STATE OF SOUTH CAROLINA	)	IN THE FIFTH JUDICIAL DISTRICT
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2005-CP-40-02925
T.R., P.R., K.W., AND A.M. ON behalf of themselves and others similarly situated; and Protection and Advocacy for People with Disabilities, Inc.,	)	**Report of Plaintiffs' Expert Steve J. Martin**
Plaintiffs,	)	
v.	)	
State of South Carolina; South Carolina Department of Corrections; and Jon Ozmint, as Director of the South Carolina Department of Corrections,	)	March 11, 2011
Defendants.	)	

I. INTRODUCTION

I have been retained by plaintiffs' counsel as an expert witness to provide testimony on behalf of inmates with mental illness who are confined in the custody of the South Carolina Department of Corrections ("SCDC"). Specifically, I have been asked to render opinions related to SCDC's disciplinary process/practices, and conditions and management, of inmates with mental illness in segregated confinement; and whether, these practices and conditions of confinement cause unnecessary harm to inmates with mental illness. Moreover, I have been asked to render opinions on whether these practices and conditions of confinement are consistent with sound correctional practice and whether they advance valid penological objectives.

II. QUALIFICATIONS OF THE EXPERT WITNESS:

My general qualifications as an expert in the field of corrections are set forth in my *Curriculum Vitae*, attached hereto as Exhibit 1. I began my career as a correctional officer in 1972 at a maximum security prison operated by the Texas Department of Corrections ("TDC"). While employed with TDC as a correctional officer, I also worked at a prison for female felony offenders. I subsequently served as casework intern in mental health programs with the Federal Bureau of Prisons at the Federal Correctional Institution, Fort Worth, Texas. In 1981 I rejoined the TDC as an administrator of technical programs, and subsequently served as Legal Counsel, General Counsel, and Chief of Staff to the Director of the TDC. In my service with the TDC, I was involved in the development of policies and procedures in the areas of classification, administrative and punitive segregation, inmate disciplinary procedures, use of force, special needs prisoners (protective custody, mentally/physically impaired, etc.), and numerous other operational issues. Much of this work related to compliance with court orders in *Ruiz v Estelle*, a statewide prison conditions lawsuit brought by prisoners and the U. S. Department of Justice against the TDC. Pursuant to the court's orders to develop remedial plans for such issues as classification, administrative and punitive segregation, and the treatment of special needs prisoners, I was a member of the state's negotiating team that, in concert with the Special Master and plaintiffs' attorneys, developed these plans. My directorate, the General Counsel's Office, was responsible for assisting TDC personnel in the implementation of the remedial plans. The General Counsel's Office was directly charged with supervising the monitoring of compliance with those plans adopted pursuant to the orders in *Ruiz*. In my capacity as General Counsel, I was directly responsible for formulating and coordinating TDC's response to all compliance monitoring reports filed with the court by the Special Master. Among the plans adopted were

comprehensive orders for the delivery of psychiatric services and the management of special needs prisoners incarcerated in TDC facilities. During the course of this work, I routinely conducted site inspections and conferred with facility managers regarding implementation of the remedial plans.

As an independent corrections consultant, I have worked as a corrections expert for the U. S. Department of Justice ("DOJ"), Civil Rights Division, on many occasions related to a wide variety of correctional management issues; by both defendants' and plaintiffs' counsel in numerous cases; by federal courts; and, by a variety of state and local governmental entities relating to corrections issues. I have made well over 700 site visits/inspections to prisons and jails in more than 35 states, Puerto Rico, Guam, Saipan, Jamaica, the American Virgin Islands and Northern Ireland. I am currently serving as a court monitor and court appointed expert in conditions cases involving two state prison systems (New York and Mississippi), a state juvenile confinement system (Ohio), and one large metropolitan jail (New York City). I have served as a federal court/DOJ monitor in cases involving three other state prison systems (Arizona, Montana and Wyoming), and ten metropolitan jails in New York (3), Maryland(2), Mississippi (2), Georgia(2), and South Carolina.

I have been qualified as an expert in the field of corrections and have testified as such on more than forty occasions, mostly in federal courts. I am co-author of Texas Prisons: The Walls Came Tumbling Down (Texas Monthly Press, 1987), and contributed to Courts, Corrections and the Constitution (Oxford University Press, 1990), and Building Violence: How America's Rush to Incarcerate Creates More Violence (Sage Publications, 2000). I have published articles on correctional subjects in the *Correctional Law Journal, Law and Society Review, Social Justice Quarterly, Pace Law Review, Texas Tech Law Review, Texas Lawyer*; and journals for the Center

for Research in Crime & Justice, New York University School of Law, the National Conference on Crime & Delinquency, and the Texas Public Policy Foundation. I have also served on the adjunct or visiting faculties of six universities, including the University of Texas School of Law. I was also a Visiting Scholar at Queens University Belfast, Institute of Criminology and Criminal Justice in the fall of 2000.

In addition to these general qualifications, I have specific expertise with the correctional management of special needs offenders, i.e., offenders whose mental and/or physical conditions require special management and treatment by both security staff and professional health care providers. My first experience with prisoners with mental impairments (mental illness, mental retardation and developmentally disabled) was as a correctional officer in supervising housing areas at both a maximum security prison and a prison for female offenders in which special needs inmates were confined. During my work as a casework intern for the Director of Mental Health Programs at the Federal Correctional Institution, Ft. Worth, I was a working member of a case management team with an offender caseload that included prisoners with mental impairments. As a Federal Probation and Parole Officer (1975-1980), I assisted in the pre-release planning, placement and supervision (community, sheltered and assisted living placement) of offenders with mental impairments.

From 1981-1985, as a member of the TDC negotiating team to develop remedial plans in the Ruiz litigation, I routinely worked with professional medical and mental health care experts on development of court approved plans on the management of special needs prisoners, including those who required segregated housing from the general population inmates. I was continuously involved in monitoring and implementation issues of these plans until my departure in July 1985.

I also coordinated with the department training division on development of training programs specifically designed for correctional officers assigned to work with special needs offenders.

In 1988 I was appointed by the Texas governor to the Interagency Council on Mentally Retarded, Developmentally Disabled and Mentally Ill Offenders. The Council, created by an act of the Texas Legislature in 1987, was charged with determining the status of these special needs offenders in the state criminal justice system, identifying and coordinating services for these populations, evaluating existing programs, and developing new programs. The activities of the council were governed by the Chair and a seven-member Executive Committee, of which I was a member. I also chaired the Sub-committee on Legislative Issues and was a member of the Committee on Mentally Retarded Offenders. While on the council, I exercised direct oversight of a major study on special needs offenders most at risk to be victims and aggressors, and the situational factors that put these offenders most at risk in institutional settings.

