UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

EVERETT HADIX, et. al.,

Plaintiffs,

v.

PERRY M. JOHNSON, et. al.,

Defendants.

No. 4:92-cv-110

HONORABLE RICHARD A. ENSLEN
MAGISTRATE ELLEN S. CARMODY

/

Patricia Streeter (P30032)
Co-Counsel for Plaintiffs
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 222-0088

Michael Barnhart (P10467)
Co-Counsel for Plaintiffs
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 213-3703

Elizabeth Alexander
Co-Counsel for Plaintiffs
The National Prison Project
915 15th Street, NW, 7th Floor
Washington, DC 20005
(202) 393-4930

A. Peter Govorchin (P31161)
Counsel for Defendants
Michigan Department of Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

Defendants' Proposed Findings of Fact and Conclusions of Law

I. Procedural Background and Issue(s) Presented

1. In 1980, Everett Hadix and other prisoners incarcerated at the State Prison of Southern Michigan, Central Complex ("SPSM-CC") brought a class action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Michigan against various state officials charged with the operation of SPSM-CC. See *Hadix v. Johnson*, 367 F.3d 513, 515-517 (6th Cir. 2004).[1] R. 1846, Motion; R. 1863, Opinion. The inmates asserted that their conditions of confinement violated their rights under the First, Eighth, Ninth, and Fourteenth Amendments. *Id.*

2. Five years later, on April 4, 1985, the parties entered into a comprehensive consent decree covering most aspects of health care; fire safety; sanitation; safety and hygiene; overcrowding and protection from harm; volunteers; food service; management; operations; access to courts; and mail. *Id.*

3. Though the state officials admitted no liability on the inmates' claims, the decree explicitly stated that it was intended by the parties to assure the constitutionality of the conditions under which prisoners are incarcerated at SPSM-CC. *Id.* Under the consent decree's terms, the state officials could apply for termination of the decree when

[1] The history of this case is stated in previous decisions of the Sixth Circuit Court of Appeals, see *Hadix v. Johnson*, 367 F.3d 513 (6th Cir. 2004); 230 F.3d 840 (6th Cir. 2000); 228 F.3d 662 (6th Cir. 2000); 144 F.3d 925 (6th Cir. 1998); 143 F.3d 246 (6th Cir. 1998); 133 F.3d 940 (6th Cir. 1998), and in previous decisions of the district court, see *Hadix v. Johnson*, 45 F. Supp. 2d 584 (E.D. Mich. 1999); 947 F. Supp. 1113 (E.D. Mich. 1996); 947 F. Supp. 1100 (E.D. Mich. 1996); 933 F. Supp. 1360 (E.D. Mich. 1996); 879 F. Supp. 743 (E.D. Mich. 1995); 896 F. Supp. 697 (E.D. Mich. 1995); 792 F. Supp. 527 (E.D. Mich. 1992); 740 F. Supp. 433 (E.D. Mich. 1990); 712 F. Supp. 550 (E.D. Mich. 1989); 694 F. Supp. 259 (E.D. Mich. 1988).

they were in compliance with all decree provisions. *Id.* The district court retained jurisdiction to enforce the terms of the consent decree until compliance was achieved. *Id.*

4. In 1992, the District Court for the Eastern District transferred the medical and mental health components of the Consent Decree to this Court.[2] *Id.* The Sixth Circuit also transferred the access to courts portion of the case to this Court. *Knop v. Johnson*, 977 F.2d 996, (6th Cir. 1992).

5. The Consent Decree in this case provides:

> 1) This was an action brought pursuant to 42 U.S.C. § 1983 and other applicable statutes seeking declaratory and equitable relief with respect to the conditions of confinement at the Central Complex of the State Prison of Southern Michigan, including the Reception and Guidance Center (hereinafter referred to as SPSM-CC).
>
> 2) Plaintiffs are prisoners at the SPSM-CC and represent themselves and the class of all prisoners who are now or will be confined within said institution. Defendants are state officials charged under Michigan law with the operation of SPSM-CC. [R. 199, Consent Decree, Introduction, p. 1.]

6. At the time of the entry of the Consent Decree, April 1985, SPSM-CC consisted of Cell Blocks 3, 4, 5, 6, 8, 11, 12 and administrative segregation (which was the hospital). See, the January 8, 2002 Affidavit of Barbara Hladki; R. 1540; R. 1846, Motion. 6-Block only consisted of galleries base through 3. The 4th gallery also known as "top 6," was part of the Reception and Guidance Center. 7-Block was then as it is now, the Reception and Guidance Center. *Id.* Cell Blocks 1 and 2 were the North Complex, and Cell Blocks 9, 10 and 16 were the South Complex. *Id.* 16-Block was demolished and is being replaced with a new housing unit. *Id.* A and B units, which are now part of the Reception and Guidance Center, did not exist at the time the Consent

[2] On January 8, 2001, this Court entered its order terminating in all respects Section II.B (mental health care) of the Consent Decree.

Decree was entered, and when they were first built they were part of the Parnall Correctional Facility. *Id.* C Unit did not exist at the time the Consent Decree was entered, and is now administered by the Egeler Correctional Facility. *Id.* The Duane Waters Hospital did not exist at the time the Consent Decree was entered. *Id.*

7. In April of 1996, Congress enacted the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 100 Stat. 1321-66 (1966). "Enacted in part in response to criticisms that federal courts had overstepped their supervisory authority in prison conditions cases, the PLRA was specifically intended to limit the use of court-enforced consent decree cases and to restrict 'the ability of Federal judges to affect the capacity and conditions of prisons and jails beyond what is required by the Constitution and Federal law'." *Hadix*, 228 F.3d at 665; *Hadix*, 144 F.3d at 931.

8. After enactment of the PLRA, the defendants moved for termination of the Consent Decree in the Eastern District pursuant to 18 U.S.C. § 3626(b)(2). *Hadix*, 228 F.3d at 665-666. On November 1, 1996, the Eastern District denied defendants' motion to terminate the Consent Decree, ruling that the termination provisions of the PLRA were unconstitutional on separation-of-powers grounds. *Id.* at 666. On appeal, the Sixth Circuit reversed the Eastern District's judgment [*Hadix v Johnson*, 133 F.3d 940, 941 (6th Cir. 1998), *cert denied* 524 U.S. 952 (1998)]. *Id.* The Sixth Circuit remanded the case to the Eastern District for the consideration of the merits of the defendants' motion for termination. *Id.*

9. On March 18, 1999, the Eastern District issued its ruling on defendants' motion for termination, and focused its attention on whether there had been substantial compliance with the consent decree with regard to the facilities designated in the break-

up plan [*Hadix v Johnson*, 45 F. Supp. 2d 584 (E.D. Mich. 1999)]. *Id.* at 666. The Eastern District unconditionally terminated certain portions of the consent decree, and conditionally terminated other provisions. *Id.* at 666-667. On October 5, 2000, the Sixth Circuit reversed the Eastern District's order terminating the Consent Decree because it failed to comply with the requirements of the PLRA, and remanded the case with strict instructions for the prompt resolution of the defendants' motion to terminate. *Hadix v Johnson*, 228 F.3d 662 (6th Cir. 2000).

10. On March 18, 1999, the Eastern District also transferred sections I.P., I.Q., and I.S. of the Consent Decree (regarding water temperatures, housing temperatures, and ventilation, respectively) pertaining to Facility B (formerly Cell Blocks 4 and 5, now the Southern Michigan Correctional Facility or JMF) to this Court. Eastern District R. 1342; R. 1863, Opinion; *Hadix*, 367 F.3d at 515-517. The Eastern District further transferred to this Court Defendants' proposed alternatives to Facility A (Cell Block 3 of the Egeler Correctional Facility or SMN). *Id*. The Eastern District determined that health care was implicated in these provisions at each of these facilities.

11. On December 2-3, 1999, this Court conducted hearings on the medical health care provisions of the Consent Decree and other issues transferred by the Eastern District. *Id*. Subsequently, on February 18, 2000, this Court issued its Order and Findings of Fact and Conclusions of Law. R. 1372, 1373. This Court determined that Plaintiffs sustained their burden by proving the existence of constitutional violations with regard to section II.A.3.6, II.A.4.a, II.A.5.a, II.A.7, and II.A.11, and that Plaintiffs failed to sustain their burden of proving the existence of constitutional violations as to the remaining health care provisions of the Consent Decree and terminated its jurisdiction

over those provisions. Additionally, this court found that the temperature, ventilation and fire safety conditions at JMF, Egeler, and Administrative Segregation support a finding of constitutional violations. *Hadix*, 367 F.3d at 515-517. The February 18, 2000 Order was not final, as the Court reserved judgment on termination of other portions of the Consent Decree and the entry of any remedial order. *Id*.

12. In an Order dated February 18, 2000, this Court terminated Section I.P. of the Consent Decree as to JMF.

13. On July 12, 2000, the Eastern District transferred to this Court Plaintiffs' claims that conditions in Facility C (formerly Cell Blocks 11 and 12, now State Prison of Southern Michigan Central Complex or SMI) with regard to water, temperature and ventilation (Sections I.P., I.Q., and I.S., respectively) endanger the health of prisoners. Eastern District R. 1421; *Id*.

14. On November 15, 2000, the Eastern District transferred to this Court Plaintiffs' claims that conditions in Facility D (8-Block of the Parnall Correctional Facility or SMT) with regard to temperature and ventilation (Sections I.Q. and I.S., respectively), and the fire safety issues which are the same as to those concerning Facility A previously transferred. Eastern District R. 1432; *Id*.

15. On June 27, 2001, the Eastern District issued its Order of Termination. Eastern District R. 1442.[3] The Eastern District's Order of Termination provided in pertinent part:

[3] On April 8, 2002, pursuant to a stipulation of the parties, this Court terminated its jurisdiction over water temperatures of the Consent Decree as to all *Hadix* facilities. R. 1608. On June 17, 2003, this Court issued its Order terminating jurisdiction over SMI. R. 1714. On May 3, 2002, pursuant to a stipulation of the parties, this Court terminated its jurisdiction over ventilation as to SMN, SMI, and SMT. R. 1621.

> With the exception of those portions of the Consent Decree transferred to the Western District [orders dated June 5, 1992; March 18, 1999; July 12, 2000; and November 15, 2000] . . . the Court hereby TERMINATES its jurisdiction over all sections of the Consent Decree and implementing orders remaining before this Court.

16. On May 6-8, 2002, this Court conducted hearings on the remaining medical health care provisions of the Consent Decree and other issues transferred by the Eastern District. Subsequently, on October 29, 2002, this Court issued its Order and Injunction and Findings of Fact and Conclusions of Law. R. 1658, 1659. The Court determined that the existing system of health care continues to violate Sections II.A.3.6, II.A.4.a, II.A.5.a, II.A.7, and II.A.11 of the Consent Decree and the Eighth Amendment. *Hadix*, *supra*, 367 F.3d at 517. The Court further found that Defendants' failure to protect prisoners from heat-related illnesses and the risk of injury from smoke and fire for prisoners with disabilities and chronic diseases resulted in violations of the Consent Decree and Constitution. *Id*.

