q. If we assume that MDOC has now properly reclassified all
2 the inmates and that they are no longer housing close custody
3 inmates at Walnut Grove, that is there -- everybody there has
4 properly been classified as not being close custody, does that
5 mean that Walnut Grove is now a safe facility because there's
6 no more close custody?

7 A. No, it does not.

8 Q. On what do you base that opinion?

9 A. Well, two things, certainly, my own experience, but also
10 just a comment about classification systems. They're not a
11 diagnostic tool like an x-ray machine. They're an actuarial
12 machine. They're accurate to a certain percentage point. So
13 they aren't precise about individual offenders. But inmates in
14 medium and even minimum custody are certainly capable of
15 serious violence.

16 Q. So violence does occur in medium and minimum, not just in
17 close custody?

18 A. Violence, riots, all kinds of things occur.

19 Q. Do you know an example of that happening at Walnut Grove
20 right before the July riot?

21 A. It was in one of the medium units there was a serious
22 assault on a correctional officer.

23 Q. Was that a female security who was first verbally abused
24 and then assaulted?

25 A. Yes.

1 Q. And was there also another assault on staff recently?

2 A. There was one last week. Yes.

3 Q. Is there any other example of -- well, I think you -- you
4 previously mentioned that one of the zones that rioted at
5 Walnut Grove during the July riot was medium custody
6 population. Correct?

7 A. It was.

8 Q. Do you know of any other very recent examples at any other
9 prison run by MTC of extreme disturbance in a medium or minimum
10 custody facility?

11 MR. FRIEDMAN: Object. That is irrelevant to what's
12 going on at Walnut Grove.

13 MS. WINTER: May I be --

14 THE COURT: Any other -- any other facility in
15 Mississippi or where?

16 MS. WINTER: A recent example -- and may I proffer
17 what the evidence -- we'd like to put in?

18 THE COURT: Is this in Mississippi or somewhere else?

19 MS. WINTER: It's not in Mississippi. It is an MTC
20 facility in another state where a few weeks ago there was
21 an enormous riot in a lower security facility. The reason why
22 we think this is relevant is because MDOC argues that close
23 custody -- *It doesn't matter anymore because there is no more*
24 *close custody at Walnut Grove. So why should we be concerned?*

25 Mr. Friedman's very words were -- I think he said

1 something exactly like that -- *It's not an issue anymore*
2 *because there is no close custody. So there can't be another*
3 *riot.*

4 MR. FRIEDMAN: That's not what Mr. Friedman said.
5 But, in any event, what happened at another prison somewhere --
6 another prison even in Mississippi, but certainly out of
7 Mississippi, is irrelevant to Walnut Grove.

8 MS. WINTER: But this is a facility run by MTC which
9 the evidence is showing is incapable of -- not just of close
10 custody but of other custody levels too. And MDOC knows this.
11 This goes to MDOC's deliberate indifference.

12 THE COURT: I'll let you -- I'll let you ask MDOC
13 whether they know anything about what was happening at MTC's
14 affiliates.

15 MS. WINTER: Okay.

16 THE COURT: But objection sustained.

17 MS. WINTER: Thank you.

18 BY MS. WINTER:

19 Q. Do you have any personal experience with riots occurring in
20 medium and minimum custody?

21 A. I do.

22 Q. Could you explain what that experience is?

23 A. Well, more than one, but one example, it was Labor Day --
24 Friday -- the Friday night before Labor Day in 1992 when I was
25 the superintendent or warden of the McNeil Island Correctional

1 Center. At the time about 16-, 1700 inmates, medium, minimum
2 and maximum. The medium unit was standalone, 400 bed. And a
3 riot occurred there resulting in the loss of life of one
4 prisoner.

5 It took tactical squads from off the island -- I mean, this
6 is a true island prison -- from the state patrol and from
7 another institution to help us regain control of that compound.
8 It took us about 12 hours to get it done.

9 Q. Do you have any other experience when you were --

10 A. Well, in -- again, another example, in 19 either '98 or
11 '99, might have been '99, springtime, about this time of year,
12 we had rented beds from -- because we were overcrowded and we
13 needed beds. We didn't have enough beds to put inmates in. So
14 we rented beds out of state in a private facility in the state
15 of Colorado.

16 We took the two planeloads in. The first planeload was 125
17 inmates. The second planeload was 125 inmates. 125 inmates in
18 each planeload. I came down between those two planeloads. So
19 I was on the ground when our 250 inmates were introduced into
20 this private facility. And I spent that first week there.

21 As I was getting ready to leave on the final day, I met
22 with the warden and I said, *I am very concerned about the*
23 *climate in this facility.* And I don't think he listened to me;
24 but, you know, that was his prison and I was the -- I was
25 renting the beds and so off I went to the airport. Before I

1 got to the airport I got a call from my bosses back in
2 Washington telling me that the prison had rioted. And it had.

3 And I went back to the institution and it was a -- in a
4 full-blown riot. And, I mean, that's a whole other long story.
5 But I found that in that case I had to put my monitors -- four
6 monitors, including a retired director of prisons, on the
7 ground in order to help them manage that facility that they
8 were incapable of managing. And it was a medium security
9 facility.

10 Q. In your August 4th, 2014, report did you warn MDOC and MTC
11 that a riot resulting in the loss of life can occur even in a
12 minimum security environment if there's not an effective
13 emergency plan in place?

14 A. I did.

15 Q. Did you also tell them at that time that MDOC must have an
16 effective emergency plan in place with officers trained to
17 follow that plan and their performance tested in realtime
18 drills?

19 A. Yes, I did.

20 Q. Has MDOC compelled MTC to put an effective emergency plan
21 in place at Walnut Grove?

22 A. No, they have not.

23 Q. I'd like to turn now to the monitors' fifth report that
24 they filed on October 22nd, 2014. After the plaintiffs filed
25 their August 2014 motion to enforce the consent decree, did the

1 court-appointed monitors some weeks later file a report on
2 MDOC's compliance with the consent decree?

3 A. Yes, they did.

4 Q. And that was the monitors' fifth report?

5 A. Correct.

6 MS. WINTER: And that is Plaintiffs' Exhibit 10 which
7 plaintiffs would move in evidence.

8 MR. FRIEDMAN: No objection.

9 THE COURT: Exhibit 10 will be admitted.

10 (EXHIBIT P-10 MARKED)

11 BY MS. WINTER:

12 Q. Do you have that report in front of you, Mr. Vail, to refer
13 to if you need it?

14 A. Yes, I do.

15 Q. What did the monitors conclude in their fifth report about
16 MDOC's compliance with the consent decree provisions relating
17 to violence and inmate safety? I mean, were there any non --
18 findings of noncompliance in any key issues -- on any key
19 issues?

20 A. They were found noncompliant in protection from harm
21 category, reasonably safe living conditions.

22 THE COURT: Could you tell the court what page you're
23 looking on?

24 THE WITNESS: I'm looking at page 5, bottom of the
25 page.

1 A. They found the facility was in noncompliance with
2 sufficient numbers of adequately trained staff. That's on the
3 bottom of page 9. Top of page 11, they found noncompliance
4 with use of force and chemical agents. And middle of page 16
5 they found noncompliance with the contract monitoring
6 provision.

7 BY MS. WINTER:

8 Q. In their fifth report did the monitors make any findings
9 reflecting on the integrity or the accuracy of the information
10 that had been provided to them by MDOC or MTC?

11 A. Well, there was one mentioned here. And I'm sorry if I
12 can't find the precise page, but --

13 Q. Could you look at page 17?

14 A. Okay. Yeah, there it is.

15 Q. The monitors found that there were, quote, stark
16 inconsistencies, unquote, between the MDOC Walnut Grove audit
17 findings and the monitors' findings in such key areas as
18 protection from harm, staffing and use of force. Correct?

19 A. Yes. They were speaking about the monitoring process.
20 Yes.

21 Q. And did they give an example of stark inconsistencies?

22 A. Well, the most striking example is that the entire July
23 riot was categorized as only one assault instead of -- we don't
24 really know how many assaults, but nine people went to the
25 hospital.

1 Q. We just saw --

2 A. It should have been more than one.

3 Q. Yes. And in the video we just saw we saw dozens of
4 assaults, did we not?

5 A. We saw more than one.

6 MR. FRIEDMAN: Objection. Mischaracterization.

7 THE COURT: Objection sustained. We saw a bunch of
8 them. We did see a bunch of them.

9 MS. WINTER: Yeah. Okay.

10 THE COURT: And I'll see them again when I look these
11 tapes.

12 BY MS. WINTER:

13 Q. In the few months since the monitors made those findings in
14 October, have you discovered any other stark inconsistencies in
15 what prison officials report about their current operations at
16 Walnut Grove and the reality that you have observed? Can you
17 give any examples since the monitors' fifth report of
18 inconsistencies?

19 A. Well, there's -- there's the issue of whether or not --

20 Q. Well, let me ask you something. Just now could you say yes
21 or no and I'll ask you later to give me examples.

22 A. Okay. Yes.

23 Q. Now I'd like to turn to your January 2015 visit to the
24 Grove -- the Walnut Grove. After the monitors' fifth report
25 did you again meet with MDOC and MTC officials at the prison?

1 A. I did.

2 Q. And in January 2015 you had a meeting with them at Walnut
3 Grove?

4 A. I did.

5 Q. Did you ask MTC and MDOC officials for a copy of the
6 after-action report on the July riot?

7 A. I assumed there would be one. Yes, I did.

8 Q. And what did they say to you?

9 A. There was not one completed.

10 Q. And does MTC policy require an after-action report?

11 A. Yes. The safety policy requires it.

12 Q. Could you turn to Exhibit 11, MTC Safety Committee Policy.

13 A. Okay.

14 MS. WINTER: Plaintiffs would move the admission of
15 Exhibit 11, which is MTC's Safety Committee Policy produced by
16 them.

17 MR. FRIEDMAN: No objection.

18 THE COURT: Exhibit 11 will be admitted.

19 (EXHIBIT P-11 MARKED)

20 BY MS. WINTER:

21 Q. Mr. Vail, could you look at page 2, item 5, and read aloud
22 the policy.

23 A. This is the section on emergency plans. The safety
24 committee shall convene after all critical incidents to ensure
25 proper safety protocols have been followed. The committee

1 shall report -- shall submit a report to the facility
2 administrator detailing the effectiveness of the emergency
3 response and recommendations for any corrective actions that
4 may be necessary.

5 Q. Did MDOC take MTC to task for this violation of MTC's own
6 policy?

7 A. Not to my knowledge, no.

8 Q. Were they present in the meeting when you raised this
9 issue?

10 A. Deputy Commissioner Longley was there, yes.

11 Q. Did they say that -- did they say or suggest that they
12 couldn't do an after-action report because there was an ongoing
13 criminal investigation?

14 A. We did have that conversation.

15 Q. Is an ongoing criminal investigation a justification for
16 not preparing an after-action report?

17 A. No. I've been in a similar circumstance where a local
18 prosecutor was interested in pursuing criminal charges. You
19 simply work with them to make sure that nothing in your
20 investigation gets in the way of the criminal investigation.
21 They are two separate kinds of investigations.

22 Q. What's the purpose of an after-action report as compared to
23 a criminal investigation?

24 A. Well, as I testified previously, you want to be able to
25 document what went wrong -- or you want to document what

1 happened and then you want to identify what went wrong. You
2 want to see what you need to do to correct the problem so it
3 won't go wrong again. And then you need to track, to follow up
4 to see that you actually did it. That's purpose of an
5 after-action report. I think there's another purpose there of
6 public accountability.

7 Q. And the purpose of the criminal investigation is to
8 prosecute --

9 A. Prosecute a crime.

10 Q. Did you ask officials when you met with them in
11 January 2015 at the prison if they had identified the lessons
12 they learned from the July 10th riot?

13 A. I did ask that question.

14 Q. What did they say?

15 A. They said that, yeah, that they had identified some things
16 and that they had done that work. I asked them then if -- *Did*
17 *you write any of that down so I can see what you learned?* And
18 they said, no, they didn't write it down.

19 Q. In your opinion, what are the likely consequences of
20 failing to write it down in a written report when there has
21 been a serious disturbance?

22 A. My fear would be that given the same set of circumstances
23 they encountered twice in a 15-month period they may well be no
24 better prepared to deal with it today than they were then.

25 Q. Does MDOC's refusal to make an after-action report affect

1 your opinion in any way?

2 A. Yes.

3 Q. And how? How does it affect it?

4 A. It's a critical component of why I think that there is
5 still a substantial risk of serious harm at that institution to
6 the prisoner population. It also makes me concerned for the
7 staff who work there.

8 Q. Does MTC's emergency plan require regular meetings by
9 safety committee?

10 A. Yes.

11 Q. And what is that safety committee supposed to do?

12 A. Safety committees are typical in correctional institutions.
13 And you simply identify if there are safety inspections
14 occurring, if safety policy is being followed, if there are
15 hazards that you've identified and what you might want to do
16 about them. It's kind of a core function to keep an
17 institution safe.

18 Q. Did you ever ask for safety committee minutes either before
19 or after the January meeting?

20 A. During the January meeting I asked if I could see the
21 safety committee minutes for calendar year 2014.

22 Q. What did they respond?

23 A. They said they would get them to me right away.

24 Q. And did you eventually get the minutes?

25 A. I got minutes for two months in 2014.

1 Q. Did it turn out that they had not been following their own
2 policy about minutes?

3 A. Yes. I got a copy of a memo from the warden to the
4 regional vice president identifying that they had not been
5 following their policy but they were going to start doing it
6 from now on.

7 Q. Could you turn to Exhibit 12, memo from Lepher Jenkins,
8 Warden, to Marjorie Brown, Vice President Region IV, RE: Safety
9 Committee, dated January 22nd, 2015?