During the course of my consulting work the past twenty-four years, I have on many occasions been involved in working on remedial issues such as administrative/punitive segregation and inmate discipline procedures related to special management populations. I have served as a consultant, court expert and court monitor for numerous correctional facilities housing offenders with mental impairments in which security and treatment issues had to be coordinated/integrated for delivery of program services. I am presently serving as a designated security expert in *Disability Advocates, Inc. v. New York State Office of Mental Health,* wherein I monitor select provisions of the Private Settlement Agreement entered into between the parties in 2007 relating to the management of mentally ill offenders in the New York State Department of Correctional Services. I am also presently serving as a Rule 706 Court Expert in *Carruthers v. Jenne*, a conditions case in Broward County, Florida, involving the management and treatment of

offenders with mental impairments. I am also a federal court monitor in *Reynolds v. Schriro*, a class action lawsuit involving New York City jail inmates/patients assigned to the forensic units of Bellevue and Elmhurst Hospitals. In 2008 I served as an expert for the U. S. Department of Justice involving the Augusta State Medical Prison which houses a substantial population of offenders with mental impairments. I have also served as a consultant to the Georgia Attorney General's Office in *Fluellen v. Wetherington*, litigation involving the Phillips State Prison, a facility which provides psychiatric services to a large number of inmates. I also served as an expert in *Hargett v. Adams*, litigation involving the Joliet Treatment and Detention Facility, a secure treatment facility for sexually violent offenders. I have been involved in two class action lawsuits involving the treatment of offenders with mental impairments in the California Department of Corrections ("CDOC"). *Gates v. Deukmejian* concerned the treatment of prisoners confined to the California Medical Facility at Vacaville, and *Clark v. California*, involved the treatment of prisoners with mental retardation and developmental disabilities housed throughout facilities operated by the CDOC. I served as one of two Joint Expert Consultants for four years (1998-2002) in *Sheppard v. Phoenix*, in which Norman A. Carlson (former Director of the Federal Bureau of Prisons) and I monitored the Central Punitive Segregation Unit ("CPSU") of the New York City Department of Corrections at Rikers Island. The CPSU housed offenders who had committed serious institutional disciplinary infractions. Our oversight responsibilities included the monitoring of the inmates with mental illness assigned to the CPSU. Finally, I have been involved in numerous cases related to the management and treatment of inmates in high maximum or super-maximum ("supermax"), prisons or housing units within prisons wherein prisoners are isolated from the general population and from each other, typically in excess of twenty-two hours a day. I testified for the plaintiffs in *Madrid v. Gomez*, which involved

prisoners confined at the Pelican Bay State Prison, a supermax facility with a Special Housing Unit ("SHU") that housed mentally impaired offenders for up to twenty-three hours a day. I have served as an expert in class action lawsuits involving supermax prisons in Virginia, Missouri, Oklahoma, Arizona, and Maryland. I have been involved in litigation at maximum security prisons in no less than fourteen states.

III. PUBLICATIONS AUTHORED BY THE EXPERT WITNESS

A listing of publications I have authored/coauthored may be found at pages 12-13 of my *Curriculum Vitae*, attached hereto as Exhibit 1.

IV. TESTIMONY AS AN EXPERT WITNESS AT TRIAL OR DEPOSITION

A listing of cases in which I have testified at trial or deposition within the preceding four years is attached hereto as Exhibit 2.

V. COMPENSATION

I am being compensated at a rate of $150 per hour for in-office work and $1500 per day for work performed on-site.

VI. DATA AND OTHER INFORMATION CONSIDERED IN FORMING OPINIONS

In formulating my opinions in this matter, between January 2006 and August 2010, I conducted site inspections of the following SCDC facilities: Kirkland Correctional Institution ("Kirkland"), including the Maximum Security Unit ("MSU") and Gilliam Psychiatric Hospital ("Gilliam"); Camille Graham Correctional Institution ("Graham"); the Lee Correctional Institution ("Lee"), including the Special Management Units ("SMU"); the Lieber Correctional Institution ("Lieber"), including the SMUs ; and, the Perry Correctional Institution, including the SMUs.

During the course of the site inspections at the SCDC facilities listed above, I conducted structured interviews with approximately fifty inmates as set forth in Exhibit 3. In addition, I conducted cell front interviews with numerous inmates in virtually all housing units I inspected. I also conducted interviews with numerous officials at each facility related to the routine operation and management of their respective housing areas.

A complete listing of the materials I have received from plaintiffs' counsel in preparation of this report is attached as Exhibit 4. Among the materials I have received, reviewed, and considered in preparation of this report are: 1) SCDC policies and procedures on employee training standards, staff use of force, chemical agents and restraints; inmate disciplinary system; special management units (including SMU procedural manual); maximum security units; inmate classification; 2) Management Information Notes ("MIN") on staff use of force; 3) data on mentally ill inmates subjected to use of force; 4) data on custody assignment and time in segregation for mentally ill inmates; 5) data on mentally ill inmates with disciplinary infractions; 5) staff shift rosters; 6) recreation records/logs; 7) restraint chair records/logs; 8) alternative meal service records; 9) records related to placement of mentally ill inmates in Crisis Intervention ("CI"); 10) videos of staff use of force incidents; 11) depositions of facility personnel; 12) select investigative files from the SCDC Inspector General's Office; 13) disciplinary records for mentally ill inmates who self-mutilate; 14) select institutional files for mentally ill inmates; 15) SMU logs; 16) training materials and lesson plans for correctional officer training related to mentally ill inmates; 17) materials prepared by plaintiffs' counsel at my direction on select mentally ill inmates related to segregation and staff use of force.

In addition to the above-referenced case-specific materials, I have reviewed the following source information related to use of force in a confinement setting: 1) Federal Bureau of Prisons,

Program Statement, 5566.05, *Use of Force and Application of Restraints on Inmates;* 2) *Hudson v. McMillian*, 503 U.S. 1 (1992); 3) *Whitley v. Albers*, 474 U.S. 312(1986); 4) *Hope v. Pelzer*, 536 U.S. 730(2002); 5) *Jackson v. Bishop*, 404 F.2d 571 (1968); 6) *Soto v. Cady*, 566 F. Supp 773 (1983); 7) *Wilkins v. Gaddy*, 559 U.S. ____(2010); 8) *Hickey v. Reeder*, 12 F.3d 754 (1994); 9) *Thomas v. Bryant*, 2010WL3270965 (C.A. 11, 2010); 10) *Prisoners' Self-Help Litigation Manual,* John Boston and Daniel E. Manville, 4th Edition 2010.

My observations and opinions in this matter are based on my study and review of the above materials; my thirty-eight years experience in the field of corrections; national and state standards, guidelines, regulations and policies/procedures related to management of special needs offenders; and, professional/legal scholarly literature related to the treatment of mentally ill offenders in confinement settings.

I reserve the opportunity to supplement this report should additional information be made available for my review.

VII. OPINIONS

SCDC Use of Chemical Agents on Inmates with Mental Illness:

A. SCDC officials routinely deploy chemical agents on mentally ill inmates in the absence of any objective and immediate enforcement necessity to incapacitate, neutralize, or immobilize the subject inmates.

B. SCDC officials routinely apply levels of force disproportionate to the levels of resistance presented by mentally ill inmates.

C. SCDC officials routinely deploy dangerous and unnecessary quantities of chemical agents on mentally ill inmates who are locked securely in their cells, are not armed, and not barricaded.

D. SCDC officials routinely fail to consider alternative measures to use of force and very often immediately resort to the use of chemical agents notwithstanding time and opportunity to consider/attempt alternative measures.

E. SCDC officials routinely deploy chemical agents without consideration of contra-indications for their use when time and circumstance permit such consideration.

F. SCDC officials routinely deploy chemical agents as a means of imposing summary and corporal punishment on mentally ill inmates who are not engaged in active or combative resistance, and in the absence of an objective and immediate enforcement necessity to incapacitate, neutralize, or immobilize the subject inmates.

SCDC Use of the Restraint Chair on Inmates with Mental Illness:

G. SCDC officials routinely deploy and use the restraint chair on mentally ill inmates for periods longer than is necessary to gain control of the inmates.

H. SCDC officials routinely utilize the restraint chair as a means of imposing summary and corporal punishment on mentally ill inmates who are not engaged in active or combative resistance, and in the absence of an objective and immediate need to fully immobilize the subject inmates.

I. SCDC officials routinely utilize the restraint chair in a manner that causes unnecessary pain and/or extreme discomfort.

SCDC Administration of Disciplinary Segregation for Inmates with Mental Illness:

J. The imposition of disciplinary segregation as administered by SCDC officials on mentally ill inmates is without valid penological purpose and is starkly inconsistent with sound correctional management practices.

K. The imposition of disciplinary sanctions as administered by SCDC officials on mentally ill inmates fails to recognize that such inmates often have conditions that impair their ability to consistently conform to a highly restrictive and punitive regimen of rules and regulations while isolated for twenty-three hours a day for very extended periods of time.