17. This Court ordered the parties to further brief the issue of whether there is any alternative to compartmentalization, consistent with Section VIII of the Consent Decree, as a remedy for the fire safety problems and risks. *Id*. After briefing, on February 25, 2003, this Court issued its Injunction ordering compartmentalization of the facilities as the fire safety remedy. R. 1696. The Injunction applied only to SMN and SMT.

18. On March 4, 2003, Defendants filed their Notice of Appeal with the Sixth Circuit.

19. On December 23, 2003, Defendants submitted their filing entitled "State Prison of Southern Michigan Fire Safety and Egress Report for Egeler Cell Blocks 1, 2,

3, & 7 and Parnall Cell Block 8." ("Plan") R. 1739. Defendants further indicated that subject to certain conditions they would voluntarily proceed with that portion of the Plan which concerned:

> Expansion of the fire protection system to provide fire protection throughout each cell block;
>
> Removal of the transformers and other electrical equipment that are no longer in use in the basement;
>
> Increasing the guardrail height at the open side of the walkway at each tier of elevated cells; and
>
> Removal of the unenclosed storage areas and laundry facilities and construction of a 1-hour rated wall around the laundry facility at the Parnall Correctional Facility.

The portions of the December 23, 2003 Plan that Defendants did not agree to complete voluntarily was a) installation of a mechanical smoke exhaust system in Cell Blocks 1, 2, 3, 7 and 8; b) replacement of the manual remote cell door locking system in Cell Blocks 1, 2 and 3 with a remote electronic cell door locking/unlocking system; and c) installation of a vertical dividing wall on each side of Egeler's Cell Blocks 1, 2 and 3 and across the center of the atrium in 7 and 8 Blocks.

20. On February 2, 2004, this Court issued its Order preliminarily approving Defendants' fire safety plan pending further hearing. R. 1751.

21. On March 25, 2004, the Sixth Circuit granted Defendants' request for a stay of this Court's February 25, 2003 Injunction. Subsequently, on May 6, 2004, the Sixth Circuit issued its Opinion affirming in part and reversing in part this Court's

injunctive order. *Hadix v. Johnson*, 367 F.3d 513 (6th Cir. 2004). In reversing and remanding the alleged fire safety constitutional violations, the Sixth Circuit stated in part:

> In this case, the district court failed to identify the point at which certain fire safety deficiencies ceased being mere deficiencies and, instead, became constitutional violations. As noted above, this Court was informed at oral argument that Defendants have taken steps to remedy some of the problems noted by the district court, such as removing the dry transformers from the basement and installing additional sprinklers. It is unclear to us whether those remedies are sufficient to cure the constitutional violations at the Hadix facilities.
>
> We understand that the judicial supervision over prison conditions is a daunting task. We cannot, however, accept the approach taken by the district court in this case, namely, providing a laundry list of all the things that were wrong in the *Hadix* facilities, declaring a constitutional violation, and ordering a highly expensive, and potentially ineffective, solution. . . . Accordingly, we remand this case for a more detailed analysis of how the current conditions in the *Hadix* facilities continue to be deprivations denying "the minimal civilized measure of life's necessities" rather than potentially minor deviations that may satisfy the equivalency provisions of the LSC. Also, we remand for a more detailed analysis of why the steps taken by the prison officials, which the lower court may disagree with, constitute "deliberate indifference," rather than a mere difference of opinion. [*Id*. at 529-530]

With regard to the issue of compartmentalization,[4] the Sixth Circuit reversed this Court and held:

> Our reading of the record indicates that Defendants consented to compartmentalization as a remedy not for fire safety concerns, but for the concerns over violent attacks that were taking place in the prison complex. The concerns about personal safety of the prisoners stemming from the potential outbreak of violence have been remedied and are not subject of the current appeal. Accordingly, the district court erred when it proceeded on the assumption that Defendants had agreed on an earlier occasion to compartmentalization of the facilities to remedy fire safety violations. [*Id.* at 519].

[4] Compartmentalization refers to physical modifications which divide the cell blocks into smaller units.

22. On July 29, 2004, Defendants' counsel advised the Court, Court Monitor, and the Plaintiffs that pursuant to Defendants' Plan, "MDOC maintenance staff have removed the six transformers and four oil switches from the basement of Parnall's 8-Block." R. 1846, Motion.

23. On August 5, 2004, this Court issued its Order which provided in part that the parties should file simultaneous briefs on the process which should be used to resolve the fire safety remand from the Sixth Circuit. R. 1771.

24. On August 17, September 7, and September 17, 2004, Defendants' counsel advised the Court, Court Monitor, and the Plaintiffs that pursuant to Defendants' Plan the transformers and all electrical equipment had been removed from the basement in Egeler Cell Blocks 1, 2, 3, and 7, and Parnall Cell Block 8. R. 1846, Motion.

25. On September 28, 2004, this Court issued its Scheduling Order (R. 1775), which provided for the filing of a detailed schedule for fire safety improvements planned; discovery, site visits by the experts; and an evidentiary hearing. Subsequently, on October 14, 2004, Defendants filed their Schedule for Fire Safety Improvements. R. 1785.

26. On October 12, 2004 and December 1, 2004, Defendants' counsel advised the Court, Court Monitor, and Plaintiffs that pursuant to Defendants' Plan, the MDOC completed the removal of the unenclosed storage areas and laundry facilities and had increased the guardrail height in Egeler Cell Blocks 1, 2, 3, and 7 and Parnall Cell Block 8. R. 1846.

27. On February 28, 2005, Defendants filed their Expedited Motion to Dismiss the Court's Attempt to Exercise Jurisdiction Over Facilities Not Subject to the

Consent Decree and/or Issues and Facilities Previously Terminated by the Federal Court. R. 1846, 1847.

28. On March 31, 2005, this Court issued its Opinion and Order granting in part and denying in part Defendants' Motion to Dismiss. R. 1863, 1864. The Court held that the fire safety issues before the Court did not include cell blocks at the JMF Facility and Blocks 9 and 10 of the Parnall Facility. *Id*. JMF had been dismissed by the Eastern District on a finding that the plan for that facility had been fully implemented. *Id*. Cell Blocks 9 and 10 of the Parnall Facility are non-*Hadix* facilities. *Id*.; R. 1612. This Court denied Defendants' Motion as to the "support" facilities for Cell Block 8 of the Parnall Facility and the Egeler Facility.

29. On April 29, 2005, the parties filed a Stipulation to Terminate Jurisdiction Over Certain Areas Regarding Fire Safety Issues. R. 1876. These areas concerned the Parnall creamery; Parnall meat processing plant; Jackson prison complex power plant; Parnall chow hall; Egeler chow hall; and MSI shoe factory/box and carton factory in Parnall. *Id*. On May 4, 2005, this Court issued its Order Approving and Adopting Stipulation. R. 1878.

30. The only remaining "support facilities" at issue are the SMT/MSI laundry building and the SMT/MSI metal furniture factory. The SMT laundry building is a two-story building separate from the housing units. R. 1846. The only issue in the SMT/MSI laundry is whether the egress from the second floor to the ground floor is properly marked and indicated with exit signs, and whether the ground floor direction to the exit from the second floor egress is properly marked. The SMT/MSI metal furniture factory is a two-story building with a basement. The only issue for the SMT/MSI metal furniture

factory concerns the storage and handling of xylene fluids on the first floor painting area and the storage of mineral fluids on the second floor.

II. Backgrounds of the Experts

A. Defendant's Expert Witnesses (Wayne G. Carson, Frederick Mowrer, Ph.D. and George Pramstaller, D.O.

31. Wayne G. Carson is a consulting fire protection engineer and operates his own firm. R. 1637. Mr. Carson has consulted for governmental and non-governmental agencies. *Id*. Mr. Carson is a licensed engineer in five states and the District of Columbia. Mr. Carson has testified as an expert in over 50 states including this Court. *Id*. Mr. Carson has inspected over 75 correctional facilities around the country. *Id*. Mr. Carson teaches seminars around the country. *Id*.

32. Mr. Carson is familiar with the Life Safety Code. *Id*. With regard to the National Fire Protection Association (NFPA) codes and standards, Mr. Carson is serving or has served in the following capacities:

- Past member, Safety to Life Committee which is responsible for the *Life Safety Code*® (NFPA 101)
- Past Chairman, Subcommittee on Residential Occupancies
- Past Member, Subcommittee on Detention and Correction Occupancies
- Past Chairman, Technical Committee on Health Care Occupancies (Chaps. 12/13)
- Member, Technical Committee on Fundamentals (NFPA 101, Chaps. 1-4)
- Member, Technical Committee on Alternate Approaches (NFPA 101A)
- Member, Technical Committee on Health Care Occupancies (NFPA 101, Chaps. 18/19)
- Secretary, NFPA Building Construction and Safety Code (NFPA 5000)

The NFPA Safety to Life Committee oversees the writing of the Life Safety Code and the work of all technical committees. *Id.* Mr. Carson was a member of the Safety to Life Committee for 12 years. *Id.*

33. Mr. Carson also served on the Detention and Correctional Committee from its inception in 1977 through the 1991 edition of the Life Safety Code. *Id.* Mr. Carson was involved in the drafting of the correctional facility provisions of the Life Safety Code. *Id.*

34. Mr. Carson is familiar with the Life Safety Code Handbook. *Id.* The Life Safety Code Handbook explains certain provisions of the Life Safety Code and provides examples of how the Code might be applied to buildings. *Id.*

35. Mr. Carson is a professional member of the Building Officials and Code Administrators International (BOCA) which publishes the BOCA National Building Code.

36. Mr. Carson has published numerous papers and publications, including contributions to the Fire Protection Handbook and the Life Safety Code.

37. Frederick W. Mowrer is an Associate Professor in the Department of Fire Protection at the University of Maryland. He holds a Ph.D. in Fire Protection Engineering and Combustion Science; an M.S. in Engineering; and a B.S. in Fire Protection and Safety Engineering.

38. Prior to his present position, Dr. Mowrer was a lecturer in civil engineering at the University of California (Berkley) and a fire protection engineer. Dr. Mowrer is a registered fire protection engineer in the State of California.

39. Dr. Mowrer has held and continues to hold numerous positions with the Society of Fire Protection Engineers, NFPA, International Association of Fire Safety Science, and the International Standards Organization.

40. Dr. Mowrer has received numerous awards and honors in the field of fire protection. Dr. Mowrer has authored or contributed to over 100 publications.

41. Dr. George Pramstaller is MDOC's Chief Medical Officer. R. 1658. Dr. Pramstaller has extensive medical experience within MDOC and in private practice. *Id.* Prior to assuming his current position, Dr. Pramstaller was MDOC Director of Medical Services for Region I. *Id.* Dr. Pramstaller is a certified Correctional Health Professional, a Fellow-American College of Osteopathic Family Physicians, and Board Certified in Family Practice.