10 A. Yes.

11 Q. Is this the memo you just referred to?

12 A. It is.

13 MS. WINTER: Plaintiffs offer Exhibit 12.

14 MR. FRIEDMAN: No objection.

15 THE COURT: Exhibit 12 will be admitted.

16 (EXHIBIT P-12 MARKED)

17 BY MS. WINTER:

18 Q. Was the emergency plan at Walnut Grove updated after the
19 riots?

20 A. No, it was not.

21 Q. Should it have been updated?

22 A. Yes.

23 Q. Why?

24 A. Well, they had two events that were very serious. And it
25 showed some pretty profound levels of incompetence in a number

1 of ways from the command level to the officer level on the
2 line. And you would want to go back and take a look at your
3 plan to figure out if there was an inadequacy in that document
4 that was contributing to your inability to respond to a riot.

5 Q. When was the last time it had been updated at that point?

6 A. The policies that I saw up to a couple of weeks ago were
7 all dated 2012 and 2013.

8 Q. Did the emergency plan -- did the emergency plan contain
9 obsolete information?

10 A. In -- once I actually got a copy of their emergency plan,
11 yes, it had notification rosters for key officials including
12 administrators that were staff who no longer even worked at the
13 facility.

14 Q. You mean contact information?

15 A. Telephone numbers, yes.

16 Q. Who to call --

17 A. Who to call.

18 Q. -- in case of a riot. And that meant that information was
19 obsolete?

20 A. Yes.

21 Q. Does -- did the plan cover all the areas it was supposed
22 to?

23 A. No. On the first page of the table of contents, there
24 are -- there's listed 16 different chapters and there are
25 different kinds of emergencies. What you would expect then is

1 to flip to the back of the book or the section to figure out
2 what you're supposed to do in case of that emergency. Seven of
3 them aren't in the plan at all.

4 Q. They're missing from the plan?

5 A. They don't exist in the plan that they gave me a copy of.
6 No.

7 Q. Does the emergency plan provide for how to evacuate the
8 prison?

9 A. It does.

10 Q. Is there anything of -- had the evacuation plans been
11 updated at that point?

12 A. When I first got the copy of the emergency response plan,
13 no, they had not been updated to reflect the configuration of
14 the institution at the time that I got the emergency response
15 plan.

16 Q. Was the plan ever updated to show the current configuration
17 of the population?

18 A. It was -- maybe two or three weeks ago I did receive an
19 update that reflected the current configuration of housing
20 assignments at Walnut Grove and their evacuation plan.

21 However, again, if you look at the table of contents -- and I
22 don't remember the number at this time, but there are -- the
23 evacuation plans are actually pretty good for the ones that
24 they've got, but there are a whole section of plans that the
25 table of contents say they're supposed to have that simply are

1 not in the plan.

2 Q. So some evacuation plans were actually missing.

3 A. Are still missing.

4 Q. Are still missing. And why does that matter?

5 A. Well, it only matters if you have to evacuate that area.

6 But you want to have contingency plans in case of emergencies.

7 And you never can really predict what's going to happen. Part
8 of the purpose of having the plan is pull it off the shelf when
9 that unexpected event occurs to give you some guidance in how
10 to best respond to contain the situation.

11 Q. You said that a couple of weeks ago they updated their
12 emergency plan. With the changes that MDOC finally made a
13 couple of weeks ago, is the plan now a sufficient guide to the
14 institution if another disturbance should occur?

15 A. No, it is not.

16 Q. Is it close?

17 A. No, it is not.

18 Q. Could you explain to the judge what a command center is in
19 a prison setting?

20 A. A command center is a predetermined location from which
21 you're going to manage a specific emergency. It's going to
22 have communications equipment. It's going to have manuals,
23 blueprints, floor plans, all the supplies that you would need
24 to manage an emergency.

25 Q. How soon should a prison be able to establish a command

1 center after a serious incident?

2 A. You should be able to get your command center up and
3 running within several minutes.

4 Q. Several minutes?

5 A. Minutes.

6 Q. During the July riot, how long did it take for them to set
7 up the command center?

8 A. According to the time line that I did see about the July
9 riot, it took them almost 90 minutes. And if you think of the
10 videos we watched, most everything was over by then.

11 Q. What is an incident commander?

12 A. An incident commander is the person who at the present
13 moment is in charge of the response to the emergency in the
14 institution.

15 Q. Does MTC's emergency plan give adequate guidance to
16 incident commanders?

17 A. I do not believe it does. No.

18 Q. What is missing?

19 A. Well, what I'm -- what I've seen in different jurisdictions
20 is specific -- you can call them lots of things. Again back to
21 nomenclature -- an emergency post order, an emergency
22 checklist. And those are predeveloped before the emergency and
23 they're developed for specific emergencies.

24 If I'm incident commander, here is my one piece of paper
25 that says these are the critical things I need to worry about

1 during a riot. If I'm an incident commander and I've got an
2 escape, here's another piece of paper that says this is what I
3 need remember in case of a riot (sic).

4 There is one checklist that I saw in Walnut Grove's
5 emergency response plan, and it's kind of everything you could
6 possibly think of thrown into one list that is not organized in
7 any effective or usable way. You'd get lost in the detail and
8 you'd have to sort out does this one apply to this situation or
9 not. There is not enough specific guidance, not only for the
10 incident commander but for all the other predetermined roles
11 that people will be assigned in a serious and prolonged
12 emergency situation.

13 Q. During your January 2015 discussion with MDOC and MTC, did
14 you ask them whether the missing documents, the post orders and
15 the checklists existed, the ones that you couldn't find in
16 the -- in the emergency plan?

17 A. Yeah. I asked them directly, *Do you have emergency post*
18 *orders? Do you have checklists?* I did ask that question.

19 Q. And what did they say?

20 A. They seemed a bit puzzled and finally said, no, they don't.

21 Q. Was Odie Washington, MTC's vice president, present at that
22 the meeting?

23 A. He was there, yes.

24 Q. Did he seem to know what those documents were?

25 A. He did not seem to connect with what I was trying to

1 communicate.

2 Q. Did you ask MTC about the training materials they used to
3 teach how to perform as incident commanders?

4 A. Yeah. I asked that question directly. *So how do you train*
5 *your incident commanders?*

6 Q. What did they tell you?

7 A. They told me that the warden did the training.

8 Q. Did you ask if this training was documented anywhere?

9 A. I asked that as well as is there any, you know, curriculum
10 for that instruction and is it documented after you do it?

11 Q. And what did they tell you?

12 A. No to both questions. There was no curriculum and it's not
13 documented.

14 Q. The questions you were asking MTC and MDOC top officials at
15 that January 2015 meeting, were they particularly difficult or
16 sophisticated questions about emergency response?

17 A. No. These are -- we didn't get to those kinds of
18 questions. I mean, we didn't get to more sophisticated
19 questions. These are just basic, fundamental, elementary kinds
20 of things that you would expect to find in a competently run
21 prison.

22 Q. The things that you just testified about, the inability to
23 rapidly establish a command center and to have staff that's
24 been trained to serve as incident commanders, in light of what
25 you've just testified to, what is the likelihood that MTC can

1 respond better to the kind of emergency that they faced twice
2 within seven months last year in 2014?

3 A. I don't see that there's been any effort made to
4 significantly improve their chances of successfully managing a
5 riot or disturbance in the future.

6 Q. Have you reviewed MTC's training plan for 2015?

7 A. I have.

8 Q. What should occur during annual in-service training?

9 A. Well, it depends on -- I mean, there's a couple of things
10 that should occur. One, you've usually got some kind of
11 statutory obligation that you have to do so many hours of
12 certain training a year. So that eats up some of that time.

13 But you also reserve part of the resource devoted to your
14 in-service training to focus on current issues and what's
15 happened in the last year and what do we all as a group, as a
16 team need to get better at.

17 Q. Did any of that appear in the training materials that MDOC
18 produced for your review?

19 A. I could see no direct connection between the two dramatic
20 events that they had in 2014 and their training plan for 2015.

21 Q. Is the 2015 annual training plan adequate to train security
22 staff how to respond during an emergency?

23 A. No. And they have kind of the perfect vehicle here. I
24 mean, the video that we showed shows -- and they could show the
25 one in Unit 4 too because they have, you know, more types. You

1 show *This is how it's done and this is where we got it wrong.*
2 *So I want everybody -- we're all going to learn how to respond*
3 *should we have this exact same situation again.*

4 They have the tools. They've made the mistakes. The
5 tragedies happened. This is a wonderful opportunity for them
6 to use their misfortune to get better for the future, but it
7 was not in the plan that I saw, nothing really related to it
8 whatsoever.

9 Q. You have recommended, haven't you, that MDOC must require
10 MTC have an effective emergency plan in place that officers
11 must be trained to follow the plan and that their performance
12 must be tested in realtime drills. Correct?

13 A. Officers need to be tested and so do the administrators who
14 are going to be likely charged with managing those incidents,
15 yes.

16 Q. And you recommended that to them --

17 A. I have recommended that to them. Yes.

18 Q. What's the reason for requiring realtime drills on an
19 emergency plan?

20 A. Well, there's -- there's nothing quite like the stress that
21 comes from responding to a disturbance, and it's never clean.
22 Things don't come in a linear, organized fashion. It's highly
23 likely that you'll get bad information. It's highly likely
24 that one incident will start and before you know it you've got
25 something else going on at the same time.

1 And so to begin to have some practice, some sense of what
2 the dynamic is in the room in a true emergency is really
3 important. You find out what you don't know. I mean, the
4 purpose is try to create the mock event so that you can make
5 your mistakes there and you'll make fewer mistakes when the
6 time comes.

7 And it's also to test your systems. Do those phones work?
8 Do the head of the -- you know, just giving examples here --
9 head of your SERT team know how to get the munitions that they
10 need? Does your incident commander -- and this becomes more
11 sophisticated -- understand the tactical capacity of their
12 emergency response teams?

13 Personally, I found that was a problem. The people running
14 the incident didn't really know what those teams could do.
15 There's any number of things that can be tested and should be
16 tested before the emergency.

17 Q. Did the court-appointed monitors also make this very same
18 recommendation in their fifth report, that is, to have realtime
19 drills?

20 A. Yes, they did.

21 Q. Did MTC conduct realtime drills in 2014?

22 A. I had brief access to those materials when I was at the
23 prison last January. And there were some, not very many, at
24 the beginning of the year. There were a few more from October
25 to December.

1 Q. And were those drills adequate?

2 A. I didn't think they were. No.

3 Q. Did -- were many custody staff involved?

4 A. No. And I had this conversation with MTC and MDC -- MDOC
5 officials when I was there as well. There -- you know, there
6 was a lot of staff who -- who weren't officers. I mean, in
7 some of the exercises there was like one officer or two
8 officers. And so I pointed that out. And they told me that
9 there were some other exercises that they did with more
10 officers, but they didn't document that.

11 Q. Is there any problem with not documenting who was involved?

12 A. Yeah. I mean, it's tough to -- to know who actually has
13 had the experience, who hasn't had the experience. I mean,
14 this does drive resources. You don't want to devote all of
15 your resources to the same group of people. You need to
16 document so that you can make sure all of your staff -- and I
17 think their policy requires once or twice a year -- at least
18 have exposure to a realtime emergency drill.

19 Q. Mr. Vail, I'd now like you to turn to the subject of gangs
20 and ask if you could tell us briefly what is the extent of the
21 problem of gang management at Walnut Grove.

22 A. It's my opinion that it drives a very big portion of the
23 violence that occurs at that facility.

24 Q. And, in your opinion, is it an ongoing problem?

25 A. It is an ongoing problem, yes.

1 Q. Is that based on your review of recent extraordinary
2 occurrence reports?

3 A. In part, yes, and also interviews with prisoners and
4 conversations with the monitors.

5 Q. In your opinion, are MDOC's policies on gangs adequate?

6 A. No, I do not believe they are.

7 Q. I'd like you to turn to Exhibit 13, MDOC policy 16-19,
8 Security Threat Group Management. And would you read aloud the
9 language.

10 A. Yeah. At the bottom of page 2 there's a statement that
11 says staff will not condone existence of an offender's STG --
12 that means security threat group -- membership, or acknowledge
13 STG as an organization.

14 MS. WINTER: Plaintiffs offer Exhibit 13 in evidence.

15 THE COURT: Any objection?

16 MR. FRIEDMAN: No objection.

17 THE COURT: Exhibit 13 will be admitted.

18 (EXHIBIT P-13 MARKED)

19 BY MS. WINTER:

20 Q. Mr. Vail, will you now turn to Exhibit 14, MDOC policy
21 16-19-09, Security Threat Group Management, Offender in Private
22 Prisons and County Regional Facilities. And could you read
23 aloud the language about zero tolerance?

24 A. "It is the policy of the Mississippi Department of
25 Corrections to maintain a zero tolerance for security threat

1 group members."

2 Q. What, if anything, is problematic about these policy
3 statements that you have on gangs?

4 A. Well, to me, they reinforce an attitude that *We don't have*
5 *gangs here, that gangs aren't a problem. We refuse to*
6 *recognize them.*

7 Q. Does MDOC policy on gangs for contract facilities in any
8 way instruct private contractors on how to manage gangs?

9 A. No, not in any meaningful way I don't believe.

10 Q. Do they require each prison to appoint a staff member to
11 coordinate STG information? Does that --

12 A. Yes.

13 THE COURT REPORTER: I'm sorry. I didn't hear the end
14 of your question.

15 BY MS. WINTER:

16 Q. The question is, I think, the policy does require each
17 prison to appoint a staff member to coordinate STG information
18 and to allow for the transfer of some STG members, does it not?

19 A. You know, I don't think -- I don't see that it specifically
20 does. It defines what an STG coordinator is and it says that
21 they will implement the STG information. I guess we can assume
22 that they're supposed to appoint one.

23 Q. Was there anything else or anything instructing private
24 contractors about their obligation to manage the impact that
25 gangs have on institutional safety and security?

1 A. It says that some of them can be moved to an STG management
2 unit.

3 Q. During your January 2015 meeting with high-level MDOC and
4 MTC officials, did you ask them if they had a gang problem at
5 Walnut Grove?