L. The imposition of disciplinary segregation on mentally ill inmates by SCDC officials for extreme periods of confinement needlessly heightens the risks of harm to both the inmates and staff.

M. The severity of conditions to which mentally ill inmates are subjected by SCDC officials for extreme periods of time constitute a physically punitive regimen that violates minimal standards of sound correctional management.

Use of Crisis Intervention Housing for Inmates with Mental Illness:

N. The conditions of confinement for mentally ill inmates housed in crisis intervention cells/space violates minimal standards of correctional management and cause unnecessary harm and pain to those so confined.

VIII. BASIS FOR OPINIONS

A. SCDC Staff Use of Chemical Agents on Inmates with Mental Illness Violates Applicable Standards

The analytical framework employed to review the evidence of staff use of force as it relates to inmates with mental illness confined at the SCDC facilities subject to this litigation included, among other things, an assessment of: 1) the need for the use of force; 2) the amount of force actually applied; 3) the threat as reasonably perceived by correctional officers and their supervisors; 4) efforts by staff to temper or moderate the extent of force applied; 5) the extent of harm sustained by the subject inmate. (see *Hudson v. McMillian,* 503 U.S. 1).

The analytical framework employed to arrive at the following observations and opinions as they relate to use of force on mentally ill inmates by SCDC officials and their supervisors also included an assessment of the following essential components related to staff use of force at the facilities subject to this litigation as set out in SCDC Policy/Procedure, Number: OP-22.01, Use of Force:

> POLICY STATEMENT: When authorized, trained staff members will use only the minimum mechanical and/or minimum reasonable force necessary to gain control of an inmate; to protect and ensure the safety of the public, staff, inmates, and others; to prevent serious property damage; and to ensure institutional security and good order... (see also, Sections 1-21 of the OP-22.01).

I also incorporated the following generally accepted prohibitions (professional and legal standards) as they relate to staff applications of force: 1) staff are prohibited from using force as corporal punishment or to discipline a prisoner (see *Jackson v. Bishop*, 404 F.2d 571 and *Hickey v. Reeder,* 12 F.3d 754); 2) staff are prohibited from using force for the singular purpose of causing physical or psychological pain or injury (see *Hudson v. McMillian)*; 3) staff are prohibited from using force and restraints that exceed that necessary to control, neutralize or immobilize a resisting or threatening prisoner (see *Hudson* and *Hope v. Pelzer,* 536 U.S. 730).

In accord with sound correctional standards as reflected in SCDC's own policy on use of force:

> Chemical agents may be used to prevent injury to self and/or others and/or to control disruptive behavior but only after all other less forceful means of gaining compliance have been exhausted, **except in urgent circumstances** [emphasis added]. Such devices/ munitions will not be used to threaten, punish, or harass any inmate (see OP-22.01, 6.1).

Provision 6.1 sets a standard consistent with sound correctional practice in the administration of chemical agents. In other words, under SCDC's own policy, absent circumstances in which chemical agents are necessary to incapacitate, immobilize, or neutralize an inmate who is reasonably perceived to pose an immediate threat to the safety of staff or others by displaying active aggression/resistance (thereby constituting "urgent circumstances"), use of chemical agents is unnecessary when "less forceful means of gaining compliance have [not] been exhausted, except in urgent circumstances." Moreover, use of chemical agents are prohibited for use "to threaten, punish, or harass any inmate."

The following incidents are fairly illustrative of a pattern and practice I observed in my review of well in excess of 1,000 Mangement Information Notes ("MIN") and Use of Force reports prepared by SCDC officers on incidents involving inmate with mental illness between 2003-2009 at the subject facilities. In each of these incidents there is evidence that the force applied by the use of chemical agents violated either SCDC's own policy and/or sound correctional practices as set out above.

> Use of Force Report 8-17-08 Inmate #308080 (Bates 6875-PP-003): An inmate was lying on the floor of a SMU cell "unresponsive." After "shaking him several times," he was still unresponsive. The officer then deployed a burst from the OC cannister "four to six inches from his face while he was on the floor." He remained unresponsive until he "began moving his head" two minutes later.
>
> MIN Note#3/39 (Bates 6875-000-4404): A female inmate was observed "sticking her head in the toilet" for which she was subjected to OC. The reporting officer noted that the inmate was "psychotic, and was transported to Just Care hospital."
>
> MIN Note#79/234 (Bates 6875-EE-771): OC deployed on inmate in a SMU cell for "standing in the nude."

MIN Note#71/94 (Bates 6875-QQ-946): An inmate who had been placed in a cell on CI status was subjected to three separate applications of OC for his refusal to strip nude. [Note: as will be discussed below, a supervisor used almost 10 ounces (265.5 grams) of OC spray from a cannister fogger designed for use as a crowd control contaminate–that he would use such an amount in an enclosed cell on an unarmed inmate in crisis constitutes an egregious abuse of a tactical weaponry.]
MIN Note#24/234 (Bates 6875-EE-689): Oleoresin Capsicum ("OC") deployed on an inmate locked securely in a SMU cell when observed by an officer masturbating while lying on his bed. [Note: OP-22.01, 6.2 specifically provides that officers may use chemical agents for Sexual Misconduct (822) only to defend themselves or others against a sexual assault and to control the inmate's behavior.]

MIN Note#37/39 (Bates 6875-000-4466): A female inmate in SMU was observed with a sheet tied around her neck. The supervisor administered one burst of OC and then entered the cell and with another officer removed the sheet.

MIN Note 31/45 (Bates 6875-000-4379): A female inmate kept asking for the time and was told "to be quiet and lay down." She refused to do so and was subjected to two bursts of OC.
MIN Note#4/8 (Bates 6875-000-0015): An inmate in MSU was cuffed and lying on the floor of his cell in a fetal position when he was subjected to "several bursts of chemical munitions." He had just previous to these applications accused the officers of "trying to get him to participate in a pornographic movie."

MIN Note#163/166 (Bates 6875-EE-1244): OC deployed on an inmate in a SMU cell when he was observed kicking on his door and verbally threatening an officer. In an interview with the inmate, he acknowledged using profane language because he was denied his out-of-cell recreation period.

MIN Note#11/234 (Bates 6875-EE-670): OC deployed on an inmate in a SMU cell when he refused to stop "banging" in his cell door.

Use of Force Report 5-13-08 Inmate #311760 (Bates 6875-PP-015): An inmate was locked securely in a SMU cell and verbally threatened an officer. The officer ordered him to stop his "bad behavior" and then administered a burst of OC.

Use of Force Report 1-31-08 Inmate #318396 (Bates 6875-PP-022): An inmate was observed through a window of his cell in SMU standing "completely naked and masturbating." The officer "upholstered [her] Top Cop and administered a burst to his facial area, mouth and penis."

Use of Force Report 1-2-08 Inmate #299191 (Bates 6875-PP-024): An inmate who complied with directives to be placed in a restraint chair "began to get defiant and oppositional refusing all directives." He was then subjected to four separate applications of OC.

MIN Note#150/166 (Bates 6875-EE-1225): OC deployed on an inmate in SMU for "using verbal abusive language, and making threats..." Nursing notes indicated he passed out after the OC was deployed.

MIN Note#21/30 (Bates 6875-EE-641): OC deployed on inmate who "was complaining about not receiving his evening meal."

MIN Note#19/30 (Bates 6875-EE-639): OC was deployed on inmate in a SMU cell for "being very disrespectful..." [Note: for the first six months of 2008 this inmate was repeatedly subjected to applications of force in which OC was used, often followed by extended periods in a restraint chair. These incidents finally ceased when the inmate committed suicide while in a SMU cell in June 2008.]

MIN Note#67/234 (Bates 6875-EE-754): OC deployed on inmate in SMU cell for using profane language.