42. Dr. Pramstaller is a member of numerous professional associations, including the Society of Correctional Physicians and the American Correctional Health Services Association. Dr. Pramstaller is on the Board of Directors of the National Commission on Correctional Health Care. *Id.*

B. Defendant's Lay Witnesses (Eugene Fushi, Thomas R. Smith, Barbara Hladki, Thomas Meeker, Ronald Embry and William Denman)

43. Thomas R. Smith is employed as Project Manager with Fishbeck, Thompson, Carr and Huber, Engineers, Scientists and Architects, Grand Rapids, Michigan. Tr. I, pp. 127-128. Mr. Smith holds a Master's Degree in architecture. Id. Mr. Smith is a Project Manager on large multi-discipline projects, typically institutional occupancies such as health care, hospitals, long-term care, nursing facilities, and detentional occupancies. *Id.*

44. Eugene Fushi is employed by the MDOC as a Regional Fire Inspector. *Id.* at 12. Mr. Fushi oversees the prisons within the Jackson region, including the Egeler and Parnall Facilities. *Id.*

45. Barbara Hladki is employed by the MDOC as Administrator, Jackson Medical Complex, Bureau of Health Care Services. *Id.* at 110-111. Ms. Hladki's duties include the supervision of all health care staff within the Jackson Medical Complex (with the exception of mental health staff and medical service providers), quality assurance, audits, and reviews. *Id.*

46. Thomas Meeker is employed by the MDOC as a Resident Unit Officer (RUO) in 8-Block at Parnall. *Id.* at 76. RUO Meeker has been assigned to 8 Block for the last five to seven years. *Id.* RUO Meeker has been working at the Parnall Facility for 19 years. *Id.* at 78.

47. Mr. Thomas Meeker is a Resident Unit Officer (RUO) in 8-Block. *Id*. at 76. He has been assigned to this position for 7 years. *Id*. He is currently working the first shift (5:18 a.m. – 1:18 p.m.). *Id*.

48. Ronald Embry is employed by the MDOC as an Assistant Resident Unit Supervisor (ARUS) in 8-Block at Parnall. *Id.* at 81-82. Mr. Embry has been assigned to 8 Block for five years. *Id.* Mr. Embry has supervisory responsibilities over the RUOs and reports to a Resident Unit Manager (RUM). *Id.*

49. Mr. Thomas Meeker is a Resident Unit Officer (RUO) in 8 Block. *Id.* at 76. He has been assigned to this position for 7 years. *Id.* He is currently working the first shift (5:18 a.m. – 1:18 p.m.). *Id.*

50. ARUS Embry's working hours are 8:00 a.m. – 4:30 p.m., with the exception of Mondays when his hours are 11:00 a.m. – 7:30 p.m. *Id*.

51. Mr. William Denman is currently employed as Resident Unit Manager (RUM) of 7-Block. *Id*. at 103. He has held his current position sine December 2004. *Id*. Prior to this position, he was RUM at Cell Blocks 1, 2, and 3 for over 11 years. *Id*.

III. Physical Description of Cell Blocks

A. Egeler's Cell Blocks 1, 2, and 3

52. Cell Block 1 contains a series of observation or quarantine and handicapper cells located at base level. *Id*. at 26. These cells need to be key released by an officer. *Id*. at 27. The quarantine cells have solid fronts. *Id*. These cells offer greater protection from smoke by being solid fronts. *Id*. The rest of the cells on base and all of the cells on 1-4 galleries are open front and may be released remotely by the breaker bar at each end of the gallery. A diagram of the cell blocks is included in Defendants' Exhibit 2.

53. The MDOC has raised the rail heights in the cell blocks from 36 to 48 inches by adding a third rail and additional vertical railings in each gallery. *Id*. at 43.

54. Cell Blocks 1, 2 and 3 have been fully sprinkled by adding sprinklers to the attic, basement, and end spaces of the cell blocks. *Id*. at 44.

55. The loose laundry combustibles that had been stored at the ends of Cell Blocks 1, 2 and 3 were removed. *Id*.

B. Egeler's Cell Block 7

56. Egeler Cell Block 7 cells are all open front cells that can be opened electronically from the end of the galleries and from the control center in addition to

being able to be unlocked by the officer's key. A diagram of the cell block is included in Defendants' Exhibit 2.

57. The MDOC has raised the rail heights in the cell blocks from 36 to 48 inches by adding a third rail and additional vertical railings in each gallery. *Id*. at 43.

58. Cell Block 7 has been fully sprinkled by adding sprinklers to the attic, basement, and end spaces of the cell blocks. *Id*. at 44.

59. The replacement bedding under the officer's station has also been removed. *Id.* at 45.

60. Cell Block 7 has been fully sprinkled by adding sprinklers to the attic, basement, and end spaces of the cell blocks. *Id*. at 44.

C. Parnall's Cell Block 8

61. Parnall Cell Block 8 cells are all open front cells that can be opened electronically from the end of the galleries and from the control center in addition to being able to be unlocked by the officer's key. A diagram of the cell bock is included in Defendants' Exhibit 2.

62. The MDOC has raised the rail heights in the cell blocks from 36 to 48 inches by adding a third rail and vertical railings in each gallery. *Id*. at 43.

63. Cell Block 8 has been fully sprinkled by adding sprinklers to the attic, basement, and end spaces of the cell blocks. *Id*. at 44.

64. The loose laundry combustibles that had been stored at the ends of Cell Block 8 were removed. *Id*. A one-hour rated, fire-door rated laundry room in 8-Block has been completed. *Id*.

D. Other areas

1. SMT/MSI Laundry

65. The only issue in this building at the time of the hearing was a contention by Plaintiffs that the egress from the second floor to the first floor was not sufficiently marked and that the route from where the egress stairs opened onto the first floor to the first floor exit was not sufficiently marked. Since the May 5-6, 2005 hearing, Defendants have painted wide yellow lines on the second floor to direct a person to the second floor egress. That stairway is marked with a lighted exit sign. Also, wide yellow lines have been painted on the first floor to take a person from the first floor doorway of the egress stairs from the second floor to the first floor exit. Confirmation of these actions have been sent to Plaintiffs by letter dated June 10, 2005.

2. SMT/MSI Metal Furniture Factory

66. This building has a walk-in basement level and two upper floors. There is no fire safety issue on the basement level. In one end of the first floor, there is a painting operation. As part of that operation xylene is used to clean the paint equipment. It is stored in 55 gallon drums in a locked metal cage. The cage is ventilated to the outside by a 16 inch fan. The Plaintiffs contended that the drums should be grounded and bonded. Since the May 5-6, 2005 hearing the Defendants have grounded and bonded the xylene drums. Confirmation was sent to the Plaintiffs on May 31, 2005. The Plaintiffs also contended that the drums should be sealed around the hand pumping equipment in the top of the drums. Since the May 5-6, 2005 hearing seals have been acquired and installed on the drums. Confirmation was sent to Plaintiffs on May 31, 2005.

67. On the second floor of the metal furniture factory there is another lockable metal cage area where several 55 gallon drums of mineral spirits used for lubrication and cleaning are stored. The same issues described for the xylene barrels have been resolved in the same way for the mineral spirits barrels.

68. The parties disagree whether additional modifications are required in the metal furniture factory with regard to the storage and handling of the xylene and mineral spirits.

IV. Prisoner Characteristics

A. Egeler (Cell Blocks 1, 2, 3 and 7)

1. Classification of prisoners in Egeler.

69. The Egeler Correctional Facility is now the reception center for all male prisoners.

70. PD 04.01.150 Reception Center Services, effective February 14, 2005, governs the processing of prisoners into the facility and preparing those prisoners for transfer to their first permanent location. Plaintiff's Exhibit 6. [Plaintiffs submitted an out of date policy directive in their exhibit book but Defendants provided Plaintiffs with the current version, in effect for 3 months, prior to the May 5-6, 2005 hearing.] Tr. II, pp. 215-16.

71. Prisoners arriving in Egeler are treated as Level V prisoners for purposes of personal property, Defendants' Exhibit 4, and state issue property, Defendants' Exhibit 3. This is significantly less property than prisoners in Egeler possessed in 2002 when Egeler was a Level II general population prison. Tr. I, pp. 104-05.

72. Prisoners arriving at Egeler and not needing immediate placement in the hospital or Unit C, are placed in cell blocks 1, 2 or 3.

73. After the prisoner's initial health screening and classification, they move to Cell Block 7 to await transfer to their regular housing assignment in another facility. Plaintiffs' Exhibit 6 (February 14, 2005 version).

2. Health Characteristics

74. The prisoners arriving as new commitments and as parole violators come in with the mix of health characteristics that could be found on any random sampling of an equivalent number of prisoners sampled from the entire male prisoner population in the Department of Corrections. As prisoners are health screened, some of them are listed in the MDOC's HC-251 and/or HC-261 reports. HC-251 lists prisoners who are eligible for a special accommodation. HC-261 lists prisoners who are assigned to a chronic care clinic. Defendants' Exhibits 21, 24, 25 and 26.

75. Dr. Walden recognized that all newly committed prisoners received a comprehensive health care screening but believed that parole violators who were returning to prison after less than two years after being away were not given a physical as a matter of course. Walden dep, p. 90. However, Dr. Walden recognized that the 2001 document he was relying on also authorized full health care screening "if health warrants it." Walden dep, p. 91. Dr. Walden recognized that for someone to determine if a prisoner's "health warrants it" [a medical exam], that information would most likely be brought up as a complaint by the prisoner or an observation by the nurse that there was a health problem. Walden dep, p. 91. However, Dr. Walden noted that the prisoner might not disclose a health care complaint or the nurse might not recognize such a complaint.

76. Dr. Walden has not reviewed the medical records of prisoners listed on the HC-251 and HC-261 forms. Defendants' Exhibits 21, 24, 25 and 26 and Plaintiffs' Exhibits 39 and 40. April 28, 2005 deposition to preserve testimony of Dr. Jerry Walden, at 125.

77. When asked if that "needs assistance" could be that he needs to use an inhaler, Dr. Walden answered, "I can only speculate." Walden dep, p. 138. This makes perfect sense because Dr. Walden did not review any of the prisoners' medical files listed in the HC-251 and HC-261 reports. *Id.* at 125.

78. When Dr. Walden referred to prisoner #183348 who had a "Level of function: A" Dr. Walden testified that he believes that means he needs assistance but he does not know what that assistance is. Walden dep, pp. 137-38.

79. Dr. Walden admitted that an indication in the HC-251 of an orthopedic disorder did not indicate what the disorder was or whether it had any impact on a prisoner's mobility. Walden dep, p. 137.

80. The inability to reach conclusions based on the information in the HC-251 and HC-261 alone regarding the qualitative state of a prisoner's health condition was demonstrated by Ms. Hladki. Tr. I, pp. 118-120. Ms. Hladki referred to Plaintiffs' Exhibit 38, which represented a compilation of those prisoners who have been identified on the April 5, 2005 HC-251 and HC-261 forms. This listing was also correlated with the prisoners' lock locations. Ms. Hladki stated that a review of this table (Plaintiffs' Exhibit 38) for auditing purposes would not indicate to the auditor the severity of a particular prisoner's condition.