6 A. I did. I asked them how -- yeah, I asked them that
7 directly. *Do you think you have a gang problem at this*
8 *facility?*

9 Q. And who responded?

10 A. Archie -- or no. Deputy Commissioner Longley did. He said
11 that -- first he said no, and then after a brief pause he
12 added, *No worse than at other Mississippi prisons.*

13 Q. Do you doubt his word on that, that the problem at Walnut
14 Grove is no worse than at other Mississippi prisons?

15 A. I do not.

16 Q. Are there prisons outside of Mississippi that also have
17 serious problems with gangs?

18 A. In nearly every jurisdiction of which I am aware management
19 of gangs is a challenge these days.

20 Q. Do you fault MDOC for the presence of gangs in its prisons?

21 A. I do not.

22 Q. Do you find any fault with them about their management of
23 gangs?

24 A. Well, yes. I mean, I -- I fault Walnut Grove for not
25 having a comprehensive and effective strategy to manage the

1 gangs.

2 Q. Can you describe the way that a prison system can work to
3 manage and minimize the impact of gangs on prison safety?

4 A. Certainly have to use a carrot and a stick approach. You
5 want to identify behavior that creates risk for staff or
6 inmates that's related to gangs, talk to your staff about that
7 and figure out ways to extinguish that kind of behavior.

8 But equally important and perhaps even more important, you
9 have to have meaningful productive activities for the inmates
10 to be engaged in so that they have something to lose, so that
11 they have something they can care about as much or more than
12 their gang affiliation. It takes a balanced approach.

13 Q. How vigorous are MTC's current efforts to minimize gang
14 control of the operations at Walnut Grove?

15 A. I do not believe they're vigorous.

16 Q. Do they focus on anything besides suppression of gang
17 activity?

18 A. Not that I can tell, no.

19 Q. Does there need to be anything besides suppression efforts?

20 A. They need to have more programs. They need to have
21 activities that will engage the inmates that they value and
22 that hopefully will help them begin to find ways to not return
23 to prison.

24 Q. During your visit to Walnut Grove in January, did you hear
25 any current examples of gang influence on prison operations?

1 A. I asked the prisoners that I interviewed I think maybe with
2 one exception if they had ever heard of the practice of inmate
3 security escorts, inmate bodyguards. In other words, when a
4 powerful gang leader would be leaving the unit to -- well,
5 sometimes not even leave the unit, but, for example, to be
6 leaving the unit, they would have subordinate gang members
7 serve as bodyguards and escort them through the facility or
8 even guarding the shower when one of them was taking a shower.
9 And every one of them told me that, yes, that's a common
10 practice. One guy told me all day every day that that is what
11 goes on at Walnut Grove.

12 Q. Did you ask the prisoners you interviewed how the staff at
13 the prison responds to this practice, this common practice of
14 inmate bodyguards?

15 A. Absolutely. That was the next follow-up question. And the
16 answers were *Some will intervene. Many look the other way.*

17 Q. And the inmates told you that certain gangs control certain
18 areas?

19 A. Yes. Sometimes they control a shower or a TV-viewing area.

20 Q. Do recent incident reports corroborate that this is
21 happening?

22 A. Yeah. You can look at some of the fights in the last few
23 months and see that they were connected to who wouldn't stay
24 away from the shower and, you know, the latest issue of
25 security escorts for the showers, yes.

1 Q. Have the court-appointed monitors corroborated that this
2 practice is ongoing at Walnut Grove?

3 A. I was aware of the fact first from the court-appointed
4 monitors. They encountered it when they were doing -- they
5 wanted to interview somebody and that person showed up with
6 security escorts, and the monitors asked them, *What's this*
7 *about?* And they were told. I believe that they informed the
8 warden at that time.

9 Q. Did this appear in the monitors' sixth report? Did they
10 include this in their sixth report?

11 A. I think they did. Yes.

12 Q. Do you know -- do you know whether this practice occurs at
13 East Mississippi?

14 MR. FRIEDMAN: Objection. Irrelevant.

15 THE COURT: I'll let you respond, Ms. Winter.

16 MS. WINTER: It seems to me that it is evidence of an
17 extremely widespread practice that because it is so obvious and
18 longstanding MDOC has to be aware of it and is deliberately
19 indifferent to it.

20 MR. FRIEDMAN: We're not here --

21 THE COURT: Objection sustained.

22 BY MS. WINTER:

23 Q. Is it possible to stop this kind of gang control of a
24 prison?

25 A. It is possible to --

1 MR. FRIEDMAN: I'm going to object to the
2 characterization of "gang control of a prison."

3 MS. WINTER: I'll rephrase it.

4 BY MS. WINTER:

5 Q. Is it possible to stop this kind of gang activity where
6 gangs control certain operations in a prison, like who can go
7 to a shower and who they must be escorted by?

8 A. Yeah. Absolutely. But you have to trust your line staff
9 and they have to trust you.

10 Q. What would you do if you were the warden at Walnut Grove to
11 address this issue?

12 A. I would talk to my staff. There's no way that they are
13 unaware of this problem, and I can't imagine that for the most
14 part staff like it happening. But if everybody's not rolling
15 in the same direction, it's difficult for individual staff
16 members to take it on.

17 So I would go to those staff and say, *Look, I've discovered*
18 *that this is an issue. And I'm happy that I've discovered it*
19 *and so here's what we're going to do about it. And in the*
20 *future I would expect if you see other kinds of things like*
21 *this, that let's talk about it. You know, don't go off --*
22 *don't go be cowboy and try to fix the problem yourself. Let's*
23 *bring this forward, talk to the supervisors.*

24 And then I would follow up to see that that kind of
25 behavior occurred. You have to enlist the eyes and ears and

1 the heart of the staff who work for you. If you do, you will
2 find that -- that your institution will become much safer.

3 Q. If MTC officials crack down on this kind of activity, will
4 that result in a safe prison?

5 A. If they do it in isolation, they're likely to make their
6 prison more dangerous. And by "isolation," I mean if they just
7 use the stick, they're likely to create more risk of violence.
8 They need to also use the carrot at the same time.

9 *We're not going to let you do this kind of stuff, but we*
10 *are going to let you guys who behave do this kind of stuff,*
11 *positive incentives, whether that's recreation, volunteers,*
12 *program, treatment, whatever it is. You've got to do both*
13 *simultaneously in order to maintain the balance that keeps you*
14 *from slipping over the edge into a violent situation.*

15 Q. Mr. Vail, could look at Exhibit 15, which is the monitors'
16 sixth report?

17 A. Yes.

18 MS. WINTER: I'm not sure if I moved the sixth report
19 in evidence. If not, I would like to.

20 THE COURT: Monitors' sixth report, is that --

21 MS. WINTER: And, your Honor, I think I --

22 THE COURT: -- Exhibit 15? What about Exhibit 14?

23 Have you --

24 MS. WINTER: I would like to move Plaintiffs'
25 Exhibit 14 into evidence, the MDOC Security Threat Group

1 Management.

2 THE COURT: Okay. Any objection from the defendant?

3 MR. FRIEDMAN: No objection.

4 THE COURT: Okay. Exhibit 14 will be admitted.

5 (EXHIBIT P-14 MARKED)

6 THE COURT: And the monitors' report is Exhibit 15?

7 MS. WINTER: Yes.

8 THE COURT: The sixth monitors' report, you wish to
9 move that into evidence?

10 MS. WINTER: Yes.

11 THE COURT: Any objection from the defendants?

12 MR. FRIEDMAN: The sixth monitors' report? No, sir.

13 THE COURT: Okay. Exhibit 15 will be admitted.

14 (EXHIBIT P-15 MARKED)

15 MR. FRIEDMAN: I do have a question.

16 THE COURT: Okay.

17 MR. FRIEDMAN: Are we going to take a break?

18 THE COURT: Yes, we are. We're going to take one
19 about 3:30 I hope.

20 MR. FRIEDMAN: 3:30? Okay.

21 THE COURT: Uh-huh (indicating yes). I've been trying
22 to hold patiently too.

23 BY MS. WINTER:

24 Q. Mr. Vail --

25 MR. FRIEDMAN: No objection.

1 THE COURT: Okay.

2 BY MS. WINTER:

3 Q. -- would you look at page 13 of the report. What is it
4 that the monitors are saying there about the gang problem at
5 Walnut Grove? Do they concur that it's an ongoing security
6 concern at Walnut Grove?

7 A. Well, the report says, "There remains a significant
8 presence of gang" -- "of active gang members who are attempting
9 on a daily basis to control certain aspects of the facility's
10 operation." They go on to say, "Development of a plan that
11 identifies these gang members and then manages them using a
12 variety of methods" --

13 THE COURT: Slow down. Slow down. Slow down.

14 THE WITNESS: Sorry. I'm very sorry. I'm ready for
15 the break too.

16 A. And I won't read the rest of the paragraph. It speaks for
17 itself.

18 BY MS. WINTER:

19 Q. What do you think that MDOC needs to do to address the gang
20 issue besides what you've already testified to? In summary,
21 could you say it was having significantly more meaningful
22 programs? Does that say it in a nutshell or --

23 MR. FRIEDMAN: Objection. I've let this go, but
24 Ms. Winter has consistently led throughout this day. I'm going
25 to object to leading.

1 THE COURT: Okay. Rephrase your question, please.

2 MS. WINTER: Yes.

3 BY MS. WINTER:

4 Q. Mr. Vail, besides what you've already testified to, is
5 there anything else that you think MDOC needs to do to address
6 the gang issue at Walnut Grove?

7 A. No. I actually think I've covered it. It takes the carrot
8 and the stick. You've got to talk to your staff, extinguish
9 the obvious signs of gang behavior, develop robust enough
10 programs so the inmates have meaningful choices between either
11 status from being a gangster --

12 THE COURT REPORTER: Whoa.

13 (REPORTER READ BACK)

14 A. -- programs sufficient to drive the inmates to have to make
15 a choice between something that is productive, pro social,
16 versus something that furthers their criminal activity.

17 BY MS. WINTER:

18 Q. Does inmate idleness contribute in any way to the risk of
19 violence?

20 A. Yes.

21 Q. Does inmate participation and programs tend in any way to
22 reduce that risk?

23 A. It does.

24 Q. And just very briefly -- I think you've covered this, but
25 very briefly, why is that?

1 A. Well, I think I said this before, maybe not terribly
2 articulate, but prisoners are people and they need to be
3 engaged. They need to be valued. They need to find
4 recognition and achievement. And if that can be found through
5 the structured programs that the prison offers, many inmates
6 will choose that route. If it doesn't exist and the only place
7 to find it is within the structure of the gang, that's all
8 that's left for the prisoners.

9 Q. Did the monitors warn in their fifth report, their October
10 report, about idleness and lack of programming at Walnut Grove?

11 A. I believe they did.

12 Q. Could you look at Exhibit 10, which is the fifth report,
13 and turn to page 4?

14 A. Yes.

15 MS. WINTER: I don't believe that Exhibit 10 has been
16 introduced yet. Plaintiffs offer Exhibit 10.

17 MR. FRIEDMAN: I thought it had been, but --

18 MS. WINTER: Oh, I'm sorry. My mistake.

19 THE COURT: Exhibit 10 is in.

20 MS. WINTER: Yes, 10.

21 BY MS. WINTER:

22 Q. Could you turn to Exhibit 10 at 4. This is the monitor's
23 October report.

24 A. Yeah. I'm there. The pertinent portion here says, "While
25 facility officials have a variety of programming plans being

1 considered, the inmate population spends a significant portion
2 of their waking hours with unprogrammed/unstructured time in
3 the dayrooms of the housing units."

4 MR. FRIEDMAN: What page is he reading from?

5 MS. WINTER: This is at 4.

6 THE WITNESS: Page 4.

7 BY MS. WINTER:

8 Q. At the time of your January 2015 meeting with officials at
9 Walnut Grove, had idleness been significantly reduced since
10 the -- this October report by the monitors?

11 A. I do not believe it had been, no.

12 Q. Could you turn to Exhibit 16, the Walnut Grove Correctional
13 Facility Program Overview?

14 A. Yes.

15 Q. Can you identify what this document is?

16 A. This was given to me during my January visit in response to
17 my request for some detail about how often prisoners were
18 productively occupied in program activities.

19 MS. WINTER: Plaintiffs move the admission of
20 Exhibit 16.

21 THE COURT: Any objection from --

22 MR. FRIEDMAN: No, no objection.

23 THE COURT: Exhibit 16 will be admitted.

24 (EXHIBIT P-16 MARKED)

25 BY MS. WINTER:

1 Q. Mr. Vail, what do these figures show about the level of
2 programming -- the current level of programming at Walnut
3 Grove?

4 A. Well, on page 2 of the document there's a box at the top.
5 And what it says to me is that about 13 percent, or 162
6 inmates, have jobs that occupy them 30 hours a week. Now,
7 that's pretty good to have something to do 30 hours a week when
8 they're in prison.

9 There is another category, academic or vocational, with the
10 average of 15 hours a week for another 39 percent. And then
11 the rest doesn't look like they have a whole lot to do. And I
12 add those two percentages together. It's almost half without
13 any significant program opportunity according to the data that
14 I got from MTC.

15 Q. In your view, is that a dangerous level of idleness?

16 A. Yes, it is.

17 Q. What does the monitors' sixth report, that most recent
18 report, say about the level of programming?

19 A. I believe that they estimated about 70 percent of the
20 prisoners at Walnut Grove are engaged in a program.

21 Q. Did you ask Dr. Austin about those figures?

22 A. I asked him directly if he knew or had any estimate of how
23 many hours that program involvement included, and he did not.

24 Q. What does --

25 THE COURT: There's an objection. I'm sorry.

1 MR. FRIEDMAN: Let me hear the next question.

2 THE COURT: Okay. You may proceed, Ms. Winter.

3 BY MS. WINTER:

4 Q. What does defendants' corrections expert, Tom Roth, say
5 about the current level of programming in his expert report?