MIN Note#14/39 (Bates 6875-000-4421): A female inmate in lockup who had been placed on crisis intervention status requested a blanket; a request denied by security personnel. She persisted in her request by banging on the door. The supervising captain then subjected her to OC and she was thereafter denied a shower when she continued to bang on the door. Later in the day while still in the CI cell, the inmate was subjected to another application of OC when she was observed letting her sink overflow (MIN Note #15/39 (Bates 6875-000-4423). [Note: From 2007-2009 this

inmate was subjected to approximately twenty-five applications of OC, many of which were precipitated by behavior similar to the two incidents cited herein.]

MIN Note#5/39 (Bates 6875-000-4406): A female inmate in SMU was ordered to sit on the stool in her cell. She refused by using profane language and inviting the officer to come into her cell. The supervisor responded by using OC.

B. Application of Excessive and Dangerous Levels of Chemical Agents on Inmates with Mental Illness

The amount of force applied by staff in a given set of circumstances must bear a relationship to the amount or extent of threat presented by the subject, i.e., greater levels of resistance justify the use of greater levels of force. If a subject is armed and actively engaged in targeted aggression directed at others with no barriers between the subject and his/her intended target, the highest levels of force may be warranted. Conversely, if an unarmed inmate is sitting passively on a bed locked securely in his cell and refuses an order sit on a stool, no responsible official would countenance the immediate deployment of intermediate impact weaponry that causes pain and possible injury. In other words, varying levels of force cannot be indiscriminately deployed. SCDC's own use of force policy recognizes these axiomatic principles (see OP-22.01, 3. Force Continuum).

As is set out below, SCDC officials routinely deploy crowd control contaminants (MK-9, 14-16 oz) when they are tactically contra-indicated rather than utilizing an equally effective personal size cannister (MK-4, 3 oz). Moreover, there is clear evidence that the MK-9 is used in indiscriminate, excessive and dangerous amounts that far exceed those necessary to achieve a valid tactical objective.

The MK-9 pepper fogger falls within the tactical category of crowd control management. The fog delivery system of this 14-16 oz cannister size is described as follows by one of the leading manufacturers (Defense Technologies and Federal Laboratories, Inc.):

> Designed to distribute a large quantity of formulation over a widespread area, fog delivery products primarily affect the respiratory system. Our family of high volume stream, fog, and foam aerosol projectors, available in OC, CN, CS and OC/CS, OC/CN blends offer the first line of solutions for the management of crowds. These large canisters are extremely portable, but dispense the volume of agent needed for effective **crowd contamination** [emphasis added]. These devices are unparalleled in the initial use of force for crowd management.

In order to grasp the enormous amount of chemical agent that can be dispersed with the MK-9 model, it should be understood that the dispersal model normally utilized in situations with unarmed subjects locked securely in a confined cell space would be a duty size model containing three to four ounces capable of delivery 30-35 bursts of approximately one-half second each (MK-4). Such a hand-held unit would normally be used to disperse no more than one-to-three bursts in an incident involving a single inmate secured in a small confined cell-space. The quantity delivered with a single one-half second burst is less than an ounce. As will be seen below, SCDC officials routinely use massive quantities in these in-cell incidents involving unarmed inmates with mental illness, and on at least four occasions at two different facilities, have astoundingly exhausted entire canisters of MK-9 in separate incidents in which the inmates were unarmed and locked securely in their cells.

Massive exposure to OC can adversely effect vital functions of the body and can certainly exacerbate such respiratory conditions as asthma (see *The Human Health Effects of Pepperspray-A Review of the Literature and Commentary,* Journal of Correctional Health Care, Volume 4, Issue 1, at pages 77-78). It should also be noted that OC can actually exacerbate the difficulty in controlling or managing mentally ill offenders (see *Evaluation of Pepper Spray,* National Institute

of Justice, February 1997, at page 6; *Health Hazards of Pepper Spray,* North Carolina Medical Journal, 1999, 60:268-274).

The following incidents, which represent a fraction of those reviewed, illustrate the indiscriminate manner in which officers routinely use excessive and dangerous quantities of chemical agents on inmates with mental illness.

> MIN Note#135/234 (Bates 6875-EE-854): This was an inmate in SMU who refused to give up his jump suit for a paper gown and suicide blanket. He was then subjected to a burst of OC from a MK-9 Fogger. [Note: From 2003-2008 this inmate was involved in more than 60 incidents in which OC was used. He reportedly suffers from a respiratory condition and also reports severely impaired vision from these repeated applications of OC. In an interview with this inmate he demonstrated the difficulty he now has in reading claiming he has virtually no vision in one eye and impaired vision in the other. In reviewing these OC incidents there was no discernable pattern of when officers used the personal size canister vis-a-vis the crowd control contaminant canister.]
>
> MIN Note#193/234 (Bates 6875-EE-936): This was an asthmatic inmate in SMU who refused to return his inhaler. He was then subjected to multiple applications from a MK-9 canister. He was thereafter observed in the shower "balled-up" complaining of chest pain.
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> MIN Note#116/234 (Bates 6875-EE-830): An inmate was awaiting placement in a CI cell when he was observed urinating inside the holding cell. The supervisor then administered a burst from a MK-9 canister.
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> MIN Note#20/166 (Bates 6875-EE-1032): An inmate was observed attempting to take a light fixture apart inside his SMU cell. When he refused, the supervising officer gave "(1)long burst of MK-9 into the cell..." This long burst was virtually the entire can (14 oz).

MIN Note#9/135 (Bates 6875-EE-1263): An inmate in SMU was to be placed in a "stripped cell" and refused to hand officers his jumpsuit and undershirt. The supervisor emptied an entire can of MK-9 into the cell.

MIN Note#5/94 (Bates 6875-QQ-861): An inmate in SMU was "being disruptive" by banging on his door after having been given several directives by a supervisor to cease. He ceased his banging and was complying with orders to cuff-up but stepped away complaining to the supervisor about the painful manner in which they were cuffing. The supervisor then dispersed approximately 4 oz of OC from a MK-9 canister. This incident was videotaped and reflects that this mentally ill inmate was sprayed at point-blank range without warning while he was asking the supervisor questions. At the time he was sprayed, he did not pose an immediate threat. [Note: this is one of the few incidents for which video was made available despite the provision in OP-22.01 that requires "every planned use of force [to] be videotaped."]

MIN Note#72/94 (Bates 6875-QQ-947): This was a SMU inmate who refused to surrender his dinner tray. He then barricaded his door with a mattress. According to the report, when the inmate refused to come to the door, MK-9 was dispersed. He thereafter was told to surrender his clothes whereupon he refused and another dispersal was made. With the multiple applications, almost 9 oz of chemical agent was dispersed. A video of this incident indicates that he was partially complying with surrendering his clothes during one of the applications. During a subsequent application, he was OC'd while his hands were in the food port to be cuffed.

MIN Note#71/94 (Bates 6875-QQ-946): This inmate was placed on CI status and was asked to surrender his boxer shorts, which he refused to do. He was thereafter subjected to three separate applications of MK-9 totaling 9 oz of chemical agent. The video tape shows the inmate on the floor in the far corner of the cell when the MK-9 was dispersed. The tape also shows the supervisor dangerously jerk on the retrieval chain to pull the inmate to the cuff port while the inmate was compliant with removal of the cuffs.

MIN Note#6/94 (Bates 6875-QQ-863): This SMU inmate damaged a sprinkler head in his cell causing flooding on the wing. A supervisor ordered him to the cell front

to be cuffed, which he refused to do. The supervisor administered "two short bursts of Top Cop MK-9 Fogger," and the inmate persisted in his refusal. A third "short burst" was applied. These three "short bursts" equaled virtually one full canister of OC. The video taping of this incident began after these applications of OC.