81. For example, prisoner #242056 on p. 15 of Plaintiffs' Exhibit 38 was described as having an "orthopedic deformity/f/bottom bunk, other (6 SM feeding)," was in the pulmonary chronic care clinic and had asthma without status. Tr. I, pp. 119-120. In order to determine with more specificity the nature of prisoner #242056's orthopedic deformity, Ms. Hladki needed to look at the prisoner's medical record. Tr. I, p. 121. Reviewing the cover of that prisoner's medical record Ms. Hladki learned that his orthopedic deformity was a hand deformity and that, in discussing this prisoner with her nursing staff, Ms. Hladki learned that prisoner #242056 who was listed in the pulmonary chronic care clinic had asthma without status and the orthopedic deformity was employed as a porter in the unit. Tr. I, p. 123.

82. A the Jackson Medical Complex Administrator, Ms. Barbara Hladki selects the persons who will do health care audits, and reviews, modifies or creates with the assistance of other staff the audit tools that are used. Tr. I, p. 111.

83. HC-251 and HC-261 (Defendants' Exhibits 21 and 24-26) are used to identify which prisoners' medical records are actually going to be reviewed as part of the audit process. It is necessary to review the prisoner's medical file because the HC-251 and the HC-261 do not give qualitative information about a prisoner listed.

84. Dr. Walden reviewed the list of prisoners and the HC-251 and HC-261 combination chart created by Plaintiffs and submitted as Plaintiffs' Exhibit 38. Dr. Walden assumed that a person who was noted as experiencing tobacco abuse may have emphysema (without determining whether the tobacco abuse was from smoking or chewing) and assumed that any designation of asthma gave a person a heightened risk,

yet he acknowledged that the scope of a designation of visual impairment did not indicate the degree of visual impairment. Walden dep, p. 136.

85. Under the Department's chronic care clinic system for following the health care of prisoners who have certain categories of medical conditions, a person with hypertension would be in a chronic care clinic. Tr. I, p. 126. This same person would most likely be identified as "at risk of heat-related illness" and therefore be on the HC-251 list. Tr. I, p. 126. If that same person was taking medication to control his hypertension and the hypertension was controlled, that person would still be in the chronic care clinic. Tr. I, p. 126. They would still be on the list of "at risk for heat-related illness" even if their hypertension was under control. Tr. I, p. 126.

86. Dr. Walden stated that he does not think there is a risk or at least the increased risk is minimal, by exposure to smoke for a short duration of say 15 minutes for a person with hypertension. Walden dep, p. 142.

87. One is not able to tell from a review of the HC-251 or the HC-261 whether a prisoner has a particular susceptibility to an environmental constraint. Tr. II, p.245.

88. Prisoners who have a particular medical condition, have the severity of that medical condition assessed by the medical service provider. Tr. I, p. 127. In most cases, the MSPs take the listed policy and anyone that fits that category, is written a special accommodation. These prisoners would be listed on the HC-251.

89. Without reviewing a prisoner's medical file, one is not able to tell an asthmatic from someone who has COPD just by looking at the fact that they are in the chronic care pulmonary clinic. You could tell for instance if the person was on continuous oxygen or had an oxygen concentrator but then obviously that person would

be so severely impaired by their pulmonary condition they would not be in a general population cell block. Tr. II, pp. 245-46. Therefore, such a person would not be in either Parnall's 8 Block or any of the cell blocks in Egeler.

90. The Department creates a list of prisoners who are considered to be at risk of heat-related illness. Designation of a prisoner on this list entitles a prisoner to be placed, between May 1 and September 30 of the given year on either base or first gallery in the cell block. Prisoners who are designated as at risk for heat-related illness are listed on the HC-251 which is the form that lists accommodations. Tr. I, pp. 112-113.

91. Dr. Walden considers an MDOC special accommodation as a feature of medical care. Walden dep, p. 86.

92. A listing of prisoners' locations dated April 5, 2005 would not necessarily indicate the implementation of accommodations for prisoners who are identified as at risk of heat-related illness because those prisoners' placement on base or first gallery is not required to take place until May 1st of the year. Tr. I, p. 114.

93. Placement on base or first gallery is an accommodation. Tr. I, p. 115. Not all prisoners who are entitled to be placed on base or first gallery want to accept that placement accommodation. Ms. Hladki was involved in the concept of these at risk of heat-related illness accommodation waiver form. Tr. I, p. 115.

94. The form was developed because many prisoners, particularly in the Parnall facility which includes 8 Block, had expressed considerable displeasure over having to move from their current placement on second or third or fourth gallery down to base or first gallery. Tr. I, p. 115. If a prisoner signs the waiver form it allows the

prisoner to decline moving from a cell on an upper gallery to a cell on base or first gallery. Tr. I, p. 116.

95. A prisoner may revoke their waiver of the special accommodation by filing a grievance or sending a kite that they would like out of their waiver. Tr. I, p. 116. If a prisoner waives their cell placement accommodation due to risk of heat-related illness, that waiver does not affect any other medical care or other accommodations that are offered to that prisoner. Tr. I, p. 117.

96. Dr. Walden acknowledges that private persons, that is members of the general public, have a right to reject medical care but asserts that it is his belief that prisoners do not have the right to reject medical care. Walden dep, pp. 86-87.

3. Potential impairments to fire protection and egress

97. When Egeler converted to a Reception and Guidance Center, it converted from a general population Level II facility to a Level V facility. *Id*. at 104.

98. This conversion of Egeler to a Reception and Guidance Center reduced the amount of out-of-cell time for prisoners, along with the amount of property available. *Id*. at 105.

99. All the property the prisoners have is state issue clothing. *Id*. This contrasts with the one footlocker and one duffel bag of property available to general population prisoners. *Id*. and that amount of property Egeler prisoners could possess before the end of 2002. Tr. I, at p. 105. Thus, by reducing the fuel available the risk of serious injury from smoke and fire to prisoners in cell blocks 1, 2, 3 and 7 is significantly reduced from whatever that risk was in 2002.

100. The 2004 removal of the unused transformers and related electrical equipment reduces the risk of serious injury from smoke and fire from whatever it was in 2002.

101. The removal of stored property and laundry from the ends of the cell blocks in 2004 reduced the risk of serious injury due to smoke and fire from whatever it was in 2002.

102. Increasing the rail heights on the galleries from 36 to 48 inches in 2004 reduced the risk of serious injury due to smoke and fire from whatever it was in 2002.

103. Fully sprinkling the cell blocks in early 2005 has decreased the risk of serious injury due to smoke and fire from whatever that risk was in 2002.

104. The fact that the cells in cell blocks 1, 2 and 3 are opened manually instead of electronically is not an impediment to prisoner safety from injury due to smoke and fire. Defendants' Exhibits 6, 8, 10, 11, 12, 14 and 15.

B. Parnall

1. Classification

105. The prisoners in Parnall's Cell Block 8 are Level I general population prisoners.

106. The prisoners in 8 Block are considered general population prisoners even if they are enrolled in a chronic care clinic. Tr. II, p. 243.

107. Their cell doors are open most of the day. Tr. I, p. 92.

108. The prisoners leave their cells and the block for chow, job assignments, law library, health care, visits and yard.

2. Health Characteristics

109. Prisoners in 8 Block comprise a mixed population of low security level general population prisoners. Any prisoners with lingering medical needs are provided treatment by enrolling them in one of the MDOC's chronic care clinics. Plaintiffs' Exhibit 34.

110. A prisoner in general population, even if identified on the HC-251 and/or HC-261 as being in a chronic care clinic is generally speaking able to walk to chow, able to walk to the store, able to walk to school, able to go to their job or, in other words, they are able to function at a level that allows them to get around to their necessary activities while incarcerated. Tr. II, p. 244.

111. On May 5, 2005, 8 Block ARUS Embry noted that there were no prisoners in a wheelchair housed in Cell Block 8. Tr. I, p. 86.

112. Ms. Hladki also stated that as of May 5, 2005, there were no prisoners in wheelchairs in 8 Block at Parnall Correctional Facility. Tr. I, p. 117. A prisoner who is completely or permanently dependent on a wheelchair would not be housed at the Parnall Correctional Facility as it is not designated as a wheelchair-accessible facility. Tr. I, p. 118.

113. The HC-251 and HC-261 (Defendant's Exhibits 21 and 24-26) are used to identify which prisoners' medical records are actually going to be reviewed as part of the audit process.

114. As the Jackson Medical Complex Administrator, Ms. Barbara Hladki selects the persons who will do health care audits, and reviews, modifies or creates with the assistance of other staff the audit tools that are used. Tr. I, p. 111.

115. One is not able to tell from a review of the HC-251 and HC-261 whether a prisoner has a particular susceptibility to an environmental constraint. Tr. II, p. 245.

116. Under the Department's chronic care clinic system for following the health care of prisoners who have certain categories of medical conditions, a person with hypertension would be in a chronic care clinic. Tr. I, p. 126. This same person would most likely be identified as "at risk of heat-related illness" and therefore be on the HC-251 list. Tr. I, p. 126. If that same person was taking medication to control his hypertension and the hypertension was controlled, that person would still be in the chronic care clinic. Tr. I, p. 126. They would still be on the list of "at risk for heat-related illness" even if their hypertension was under control. Tr. I, p. 126. Prisoners who have a particular medical condition, have the severity of that medical condition assessed by the medical service provider. Tr. I, p. 127. In most cases, the MSPs take the listed policy and anyone that fits that category, is written an accommodation.

117. The inability to reach conclusions based on the information in the HC-251 and HC-261 regarding the qualitative state of a prisoner's health condition was demonstrated by Ms. Hladki. Tr. I, pp. 118-120. Ms. Hladki referred to Plaintiffs' Exhibit 38, which represented a compilation of those prisoners who have been identified on the April 5, 2005 HC-251 and HC-261 forms. This listing was also correlated with the prisoners' lock locations. Ms. Hladki stated that a review of this table (Plaintiffs' Exhibit 38) for auditing purposes would not indicate to the auditor the severity of a particular prisoner's condition. For example, prisoner #242056 on p. 15 of Plaintiffs' Exhibit 38 was described as having an "orthopedic deformity/f/bottom bunk, other (6 SM feeding)," was in the pulmonary chronic care clinic and had asthma without status. Tr. I, pp. 119-

120. In order to determine with more specificity the nature of prisoner #242056's orthopedic deformity, Ms. Hladki needed to look at the prisoner's medical record. Tr. I, p. 121. Reviewing the cover of that prisoner's medical record Ms. Hladki learned that his orthopedic deformity was a hand deformity and that, in discussing this prisoner with her nursing staff, Ms. Hladki learned that prisoner #242056 who was listed in the pulmonary chronic care clinic had asthma without status and the orthopedic deformity was employed as a porter in the unit. Tr. I, p. 123.