6 A. I believe that he also talked about a 70 percent program
7 involvement.

8 Q. And you said 50 percent?

9 A. I did, based on this data that I received when I was at the
10 prison in January of this year.

11 Q. So do you have any idea where the difference may come from
12 between your figure of 50 percent and his of 70 percent?

13 A. Well, the population has dropped since then. Maybe that
14 has something to do with it, but, honestly, I don't know.

15 Q. Assuming that Mr. Roth's figures are correct, does that
16 mean that Walnut Grove now has adequate programming?

17 A. Well, I would want to know a lot more in order to reach
18 that conclusion, plus I think that, you know -- I'm pretty
19 convinced that this is what was going on as of the date of this
20 report. All these reports have been written pretty close
21 together. I would want to see it sustained for a while to see
22 if it's really there.

23 Q. Is it feasible for MDOC to add meaningful programs for
24 inmates at Walnut Grove?

25 A. Yeah. Yes, I believe it is.

1 Q. Would it cost money to do that?

2 A. Not necessarily.

3 Q. Can you provide any examples from your home state?

4 A. Well, yeah. In 2008 when sort of a worldwide economy
5 collapsed and all state government agencies wound up cutting
6 their budgets significantly, we went through that same painful
7 experience in Washington; and we lost some program dollars.
8 And our staff have a strong belief that you've got to keep
9 these guys busy in order to keep the prison safe.

10 And so not so much me, but the people that work for me got
11 very creative around how we could employ -- employ prisoners.
12 And one of the things that really took off was just simple
13 prison sustainability practices. If you sort the enormous
14 amount of trash coming out a prison into that stuff that's
15 recyclable versus that stuff that is -- has to go to the
16 landfill, you can actually make money.

17 And then you can take the compost and you can pour it on
18 the garden and grow your own food. And, anyway, we were very
19 successful without really any investment at generating
20 productive activities, inmate programs, reducing idleness
21 through a practice that we found to be fairly successful.

22 We had local colleges and other government agencies see
23 what we were doing and come to us. And they had some resources
24 and found that we could help them on different kinds of
25 projects that at relatively low cost compared to what they'd

1 have to do if they went someplace else.

2 So it really -- it really sort of blew up in a positive
3 way. And the prison sustainability program got launched not
4 only out of our state but in other jurisdictions as well.

5 Q. So is there actually evidence that meaningful prison
6 programming like you've been describing actually saves
7 taxpayers money?

8 A. Well, another line of -- another way to respond to your
9 question is that there's an organization called the Washington
10 State Institute for Public Policy, which is an arm of the
11 legislature in the state of Washington. And they are often
12 tasked with trying to figure out which investments make sense.

13 And they've done extensive research for, I don't know, 10,
14 15 years now on programs for prisoners that in the long run pay
15 for themselves in two ways, one, through reduced victimization
16 of people once they're released in terms of the crime victims
17 as individuals, and also over the long haul reduce costs to the
18 taxpayers.

19 It may cost you a little more money up front; but if you
20 follow with fidelity the program design, you will reduce
21 recidivism sufficiently to pay for the program itself. But
22 you've got to be willing to make an investment. That is
23 measured by more than a year or two. It takes three or four or
24 five before you see the return begin to come back to you.

25 Q. Would you look at Exhibit 17, your February report.

1 MR. FRIEDMAN: I don't have a 17. Plaintiffs' 17?

2 MS. WINTER: Exhibit 17, Eldon Vail February 2015
3 report, at 21.

4 MR. FRIEDMAN: Is this his expert report? Because I
5 don't have it. Is this his expert report?

6 MS. WINTER: Yes.

7 (COUNSEL CONFERRED)

8 THE COURT: Before we move to talk about a new
9 exhibit, this may be a great place to take our afternoon break.
10 So we'll take a break for about 15 minutes, and we'll start
11 back up after that.

12 MR. FRIEDMAN: May I ask how long you intend to go
13 this evening?

14 THE COURT: Not any longer than 5:15 or so, unless
15 there's a need to go to 5:30; but I have to be out by 5:30.
16 All right. We're in recess.

17 (RECESS)

18 THE COURT: You may continue.

19 MS. WINTER: Thank you.

20 BY MS. WINTER:

21 Q. Mr. Vail, is --

22 THE COURT: Make sure you're speaking into the mic.
23 You may proceed.

24 BY MS. WINTER:

25 Q. Mr. Vail, is MTC right now fully utilizing the resources

1 for programs that they're currently allotted?

2 A. Not according to the report that they submit monthly to
3 MDOC.

4 Q. Could you look at Exhibit 18, MDOC's monthly report dated
5 March 4th, 2015?

6 A. Yes.

7 MS. WINTER: Plaintiffs move Exhibit 18 in evidence.

8 THE COURT: Is there any objection from the defendant?

9 MR. FRIEDMAN: No objection.

10 THE COURT: P-18 will be admitted.

11 (EXHIBIT P-18 MARKED)

12 BY MS. WINTER:

13 Q. Mr. Vail --

14 MS. WINTER: Should we proceed?

15 THE COURT: Yes, you may.

16 BY MS. WINTER:

17 Q. Can you tell us what this monthly report tells us?

18 A. It tells a lot of things; but regarding program
19 involvement, it shows people who are participating in certain
20 programs and it also shows the capacity for participation in
21 those programs. And there's a difference between the number of
22 slots available and the number of bodies enrolled.

23 Q. So for December and January, how many vacant slots are
24 there in the GOD (sic) program?

25 A. In the GED program for both of those months there are 101

1 vacant spots in the program.

2 Q. And for December and January how many vacant slots are
3 there in the adult basic education program?

4 A. 14.

5 MR. FRIEDMAN: Could y'all tell me what line you're
6 on?

7 THE WITNESS: Page 8 and page 9 is where that data is.
8 The lines are hard to track, sir.

9 BY MS. WINTER:

10 Q. And in December how many vacancies were there in the
11 substance abuse education program?

12 A. 138.

13 Q. And in January how many vacancies were there in that
14 program?

15 A. 40.

16 Q. If these slots had been filled in December, how many
17 additional inmates would have had -- would have received
18 programming?

19 A. Well, if you add in the vacancies in vocational education
20 for both of those months, which was 22, in December there would
21 have been opportunities for 275 more inmates and in January
22 there would have been 177 more inmates in a -- in some good,
23 positive programming.

24 THE COURT: Could you tell me how you get to those
25 numbers? I'm trying to follow you too.

1 THE WITNESS: Yes, sir, your Honor. If you look
2 for example, on page 8, line 550, about halfway down.

3 THE COURT: Okay.

4 THE WITNESS: Says "General Educational Development,"
5 which I'm pretty sure is the GED program, and then you go down
6 to line A and then you scroll over to December and January,
7 that tells you the capacity. And then the line right below
8 there tells you how many are actually enrolled. I'm just doing
9 basic subtraction and addition.

10 THE COURT: Right. Right. Okay.

11 BY MS. WINTER:

12 Q. Okay. Mr. Vail, what should MDOC do in response to a
13 report like this?

14 A. I would hope that they would pay attention to this report
15 that they get on a monthly basis and demand an explanation why
16 they aren't filling the slots that are available --

17 Q. You mean an explanation from?

18 A. From MTC, and expect them to get those programs full. And
19 if for some reason they can't get those programs full, then
20 they should devote those dollars to some other kind of
21 productive program that they can get full.

22 Q. I'd like to now turn to the subject of staffing. Have the
23 monitors expressed concern about there not being sufficient
24 numbers of adequately trained staff at Walnut Grove?

25 A. Yes, they have, I believe in every report they've

1 submitted.

2 MS. WINTER: Your Honor, plaintiffs would move in
3 evidence Exhibit 9 -- 19 -- excuse me -- which this is the
4 monitors' first report; and Exhibit 20, which is the monitors'
5 second report; and Exhibit 21, which is the monitors' third
6 report.

7 MR. FRIEDMAN: No objection.

8 THE COURT: Okay. Exhibits 20 -- I mean, excuse me.
9 Exhibits 19 --

10 MS. WINTER: 19, 20 and 21.

11 THE COURT: -- 20 and 21 are admitted.

12 (EXHIBITS P-19, P-20 AND P-21 MARKED)

13 BY MS. WINTER:

14 Q. If you'd turn to Exhibit 19, the monitors' first report,
15 would you look at page 5 and tell us what the monitors say here
16 about staffing.

17 A. "MTC officials have not yet hired and trained sufficient
18 staff to fully implement the recommended staffing plan."

19 Q. And then looking at Exhibit 20, the monitors' second
20 report, at 9, what do the monitors say in their second report
21 about staffing?

22 A. "The number of vacancies when combined with high turnover
23 and the infusion of recently trained academy cadets leaves the
24 facility with what can only be described as an inexperienced
25 workforce."

1 Q. Now could you look at Exhibit 21, the monitors' third
2 report, at page 9.

3 A. "To be sure, problematic staffing issues remain. The total
4 correctional officer complement remains relatively
5 inexperienced."

6 Q. Now, could you go to Exhibit 3, which I think is already in
7 evidence, the monitors' fourth report, at page -- starting on
8 page 3, going over to 4. What does this say about -- say about
9 staffing?

10 A. The third report warned that problematic staffing issues
11 persisted at the facility due in large part to the relatively
12 inexperienced staffing complement supervising the close custody
13 units.

14 (WITNESS EXAMINED DOCUMENT)

15 A. Yes, that's what it says.

16 Q. Can we go over to -- is this page 3? Can we go over to
17 page 4?

18 A. It started on page 3 and went to page 4, yes.

19 Q. All right.

20 A. And they say a lot of stuff, but --

21 Q. All right. We won't go through it all, then.

22 A. All right.

23 Q. All right. I would like you to look at the sentence that
24 begins "However, it was the supervision."

25 THE COURT: Which exhibit are we looking at?

1 MS. WINTER: I think this is page 4, is it not?

2 A. Yeah, I'm with you.

3 THE COURT: Of exhibit what?

4 MS. WINTER: Of Exhibit 3.

5 THE WITNESS: Exhibit 3, page 4.

6 THE COURT: Oh, okay.

7 MS. WINTER: The monitor's fourth report where they're
8 discussing staffing.

9 THE COURT: Okay. You may proceed.

10 A. My apologies. I -- we talked about this sentence a couple
11 of times. And so I missed it --

12 BY MS. WINTER:

13 Q. All right.

14 A. -- this time. But it does says, "However, it was the
15 supervision of these inexperienced security staff members which
16 was revealed to be sorely deficit" -- or "deficient that set
17 the stage not only" -- "for not only the outbreak of the
18 disturbance but the actual mismanagement of the event and its
19 aftermath."

20 Q. Could we now look at Exhibit 10, the monitors' fifth
21 report, which I think is already in evidence, and turn to page
22 9 -- 9, 10 and tell us what it says about staffing.

23 A. "Ten days prior to the July 10th, 2014, disturbance, there
24 were 25 vacant correctional officer positions, the highest
25 number of vacancies since the monitoring term began in 2012.

1 Approximately 25 percent of the staffing complement had less
2 than six months of service on the job. On August 31st, 2014,
3 there were 21 vacancies with 34 percent of the staffing
4 complement having less than six months of service."

5 Q. What kinds of problems are associated with insufficient
6 staffing levels?

7 A. There are innumerable problems; but, for example, if they
8 don't have enough officers on staff to put one in the zones
9 when the inmates are out of their cells, that's an enormous
10 problem that I've mentioned several times today. If you don't
11 have enough officers on staff, you can't adequately respond to
12 an emergency. Even things like perimeter security can come
13 into question if you don't have sufficient enough correctional
14 officers.

15 Q. Are inadequate staffing levels linked to the gang issue?

16 A. In the sense that if you don't have people supervising the
17 inmates, then the opportunities for gangs to increase their
18 control certainly exists.

19 Q. If there are enough officers to have an officer in every
20 housing zone, does that solve the problem of staffing?

21 A. Not if they don't actually stay there. I mean, you've got
22 to have them on your roster; but then you've got to have
23 expectation and the monitoring to make sure that they actually
24 do stay there.

25 Q. How do you know that the officers don't stay on the zone at

1 Walnut Grove?

2 A. I think three different ways. It -- well, probably four.
3 I mean, I've testified to looking at videos of violence and
4 they're not in the units. I ask that question every time I get
5 a chance to talk to a prisoner, and their responses are,
6 *Sometimes yes. Sometimes no. Depends on what time of day it*
7 *is and who is on duty.*

8 I also in the January meeting asked directly of the
9 assembled MDOC and MTC officials *Is this rule in writing?* And
10 they told me that it was not in writing. And then most
11 recently having an opportunity to review Marjorie Brown's
12 deposition, it became clear to me that at that level of the
13 organization it is not an expectation. She made it pretty
14 clear in her deposition that officers -- a single officer can
15 be assigned to share supervision of more than one zone.

16 Q. Should there be a rule that officers must stay in the
17 housing zone that they're assigned to?

18 A. Yes, and a documented relief procedure when -- if there is
19 a legitimate reason for them to leave and that somebody is
20 there to take over supervision of that unit while they step out
21 to meet with their supervisor or perform some other activity.

22 Q. Mr. Vail, could you look at Exhibit 15, which is the
23 monitors' sixth and most recent report. In this most recent
24 report did the monitors finally find MDOC in compliance with
25 the requirement of sufficient numbers of adequately trained

1 staff?

2 A. No. They found them to be in partial compliance.

3 Q. Was this the first time ever that the monitors had found
4 MDOC to be even in partial compliance rather than
5 noncompliance?

6 A. I believe that it was.

7 Q. What about the training of staff? Is Walnut Grove staff
8 adequately trained?

9 A. I don't believe they are. No.

10 Q. Do you have any views of their basic competency and custody
11 skills?

12 A. I have spent lots of hours watching videos, either the
13 surveillance videos similar to what we saw earlier today -- I
14 mean similar in terms of, you know, there are cameras from the
15 roof into the unit, but, more importantly, handheld video
16 cameras that document use of force events. And it is very rare
17 that I watch one of those handheld videos where I don't see
18 some kind of basic fundamental violation of good corrections
19 practices.