MIN Note#36/94 (Bates 6875-QQ-905):This SMU inmate was ordered to pack his property for a cell move. When he refused, an officer dispersed OC from a MK-4 canister–this initial application was not video taped. Thereafter, a second application with a MK-9 canister of 9 oz was dispersed. At the time of the second dispersal, he was standing passively in his cell. In an interview with this inmate, he claimed he simply wanted to retrieve his legal papers before the move.

C. Failure by SCDC Staff to Exhaust/Temper Use of Force on Mentally Ill Inmates

It should also be noted that very frequently officers use force immediately "where **time** and **circumstances** [emphasis added] allow for consultation with and approval by higher ranking staff and where there is some opportunity to plan the actual use of force." (see, OP-22.01, 21. Definitions, "Planned Use of Force"). In many instances, officers and supervisors use force immediately without following the procedures as required by OP-22.01, Section 1. Conflict Resolution/Situation Management and Section 2. Use of Force. Moreover, I did not review a single incident in which a chemical agent was applied in which a supervisor called upon a medical/mental health staff member to speak with an inmate in an effort to achieve compliance without the use of force (see OP-22.01, Section 10.7). In other words, officers and supervisors routinely use chemical agents in response to all levels of inmate resistance without considering or exhausting lesser alternatives to the use of force, i.e., according to 22.01.1, "Reasonable and preventive actions should include alternatives to the use of force, **wherever possible**" [emphasis added].

Moreover, as reflected in sound correctional practice, the law, and SCDC policy, staff use of force may not be used to punish an inmate. When security is not immediately threatened and force is used prematurely, as seen in many of the above incidents, to the exclusion of available alternatives to either avoid force altogether or to use lesser forms of force, it becomes a *de facto* method of imposing summary corporal punishment. In other words, force may not be used on every inmate who fails to follow a prison rule or an order, irrespective of whether such a rule or order violation also triggers an immediate necessity to incapacitate, immobilize, or neutralize threatening behavior. The practice in which SCDC supervisors and officers consider any and all rule violations as justifying the use of chemical agents is best exemplified by the testimony of an associate warden at Lee.

Deposition at pages 49-50:

> Q. Right. And again, though, and it seems like the appropriate analysis in going back to that policy language is if the consequences–if the action is unchecked, the consequences could lead to a dangerous situation, would that be right?
>
> A. Yes. **There is also at some threshold the inmates need to do what we tell them to do, and we need to use a level of force to get them to go along with the rightful order**. [emphasis added]
>
> Q. All right. Even in a situation where the consequences may not be dangerous?
>
> A. So if an inmate in the nicest, softest voice says, "No, I'm not going to do that," we still are going to need to cuff him, bring him out of the situation, et cetera, or use gas because if it's a rightful order, he needs to do what we're telling him to do.

The following incidents, as do any number of those already cited herein, reflect a clear pattern and practice by SCDC officials to use force to impose immediate and summary punishment on mentally ill inmates for rule violations unaccompanied by a compelling or immediate security

threat, i.e., a failure to follow a "rightful order" is *ipso facto* a sufficient basis to use force. Such a standard is not only inconsistent with sound correctional practice, it is wholly inconsistent with SCDC's own policy. Not a single one of the inmates involved in the following incidents was armed, barricaded, engaged in active aggression/combative behavior, or behaviors constituting exigent or urgent circumstances. [Note: In reviewing the following incidents, the reader should keep in mind the provision: OP-22.01,6.1. "Chemical munitions may be used to prevent injury to self and/or others and/or to control disruptive behavior **but only after all other less forceful means of gaining compliance have been exhausted, except in urgent circumstances."** (emphasis added)]

MIN Note#137/234 (Bates 6875-EE-856): An inmate in supermax was observed masturbating. Rather than securing the outer door (time and circumstance) for consulting/planning, the supervisor dispersed OC.

MIN Note#189/234 (Bates 6875-EE-932): An inmate began to "kick and bang on the holding cell door." Rather than consulting/planning (time and circumstance), the supervisor applied OC with a MK-9 canister.

MIN Note#117/234 (Bates 6875-EE-831): An inmate refused to return his food tray. Rather than consulting/planning (time and circumstance), the supervisor applied OC.

MIN Note#18/234 (Bates 6875-EE-679): An inmate was "kicking his cell door and using profanity..." Rather than consulting/planning (time and circumstance), the supervisor applied multiple applications of OC.

MIN Note#20/30 (Bates 6875-EE-640): An inmate "was yelling loudly and refused to stop." Rather than consulting/planning (time and circumstance), the supervisor applied OC.

MIN Note#218/234 & 219/234 (Bates 6875–EE-981-982): This inmate within a matter of hours was subjected to multiple applications of OC for beating/banging on

his cell window. On neither occasion did the officer or supervisor engage in consulting/planning (time and circumstance) before dispersing OC.

MIN Note#53/58 (Bates 6875-QQ-849): This inmate refused to return his food tray. The supervisor responded with a burst of OC from a MK-9 canister. He waited "three minutes" and then administered another application. A total of 8 oz of OC was utilized between the two applications.

MIN Note#18/39 (Bates 6875-000-4428): An female inmate was banging on her cell door and when told to cease responded as follows: "Go ahead bitch I don't give a fuck, spray me." Rather than consulting/planning (time and circumstance), the supervisor dispersed OC.

MIN Note#9/38 & 10/38 (Bates 6875-000-84-85): This inmate was told to stop "hitting on the door of her cell." She continued her behavior and used "profanity towards staff," whereupon the supervisor deployed an application of OC. Approximately 20 minutes later, this whole exercise was repeated without the supervisor attempting any consulting/planning(time and circumstance) on either occasion.

MIN Note#132/234 (Bates 6875-EE-851): The inmate threw his food tray on the floor at which time the supervisor dispersed OC with a MK-9 Fogger.

MIN Note#42/45 (Bates 6875-000-4394): A female inmate was banging on the cell door and cursing. The supervisor dispersed OC "in order to make [her] stop banging on her cell and to stop cursing."

MIN Note#64/234 (Bates 6875-EE-750): This inmate was in a holding cell when he was observed with his penis exposed. He began to shout threats and racial slurs, walked to the back of the cell and pulled his pants down exposing his buttocks and continuing his racial slurs whereupon the supervising officer dispersed OC.

D. SCDC Use of Restraint Chair on Inmates with Mental Illness Violates Applicable Standards

SCDC Policy OP-22.01.11 governs the use of the restraint chair. Relevant provisions of the policy are as follows:

> 11.1: The restraint chair will be used for **control** [emphasis added] purposes only. The use of the restraint chair to either punish or retaliate against an inmate is strictly prohibited.
>
> 11.2 The restraint chair will never be used in such a manner as to cause physical injury to an inmate, or to deprive an inmate of food or the use of restroom facilities for an unreasonable period of time.
>
> 11.3 The restraint chair will only be used for inmates housed in Special Management Units or the Maximum Security Unit. The restraint chair should only be used under the following circumstances:
>
> · The inmate presents an imminent danger of physical harm or injury to self or others;
> · The inmate destroys and/or causes or attempts to cause damage to state property;
> · The inmate throws, attempt to throw, or defaces with human waste or other substances another person, him/herself, and/or state property.
>
> 11.10 The restraint chair is to be used for control purposes only and will not be used for any longer than the condition warrants [emphasis in original].

These provisions reflect sound correctional practice and valid penological objectives. They are also consistent with industry standards governing the use of the restraint chair.

> American Correctional Association *Standard for Use of Restraints,* 3-4183: Written policy, procedure, and practice provide that instruments of restraint, such as handcuffs, irons, and straight jackets, are never applied as punishment and are applied only with the approval of the warden/superintendent or designee.