118. Without reviewing a prisoner's medical file, one is not able to tell an asthmatic from someone who has COPD just by looking at the fact that they are in the chronic care pulmonary clinic. You could tell for instance if the person was on continuous oxygen or had an oxygen concentrator but then obviously that person would be so severely impaired by their pulmonary condition they would not be in a general population cell block. Tr. II, pp. 245-46. Therefore, such a person would not be in either Parnall's 8 Block or any of the cell blocks in Egeler.

119. Ms. Ferguson relied on the HC-251 (Special Accommodations List) and the HC-261 (Chronic Care Clinic List) to conclude that 103 individuals in the Parnall Correctional Facility's 8 Block would have trouble getting down the stairs or out of the block in the event of a fire in the block. Tr. II, pp. 285-86. However, Ms. Ferguson did not actually interview any prisoner or review their medical files in 8 Block. Tr. II, p. 286. Ms. Ferguson relied on the identification of prisoners who either had lower body orthopedic problems or who had respiratory conditions that by "definition" she believed limited their walking either one block or up a flight of stairs. Tr. II, p. 286.

120. Ms. Elizabeth Ferguson retired from the State of Michigan in 1992. In 2002 she testified that she had no medical training and on May 6, 2005 she testified that since her last testimony (in 2002) she had not received any medical training. Tr. II, p. 284. Ms. Ferguson's current fulltime activity is landscape painting (erroneously transcribed as "landscaping"). Tr. II, p. 284.

121. Plaintiffs' witness, Ronald Kovaleski #213896, is housed in 8 Block of the Parnall Correctional Facility and is identified in Plaintiffs' Exhibit 38 as having a prescription orthotic with insert but testified that he works in the Michigan State Industries creamery from 6 a.m. to 5 p.m. and is up and down on his feet all day. Tr. II, p. 349.

122. Mr. Kovaleski testified that he was not aware of any prisoners on any of the galleries in 8 Block that need assistance to get out of their cells and go outside. Tr. II, p. 350.

123. The Department creates a list of prisoners who are considered to be at risk of heat-related illness. Designation of a prisoner on this list entitles a prisoner to be placed, between May 1 and September 30 of the given year on either base or first gallery in the cell block. Prisoners who are designated as at risk for heat-related illness are listed on the HC-251 which is the form that lists accommodations. Tr. I, p. 112-113.

124. A listing of prisoners' locations dated April 5, 2005 would not necessarily indicate the implementation of accommodations for prisoners who are identified as at risk of heat-related illness because those prisoners' placement on base or first gallery is not required to take place until May 1st of the year. Tr. I, p. 114.

125. Placement on base or first gallery is an accommodation. Tr. I, p. 115.

126. Not all prisoners who are entitled to be placed on base or first gallery want to accept that placement accommodation. Ms. Hladki was involved in the concept of these at risk of heat-related illness accommodation waiver form. Tr. I, p. 115.

127. The form was developed because many prisoners, particularly in the Parnall facility which includes 8 Block, had expressed considerable displeasure over having to move from their current placement on second or third or fourth gallery down to base or first gallery. Tr. I, p. 115. If a prisoner signs the waiver form it allows the prisoner to decline moving from a cell on an upper gallery to a cell on base or first gallery. Tr. I, p. 116.

128. Defendant's Exhibit 28 consisted of 42 of these signed waiver forms from prisoners in 8 Block of the Parnall Correctional Facility. A prisoner may revoke their waiver of the special accommodation by filing a grievance or sending a kite that they would like out of their waiver. Tr. I, p. 116. If a prisoner waives their cell placement accommodation due to risk of heat-related illness, that waiver does not affect any other medical care or other accommodations that are offered to that prisoner. Tr. I, p. 117.

129. Dr. Jerry Walden considers a Department of Corrections Special Accommodation as a feature of medical care. Walden dep, p. 86.

130. Dr. Walden acknowledges that private persons, that is members of the general public, have a right to reject medical care but asserts that it is his belief that prisoners do not have the right to reject medical care. Walden dep, pp. 86-87.

131. Dr. Walden reviewed the list of prisoners and the HC-251 and HC-261 combination chart created by Plaintiffs and submitted as Plaintiffs' Exhibit 38. Dr. Walden assumed that a person who was noted as experiencing tobacco abuse may have

emphysema (without determining whether the tobacco abuse was from smoking or chewing) and assumed that any designation of asthma gave a person a heightened risk, yet he acknowledged that the scope of a designation of visual impairment did not indicate the degree of visual impairment. Walden dep, p. 136.

132. Dr. Walden admitted that an indication in the HC-251 of an orthopedic disorder did not indicate what the disorder was or whether it had any impact on a prisoner's mobility. Walden dep, p. 137.

133. When Dr. Walden referred to prisoner #183348 who had a "Level of function: A" Dr. Walden testified that he believes that means he needs assistance but he does not know what that assistance is. Walden dep, pp. 137-38.

134. When asked if that "needs assistance" could be that he needs to use an inhaler, Dr. Walden answered, "I can only speculate." Walden dep, p. 138.

135. Dr. Walden stated that he does not think there is one or at least the increased risk is minimal of exposure to smoke for a short duration of say 15 minutes for a person with hypertension. Walden dep, p. 142.

3. Potential impairments to fire protection and egress in cell blocks 1, 2, 3, 7 and 8.

136. Ms. Ferguson testified that fixed seats in restaurants and courtrooms were examples of furniture arrangements that provided defined aisles. Tr. II, p. 284. One area of 7 Block's atrium contains fixed seats and tables.

137. All of the cell blocks under consideration have had their gallery railings raised from 36" to 48" by the addition of a third rail. Additional vertical rail supports were added from the gallery walkway to the third rail to support that third rail. This has significantly raised the sense of comfort when traversing the gallery walkways and added

to the ease of exiting by touch if visibility became so obstructed that such exiting was required. That visibility would ever become so obstructed even in a severe fire is very doubtful. Defendants' Exhibit 1.

138. The staff regularly conduct fire drills so that staff are familiar with how to quickly unlock the galleries. Tr. I at pp. 77-78, Tr. I at pp. 83, 91-92, 96-97. In fire drills or a real fire event, staff walk the galleries to ensure all prisoners are evacuated. Tr. I at pp. 84, 94, 96-97.

139. ARUS Embry stated that his experience is that the prisoners with special accommodations for base cells are usually the first prisoners out of the cell block in a fire drill or fire event. Tr. I, p. 85.

140. Prisoner aides assist visually impaired prisoners in exiting the cell blocks during fire drills and fire events. Tr. I, p. 86.

141. The same exits used by prisoners going to yard and chow are used to evacuate the cell block during fire drills and fire events so the prisoners know where the exits are. Tr. I, p. 194.

142. The reduction in combustibles in the cell blocks, the completion of full sprinklerization of all the cell blocks, the fire drills conducted, the raising of the gallery rails, the marking of the center line on each gallery, the removal of the locking and latching mechanisms on the gates between each side of the gallery in 8 Block, the experience of 8 Block staff that it is quicker to manually go from gallery to gallery to release the gang locks than rely on the remote electronic locking mechanism, Walden dep. at p. 90, and the experience of prisoners (Kovaleski, Tr. II, p. 350) and staff (Meeker Tr. I, p. 79; Embry Tr. I, p. 97) that prisoners do not get stuck or injured using the

stairways to exit in a fire drill demonstrate that there are no significant impediments to fire protection and egress in any of the cell blocks.

V. Operational and Physical Characteristics, including Fire Safety Provisions

A. Risk Factors and Conditions

143. Mr. Pulitzer is not aware of the fuel levels in the California jail he testified about. *Id.* at 241 but does know that it was not fully sprinkled. *Id.* at p. 240. Thus, it presented a higher risk than do the cell blocks at issue.

144. Prisoner Kovaleski claimed to possess more legal property than 90% of the prisoners in the cell block. *Id*. at 350. Prisoner Kovaleski has never known of a prisoner to burn their own legal property. *Id*. Thus, the likelihood of a cell fire as severe as the fire modeled by Dr. Mowrer is very low.

145. Prisoner Kovaleski is not aware of any prisoners on any of the galleries in 8-Block that need assistance in order to get out of their cells and go outside. *Id*. Prisoner Kovaleski has never observed anyone being injured in the stairways during a fire drill. *Id*. Thus, experience in the blocks demonstrates that there is no unreasonable risk of serious injury in the evacuation process.

146. Dr. Walden acknowledges that the length of time of exposure to smoke is important in terms of a person's risk of harm. Walden dep, p. 89. Dr. Walden thinks that the increased risk of harm to a person with hypertension from exposure to smoke for 15 minutes is minimal. Walden dep., p. 142.

B. Fire Protection and Alarm Systems

147. The MDOC's policy on fire safety, Defendants' Exhibit 5 and Operating Procedures on Fire Control and Emergency Evacuation and Fire Department Response, Defendants' Exhibits 4-9, outline the physical plant requirements and staff operational requirements in this area.

148. In accord with MDOC policy Mr. Fushi conducts annual inspections of the correctional facilities, including the housing units. Tr. I, p.16. The last inspection of Egeler was in November 2004 and Parnall in May 2005. *Id*.

149. During his inspections, Mr. Fushi is looking for any possible violations of the Life Safety Code and any changes that may affect the fire safety and operation of the facility that would make it less safe. *Id*. at 17. He is also examining the facility to ensure it is following MDOC fire safety policy not only operationally but also administratively. *Id*.

150. Mr. Pulitzer believes evacuation is the appropriate response when there is a fire in the building. Tr. II, p.210. The primary response is evacuation. *Id*.

151. Mr. Pulitzer was not aware if the prisons he testified about in New Mexico and Attica riot situations were fully sprinkled. *Id*. The California jail fire that Mr. Pulitzer testified about involved a jail that was not fully sprinkled. *Id.*

152. Dr. DiMascio believes that a sprinkler in a cell where a fire has been set by a prisoner will resolve the problem if the sprinkler has not been compromised. *Id*. at 308.

153. Mr. DiMascio factors in fire suppression to the point that you would not have a large fire extending to multiple cells. *Id*., at 317. An arsonist may manipulate the sprinkler head in his cell to prevent the sprinkler in that cell from operating. *Id*.

154. In the case where the ceiling temperature in the cell above the cell fire reaches 175 degrees, the sprinkler would be triggered. *Id*. at 318. This would then provide a decrease in temperature in the arsonist's cell also. *Id*.

155. The MDOC's staff fire drill training and experience combined with the fire protection sprinkler system, alarm system and local fire department response prevents any unreasonable risk of serious injury to the prisoner population from smoke and fire.

156. The California jail fire that Mr. Pulitzer testified about was not fully sprinkled. *Id.*

C. Unlocking Mechanisms

157. Within 8 Block, there are multiple ways of unlocking the cells: 1) electronic release at the end of each gallery; 2) manual release at the end of each gallery; 3) remote electronic release from the control center. *Id*. at 62.

158. The release mechanisms in Cell Blocks 1, 2, and 3 are all manual except for the gallery gates. *Id*. at 69. At the end of each gallery there is a breaker bar (i.e., 2 for every floor). *Id*.