20 For example, I see officers, I see captains and majors
21 doing a targeted cell search. And by that I mean they know --
22 they think that something's in that cell. So it's a target.
23 It's not like a random search. And they go there to search it
24 and they don't remove the inmates, which results predictably in
25 an unnecessary use of force events -- force event.

1 I mean, if you're going to go through somebody's property,
2 particularly if you think you're looking for contraband, first
3 thing is you get them out of the cell and get them away from
4 there. But -- recently that's happened.

5 I've watched officers take leg irons off a person kneeling
6 down in front of them. And that makes you very vulnerable to
7 being kicked. That is not -- that's not good protocol. I've
8 watched officers take a person back to the cell who was in
9 cuffs and not have a cuff key themselves, have to get -- go get
10 one. And then they can't get the cuffs off, so they open the
11 cell door. And in this case it was a guy who had just hit and
12 bit an officer. He made himself very vulnerable.

13 I've watched officers open the -- open bar door of a cell
14 to administer OC spray, make -- putting themselves at risk when
15 they could have done the same thing by just spraying through
16 the bars. And these are basic kinds of security concerns that,
17 in my opinion and I believe in the industry's opinion, would be
18 just not what you do.

19 And, again, I don't chastise the officers. If they haven't
20 been trained to do it the right way, okay. We've got -- we've
21 got now. Each one of those videos is a great opportunity to
22 train and counsel the officers. *Let's sit down and look. You*
23 *know, you really shouldn't -- you really shouldn't have had*
24 *that guy kneel there. How come you opened that cell door and*
25 *made yourself vulnerable?* Those things are important.

1 Officers' safety is important because if they get injured or if
2 they get assaulted, then their ability to control the situation
3 with the inmate is compromised.

4 So that has permeated not literally every video but the
5 majority of the videos I've watched. There's always something
6 that could be learned. And I don't see any evidence that
7 that's reflected in their reviews of use of force or that
8 instruction is going on to improve the performance of their
9 correctional officers.

10 Q. Are there adequate numbers of supervisory staff at Walnut
11 Grove?

12 A. I don't believe that there's enough sergeants in the living
13 units where the inmates are.

14 Q. And what -- what is the basis for your belief? What do
15 you -- what level do you need of supervisory staff?

16 A. Well, the monitors have clearly documented that the officer
17 corps at Walnut Grove is relatively inexperienced. To me that
18 drives the need for supervision.

19 Now, what I would ask them to do is the same thing that I
20 would do in a facility that does have an experienced officer
21 corps. The inmates spend the majority of their day, even when
22 you've got good programs, in those living areas. That's where
23 fights can occur, incidents can occur.

24 What they have today is one sergeant for each unit who
25 works eight hours a day, five days a week. But those units

1 operate 24 hours a day, seven days a week. I think they need a
2 dedicated officer on the day shift and a dedicated officer on
3 the swing shift to provide adequate supervision to continue to
4 help those staff get better and to continue to help the staff
5 be safer so that the inmates can be safer.

6 Q. But hasn't there recently been a dramatic drop in
7 population at Walnut Grove?

8 A. The staffing has been dropped commensurately with that. So
9 while they've lost inmates, they've also lost staff. That's
10 still their model, an eight-hour, five-day-a-week sergeant for
11 the living units. I don't think that's enough.

12 Q. I'd like now to turn to the subject of use of force and
13 chemical agents. Have the monitors ever found MTC/MDOC to be
14 in compliance with the consent decree regarding use of force
15 and chemical agents?

16 A. No, they have not.

17 Q. Could you turn to Exhibit 22?

18 A. Yes.

19 Q. Was this chart made under your supervision?

20 A. It was.

21 MS. WINTER: Plaintiffs offer --

22 BY MS. WINTER:

23 Q. Well, let me ask first, what does this chart show?

24 A. This is just taken from the monitors' report category by
25 category, the different findings they've made in each report

1 for all the different areas that they have been monitoring.

2 And it's laid out in a table.

3 MS. WINTER: Plaintiffs offer Exhibit 22 in evidence.

4 MR. FRIEDMAN: Your Honor, we've not seen this
5 until -- this is the first time I've seen it. They gave us all
6 these documents this morning. I don't know if this is correct
7 or not. The only way for me to go -- do is go through.

8 I would say this, that the monitors' reports say what
9 they say. And they may be trying to make this easier. I don't
10 know. But I can't stand up here and say this is correct
11 because I haven't been through all six monitors' reports and
12 all the different categories to find out.

13 THE COURT: Okay. I understand your objection. I'll
14 let you mark it for ID as a demonstrative, as a demonstrative
15 aid, and he can testify about these things. I assume he's
16 going to tell the court what "PC" is. I think that's partial
17 compliance. What "C" is, compliance. I assume "NC" would be
18 noncompliance, I guess.

19 MS. WINTER: Yes.

20 THE COURT: And "D" is what?

21 THE WITNESS: Deferred.

22 THE COURT: Deferred?

23 THE WITNESS: Yes.

24 THE COURT: "SC," substantial compliance?

25 THE WITNESS: I believe it is, yes.

1 THE COURT: Okay. I'll allow it as a demonstrative.

2 MS. WINTER: Thank you. It will help the court. And
3 we'll see if it's all correct.

4 BY MS. WINTER:

5 Q. But this is something you prepared, Mr. Vail?

6 A. Yeah. I asked if the staff could just go through the
7 documents and -- so you can see at a glance, just for ease,
8 where -- how the compliance issues have been trending during
9 the duration of the consent decree.

10 THE COURT: Okay. P-22 will be marked for ID only.

11 (EXHIBIT P-22 MARKED FOR IDENTIFICATION)

12 BY MS. WINTER:

13 Q. So what are the monitors' findings over time with
14 respect -- what are the findings over time with respect to the
15 provision on use of force and chemical agents?

16 A. With the exception of the fifth report where they found
17 noncompliance, they have consistently been found to be in
18 partial compliance.

19 Q. What are -- could you turn to Exhibit 19, the monitors'
20 first report?

21 A. Okay.

22 Q. What did the monitors find regarding use of force in the
23 first? Look -- if you'd turn to page 5 and 6.

24 A. That the operating procedure does not include a provision
25 for weighing chemical agents containers at the beginning and

1 conclusion of a shift and that such weights be documented in a
2 logbook, that the operational procedure did not contain a
3 provision requiring staff in a planned use of force to check
4 for medical contraindications of chemical agents.

5 It goes on to say that the policies that require training
6 and certification of any staff utilizing chemical agents were
7 violated in two incidents, one including the warden, during
8 this period. And, last, that there was evidence that the
9 amount of chemical agent deployed was excessive.

10 Q. Could you look at Exhibit 20 now, this is the monitors'
11 second report, at page 10. What did they find in their second
12 report?

13 A. "Three instances in which officers and supervisors violated
14 various provisions of the procedures on use of force with
15 chemical agents."

16 Q. And could you look at their third report. This is Exhibit
17 21 at page 10.

18 A. "A number of issues were identified, all of which could be
19 eliminated with a more thorough administrative review process.
20 Among those issues were the proper use of OC spray,
21 videotaping, escorting of restrained inmates, and detached
22 supervision of application of force by supervisors."

23 Q. And now could you turn to Exhibit 3, which is the monitors'
24 fourth report, and go to page 11, the section on use of force
25 following the New Year's riot. This is rather long. So if

1 there's any way to summarize --

2 A. "The December disturbance after-action report noted that
3 staff failed to video the force applied by staff. Moreover,
4 the use of force incident reports were not completed in a
5 timely fashion. The report also noted that there was not a
6 clear chain of command for the staff response. Notably, the
7 incident packet did not include statements from the deputy
8 warden and the major, both of whom were present and were
9 involved in the staff response.

10 "The incident packet also failed to document the manner in
11 which the offenders and the housing units were decontaminated,
12 which is critical given the repeated applications of a variety
13 of chemical munitions that were deployed during the
14 disturbance. The staff response was so fraught with
15 disorganization that the after-action report has called for a
16 major revamping of the facility emergency response plans,
17 protocols and procedures."

18 Q. That last sentence, quote, The staff response was so
19 fraught with disorganization that the after-action report has
20 called for a major revamping of the facility emergency response
21 plans, protocols and procedures, did you ever see any evidence
22 of a major revamping of the Walnut Grove emergency plan?

23 A. No, I have not.

24 Q. Would you look now at Exhibit 10, which is the monitors'
25 fifth report from October 2014?

1 A. Yes.

2 Q. Did the monitors there opine noncompliance with the consent
3 decree provisions on use of force and chemical agents?

4 A. They did.

5 Q. And could you look at Exhibit 10 on page 11 and --

6 A. "There was no video available for five of the planned use
7 of force incidents. In seven of these planned incidents there
8 were cameras or operator malfunctions with the recording. In
9 reviewing the August planned use of force incidents in which
10 chemical agents were deployed, the staff did not document
11 whether officials had initiated contact with medical staff to
12 determine whether there were medical contraindications for the
13 use of chemical agents.

14 "In one of these incidents it appeared that the application
15 of OC may have been administered at an unsafe distance. In
16 another incident an inmate was subjected to a dangerous
17 takedown. Disturbingly, neither of these incidents reflected
18 completion of the administrative review process. Moreover, in
19 the August analysis of use of force conducted by the chief of
20 security and the facility investigator, none of these
21 aforementioned issues were addressed."

22 Q. So, now, Mr. Vail, would you please turn to Exhibit 15,
23 which is the monitors' most recent report, the sixth report
24 from February. Did the monitors find compliance with the
25 provisions of the use of force and chemical agents in February?

1 A. No. They found them to be in partial compliance again.

2 Q. So is it the case that as of today the monitors have never
3 made a finding of compliance regarding use of force?

4 A. That's true.

5 Q. I'd like to focus on the subject of pepper spray. What
6 happens after an inmate is exposed to pepper spray?

7 A. You mean what happens --

8 Q. Well, what should happen after an inmate is exposed to
9 pepper spray?

10 A. As soon as you can safely do so, you should begin the
11 decontamination process. And the best way to do that is to get
12 the inmate to a cold shower for several minutes.

13 Q. Why is it important to begin the decontamination process as
14 quickly as possible?

15 A. Well, for a couple of reasons. One is that it hurts. It's
16 painful. It has different effects on different individuals,
17 but it's a pretty uncomfortable experience to be doused with
18 pepper spray. So it's kind of the right and the humane thing
19 to do. If you don't do it right away, I think that there is at
20 least the perception on the part of prisoners that I've talked
21 to that --

22 MR. FRIEDMAN: I'm going to object to his speculation
23 about what might happen. He's about to -- he says he thinks
24 and he's about to deliver a medical opinion I think. But
25 whatever, with -- he's about to speculate and I object.

1 THE COURT: You need to rephrase.

2 A. If you begin to offer relief to the pain of the spray, you
3 begin to deescalate the situation; and it turns from a
4 conflict. The staff turns from a necessary aggressor into
5 someone who is providing relief and supporting the relief from
6 the pain in the inmate. It is a consistent practice around the
7 country and every jurisdiction that I've seen to get people
8 into the shower as soon as possible to relieve the discomfort
9 of the spray.

10 BY MS. WINTER:

11 Q. Did the Department of Justice in its 2012 report make
12 findings about the lack of guidance given to staff on
13 decontamination?

14 A. Yes, they did.

15 Q. Could you turn to Exhibit 23, which is MDOC's policy on use
16 of force. It's MDOC SOP 16-23-01 at page 5, and read that
17 aloud.

18 A. It says, "Appropriate decontamination and medical treatment
19 by certified personnel will be provided to all individuals
20 exposed to chemical agents."

21 Q. Does MTC's practice conform to this MDOC policy?

22 A. No, it does not.

23 Q. Does MTC's decontamination practice at Walnut Grove comply
24 with the material safety data sheet provided by the
25 manufacturer of the product that is most commonly used at

1 Walnut Grove?

2 A. No, it does not.

3 MS. WINTER: Your Honor, before I proceed, plaintiffs
4 would offer Exhibit 23 in evidence, the use of -- MDOC's policy
5 on use of force.

6 THE COURT: What says the defendant -- what says --

7 MR. FRIEDMAN: No objection.

8 THE COURT: Exhibit 23 will be admitted.

9 (EXHIBIT P-23 MARKED)

10 BY MS. WINTER:

11 Q. So you just testified that the MTC's decontamination
12 practice at Walnut Grove doesn't comply with the manufacturer's
13 material safety data sheet. Could you look at Exhibit 24,
14 which is the material safety data sheet?

15 A. Yes.

16 Q. And could you read aloud what the manufacturer's
17 instructions say?

18 A. In the middle of the second page it says "For inhalation,
19 provide fresh air. If it gets in your eyes, irrigate with cool
20 water at least 15 minutes or until relieved. If it gets on
21 your skin, flush with cool water, wash with mild soap and
22 water. If you ingest it, rinse your mouth with water, ingest
23 milk or water, and obtain medical advice immediately."

24 Q. At Walnut Grove do they follow these manufacturer's
25 instructions?

1 A. Rarely.

2 Q. Are there ever cases where they make no attempt to
3 decontaminate the prisoner?

4 A. I've watched a number of use of force videos where there is
5 no decontamination offered.

6 Q. As of January 2015, did MDOC and MTC have a written
7 protocol on decontamination?

8 A. Not at the time that I -- no, they did not.

9 Q. Did -- after that January 2015 visit, did they finally
10 develop a written protocol on decontamination?

11 A. I received one in a packet of new information a few weeks
12 ago.

13 Q. In your view, is that adequate progress on the
14 decontamination front?

15 A. Well, we won't know until we see if it's actually used. I
16 am aware that there was an incident on March 21st where quite a
17 bit of gas was used contaminating a unit. And I don't have the
18 written records, but I have the video. It does not appear that
19 shower was offered. I don't really know until I get the
20 written report.

21 Q. Is it important for -- you've testified I think that it's
22 important for officers to wear respirators when they go into a
23 planned use of force.