> Instruments of restraint should be used only as a precaution against escape during transfer, for medical reasons, by direction of the medical officer, or to prevent self-injury, injury to others, or property damage. **Restraints should not be applied for more time than is absolutely necessary.** [emphasis added]
>
> *Model Correctional Rules and Regulations,* Mechanical Restraints: **Restraints shall be used no longer than is absolutely necessary.** [emphasis added]
>
> ABA *Standards for Criminal Justice, Treatment of Prisoners,* Use of Restraint Mechanisms and Techniques, Standard 23-5.9: When restraints are necessary, correctional authorities should use the least restrictive forms of restraints that are appropriate and should use them **only as long as the need exists, not for a pre-determined period of time.** [emphasis added]
>
> National Commission on Correctional Health Care, *Standards for Health Services in Prisons,* Standard P-66 Therapeutic Restraints: Persons should not be restrained in an unnatural position (for instance, hog-tied, facedown, spread-eagle).

SCDC officials at the subject facilities as a matter of practice, regardless of need, utilize the restraint chair for an automatic and minimum period of four hours in violation of their own policy and all of the above standards. In practice, it is an additional means by which SCDC officials impose summary corporal punishment on inmates with mental illness, for once placed in the chair, there is nothing the inmate can do to lessen the four hour placement. In the event that he is placed in the chair for behavior that doesn't require immobilization, the four hour automatic placement becomes exclusively a punitive measure, e.g., Bates 6875-HHH-4020, wherein an inmate was placed in the restraint chair for four hours for having his "window covered, would not respond verbally." This practice of utilizing pre-determined segments for the restraint chair is openly endorsed by facility officials as evidenced by the following deposition excerpts:

Deposition of Warden at pages 126-127:

Q. Paragraph 11.10, on the next page, states that the restraint chair is to be used for control purposes only and will not be used for any longer than the condition warrants. It's my understanding from review of various reports that the department's published is that the standard use of the restraint is for four hours?
A. That's correct.
Q. Is that right?
A. That's correct.
Q. That's standard. Occasionally, it's longer?
A. It can be.
Q. Are you aware of circumstances where it's less than four?
A. No.
Q. Okay. Do you know what-do you know the reason that four hours is considered to be the standard period of time for the use of the restraint chair?
A. It's just the procedure policy that we have in place.
Q. So it's become the practice and procedure?
A. That's correct.

Deposition of Captain at pages 28-29:

Q. Okay. Is there a set duration for how long someone's placed in a restraint char? Is that in the policy?
A. Yes, ma'am.
Q. Okay. And what is that duration?
A. It is four hours, ma'am, and that's only if he maintains and complies with directives, or there's no tearing up things, something like that...

It should be noted that the policy does not require a minimum of four hours but rather requires a shift supervisor to approve placement in the restraint chair for longer than four hours (see 11.10). The policy allows for extensions up to twelve hours. A leading manufacturer of the restraint chair recommends that subjects should not be left in a restraint chair for more than two hours (E.R.C. Inc.). SCDC's practice of automatic four hour periods regardless of whether the

subject inmate has regained self-control, constitutes summary physical punishment. Moreover, at least at one facility (see below, Perry), inmates are often placed in the chair in a manner that causes needless pain and/or extreme discomfort.

Based on inmate interviews, on-site record reviews of restraint chair logs, and facility restraint chair documentation reports noting length of time in the restraint chair, it is evident that once an inmate is placed in a restraint chair, the minimum length of stay is at least four hours or more (see Lee and Lieber Restraint Chair logs, Bates 6875-BBB-509-544, 6875-HHH-4015-4148). It is notable that the 15 minute observation logs for the restraint chair often document very extended periods in which the inmate is "quiet" but he nonetheless always remains the requisite four hours and in some cases well beyond, e.g., 6875-HHH-4035 wherein an inmate was in the chair for approximately twelve hours and remained "quiet" the entire period with no notations of behavior problems.

Virtually all of the inmates interviewed who had experienced the restraint chair confirmed placement in the chair for four, eight, or twelve hour stays. Many of those interviewed also complained of limbs going numb, swelling of limbs, and varying degrees of pain and extreme discomfort.

At Perry, inmates are often restrained in a "spread-eagle" or "crucifix" position for hours at a time. This is clearly a punitive practice and is unprecedented in my experience in confinement settings, a time span of some five decades. Having had the practice demonstrated while on-site at Perry, I could observe no valid tactical/penological purpose of using the restraint chair in such a manner. The following incidents reflect how officials, regardless of need, restrain inmates for very extended periods in the restraint chairs including the spread-eagle position.

MIN Note #14/94 (Bates 6875-QQ-874): This inmate was placed in a restraint chair for a self-inflicted wound for in excess of eight hours. The video reflects that after one four-interval he was released for a hygiene break and was totally compliant and had difficulty in standing but was nonetheless returned to the chair for an additional four hours.

MIN Note #66/94 (Bates 6875-QQ-941): This inmate was placed in a restraint chair for attempting to take medication from an unknown source. The video reflects that when he was placed in the chair, he appeared to be in a near unconscious state. He was held for a total of nine hours. The video reflects that at one four-hour interval he was totally compliant but was nonetheless returned to the chair for an additional four hours. In fact, upon rising out of the chair for his break he could barely stand and was experiencing pain to his wrists. He was finally released from the chair "when swelling of his hands was noted." It was also noted that "both [hands] were very sensitive to pain." A few days after this incident he was subjected to approximately 10 oz of OC from a MK-9 canister for refusal to surrender his boxer shorts (see above, MIN Note #71/94).

MIN Note #1/94 (Bates 6875-QQ-856): This inmate was placed in a restraint chair in the nude for self-harm and was allowed out after four hours for a evening meal. He was thereafter returned even though compliant with officers. The video reflects that he was again released after four hours for a hygiene break and was again compliant as he walked around his cell. He was thereafter returned immediately to the chair, where is he was confined for a total of twelve hours. It should be noted that after the first four-hour interval, it was noted by on-site personnel that his "behavior was under control" having earlier taken his medication.

MIN Note #76/94 (Bates 6875-QQ-951): This Perry inmate was placed in a restraint chair in the nude in the spread-eagle position for self-harm. The video clearly shows the awkward, if not painful, positioning of the inmate's arms as they are stretched in order to be cuffed to the bed posts of the cell. Prior to his placement he had been on CI status and spent several hours in a visiting stall (see below, CI housing). The video reflects that during a hygiene break he was compliant and in self-control but was nonetheless returned to the chair, still in the nude and in the spread-eagle position.

E. Inmate Disciplinary System As Applied to Inmates with Mental Illness Violates Applicable Standards

Pursuant to SCDC Policy OP-22.14, Inmate Disciplinary System, Disciplinary Detention ("DD") is served in SMU. Inmates confined to SMU are separated from the general population and are managed pursuant to OP-22.12. As will be seen, inmates may be confined to SMU-DD for years at a time. SMU-DD inmates are supposed to be permitted one hour of out-of-cell exercise five days per week and showers three times per week. They are otherwise confined to their individual cells. If an inmate fails to stand for count he/she automatically forfeits the next regularly scheduled exercise period. SMU-Level 1 inmates are not permitted general visiting privileges, personal telephone calls, or canteen privileges. They are limited in the property items they may possess in their cells, e.g., one book or magazine, three photographs, no newspapers. Pursuant to policy, for a variety of behaviors, SMU inmates may be placed in control cells for up to 72 hours with only their underwear, paper gown, and security blanket. They have limited, if any, in-cell programming and are not allowed to participate in any out-of-cell programs.