159. The custody staff have keys to unlock the cell blocks. *Id*. at 71. The "emergency keys" located in the control center are for the fire department. *Id*.

160. The gates at the end of the galleries are no longer locked or lockable in 8 Block. *Id*. at 95-96. The gates remain open all the time. *Id*.

161. Most of the facilities in the federal prison system are manual locks. *Id*.

162. Dr. Walden accepted a 7 Block officer's explanation that it was quicker to manually release the prisoners from their cells than it was to use the remote electronic gang release. Walden dep, p. 90.

D. Fire drills and Signage

163. Mr. Fushi recently made recommendations regarding changes to the Egeler Facility's operation of fire drills to provide greater consistency between shifts. *Id.*

164. Mr. Fushi opined that fire drills should be varied. *Id.* at 18. Ideally, during drills, you would start in the middle of the cell block and evacuate in opposite directions. *Id.* However, the recommended approach is to practice alternative ways to evacuate. *Id.*

165. Mr. Fushi has revised all the evacuation diagrams in the cell blocks so they are clearer to staff and prisoners. *Id.* at 18-19.

166. There is a fire drill report that is prepared after each fire drill. *Id.*; Def. Exhs. 10 and 11.

167. Defendants' Exhibit 11 reflects fire evacuation drill reports involving staff only without actual prisoner evacuation. *Id.* at 20-22. The purpose of this drill is to ensure the training of staff on third shift (10:00 p.m. – 6:00 a.m.) without having to evacuate the prisoners at night. *Id.* The prisoners still drill during the other shifts, and the Wardens may allow prisoner evacuation if in their opinion security is not jeopardized. *Id.*

168. In this situation (third shift), the staff walk through the evacuation procedure and conduct simulated fire drills. *Id.* The purpose of drills is to train officers and staff on the procedures to be followed in case of fire. *Id.* The prisoners take

directions from the officers. *Id*. The third shift officers actually go through the procedures and simulate all their responsibilities.

169. Defendants' Exhibit 10 is evacuation report drills involving actual prisoner evacuation. *Id*. at 22. The MDOC's Policy Directive and Operating Procedures do not mandate any particular time for a fire drill to be accomplished (i.e., the evacuation of the building). *Id*.

170. Mr. Fushi is familiar with the Life Safety Code. *Id*. The Life Safety Code does not mandate any particular time for prisoners or free citizens to evacuate a building. *Id*.

171. The MDOC's evacuation drill reports describe the facility, actual area involved, time and date of the drill, when the actual alarm or notification was provided, elapsed time for total evacuation, and an evaluation of the drill. *Id*. at 25; Def. Exhs. 10 and 11.

172. To determine whether a particular drill involved actual prisoner evacuation, the log book would have to be examined. *Id*. at 28.

173. Fire inspectors who do monthly inspections of the facilities, review the evacuation reports, and Mr. Fushi reviews the reports on an annual basis. *Id*. at 30. The range of elapsed times for evacuations set forth in Defendants' Exhibit 10 is 5-20 minutes. *Id*.

174. All the evacuation diagrams within the cell blocks have been corrected sine the tour in March 2005. *Id*. at 68. The diagrams are an educational tool or training aid for staff. *Id*. at 68. In an actual emergency, direction will be provided by MDOC staff. *Id*. at 68-69.

175. When a fire drill takes place in a housing unit, all staff in the housing unit, including non-custody staff, are involved. *Id*. at 72. Custody staff in the housing unit are the first responders, but all custody staff (i.e., yard sergeants, supervisors, staff from other blocks) are utilized. *Id*.

176. The MDOC will do one fire drill per shift per quarter. *Id*. at 74.

177. RUO Meeker has never observed prisoners getting "caught" or blocked in an exit during a fire drill. *Id*.

178. RUO Meeker has never observed prisoners getting "caught" in the stairwells going down to the exit during a fire drill. *Id*.

179. RUO Meeker has never observed prisoners falling in the stairwells during a fire drill. *Id*. at 79-80.

180. ARUS Embry has been in 8-Block during fire drills and also a fire incident. *Id*.

181. Fire drills are conducted quarterly. *Id*. at 83. The RUM will determine when a fire drill is to be conducted. *Id*.

182. Prisoners evacuate out of both the front and rear entrances of Cell Block 8. *Id.* at 96.

183. ARUS Embry has never observed prisoners becoming congested along the gallery walkways during a fire drill. *Id*. at 97.

184. ARUS Embry has never observed prisoners becoming congested down the stairways during a fire drill. *Id*.

185. ARUS Embry has never observed prisoners falling on the stairs during a fire drill. *Id*. at 98.

186. During a fire drill, the first prisoners evacuated are on base level. *Id*. The situation varies in the event of an actual fire incident. *Id*.

187. Prisoner aides assist to evacuate disabled prisoners. *Id*. The prisoner aides are assigned to particular prisoners. *Id*. at 101. ARUS Embry has never observed a prisoner aide not doing his job during a fire drill. *Id*.

188. As an ARUS, Mr. Embry personally or the other RUM or ARUMs personally check to make sure every cell has been evacuated. *Id*. at 102.

189. While assigned to Cell Blocks 1, 2, and 3, RUM Denman was involved in fire drills. *Id*. at 106.

190. A fire drill is basically training; it is not intended to be a timed drill. *Id*. The purpose of a fire drill is not speed; its purpose is to be a learning exercise for people to know what to do in event of emergency. *Id*.

191. The difference between the fire drill and the real fire evacuation is motivation. *Id*.

192. The primary effect with the familiarity of the prisoners in the cell blocks with the exits is the repeated use of the same exits for chow, yard, or other activities. *Id*

193. Time of evacuation in a fire drill is not what is important in drills. *Id*. at 203. It is not unusual in a jail or prison environment to have the times vary considerably depending on time of day, what the prisoners are doing, and what is happening in the cell block. *Id*. The important thing is that drills are being conducted and staff and prisoners are getting practice on what to do. *Id*.

194. Variation in fire drill times in a prison is expected. *Id*. at 205. Evacuation during a fire drill would not directly relate to the issue of evacuation during emergencies,

since the fire incident reports indicate evacuation in five or seven minutes. *Id*. at 205-206.

195. There is no specified time in the codes for drills or evacuation. *Id*. at 206. The primary purpose of the drills, as set forth by the codes, is to familiarize people with what they are supposed to do and how they are supposed to do it. *Id*.

196. Mr. Curtiss Pulitzer was not aware if hospitals or nursing homes conduct mock fire drills at night. Tr Vol II at 240.

197. Mr. Ronald Kovaleski is currently incarcerated with the MDOC residing in 8-Block. *Id*. at 345 and has participated in fire drills where the cell block has been evacuated. *Id*. at 346.

198. Prisoner Kovaleski has observed handicapped prisoners assisted by prisoner aides during the fire drill. *Id*. at 347.

199. Prisoner Kovaleski has never observed anyone being injured in the stairways during a fire drill. *Id*.

E. Operational Policies

200. An actual fire incident will generate a critical incident report, written testimony of the personnel involved, and a fire incident report. *Id*. at 31-32; Defendants' Exhibits 12a-20c. It may also include an investigation report by the Michigan State Police. *Id.*

201. The MDOC's policy does not require the evacuation of the prisoner population in a cell block whenever a fire incident within a cell block occurs. *Id*. at 33. It is better to evaluate and only evacuate the necessary prisoners that you have to during a fire, since many of them are very small. *Id*. There is no need to jeopardize the security

of an entire cell block for a small fire that is not generating any danger to any of the occupants other than the few around the cell. *Id.*

202. Mr. Fushi has the authority to make recommendations regarding fire safety operational changes. *Id.* at 40. He has made recommendations concerning the response of the SCBA team. *Id.*

203. Evacuation is one response to a fire, and fire suppression is a totally separate response. *Id.* at 42.

204. The local fire department, Blackman Township, is only two miles away and can respond to a fire emergency. Tr. I, p. 15. The Blackman Township fire department participates in an annual "pre-fire plan" with the facilities to review equipment changes and refresh on procedures in the prison for getting in to respond to a fire. *Id.*, pp. 15-16.

205. Fire emergency keys used to unlock exit and egress doors have a rivet attached so they can be identified by feel and sight. Defendants' Exhibit 5.

206. Egeler and Parnall facility operating procedures require staff from the control center and other parts of the facility not involved in a fire incident to respond to a housing unit where there is a fire incident. Defendants' Exhibits 6 and 8.

207. MDOC policy does not require that an entire housing unit be evacuated in a fire incident, no matter how minor. Tr. I, p. 33. It is better not to jeopardize the security of an entire cell bock for a small fire that is not generating any danger to the occupants of the block. *Id.*, p. 33. If nearby occupants are endangered they should and would be evacuated. This decision making is part of staff training. *Id.*, p. 33.

208. The small 10 Block fire on the catwalk behind prisoner Davidson's cell that was put out by a nearby prisoner tossing his 16 ounce tumbler of coffee on it is a type of fire in a housing unit that does not require that the cell block or even any prisoners be evacuated. Tr. II, pp. 342-43.

209. The handicapper cells are on base and identified by a card on the cell door. *Id*. at 64. Handicapper prisoners who need assistance are housed on base. *Id*.

210. In 7 Block, there is a laundry exchange once a week where prisoners will drop their linen in tubs and pick up new linen. *Id*. at 107. The tubs are rotated between the cell block and quartermaster building. *Id*. The tubs are removed before the end of second shift and are not in the cell block overnight. *Id*. at 108.

F. Staff Performance

211. Dr. Walden acknowledged that he is not a correctional expert in terms of correctional staffing. Walden dep, pp. 88-89.

212. Mr. Fushi has witnessed MDOC fire drills. *Id*. at 23. Since fire drills are a training exercise, they are not a surprise to staff. *Id*. The fire drill commences with the sounding of the fire alarm or using the public address system. *Id*. at 24. Once a fire drill commences, all procedures are followed (i.e., simulated). *Id*.

213. After releasing the galleries, RUO Meeker makes rounds of each gallery to ascertain that all prisoners have left their cells. *Id*. RUO Meeker has observed prisoners who have not left their cells for the fire drill. *Id*. at 79. The prisoners exit when confronted and are told to do so. *Id*.

214. It is not important that everyone have the opportunity to practice in a drill to reduce or eliminate the risk of dying in a fire. *Id*. at 206-207. The staff has the opportunity to practice and drill, not necessary a transient prison population. *Id*. at 207.

215. Mr. Carson examined the fire drills to get a sense of what is going on in the cell block; whether drills are conducted on a regular basis; and whether drills are conducted at different times. *Id*. at 208.

216. Time of evacuation in a fire drill is not what is important in drills. *Id*. at 203. It is not unusual in a jail or prison environment to have the times vary considerably depending on time of day, what the prisoners are doing, and what is happening in the cell block. *Id*. The important thing is that drills are being conducted and primarily staff and to a lesser extent prisoners are getting practice on what to do. *Id*.