24 A. I have, yes.

25 Q. And you have pointed that out to MDOC and MTC, haven't you?

1 A. Yes, I have.

2 Q. Has MDOC or MTC ever explained to you why they don't
3 require all officers to use respirators during planned uses of
4 force?

5 A. No, they have not.

6 Q. Does MDOC and MTC have a policy requiring that use of force
7 incidents be recorded on video?

8 A. Yes, they do.

9 Q. Does such a policy requiring video recordings of use of
10 force serve in any way to make a prison safer?

11 A. I think that change -- well, yes, it does make a prison
12 safer, and it's happened over the country in the last 20 or 30
13 years. And it has a controlling effect on the prisoner
14 population, and I believe it also has a controlling effect on
15 the officer corps as well.

16 Q. How well does Walnut Grove do the -- do in recording use of
17 force events?

18 A. Well, not so long ago I shared some of the monitors'
19 comments about it, and I concur with those. But I would say
20 that they are pretty dedicated to try and go and get that
21 camera. Unfortunately, in a lot of these handheld videos they
22 don't do a good job of keeping the focus on the camera on the
23 incident itself. The cameras wander and you wind up on the
24 floor or the wall. And so they need to get better at it, but
25 their willingness to go get the camera I think is a good thing.

1 Q. So is it in your view a matter of more training being
2 needed?

3 A. Yes, it's one of those things that should be debriefed and
4 included in their -- in a review of use of force. *Let's sit*
5 *down with Officer Smith and help him or her learn how to work*
6 *that camera better.*

7 Q. Mr. Vail, I'd now like to turn to physical plant security
8 concerns. Did you ever recommend to MDOC and MTC that they
9 hire an independent security hardware expert to inspect Walnut
10 Grove and to identify risks?

11 A. I have made that recommendation several times, yes.

12 Q. Why did you make that recommendation?

13 A. Well, primarily because I was and remain concerned about
14 their -- their -- the locks on their doors. And as I said
15 earlier today that I saw that some of the detention hardware in
16 the videos of the riots didn't appear to be strong enough for a
17 prison. I also mentioned that maybe there's a problem with the
18 interior fencing around the yards. It just seems to me that it
19 would be good to get a completely unbiased security expert in
20 there to identify the problems that may be contributing to
21 keeping people at risk of harm in the facility.

22 Q. Could you look at the monitors' fifth report.

23 MS. WINTER: Exhibit number for the fifth report?

24 A. I believe it's number 10.

25 BY MS. WINTER:

1 Q. Could you look at Exhibit 10 --

2 A. Yes.

3 Q. -- at page 9, and read what MDOC told the monitors.

4 A. "They also retained a security consultant to inspect the
5 facility to determine measures to improve the security
6 operation."

7 Q. That is the monitors told MT -- the monitors said that MTC
8 told them that MTC had retained a security consultant.

9 A. That's what I believe that means, yes.

10 Q. Did you ever try to find out what the qualifications were
11 of the security expert and to see the results of this outside
12 inspection?

13 A. I was pretty excited when I heard about it. I thought
14 maybe they'd listened to me. So, yes, I asked, *Who did you*
15 *hire? And what are their credentials? And what did they find?*

16 Q. Was this information forthcoming?

17 A. No, I never received anything.

18 Q. When you were at the prison in January 2015, did you ask
19 this question directly to MDOC and MTC officials, that is, *Who*
20 *is this security expert that you told the monitors that you*
21 *hired and where is his report?*

22 A. That's exactly what I asked them. Yes.

23 Q. And what did they say?

24 A. That they did not hire a security expert.

25 Q. Does this incident affect your confidence in the integrity

1 or credibility of MDOC's representations -- MDOC's and MTC's
2 representations that they have recently implemented remedies to
3 security problems?

4 A. Yes, it does.

5 Q. During your January 2015 meeting, did MTC officials produce
6 a memo from the deputy commissioner dated June 10th, 2014,
7 regarding cell door operations?

8 A. Yes, they did.

9 Q. Could you please look at Exhibit 25, dated June 10th, 2014,
10 and read that aloud.

11 A. It says, "Effective immediately: Please notify staff that
12 an officer is to be present when a cell door is opened or
13 closed to ensure its functionality and to prevent tampering.
14 It is imperative that cell doors are operational. Therefore,
15 cell doors are to be inspected each time and every time a cell
16 door is opened or closed."

17 Q. In your view, was that a credible solution to insecure cell
18 doors?

19 A. No, I don't believe it's a solution.

20 Q. Why is that?

21 A. For a couple of reasons. As much as I would like to think
22 when I was a deputy secretary or a secretary that I could write
23 a memo and it would change the behavior of thousands of staff,
24 that's not how organizations change. I think it's highly
25 unlikely that this memo, unless there's other actions taken to

1 support it and reinforce it, is going to change anything.

2 Plus, the workload associated with that is pretty enormous.
3 Inmates go out of their cell lots of times of day. And while
4 you might be able to assume that's going to happen at count
5 time or at lockup time at night, I don't think you're going to
6 get a secure operation from relying on officers to go to the
7 cell door and make sure they're closed each and every time.

8 MS. WINTER: Plaintiffs offer Exhibit 25 in evidence.

9 THE COURT: Is there any objection?

10 MR. FRIEDMAN: No objection.

11 THE COURT: Exhibit 25 will be admitted.

12 (EXHIBIT P-25 MARKED)

13 BY MS. WINTER:

14 Q. Mr. Vail --

15 MS. WINTER: Oh, and Exhibit 24, I -- it seems I did
16 not offer in evidence.

17 THE COURT: All right. That's the materials safety
18 data sheet? Any objection from the defendant?

19 MR. FRIEDMAN: No objection.

20 THE COURT: Exhibit 24 will be admitted.

21 (EXHIBIT P-24 MARKED)

22 BY MS. WINTER:

23 Q. So you say that the -- this memo with this order -- this
24 directive to inspect each and every cell door each and every
25 time that it's opened or closed, you say that's not a credible

1 solution. Is there a viable solution to this problem of
2 insecure doors?

3 A. I think they need to get an outside security expert and
4 figure out what the problem is, is it a maintenance problem, is
5 it a design problem, and get an estimate on what it would take
6 to actually be able to make sure that those cell doors stay
7 lock when they're shut.

8 Q. Do you have any idea of why they haven't done so?

9 A. I do not. Yeah, I do not know why.

10 Q. During your January 2015 meeting -- 2015 meeting at Walnut
11 Grove, did MTC officials tell you that the doors had all been
12 fixed?

13 A. They told me and they showed me the fixes that they had
14 made in I believe it's Units 3 and 4. Those two units have
15 slider doors in them. The other units have hinged doors in
16 them.

17 Q. And did it appear that the slider doors in Unit 34 -- 3 and
18 4 were fixed?

19 A. It looks like they are, yes.

20 Q. And are those the units that are currently not occupied?

21 A. Those units are currently vacant is my understanding, yes.

22 Q. And all of the other units have hinged doors. Is that
23 correct?

24 A. I believe so.

25 Q. And in the units with the hinged doors, were the hinged

1 doors still not secure during your January visit?

2 A. They --

3 Q. That is they have not yet been fixed?

4 A. They told me they'd not -- they didn't believe they had a
5 problem with those doors and didn't look at them.

6 Q. But you've reviewed the report of defendants' expert, Tom
7 Roth. Correct?

8 A. I have.

9 Q. And doesn't Mr. Roth say that those problems have now
10 finally been solved, that Mr. Roth himself checked all the
11 doors?

12 A. I think he says that. Yes.

13 Q. Does Mr. Roth's report actually confirm in any way that
14 your concerns about the doors are real?

15 A. Well, my read of it is that he relied on the practice in
16 Exhibit 25, the memo from the deputy commissioner, as what made
17 it -- the system workable.

18 Q. Does he admit that the doors can still be jammed?

19 A. Yes, he acknowledges that the doors can be jammed.

20 Q. So is the situation essentially any different today than it
21 was three years ago when the DOJ issued its findings that the
22 cell doors were not secure and could be jammed?

23 A. From a physical plant perspective, no. I do think that
24 there's more awareness because we've created the awareness
25 about the issue.

1 Q. Mr. Vail, I'd now like to ask you some questions about the
2 reporting of sexual abuse at the prison. Do you have any
3 concerns about how MTC officials at Walnut Grove are reporting
4 inmate allegations of sexual abuse?

5 A. I do have concerns.

6 Q. What documentation have you seen about the handling of
7 inmate complaints of sexual abuse at Walnut Grove?

8 A. There's been two sources of information provided to me.
9 One is an audit done by a Department of Justice auditor I
10 believe that DOJ contracted with the American Correctional
11 Association to have these audits performed. And there was an
12 audit of the PREA, Prison Rape Elimination Act, policy and
13 practices at Walnut Grove that is dated August of 2014. So
14 that's one source of data.

15 The other source of data I have are the records of PREA
16 complaints on file at Walnut Grove. So those are the two
17 source -- sources where I've found information.

18 Q. And were those reports from 2014?

19 A. Some of them were. Some of them were. Some of them go
20 back to 2012.

21 Q. Do you have any particular concerns about these documents?

22 A. I can't for the life of me line them up. The amount of
23 complaints referenced in the DOJ investigation is very -- is
24 very different, very much so, from what is in MTC's own
25 records.

1 Q. Different in what direction?

2 A. The DOJ audit I believe, if I remember correctly, talks
3 about just a couple of different complaints, two I believe.
4 And there are by my count at least 11 in MTC's records. So I
5 can't reconcile the difference. I don't know what that means.

6 Q. Well, what does it suggest to you that there are far fewer
7 incidents referenced in the DOJ audit than in MTC's records?

8 MR. FRIEDMAN: Objection. He just testified he
9 doesn't know what that means. So now she's asking him to
10 speculate.

11 THE COURT: Objection sustained.

12 BY MS. WINTER:

13 Q. Mr. Vail, in your experience, what are the principal
14 indicators that a prison has a problem with violence?

15 A. Prisons are individual cultures. And each one, every
16 facility I've ever been in has a little bit different culture.
17 But something that I've found that sort of goes from one
18 facility to the next as a good indicator is what kind of
19 violence is occurring. And so I believe that when you have
20 more than one inmate fighting, when you have staff assaults and
21 when you have use of a weapon, you're into another territory
22 than just your typical one-on-one fight.

23 Q. So to be clear, when you say more than one inmate fighting,
24 what you're talking about is group fights?

25 A. Yes. I'm sorry. I mean not -- not just one-on-one fights.

1 Where there's six inmates fighting or five guys beating up on
2 one guy, or three on two, whatever it is, because you're not
3 just talking about two guys arguing about a basketball game,
4 there's probably something else going on there that relates to
5 gang activity.

6 Q. And when you say "staff assaults," you mean assaults on
7 staff.

8 A. I mean assaults on staff.

9 Q. And the third thing is use of a weapon?

10 A. Bringing out a weapon. That's sort of -- you know, you get
11 these cultures and codes, but bringing out a weapon ups the
12 ante significantly.

13 Q. Are any of these three indicators present at Walnut Grove
14 at this time, at the present time?

15 A. When I look at the documents that I've seen since I think
16 October, I can track about 15 of those kinds of incidents in
17 that time period.

18 MR. FRIEDMAN: Your Honor, throughout this day
19 Mr. Vail has made statements like that with no foundation. We
20 don't know what he's talking about. He says he can point to
21 15. We have no idea what they are. They're not in his report.
22 So I -- but he keeps making these same kind of statements.

23 I've sat here and listened to it all day. It's a lack
24 of foundation. He can get up here and say anything. There's
25 no way to cross-examine him because he hasn't shown anything.

1 It's just *I've looked at 15* and -- you know. I'm going to
2 object on that grounds, and I'm going to object on all these
3 statements he's made today going back for which there's no
4 foundation, for the record.

5 THE COURT: Oh, for the record. Okay. Because I have
6 to --

7 MR. FRIEDMAN: I understand.

8 THE COURT: -- do a mental loop myself for that one.

9 MR. FRIEDMAN: Well, I understand --

10 THE COURT: If it's not in his report, though, that's
11 a problem.

12 MR. FRIEDMAN: It's not in his report. Many of these
13 things he's testified today about are not in his report. I
14 mean, I -- it couldn't be. He's been up on the stand all day
15 and his report is not that long. But I can assure you many of
16 these things he's testified about today are not in his report.
17 And he's also just gotten up and -- you know, Ms. Winter will
18 say, *Do you agree that this happened? Yeah, I agree.* And they
19 move on. So there's been a lack of proper foundation, which
20 we'll take up on briefing; but on top of that, much of this is
21 not in his report.

22 THE COURT: Okay.

23 MS. WINTER: Your Honor, if -- may I?

24 THE COURT: You may respond.

25 MS. WINTER: I very much object to the idea that

1 Mr. Friedman can now retroactively say that he objects to lack
2 of foundation. The whole point of making an objection like
3 that is so that the opposing party can then respond. So I just
4 want it on the record that a mass objection that he did not see
5 fit to make at the time that the testimony was happening, I
6 just don't think that that works.

7 THE COURT: Well, it's -- the rules are slightly
8 different here because I don't have a jury here. And, again,
9 we're going to flesh out some of this stuff probably on
10 posttrial briefing. But, typically, when we do have a jury
11 present and there's an expert, the expert is sort of bound by
12 the report that he's given. And because the -- the report is
13 deemed to be fulsome, wholesome or whatever, and we can just
14 turn to the report and it's usually substantiated by something.

15 So I'm hoping his -- because I have not looked at all
16 the reports, all -- you know, I've not looked at all of this
17 quite yet. But he did just indicate that there were about 15
18 incidents or so about something. If he can either elaborate on
19 that or point to it in his report, it's fine --

20 MS. WINTER: Yes.

21 THE COURT: -- you know, if he can point to it in his
22 report. But the other side needs -- the purpose of these
23 reports I thought -- y'all got these reports in advance of
24 today. Right?