In addition to the standard and highly restrictive limitations set forth above, additional restrictions may be imposed on SMU inmates, including the following: 1) restraint orders requiring leg and waist chains (including a lead chain) any time the inmate is moved from the cell and during recreation; 2) deprivation orders removing an inmate's basic necessities, including showers, basic property and hygiene articles, cell cleaning supplies, and even the basic food service normally provided to inmates. The food restriction, referred to as the "alternative meal service," consists of feeding an inmate "Nutri-loaf," which by design is nutritious but unpalatable. The ACA standards do provide for restricted diets as an administrative measure when an inmate in punitive segregation

"uses food or food service equipment that is hazardous to self, staff, or other inmates....[t]he food substitution period shall not exceed seven days." (ACA Standard 3-4252)

The practice of isolating inmates from the general population as an institutional penal sanction may be described by such terms as punitive segregation, disciplinary detention, disciplinary segregation or solitary confinement. Punitive segregation is believed by most correctional professionals, including myself when properly applied, to constitute an effective mechanism to control serious inmate misbehavior. Its effectiveness is grounded in two sound principles of penology. First, it is a means to maintain the orderly operation of a prison by physically isolating those inmates who engage in seriously disruptive behaviors. Second, it can serve as a deterrent (both specific and general) because it results in a nearly complete cessation and deprivation of the commonplace incidents and routines of prison life afforded to the general population inmate. Current ACA standards define punitive segregation or disciplinary detention as follows:

> A form of separation from the general population in which inmates committing serious violations of conduct regulations are confined by the disciplinary committee or other authorized group **for short periods of time** [emphasis added] to individual cells separated from the general population (ACA *2008 Standards Supplement*, page 306).

Because of the substantial deprivations that accrue to those placed in punitive segregation, its use is normally subject to limitations, both in terms of the length of stay and the severity of the conditions, that can, in certain circumstances, compromise the health of the subject inmate. The American Correctional Association ("ACA") has recognized, at least since the mid-1960's, the potentially harmful effects of punitive segregation as a disciplinary sanction:

> It is a major disciplinary measure, which can have a damaging effect upon some inmates, and should be used judiciously when other forms

> of action prove inadequate or where the safety of others or the serious nature of the offense makes it necessary. Perhaps we have been too dependent on isolation or solitary confinement as the principle method of handling the violators of institutional rules. Isolation may bring short-term conformity for some, but brings increased disturbances and deeper ingrained hostility to more (ACA Manual of Correctional Standards, 3rd Edition, 1966, at page 413).

Under the heading of "Authority and Responsibility for Disciplinary Matters," the 1966 ACA Manual also contains the following warning and prohibition regarding length of stay in punitive segregation:

> Segregation for punishment should be **for the shortest period that will accomplish the desired result of a favorable adjustment, and in any event not over thirty days** [emphasis added]. With most inmates and for most infractions, a period of a few days proves sufficient. In other cases, a few days in punitive segregation followed by thirty to ninety days in administrative segregation, or in some other status that involves continued control or loss of privileges, is sufficient. **Excessively long periods of punishment defeat treatment goals by embittering and demoralizing the inmate** (at page 418) [emphasis added].

The current ACA Standard that specifically addresses the potentially harmful effects of punitive segregation on inmates (Standard 3-4244) contains the following "Comment":

> Inmates whose movements are restricted in segregation units may develop symptoms of acute anxiety or other mental health problems; regular psychological assessment is necessary to ensure the mental health of any inmate confined in such a unit beyond 30 days (ACA *Standards for Adult Correctional Institutions*, 3rd Edition).

The National Commission on Correctional Health Care ("NCCHC") also recognizes the potentially harmful effects of punitive segregation on inmates by requiring a qualified health care

professional to periodically assess whether "any known contra-indications to segregation exist" (see, *Standards for Health Services in Prisons*, 1997, at page 50, Standard P-39 Health Evaluation of Inmates in Disciplinary Segregation, Essential Standard).

The foregoing standards represent generally applicable safeguards for the use of punitive segregation without regard to particular special needs or vulnerabilities. Prisoners who require special services, including services from mental health professionals, clearly fall within the management category of special needs inmates. The failure to provide the requisite level of special needs services (both custody and treatment) in the appropriate setting can render these inmates more vulnerable to the potentially deleterious and harsh effects of a predominantly punitive and highly restrictive environment such as the SHU. Moreover, when a custody practice or regimen compromises the effective delivery of required mental health services, two of the most essential of the NCCHC standards are violated:

> Standard P-01 Access to Care (essential) Written policy and defined procedures require, and actual practice evidences, that inmates have access to care to meet their serious medical, dental, and mental health needs. Discussion Unreasonable barriers to inmates' access to health services must be avoided...(at page 3).

> Standard P-03 Medical Autonomy (essential) Written policy and defined procedures require, and actual practice evidences, that clinical decisions and actions regarding the health care services provided to inmates are the sole responsibility of *qualified health care professionals* and are not compromised for security reasons. Discussion The delivery of health care is a joint effort of correctional administrators and health services staff and can be achieved only through mutual trust and cooperation... (at page 5).

SCDC inmates found guilty of disciplinary offenses may be confined in SMU with no upper limitations as to length of time (OP-22.14, 17.1). Inmates who have been diagnosed with a mental illness are not excluded from SMU confinement. SMU sentences imposed on inmates with mental illness in excess of one year are very common. Cumulative disciplinary sanctions can result in SMU lengths of stay that exceed ten years. Cumulative disciplinary sanctions of one to five years are quite common. For instance, disciplinary data for approximately 110 mentally ill inmates at Perry and Graham for the years 2005-2009, reflected truly extraordinary cumulative sentences for this population: (see Bates OOO3785-4051 and QQ1004-2207).

- 98% had received cumulative DD sentences of over 1 year
- 39% had received cumulative DD sentences of over 3 years
- 20% had received cumulative DD sentences of over 5 years
- 8% had received cumulative DD sentences of over 10 years

The approximately twenty-four inmates with over five years cumulative DD sentences had amassed over 215 years of segregation time. It should be noted that in addition to DD sentences, additional sanctions most often include loss of good time and such privileges as property, visitation, telephone, and canteen (see below). While privileges can certainly be temporarily removed, suspended, or limited, as part of the disciplinary process, the wholesale removal of all privileges for months and years at a time for a single disciplinary infraction, such as SCDC officials routinely do, for all practical purposes, eliminates incentives absolutely essential for safe management of a inmate population. For instance, while visitation may be deemed a "privilege" by a prison system, inmates typically view the opportunity to periodically have contact with family and friends as essential to their well being. Some "privileges" such as visiting are considered so essential that their suspension is limited to those instances in which it can be shown that there is "clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the

visitors." (see ACA *Standards for Adult Institutions,* Visiting 3-4440 and *Model Correctional Rules and Regulations,* Correctional Law Project, ACA and National Institute of Corrections, 1980). The wholesale manner in which SCDC officials routinely remove the opportunities for visitation, telephone, property and canteen, while at the same time also imposing extended terms of DD for inmates with mental illness, reflects a total and callous disregard for sound correctional practices. Moreover, it reduces such inmates to a state of hopelessness that inevitably serves to exacerbate rather than control or ameliorate existing mental health conditions–a state of affairs wholly antithetical to sound correctional practices .

While OP-22.14, 8.1.1 (see also 9.5, 14.6, 16.3), requires assignment of a Counsel Substitute for inmates with mental illness, a review of disciplinary records for Lee and Lieber indicate that such assignments were very often not occurring (Bates 6875-EE-445-610). In the event an inmate with mental illness is found guilty, the OP-22.14 provides no formal process for mental health input on issues of culpability, mitigation and duration of, and suitability for, extended confinement to DD. Hearing officers may find that the inmate is "guilty but not accountable" (see OP-22.14, 16.3) with input from mental health staff. My review of disciplinary findings found this provision is very rarely invoked.