217. Any staff, including non-custody staff in a housing unit, are trained to respond to a fire emergency. This includes the Resident Unit Manager or the Assistant Resident Unit Supervisors. Tr. I, p. 72. Yard staff and staff from the control center and other housing units also respond. Tr. I, p. 72. Therefore, no housing unit, even on the 10 p.m. to 6 a.m. shift, is required to respond to a fire incident with only two custody officers assigned to a side of a cell block.

VI. Fire Code Compliance

A. Building and Fire Prevention Codes

218. The Life Safety Code (LSC) is applied to cell blocks 1, 2, 3, 7 and 8. Tr. I, pp. 17 and 128.

219. The LSC discusses fire drills in Section 1-7.4 and provides, "In the conduct of drills, emphasis shall be placed on orderly evacuation under proper discipline rather than on speed." *Id.*

220. A fire drill is basically training; it is not intended to be a timed drill. *Id.* The purpose of a fire drill is not speed; its purpose is to be a learning exercise for people to know what to do in event of emergency. *Id.*

221. The difference between the fire drill and the real fire evacuation is motivation. *Id.*

222. Time of evacuation in a fire drill is not what is important in drills. *Id.* at 203. It is not unusual in a jail or prison environment to have the times vary considerably depending on time of day, what the prisoners are doing, and what is happening in the cell block. *Id.* The important thing is that drills are being conducted and staff and prisoners are getting practice on what to do. *Id.*

223. There is no specified time in the codes for drills or evacuation. *Id.* at 206. The primary purpose of the drills, as set forth by the codes, is to familiarize people with what they are supposed to do and how they are supposed to do it. *Id.*

224. A basic requirement in the LSC is that people be removed from fire conditions before it becomes untenable. *Id.* at 200. People may move to another location in the same building. *Id.*

225. Smoke in a building is not necessarily untenable. *Id.*

226. The only issue where these facilities do not comply with the LSC is travel distance. *Id.* However, Mr. Carson opined that under the equivalency concept the facilities meet the level of safety intended by the LSC even with these travel distances.

Id. at 198. Dr. Mowrer's model, the fire safety evacuation system, and fire history (both these cell blocks and nationwide) demonstrate that the prisoner population can evacuate before the situation becomes untenable. *Id*.

227. The LSC does not look at a specific population to say what the percentage of people is in various categories, but the LSC recognizes there may be a variety of people in a building. *Id*.

228. The LSC looks at the general population. *Id*. at 201. The LSC looks at the condition and establishes criteria. *Id*. When the requirements for the detention and occupational occupancies in the LSC were established, the model was hospitals **(**i.e., looking at the level of safety for hospitals and adding the requirements needed for detention and correctional occupancies). *Id*. The LSC does consider the population and its general requirements are placed in the LSC. *Id*.

B. Life Safety Code and its Equivalency

229. Chapter 15 of the LSC addresses existing detention facilities. *Id*. It provides parameters for the life safety functions or physical requirements for existing prison facilities. *Id*. at 131. You may evaluate an existing facility for equivalency and determine if it meets the general overall requirements for life safety in Chapter 15 based on 13 different parameters developed in 1998. Tr. I, p. 191 and Defendants' Exhibits 30a and 30b.

230. Mr. Carson serves on the Committee that developed equivalency under the LSC. *Id*. at 191; Defendants' Exhibits 30a and 30b.

231. Mr. Carson serves on the NFPA Committee that oversees equivalency pursuant to the LSC. *Id*. at 90.

232. Equivalency was a method for developing a system for evaluating existing facilities for compliance with the level of fire safety intended by the LSC. *Id*. at 191.

233. The question of equivalency is a recognized part of the LSC. *Id*. at 138-139.

234. Mr. Carson explained the development of the equivalency evaluation as follows: "What happened is many years ago we were looking at fire safety in hospitals and the National Institute of Science and Technology was asked to look at coming up with a system for evaluating existing facilities for compliance with the level of safety intended by the code. The code establishes one level of safety, it's rather specific on how to do that, but what was believed is there a level of safety that could be achieved by other means, and they wanted to come up with a system for evaluating that. And the National Institute of Science [and] Technology came up with this system that was originally included in the Appendix to the Life Safety Code and later as more of these came about, the first one was for hospitals and [an]other came about for office buildings and detention and correctional occupancies was put in [a] separate document in 101A. It's just one tool, one method to look at, ['']does a building comply with the level of safety intended by the Life Safety Code[?']." Tr. I, p. 191.

235. Mr. Smith took part in the tours of Cell Blocks 1, 2, 3, 7, and 8. *Id*.

236. After completion of the tours, Mr. Smith performed a review to determine whether the cell blocks would pass the equivalency considerations of the LSC. *Id*. at 130.

237. The 13 parameters are: construction; hazardous areas; fire alarm; smoke detection; automatic sprinklers; interior finish (corridors and egress); interior finish (other areas); cell/sleeping room enclosure; separation of resident housing areas from

other areas; exit system; exit access; vertical openings; and smoke control. Defendants' Exhibits 30a and 30b.

238. The numbers for each item reviewed are prescribed by the LSC. *Id*. at 134.

239. Each cell block passes the equivalency under the LSC if the number is positive at the conclusion of the analysis. *Id*. at 137. In the analysis performed, the cell blocks all had non-negative numbers. *Id*. at 138. By the LSC's definition, the facilities are equivalent to all of the safety requirements identified in the LSC. *Id*.

240. Mr. Carson examined and reviewed the equivalency calculations performed by Thomas Smith. *Id*. Mr. Carson opined that he agreed with the conclusion that Cell Blocks 1, 2, 3, 7, and 8 meet the equivalency requirement of the LSC. *Id*. at 192.

241. There were two different methodologies for equivalency: 1) the life safety evaluation system NFPA 101A, and 2) Dr. Mowrer's modeling. *Id*. at 204.

242. Mr. Carson agreed with Mr. Smith's analysis that Cell Blocks 1, 2, and 3 are Use Condition V. *Id*. Cell Blocks 7 and 8 are Use Condition IV. *Id*. at 135.

243. The cell blocks are a type two building. *Id*. Type two means made of noncombustible construction; i.e., steel, concrete. *Id*. This provides additional two points from Mr. Smith's original analysis. (Item 1 of 13.) *Id*.

244. Item 3 discusses fire alarm/fire department notification. *Id*. at 193. Section 15-3.4.3.2 provides, "If you have a constantly attended controlled room where alarms come into and people can call the fire department, that's an **(?)** acceptable as a

direct connection to the fire department." *Id.* The facilities have a control room, so instead of zero in Mr. Smith's original analysis, the MDOC gets a plus-2. *Id.*

245. Item 11 concerns exit access. *Id.* Mr. Smith assumed a travel distance of less than 200 feet, when it is actually over 200 feet. *Id.* Instead of a minus-1 in Mr. Smith's original analysis, there should have been a minus-2. *Id.*

246. In terms of fire safety, you do not design a facility trying to avoid people using stairs. *Id.* at 142. Stairs are not inherently dangerous. *Id.*

247. Item 13 concerns smoke control. *Id.* The LSC states in Section 15-3.7.1 / Exception 2, "that if you have direct access to the outside and it's used or can be used, that is an exception to the requirement for smoke barriers." *Id.* This is the case with the cell blocks, and the value in Mr. Smith's original analysis should have been plus-2. *Id.* at 194.

248. The primary effect with the familiarity of the prisoners in the cell blocks with the exits is the repeated use of the same exits for chow, yard, or other activities. *Id.*

249. Mr. DiMascio reviewed the life safety equivalency scoring system performed by Mr. Smith. *Id.* at 315. Mr. DiMascio agrees with Mr. Smith's conclusion that the scoring system demonstrated Cell Blocks 7 and 8 "passed" under the equivalency system. *Id.*

VII. Actual Fire Experience in the Cell Blocks

250. The fire incident described in Defendants' Exhibits 12b and 12b1 occurred in a solid front cell. *Id.* The occupant of the cell started the fire. . *Id.* at 34. All the prisoners in the cell block were evacuated except several other prisoners in other solid front cells.

251. In an actual fire, circumstances dictate how or whether the cell block is evacuated. *Id*. at 65.

252. In actual fire incidents, response to the incident is not limited to custody staff assigned to the cell block. *Id*. It is a common practice that staff from other housing units also respond. *Id*. at 73.

253. Mr. Robert Hughes is currently incarcerated with the MDOC. *Id*. at 326.

254. Prisoner Hughes testified regarding a fire in Cell Block 1 in December 2004. *Id*.

255. Prisoner Hughes' only support for his statement that the sprinklers did not work is that the sprinkler in his cell did not activate. *Id*. at 338-339. There is no evidence of a fire in Hughes' cell.

256. Despite previously testifying at his deposition that he used a breathing machine prior to his entry into prison, Prisoner Hughes now claims he has to use an inhaler as a result of the fire. *Id*. at 337-338. However, prisoner Hughes testified during his deposition that he used a breathing device at night before he came to prison. *Id.* at 338, though he denied this at trial. *Id.* at 338.

257. Dr. Pramstaller had reviewed the report of the cell block fire in cell block 1 on December 13, 2004 (Defendant's Exhibit 12(b) and Plaintiffs' Exhibit 33A). Dr. Pramstaller noted that prisoner Robert Hughes, one of Plaintiffs' witnesses, #185558, remained in his cell, two doors from the cell in which another prisoner had started the fire for some period of time where he was certainly exposed to some of the smoke that was generated from that fire. Dr. Pramstaller noted that prisoner Hughes was taken to Duane

Waters Hospital where he was evaluated and found to have experienced minor smoke inhalation that did not require treatment of any kind. Tr. II, p. 280.

258. Hughes was given some oxygen for a short period of time but the amount of oxygen and the length of oxygen treatment was not necessarily treatment of anything because the concentration of the oxygen was not high enough and it was not given for long enough to have any therapeutic value. Mr. Hughes' carboxyhemoglobin level was measured in his blood as 3.8%. Tr. II, p. 280.

259. Dr. Pramstaller explained that even a light smoker has a carboxyhemoglobin level of up to 5%. Dr. Pramstaller opined that the carboxyhemoglobin level as tested in Mr. Hughes was at a minor level. Tr. II, p. 281.

260. Dr. Pramstaller reviewed portions of Mr. Hughes' medical record. Dr. Pramstaller noted that Mr. Hughes had breathing problems before he arrived in prison. Dr. Pramstaller noted that Mr. Hughes had reported using a breathing assistance device before arriving in prison. Tr. II, p. 281.

261. Dr. Pramstaller noted that on December 14, 2004, Mr. Hughes was seen by someone and given an inhaler but Dr. Pramstaller could not determine any medical basis for Mr. Hughes to have been given the inhaler. Tr. II, p. 281.

262. Dr. Pramstaller said that his review of the medical record indicated that the inhaler had been given to Mr. Hughes solely on Mr. Hughes' subjective complaints. There had not been any physical exam that indicated that Mr. Hughes was having difficulty and there were no peak flows done and no oxygen level done so the only thing Dr. Pramstaller could review from the medical record is that Mr. Hughes had complaints and he was given an inhaler for them. Tr. II, pp. 281-82.