25 MS. WINTER: Yes, your Honor.

1 THE COURT: And that gave everybody notice on what the
2 expert would be saying I guess to some degree. I have not
3 looked at Mr. Roth's report. But I suspect -- you know, I'm
4 hoping that -- that the testimony that Mr. Vail has been giving
5 throughout the day is based in part at least on his report,
6 because it would be unfair for the State to try to
7 cross-examine him on stuff that they know nothing about.

8 MS. WINTER: Yes. I think the record will show that
9 everything hitherto that Mr. Vail has been -- has testified to
10 the defendants have had fair notice of.

11 THE COURT: Okay.

12 MS. WINTER: But we can move on now.

13 THE COURT: Okay. How much longer do you think you
14 have with this witness?

15 MS. WINTER: I believe that we are -- we are really
16 wanting to finish Mr. Vail this afternoon, and I think that we
17 can do that if you will -- if you could stay until 5:30.

18 THE COURT: Finish -- you can finish with this.

19 MS. WINTER: Yes, we can finish. And then he will be
20 available for cross-examination.

21 THE COURT: And they'll have all day tomorrow to
22 cross-examine him.

23 MS. WINTER: Whatever.

24 THE COURT: And then that leaves one day for all the
25 other witnesses.

1 MS. WINTER: That's where it -- looks like that's
2 where we are. That's why I had, you know, proposed that
3 proposal of the available hours, but -- so that we knew what we
4 had to work with.

5 THE COURT: We knew we had three days to work with.
6 So, I mean --

7 MS. WINTER: Yeah.

8 THE COURT: All right. Oh, we can -- we have to shut
9 it off at 5:30, though.

10 MS. WINTER: Yes.

11 THE COURT: Today. All right.

12 BY MS. WINTER:

13 Q. In their sixth report did the monitors rely on inmate
14 interviews to support their conclusion that safety was
15 improving at the prison?

16 A. Yes, they did.

17 Q. They didn't identify the prisoners who they talked to, did
18 they?

19 A. No, they did not.

20 Q. They said that 42 inmates had been interviewed, had been
21 interviewed?

22 A. That's what the report says, yes.

23 Q. Did you ever learn that a large number of these 42 inmate
24 interviews had not been conducted by the monitors but, in fact,
25 had been conducted by MDOC and MTC, these inmate interviews?

1 A. I did learn that, yes.

2 Q. In your view --

3 MR. FRIEDMAN: Your Honor, I'm going to object to
4 that. I've never heard that before. That is obviously not in
5 the report. I don't know what he's talking about. And now
6 he's calling into question your court monitors.

7 THE COURT: And that's fine. I mean, she's going to
8 ask him what information -- where did he get that information
9 from and all that, or either you're going to bring that out,
10 because I would like to know.

11 MS. WINTER: Your Honor, we will have testimony later
12 that will -- from a prisoner that will explain how Mr. Vail
13 recently found this out.

14 THE COURT: Okay.

15 BY MS. WINTER:

16 Q. Let me ask you one question, though, now. Did the monitors
17 ever confirm to you, in fact, that they had not conducted all
18 of those interviews themselves but had delegated somebody from
19 MDOC to do so?

20 A. Yes, they did.

21 Q. In your view, does it affect the reliability of the inmate
22 interviews that the monitors relied on that many of those
23 interviews were conducted by MDOC or MTC?

24 A. It does.

25 Q. Did the monitors tell MDOC or MTC that no other prison

1 staff should be present during the interviews?

2 A. That's what the monitors told me, yes.

3 Q. Did you later discover that MTC security staff was, in
4 fact, present during at least some of these interviews?

5 A. At least one, yes.

6 Q. Do you believe that having security staff present during
7 inmate interviews could affect the reliability of the answers?

8 A. I very much believe that, yes.

9 Q. Looking at all the changes between the July riot and today,
10 changes that defendants say have made the prison safer, did
11 MDOC/MTC make any of those changes on their own initiative?

12 A. The one that I can track to give them credit for is the
13 additional netting and body scanners and x-ray machines.

14 Q. And what about all the other changes?

15 A. I think they were driven by the monitors' intervention or
16 by the work of the plaintiffs' team.

17 Q. What difference does it make why the changes came about as
18 long as they came about?

19 A. It speaks to the focus of the current leadership of the
20 organization when the changes are driven from the outside, when
21 so many changes are driven from the outside, and they seem to
22 have no internal capacity to want to correct problems to make
23 people safer.

24 Q. Mr. Vail, I'd now like to turn to the final subject of this
25 direct examination, and that is the -- the relief or the

1 remedies that you believe may be necessary to minimize the risk
2 of violence at the facility. I first want to ask you about the
3 consent decree in this case. And I would like to go through
4 the consent decree with you and ask you if there are any
5 provisions in the decree that are necessary to reduce the
6 substantial risk of harm from violence that you've testified.

7 A. Okay.

8 Q. And what we are going to do is go page by page through the
9 consent decree and point out which provisions of the decree you
10 believe are necessary. If there are provisions that you don't
11 think are critical, you don't need to discuss those. And we're
12 only talking about the substantive part of the decree, not
13 about the things the parties agreed to at the end about
14 process. We're talking about substance. So could you look at
15 Exhibit 2, the consent decree at page 3. It's called
16 Substantive Remedial Measures.

17 A. I'm there.

18 Q. A: Classification and Housing System: (1) MDOC will
19 utilize the classification system that ensures prisoners are
20 appropriately and safely housed within Walnut Grove. Is this
21 necessary?

22 A. Yes. It's fundamental to safety at the facility, and
23 they've recently struggled with that. I think it needs to stay
24 in place.

25 Q. The decree at page 4, Protection from Harm. The first

1 provision, quote, At all times prisoners will be provided with
2 reasonably safe living conditions and will be protected from
3 violence and other physical or sexual abuse by staff and other
4 prisoners.

5 Is this order still necessary? That is to say, do you
6 still need an order from a court that this -- that this --

7 A. Yes, I believe --

8 Q. -- goes on?

9 A. -- I believe we do.

10 Q. Now, still on page 4, will you look at .2. "MDOC will
11 ensure sufficient numbers of adequately trained direct care and
12 supervisory staff." Is it still necessary to have an ordered
13 remedy on that?

14 A. I think it's necessary and that the training portion of it
15 should be enhanced to include at least one day a year on
16 deescalating conflict.

17 Q. What would -- what would adequate numbers of staff be here?

18 A. Sufficiently to keep officers in the zones.

19 Q. And anything necessary about additional supervision?

20 A. Yeah. The additional supervisors that I've spoken of, yes.

21 Q. And would this need to be reflected in a staffing plan?

22 A. It would.

23 Q. And then about sufficient training, I think you already
24 started to mention that. What would be minimally necessary to
25 provide sufficient training in the context of Walnut Grove

1 today?

2 A. I think they need to add eight hours to their academy and
3 eight hours to their in-service training in verbal deescalation
4 skills.

5 Q. Now I'd like you to look at .3 on the same page,
6 "Mechanical, physical or chemical restraints will not be used
7 to punish prisoners." Are the -- is this order still
8 necessary?

9 A. If you read the rest of that, "force must be the minimum
10 amount required to safely contain the prisoner," yes, I think
11 it is.

12 THE COURT: Is that number 3?

13 BY MS. WINTER:

14 Q. That was number 3. Correct?

15 A. Yes.

16 Q. And then looking at the second sentence in number 4, quote,
17 If physical force or pain aversion techniques are necessary,
18 the force must be the minimal amount required to safely contain
19 the prisoners, and then it goes on, except in rare emergencies.
20 And then to the end of that sentence. Is that provision still
21 necessary?

22 A. Yes, it is.

23 Q. Is any training necessary in order to make this a reality,
24 using the least amount of force necessary?

25 A. Not directly related to this item, no. I think the

1 training and the additional work needs to come in the review
2 process of use of force.

3 Q. Now, .5 at the bottom of page 4, which is about audiovisual
4 recordings of use of force, is this provision still necessary?

5 A. Yes, as it reported the monitors today, and then I've also
6 said they need to continue to improve their performance here.

7 Q. .5, on page 5, Summary of the Use of Force, is this still
8 necessary?

9 A. Yeah, but I think this should be adjusted a little bit to
10 include this information not being just because -- I'm sorry.
11 Let me start over again. "Copies of videotapes will be
12 available for inspection by plaintiffs' counsel." I think that
13 they just need to send them along with the reports on a monthly
14 basis, send them directly.

15 Q. .7, page 5, All physical interventions must be documented
16 in writing.

17 A. That should be maintained.

18 Q. .8, Each use of force will be reviewed.

19 A. I think that one needs to be expanded and to be more
20 explicit.

21 Q. How needs it to be expanded?

22 A. I think it needs to encompass four elements that each
23 review should take a look at, whether or not the force was
24 necessary; and the second, whether or not the level of force
25 was commensurate with the reason for the need for force. And,

1 third, I think there needs to be an evaluation of the level of
2 threat; and, fourth, which is actually most important to me,
3 was there activity that attempted to diminish the use of force.

4 And I think you have to look at that prior to the incident
5 and after the incident. Was there a meaningful effort to
6 deescalate a situation where there was not an imminent risk of
7 harm. And then you also have to measure at the end, did the
8 application of the force stop once the resistance stopped.

9 MR. FRIEDMAN: Your Honor --

10 BY MS. WINTER:

11 Q. Point --

12 MR. FRIEDMAN: Your Honor --

13 THE COURT: Yes, sir.

14 MR. FRIEDMAN: -- his report -- I've got his report.

15 And at the end of his report there's a section of his
16 recommendation, and this goes way beyond his recommendation.
17 He doesn't go through the consent decree like this.

18 MS. WINTER: Your Honor, they hadn't moved to
19 terminate the consent decree.

20 MR. FRIEDMAN: It's the same burden. They have the
21 same burden. And these are their recommendations for modifying
22 the consent decree. I mean, this has nothing to do with
23 termination. They're trying to modify it. Terminating it, we
24 don't -- they don't need to be talking about relief. The whole
25 thing would be gone. There's no relief to get. So, obviously,

1 this goes to their motion to modify. And if you look on
2 page -- beginning on page 41 of his -- his expert report --

3 THE COURT: What exhibit is his expert report? Remind
4 me.

5 MR. FRIEDMAN: I don't think it's been entered.

6 THE COURT: It's been at least labeled.

7 MR. FRIEDMAN: I can get you a copy.

8 THE COURT: I have a copy.

9 MR. FRIEDMAN: But if you look at page 41, those are
10 his recommendations. And what they're going through now goes
11 way beyond those.

12 MS. WINTER: Your Honor, may I be heard?

13 THE COURT: Yes.

14 MR. FRIEDMAN: I'm informed that it is P-17.

15 MS. WINTER: There was a specific task before us when
16 the court told Mr. Vail to file an expert report and suggested
17 remedies. The expert report was before there was a motion to
18 terminate. Mr. Friedman has just said that the burden is the
19 same.

20 The burden is not the same. What we had to show
21 before was noncompliance. What we are having to show now is
22 the violation a current and ongoing violation of the Eighth
23 Amendment. That's one point.

24 So what we have to do, what we are required to do by
25 the motion that Mr. Friedman filed ten days ago or less is to

1 show whether there -- that every kind of relief that we ask for
2 is the least intrusive, most narrowly tailored relief, remedy
3 necessary to cure the constitutional violation that has been
4 proved.

5 We told the court at the beginning that we would first
6 offer our evidence of a constitutional violation and that we
7 would then ask Mr. Vail's opinion for what the remedy would be.

8 Now, before you have the hearing --

9 THE COURT: Make sure you are talking into the mic.

10 MS. WINTER: Before there is a hearing, one can never
11 come up with a correct injunctive relief. That is the purpose
12 of the hearing. You cannot narrowly tailor it until you hear
13 the evidence. The evidence that is now in the record that
14 wasn't before is the sixth report of the monitors and
15 Mr. Roth's report and presumably his testimony.

16 We now have to meet a much, much more difficult
17 standard and carry a much heavier burden than we did when we
18 were simply the proponent of a motion to enforce the consent
19 decree.

20 The idea that plaintiffs are handcuffed and had to
21 guess back in January what relief would be appropriate to ask
22 for makes no sense to me. And, furthermore, it's -- these are
23 only suggestions. And it seems to me they are suggestions that
24 are useful to the court, because Mr. Vail is an expert. And if
25 the court is not convinced either that there's an Eighth

1 Amendment violation or that Mr. Vail's -- let's assume the
2 court finds there is a violation. Mr. Vail's testimony is this
3 is what he thinks is needed. If the court thinks they aren't
4 sufficiently narrowly tailored or the least intrusive remedy,
5 the court comes up with something else.

6 But that was not the task before plaintiffs in January
7 when the court asked us to provide a list of the remedies that
8 were needed there. It's something very different that we have
9 to do now. We now have to defend every provision of the
10 consent decree on remedy that we believe is still necessary and
11 that meets the requirements of the PLRA.

12 Many of these provisions will go away. We don't think
13 there's a continuing and ongoing need for -- to forbid the
14 alligator walk or the duck walk. That's a provision of the
15 consent decree. We're not trying to enforce that. We're
16 trying to sweep away everything in the consent decree that we
17 don't think is currently required. And we're starting anew.
18 And that is what Mr. Friedman's motion required us to do.

19 It's a blank slate now. The consent decree is gone.
20 It is gone for good or for ill. And there may be provisions in
21 that consent decree that Mr. Friedman will be very sorry if he
22 gets rid -- that he got rid of. That could be how -- that
23 could be the outcome. But this is our task now, to go through
24 this consent decree. That's what the law requires.

25 MR. FRIEDMAN: Judge, if the consent decree is gone --

1 THE COURT: Hold on one second. Hold on one second.

2 (PAUSE)

3 MS. WINTER: And it's Mr. Friedman's job to come back
4 during his portion of the case and to say, *We don't agree. The*
5 *remedies that Mr. Vail has proposed are not narrowly tailored.*
6 *They are not the least intrusive.* And it's finally the court
7 who takes into consideration, for what it's worth, the
8 suggestions of the competing experts.