The following summaries of the disciplinary histories and related incidents of mentally ill inmates at the subject facilities are illustrative of the utter failure by SCDC to manage these and other inmates in a manner that reduces rather than heightens the adverse effects on inmates with mental impairments. These summaries also reflect the clear pattern evidenced in so many file and document reviews: self-destructive and/or irrational behavior, followed by a harsh punitive regimen, followed by more self-destruction, followed by more punishment, etc., etc. Such an approach reflects an mindless and purposeless imposition of punitive sanctions, which in turn, give rise to

more sanctions that ultimately are rendered ineffectual in terms of incentives/ disincentives for conforming behavior. Moreover, staff are asked to manage such inmates, who have been stripped of all privileges and spend countless days, weeks, months and years locked in their cells twenty-three and twenty-four hours a day, with no foreseeable lessening of their conditions. In addition to loss of privileges, both logs and inmate interviews reflected even the required out-of-cell recreation is very often not provided to these inmates; consequently, such inmates may spend extended periods of 24 hours a day in housing best described as "strip cells." That mentally ill inmates can routinely at the subject facilities spend months and years in *de facto* strip cells with sporadic out-of-cell time speaks volumes about the management model SCDC employs with such unremitting vigor.

> Inmate A: This is a 33 year-old inmate confined to Lee and according to his Classification Summary was "MI-3 with no current program, no current job, no current education program, assigned to Lock-Up." For one twelve month period (October 2007 thru October 2008), he was found guilty of ten disciplinary infractions for which he received the following cumulative sanctions: DD-8 years, Loss of Contact Visitation-9 years, Loss of Canteen-6 years, Loss of Phone-6 years. Six of these infractions were for sexual misconduct (masturbation). The total amount of DD he has received between 2005-2008 was approximately 17 years. From 2006-2008, he was the subject of at least eight applications of force in which OC was utilized (see e.g's, above Min Note #'s 163/166 & 137/234).
>
> Inmate B: This is a 25 year-old inmate confined to Lee and according to his Classification Summary was "MI-2 with court-ord subs abuse trea, no current job, no current education program, assigned to Lock-Up." From 2005-2009, he received over five years DD with concomitant loss of property, canteen, contact visitation and phone. On one occasion (Bates 6875-HHH-3132), he was found guilty of "making verbal statements in a threatening manner" for which he received 90 days DD, loss of property, canteen, telephone and visits for 243 days, and loss of Good Time-9 days. On another occasion for sexual misconduct (masturbation), he received 360 days DD,

loss of canteen and phone for 540 days, loss of visit 365 days, loss of Good Time-9 days. From 2003-2008, he was subject to over 60 applications of force (see above, Min Note #135/234).

Inmate C: This is a 27 year-old inmate confined to both Lee/Lieber and according to his Classification Summary has "No Mental Health Treatment, no current program, no current job, no current education program, assigned to Lock-Up." The total amount of DD he has received from 2005-2009 was approximately 20 years, which exceeds his prison sentence by 15 years. For one twelve month period (March 2008 thru April 2009), he received the following cumulative sanctions (the majority for masturbation): DD-4.5 years, Loss of Contact Visitation-8 years, Loss of Canteen and Phone-5 years. From 2004-2008, he was the subject of twenty-six applications of force (see above, Min Note #'s 20/166 & 67/234).

Inmate D: This is a 25 year-old inmate confined to Lieber and according to his Classification Summary was "MI-3 with no current program, no current job, no current education program, assigned to Lock-Up." From 2005-2009 he has accumulated 15 years DD time. He has accumulated the following sanctions for sexual misconduct (masturbation): DD-6 years, Visitation-over 10 years, Canteen and Phone: 8 years. He has also been the subject of over 17 applications of force, many involving OC for masturbation.

Inmate E: This is a 32 year-old inmate confined to Lieber and according to his Classification Summary was "MI-3 with no current program, no current job, no current education program, assigned to Lock-Up." From 2006-2008 he accumulated 17 years DD time, which exceeds his prison sentence by seven years. For one two week period in November 2006, he was found guilty on seven separate charges for a non-assaultive offense (threatening harm), accumulating the following sanctions: DD-5 years, Visiting/Phone/Canteen-8.5 years. He has also been the subject of at least fifteen applications of force, a number of which involved OC for self-harm and masturbation.

Inmate F: This is a 51 year-old inmate confined at Perry and classified at various times as MI-1, 2, 3. From 2005-2008 he accumulated 19 years DD time, which exceeds his prison sentence by nine years. In November 2006, he was found guilty of

a non-assaultive offense (threatening harm), for which he received the following sanctions: DD-999 days, Loss of Property/Phone/Canteen-999 days and Contact Visits for 3 years. He has been subjected to numerous applications of force including one in which he was subjected to three applications of OC for self-harm, while observed removing pills from his anal cavity. During the interview with this inmate, he was distressed that he was being denied "400 million dollars in his bank" and was set to appear on the television program the "Rich and Famous."

Inmate G: This is a 25 year-old inmate confined at Perry and classified at various times as MI-1, 2, 3. In a time span of sixty days, he was found guilty on three separate occasions of self-mutilation for which he accumulated six months DD and 450 days loss of visitation, phone and canteen. In addition to these disciplinary sanctions, he has repeatedly spent extended periods in the restraint chair (see above, Min Note #14/94), often times in a spread-eagle position. In addition, he has spent extended stays in a CI cell, often times naked for days at a time.

Inmate H: This is a 27 year-old female offender confined at Graham and classified as MI-2. In one twelve month period (February 2009-February 2010) she accumulated 6.5 years DD, and 8 years loss of visits, canteen, and phone. All of these disciplinary violations were non-assaultive with most charges prompted by verbal or profane threats to staff or other inmates. One of these charges was prompted when she threatened two inmates who were making derogatory remarks about a medical condition that required her to wear diapers.

The summaries set out above are representative of the inmates with mental illness for which I was provided necessary documents to formulate my opinions. Sanctions are so indiscriminately and mindlessly applied that inmates have no incentive to abide by SCDC rules and regulations. Based on my extensive review of the documents and materials noted above, and the inmate interviews I conducted, it is my opinion that there is evident a stark and consistent pattern of ill-treatment exists that is directed at this population. This collective information is strong evidence of a system which operates to the detriment of inmate with mental illness. Most

disturbingly, it operates to needlessly aggravate rather than ameliorate conditions associated with mentally ill offenders. The punitive regiment evident at the subject facilities operates with such a menu of extreme disincentives that these inmates and staff are engaged in a constant downward spiral that worsens to truly disturbing levels, and that all too often result in extreme deprivations for literally years at a time for many of these seriously ill inmates.

F. Inappropriate and Inhumane Use of Crisis Intervention Housing

SCDC officials at the five subject institutions make frequent use of CI housing. Inmate interviews revealed that they are often confined for excessive periods in this housing (in excess of 72 hours). They are often stripped naked and may or may not be left with a blanket. They are not allowed recreation and are sometimes placed on restricted diets of Nutri-loaf. The housing for these inmates ranges from dedicated cell space ("strip cells") at some facilities to makeshift housing such as recreation cages, visitation stalls, and even shower stalls at one facility (see

Associate Warden, Lieber] deposition page 52, wherein he refers to placement in a shower stall for twelve hours as "inhumane.").

Having reviewed records, when combined with the site inspections and inmate interviews, it is clear that mentally ill inmates at the subject facilities are very often subjected to conditions in these CI housing spaces that are so severe as to constitute corporal punishment, and certainly in terms of correctional management practices are indeed "inhumane."

IX. CONCLUSION

The combined patterns and practices as they relate to mentally ill prisoners at the subject facilities described above constitute an unremitting regimen of callous, cruel, and corporally damaging treatment without a valid penological purpose. These inmates, who all experience varying degrees of mental illness, are routinely locked in their cells for 23-24 hours per day for years at a time, often subject to unnecessary and excessive staff force, often subject to unnecessary and excessive immobilizing restraints, routinely subject to a mindless and never-ending series of disciplinary sanctions, and sometimes are held in conditions that can only be described as barbaric. Such practices are antithetical to every legitimate correctional management goal with which I am familiar.

Steve J. Martin 4/15/11
Date