9 (PAUSE)

10 THE COURT: It's become clear to the court that we
11 won't be through in three days, I tell you that, if we take up
12 both of these motions at one time. And I realize the State
13 moved to terminate the consent decree.

14 MS. WINTER: Your Honor, our motion to enforce
15 compliance is gone. It sort of has disappeared. It's become
16 irrelevant. The only reason why we are introducing evidence of
17 a violation of the consent decree is because it shows they are
18 to a great extent congruent with the constitutional standard.
19 It's only for that that we're doing it, and to show state of
20 mind.

21 But we are not here -- we're no longer on our motion.
22 Defendant's motion has superseded it. Our motion is dead. The
23 consent decree is gone. We're -- this court can no longer rule
24 that they have violated the consent decree -- the consent
25 decree and, therefore, the consent decree should stay in place.

1 THE COURT: Okay. I think we're going to call it a
2 day and everybody's going to think about what we're saying
3 right now, because I'm going to have -- we're going to call it
4 a day right now, because I'm hearing something I didn't expect
5 to hear at all.

6 I've been prepared to hear the motion to modify -- the
7 motion to enforce the consent decree, and what I've been
8 hearing today is that the consent decree still needs to be in
9 place, that -- I realize the State has argued that everything
10 that the plaintiffs have -- the purpose of the plaintiffs'
11 filing their motion, those purposes no longer exist. The
12 plaintiffs filed their motion on the heels of the July riot.

13 Now, because of the court and everything else that was
14 going on, this was the first available date to have that motion
15 heard. The plaintiffs have -- I mean the defendants have said
16 it's completely inappropriate to even move forward on the
17 motion because things are different -- and I'm paraphrasing --
18 things are not what they used to be like. I understand that.

19 But I'm still here and prepared to hear what things
20 have been like and what they're going forward, because there
21 are some things in this order -- well, there may be some things
22 in this order that are not being complied with through today.
23 That's what Mr. Vail has been testifying.

24 Now, you're saying that that whole motion is not on
25 the table anymore and it has been somehow superseded --

1 MS. WINTER: Yes, your Honor.

2 THE COURT: -- by -- no, because I have not even --
3 well, I said that I would consider all this together, but it
4 seems to me that the motion that was set for hearing for
5 sure -- and I did say today that I'm not granting the State's
6 motion for a continuance and all that; but if everything has
7 conflated into the second motion that was -- and to the State's
8 motion, does that change the burden of proof and the standards
9 and all that? And why have we been here today?

10 MS. WINTER: We have been here today because the
11 evidence is the same. It is the same evidence that we were
12 always prepared to put on. What we have always wanted is to
13 hold them to a constitutional standard. What has fallen away
14 is they say, *We no longer consent to the consent decree.* And
15 that means there is no more consent decree. *We can't be bound*
16 *by it, they say, because two years have passed; and under the*
17 *PLRA there is no more consent decree unless the court makes*
18 *findings on the record that there is an ongoing constitutional*
19 *violation.*

20 And so we are here to prove to you exactly what we
21 were going to prove to you in our motion. The trouble is there
22 is no more consent decree because they don't consent. *They say*
23 *two years have passed. We are entitled, in black and white*
24 *under the PLRA, to terminate that decree unless you can get the*
25 *judge to find that there is currently an ongoing violation.*

1 THE COURT: The consent decree is in place until the
2 court says it's not in place anymore. Right?

3 MS. WINTER: No, your Honor. No. This is going to
4 automatically expire in 30 days, that is on April 13th, unless
5 you make findings of an ongoing constitutional violation. You
6 have --

7 THE COURT: I can promise you this, I'm not going to
8 have a ruling by --

9 MS. WINTER: No, no. We understand.

10 THE COURT: -- by April 13th.

11 MS. WINTER: We know it's going to expire. Of course
12 you can't. You do -- you do have the ability under the law to
13 delay that for an extra 60 days. But you could use your
14 judgment to say, *For good cause, I'm going to give them 90 days*
15 *before I enter my ruling*, which would take us to June 13th.

16 THE COURT: Okay.

17 MS. WINTER: 90 days. And then the consent -- all
18 relief will be stayed unless and until you enter a -- an order
19 saying they violated the constitutional rights and I'm going to
20 enter a remedy. And, of course, during that interim, we know
21 you can't magically write an opinion. We're not expecting you
22 to do that. You'll do it when you can do it.

23 Meanwhile, there is no relief. Relief is over. It's
24 terminated by operation of law. And you do not have the power
25 under the law to keep that decree going. All you can do --

1 because they killed the consent decree. It's gone. You can't
2 bring it back and they can't bring it back. All you can do is
3 to make a finding, if that's what you find, that there's an
4 ongoing constitutional violation.

5 If there is, you need to order remedies that you think
6 are appropriate remedies. But, meanwhile, plaintiffs are
7 without relief. This motion has ended all relief for the
8 prisoners at Walnut Grove unless and until you make a finding
9 of a constitutional violation.

10 THE COURT: But if the court had not set that motion
11 for hearing, then what happens to the consent decree?

12 MS. WINTER: It's gone.

13 THE COURT: It just expires?

14 MS. WINTER: It's stayed.

15 THE COURT: It just blows up by the day.

16 MS. WINTER: It's an automatic stay by operation of
17 law. That's how Congress wrote the PLRA. Automatically,
18 starting from the date that they filed their motion, which was
19 March 13th, it automatically stays all relief until -- unless
20 and until the court makes a finding of a constitutional
21 violation. So -- because of course we don't expect you -- you
22 know, you're -- you have your docket. We're not saying you can
23 necessarily enter an order.

24 THE COURT: Make sure you're talking into the mic
25 because we have a court reporter --

1 MS. WINTER: It's --

2 THE COURT: Make sure you're speaking into the mic.
3 It helps the court reporter. Make sure you're speaking into
4 the mic.

5 MS. WINTER: Oh. It is June 13th if you give us the
6 extra 60 days, or else on April 12th or 13th if you don't, it
7 is automatically stayed. There is nothing you can do. The
8 case law is very clear on interpreting the statute. You
9 cannot -- you -- the consent decree is gone. It's gone.

10 THE COURT: But the problem that I have with what
11 you're telling me now is we should have been talking about this
12 in April. We should have been talking about this in September
13 and October, not that I would have gotten to it, because
14 there's some other pressing things going on. But when we
15 worked tediously with each other to get the appropriate date
16 for the hearing on your motion, because at that time only the
17 plaintiffs' motion existed and --

18 MS. WINTER: We had no idea they were going to do
19 this. We were stunned. And the reason we were stunned is
20 because the final provision of the --

21 THE COURT: Make sure you're talking into the mic.
22 Make sure you're talking into the mic.

23 MS. WINTER: The last provision of the consent decree,
24 which we ask you to look at, says this -- this consent decree
25 will terminate after five years, or seven years if the court

1 makes extra findings, five years. It was a drop-dead
2 provision. And we negotiated that. In exchange for not
3 invoking the two-year provision, they said, okay, five years.

4 To us what that meant was, what we understood that to
5 mean was they were giving up their right to move -- to
6 terminate the consent decree in two years. So my goodness, we
7 were astonished that they did that. It seemed like such
8 stunning bad faith to us, stunning. I've been doing this kind
9 of law for a long time. I have never ever seen what the
10 defendants did here.

11 They apparently waived their right to move for relief,
12 and then they turned around and said, *Oh, two, years have*
13 *passed. The consent decree is over.* That is what they said on
14 March 13th, and we have now said -- we said, *Okay. If it's*
15 *over, we're going to go ahead, put on our evidence and get an*
16 *order from the court,* not a consent decree, because there's no
17 more consent. They withdrew their consent.

18 What they essentially told us was *If you try to fight*
19 *this, you're going to lose,* which is probably true looking at
20 it now. We're in the Fifth Circuit, not to get too -- put too
21 fine a point on it. Nobody knows the answer to this question
22 because nobody has ever done what they've done, which is to
23 turn around and repudiate their own agreement not to move for
24 termination after two years. There's no law on this.

25 While they go to the Fifth Circuit, if you were to say

1 no because this is -- the consent decree's still good, they've
2 already told us they will go to the Fifth Circuit. This will
3 be tied up in the Fifth Circuit for some years. And,
4 meanwhile, the prisoners have no relief. They have no
5 protection from anything that you've heard today.

6 It's over. The consent decree is over. The court has
7 no jurisdiction. You are divested of jurisdiction by this
8 motion unless and until you enter an order finding that there
9 is an ongoing violation of plaintiffs' right to reasonable
10 protection from violence. That's what they did with this
11 motion. The consent decree's gone. There's nothing you can do
12 to revive it for us.

13 THE COURT: Okay. Well, it's after 5:30. We've had a
14 long day. We'll figure out how we proceed tomorrow, I mean,
15 because it's -- I do turn to the State. If the State was
16 contemplating filing their motion back in January, it would
17 have been nice for the court to know instead of the court --
18 you don't have to throw your hands and show what your strategy
19 is, but we were getting the magistrate judge involved in trying
20 to convene mediation sessions and doing all of that which was
21 required by the consent decree.

22 And so -- and, of course, I'm not privy to what
23 happens in the mediation sessions or what's been going on,
24 but -- but the notion that I was required to hear the State's
25 motion and that that's the only motion that is alive on my

1 docket seems to me -- well, I set for hearing the plaintiffs'
2 motion. That's what was set back in January. We knew how
3 plaintiffs' motion was going forward. I realize we had a
4 motion that was filed March 13th or so, two, three weeks ago.

5 But the court was interested in knowing if the State
6 had been in violation of the specific consent decree and
7 whether or not it's -- or had been in violation and have those
8 violations been cured. Some of the testimony today suggests
9 that it has not been cured. Now, whether the State has a right
10 to -- for -- whether the court should grant the State's motion
11 I thought was a whole separate question.

12 MS. WINTER: No. It's the same. It's one and the
13 same question.

14 THE COURT: Okay. Well --

15 MS. WINTER: And it's the only question now.

16 THE COURT: Well, I mean, you said it two different
17 ways today I think. I think in response to Mr. Friedman you
18 said that's not true. Mr. Friedman has always said that it's
19 the same burden of proof, it's the same standard and all that.

20 MS. WINTER: No. I think we're talking about two
21 different things. Mr. Friedman said in his motion you have to
22 prove a constitutional -- an ongoing constitutional violation,
23 and we said, *Fine. We will.* That's what we said. But what we
24 have to do now is address to the court the narrowest, most
25 least intrusive remedy. And that's not what a consent decree

1 is.

2 The consent decree remedies are whatever the parties
3 were willing to consent to. So some of them weren't too broad.
4 Some of them are too narrow. What we have to -- some of them
5 don't violate -- don't address constitutional violations. What
6 changed is the kind of relief. The relief that's in the
7 consent decree is no longer viable because they don't consent
8 to it. It has to be this court now that decides is there a
9 violation; and if so, what is the least intrusive and narrowest
10 remedy that is necessary to correct the violation of the
11 constitutional right.

12 If you look at the consent decree, you will see that
13 many of those things, they probably still -- you know, they may
14 not -- they either don't address the constitutional right or if
15 they do, and many cases they do, they're no longer narrowly
16 tailored to the actual current and ongoing violation. So it is
17 different what we have to do.

18 What we have to do today that is different is the
19 remedy. What is the remedy? And that's what we were talking
20 about with Mr. Vail. And we were pretty near the end of that.
21 *What are the remedies, in your opinion, Mr. Vail, as an expert,*
22 *that are the narrowest remedies, the most closely tailored, the*
23 *least intrusive remedies that will correct this risk of*
24 *violence?*

25 THE COURT: Okay. Well, we'll take that up tomorrow.

1 MR. FRIEDMAN: Can I make just one -- I want to assure
2 the court we're not playing games. As I told you early this
3 morning when this started, we've been thinking about it after
4 we got the sixth monitors' report March the 5th. That's
5 what -- that's what made us proceed with our motion.

6 THE COURT: That's fine. But we'll -- we'll start
7 sometime tomorrow morning with something because -- 9:00 for
8 sure, unless y'all -- if there's some issues that we need to
9 take up off the record outside the presence of the court
10 reporter, we can do so; and we can make a record later. I will
11 be here early in the morning, but we'll start up the hearing
12 process itself wherever we are at 9 a.m. All right.

13 MS. WINTER: So can we expect -- you may not be able
14 to tell me this now. But can we expect that we will -- we have
15 a little bit more, maybe 10, 15 minutes more, with Mr. Vail.
16 Should we expect to be finishing his testimony, or if that's
17 not --

18 THE COURT: You should be -- you should expect to
19 finish his testimony. The only thing is the other side was
20 raising issues about what's not in his report that was
21 submitted when the plaintiffs were only concerned with our
22 hearing back in January and the things that were -- that guided
23 you there, but there's -- now it's a moving target in my mind
24 because of the motion that was filed on the 13th. But I will
25 allow you to put in -- finish up this witness. I have to

1 figure out on my own I guess how we should move forward from
2 that point.

3 MS. WINTER: Your Honor, we have Mr. Vail's
4 February 10th report here. We were going to introduce it as an
5 exhibit. But, of course, it's also in the court's docket.
6 It's docket number 120. And it's from February 10th, in other
7 words, a month before the defendants moved for termination. It
8 doesn't say anything different substantively than what he
9 testified to today. The only thing that's changed is we now
10 have to talk about narrowly tailored remedies.

11 THE COURT: We'll take it up in the morning. I'll
12 likely allow it in, but we'll do that in the morning.

13 MS. WINTER: Okay.

14 THE COURT: I have to get out of here. Court's
15 adjourned.

16 (EVENING RECESS)

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CERTIFICATE OF REPORTER

I, MARY VIRGINIA "Gina" MORRIS, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 10th day of April, 2015.

s/ Gina Morris
U.S. DISTRICT COURT REPORTER