263. From January 1, 2001 – May 5, 2005, there have been no fire incidents in 3-Block at Egeler. *Id*. at 38-39.

264. Mr. Donald Davidson is currently incarcerated with the MDOC. *Id*. at 340.

265. Prisoner Davidson testified regarding a fire in Cell Block 10 in March 2005. *Id*. Prisoner Davidson was housed in cell 69. *Id*.

266. The fire that Prisoner Davidson testified about was "put out" when the prisoner in Cell 67 threw his 16-ounce tumbler of coffee on it. *Id*. at 343-344. Prisoner Davidson acknowledged that when the officers arrived they inquired "where is the fire?" *Id*. at 344.

267. Prisoner Davidson has a heart condition. *Id*. at 343, yet prisoner Davidson walks 2-3 miles a day for exercise. *Id*. There was no report of adverse health consequences from the fire. Tr. II, pp. 340-344.

268. During RUO Meeker's employment on the first shift at 8-Block, there has been no actual fire incident. *Id*. at 78. During his 19 years of employment working at the Parnall Facility, he could not recall an actual fire incident that he had to respond to. *Id*.

269. ARUS Embry has been in 8-Block during fire drills and also a fire incident. *Id*. at 87; Defendants' Exhibit 16. The Fire Incident Report (Defendants' Exhibit 16) was prepared by ARUS Embry. *Id*. A prisoner started a fire in a trash can on the third gallery. *Id*. at 88.

270. ARUS Embry smelled smoke, Officer Reneman extinguished the fire with a fire extinguisher, and the trash can was taken outside. *Id*. at 89. The evacuation of the

cell block commenced once smoke was observed, and the entire cell block was evacuated. *Id*. The evacuation of the cell block took 15 minutes. *Id*. at 90. .

271. Normal operations at 8 Block provide that the cell doors are open unless it is count time or at night. *Id*. at 92-93.

272. The gates at the end of the galleries are no longer locked or lockable in 8 Block. *Id*. at 95-96. The gates remain open all the time. *Id*.

273. Prisoners evacuate out of both the front and rear entrances of Cell Block 8. *Id*. at 96.

274. Neither ARUS Embry or Plaintiff's witness and *Hadix* class representative Kovaleski has ever known of a prisoner burning his legal property. Tr. I, p. 98, Tr. II, p. 350.

275. There have been no fire incidents in 7-Block sine RUM Denman has been there. *Id*.

276. RUM Denman was not involved in any fire incidents at Cell Blocks 1, 2, or 3 while assigned there. *Id*.

277. In a fire emergency, there is no rule as to whether you start at base or top gallery first. *Id*. at 99.

278. Mr. Carson reviewed the fire incident reports (Defendants' Exhibits 12-20). *Id*. None of these fire incidents indicated a fire involving anywhere near the volume of fuel that was modeled in Dr. Mowrer's model. *Id*.

279. Nationwide, there has not been an incident of fires causing death in multi-tiered open cell blocks. *Id*.

280. Mr. DiMascio is not aware of any multi-tiered cell blocks of similar construction to Cell Blocks 1, 2, 3, 7, and 8 that have been fully sprinkled in which there has been a prison cell fire that resulted in the death to the non-arsonist. *Id*.

VIII. Potential Conditions in Event of Fire

281. There were two different methodologies for equivalency: 1) the life safety evaluation system NFPA 101A, and 2) Dr. Mowrer's modeling. *Id*. at 204.

282. Frederick Mowrer, Ph.D., explained that fire modeling is an attempt to calculate the conditions resulting from a fire within a room or a building over a period of time instead of as just a snapshot of any particular moment. Tr. I, pp. 143-44. Defendants' Exhibit 1.

283. Dr. Mowrer visited the cell blocks in March 2005 and walked through cell blocks 2, 3 and 8 and perhaps an additional cell block being either 1 or 7. Tr. I, p. 150. Dr. Mowrer was provided with drawings in which he could calculate dimensions and he and Mr. Carson spot checked some measurements while they were in the blocks. Tr. I, pp. 150-51.

284. Dr. Mowrer's fire model assumes that the ceiling below the attic is solid so that the space in the attic does not act as a smoke reservoir for smoke generated by a fire in the cell block. Dr. Mowrer believes this is more conservative, that is, leads to a calculation of faster smoke spread throughout the cell block. Tr. I, pp. 152-53.

285. Dr. Mowrer's model relied on the dimensions in cell Block 3 of the Egeler Correctional Facility because it was the smaller of the four cell blocks in the Egeler Correctional Facility and therefore, a fire of the same size would fill the cell block more

quickly with smoke and thus describe a cell block situation where the cell block would fill up with smoke quicker than would be expected in cell blocks 1 and 2. *Id.*, p. 164.

286. Fire modeling considers the fuels involved in the fire both by volume or the amount of fuel and the composition of that fuel. Tr. I, p. 144.

287. There are standard references to refer to determine the heat energy contained within different materials per certain volumes or weights. Tr. I, p. 145. Dr. Mowrer took a list of the materials that were known to be in a representative cell. The inventory of those materials had been weighed and the content of the materials seem to be pretty much cellulose and some plastic products. The volumes and weights of these materials are used to calculate the energy content or the heat of combustion of the modeled fire. Tr. I, p. 146. Defendants' Exhibit 1, Appendix D.

288. Dr. Mowrer assumed that the materials in the cell were piled in the back of the cell and ignited and the pile that was ignited would go relatively quickly to a maximum size that would be governed by the quantity of exposed material. Tr. I, p. 147.

289. There are two primary approaches to fire modeling called zone modeling and computational fluid dynamics (CFD). Tr. I, p. 147. Dr. Mowrer used both approaches to model the fires in the cell blocks identified in his report. Tr. I, p. 148.

290. Dr. Mowrer's modeled fire was based on an assumption of a mattress being set on its longest edge in the back of the cell and the prisoner's property piled within that space between the mattress and the wall and combusted would generate a fire that was 3' x 6' and thus considered a fairly severe fire. Tr. I, pp. 154-55.

291. The fire that Dr. Mowrer modeled was designed to be reasonably severe, that is, it was a model of a condition that Dr. Mowrer thought was toward the high end of

what was possible given the amount of fuel, the type of fuel and the structure of the cells and cell blocks. Tr. I, pp. 158-59. This included a footlocker full of paper. *Id.,* at 155-56. However, neither staff nor Plaintiffs' prisoner witness Kovaleski had ever heard of a prisoner burning their legal papers. Tr. I, p. 98; Tr. II, p. 350.

292. Flashover, the event when the smoke at the top of a room becomes so hot (approximately 600 degrees Centigrade or 1100 degrees Fahrenheit) that the radiant heat from that smoke causes other combustible materials in the room to ignite, does not have application to fires in the cells as modeled because, contrary to a residential setting where the furniture, floors and walls may be combustible in addition to whatever is originally burning, all of the fuels in the cells when combined in order to create a fire hot enough to approach flashover temperatures at the ceiling of the cell. Therefore, there is nothing left in the cell to burn. *Id.,* pp. 165-66.

293. Dr. Mowrer relied on the Society of Fire Protection Engineers (SFPE) Handbook of Fire Protection Engineering to determine the types of combustion gases that would be produced by his modeled fire. Tr. I, pp. 159-60. Dr. Mowrer explained that the modeled fire produced carbon dioxide in the greatest quantity and, in terms of a toxic gas, carbon monoxide was the primary toxin. *Id.,* p. 160.

294. Based on the materials available to prisoners in the cells and the modeled fire, Dr. Mowrer estimated that the carbon monoxide concentration from these fires would reach a value of something around 16.9 parts per million. *Id.,* p. 161. Defendant's Exhibit 1. The SFPE Handbook of Fire Protection Engineering explains that the lethal limit of carbon monoxide is shown to be approximately 5,700 parts per million at an exposure over 30 minutes. Defendants' Exhibit 1.

295. The carbon monoxide to health relationship is an inverse relationship. That means that the higher level of carbon monoxide, the shorter amount of time it will take to reach a lethal level. Analogously, the lower level of carbon monoxide present will yield a much longer period of exposure before there are lethal consequences.

296. Therefore, it would take approximately a 30-minute exposure to a carbon monoxide concentration of 5,700 parts per million in order to expect that the exposure would be lethal. This lethal level is 300 times the level of carbon monoxide that would be expected to be produced by a cell fire according to Dr. Mowrer's model. *Id.*, pp. 161-62. Therefore, it would be reasonable to assume that it would take exposure to the level of carbon monoxide produced by the modeled cell fire for approximately 150 hours before there would be lethal consequences if there was no threshold level below which no lethal consequences would occur regardless of the period of exposure. *Id.*, p. 162.

297. However, Dr. Pramstaller explained the NIOSH standard for workers allowed constant exposure to 50 ppm carbon monoxide for 8 hours/day and 40 hours/week.

298. Mr. Carson's review of Dr. Mowrer's fire modeling has confirmed his previous opinion that the large open space in the cell blocks, the atrium, would have an efficacious effect on dissipating the smoke in the cell blocks and lead to or assist with the preservation of life safety. *Id*. at 195.

299. Tenability under the LSC is a factor that basically provides, "can the occupants get away from the fire conditions before those fire conditions become untenable." *Id*. at 197.

300. Dr. Mowrer's fire model provided a sensitivity analysis predicting what has been seen historically in multi-tiered open cell facilities. *Id*. at 196. The model looked at a severe situation (i.e., no sprinkler activation, no one doing anything). *Id*. The model indicates it is not a significant event in this large volume. *Id*.

301. Dr. Mowrer's model demonstrated a fire on base gallery in cell Block 3 as producing smoke that would expand and spread to the ceiling and then flow down from the ceiling until the level of smoke reached a height of approximately 2 meters from the ground in about 25 minutes. *Id.*, p. 168. However, because of such a large volume space and the space in the cell block to fill with smoke, the smoke would not be at a very high temperature relative to the fire temperature. *Id.*, p. 169.

302. Dr. Mowrer's model indicated that a fire on base that would expose the entire cell block to the smoke conditions but because of the dilution that occurs, there would be very mild conditions. A fire on fourth gallery would put the prisoners on fourth gallery quickly into contact with the smoke but, if those people could be moved out of harm's way efficiently, with the fire up that high the flow of the smoke would tend to stop at the level of the fire and the rest of the block would not be exposed. *Id.*, p. 170.

303. Dr. Mowrer's initial modeling did not factor in the effect of fire suppression represented by the sprinklers in the prisoners' cells or outside intervention by staff. Knowing the specifications of the in-cell sprinkler system, the model would indicate that the sprinklers would activate in about 30 seconds and would quickly suppress the fire.

304. In the event of an actual fire, Dr. Mowrer would expect that the smoke in Egeler cell blocks 1, 2 and 3 would quickly spread uniformly throughout the cell block. *Id.*, p. 177.

305. If there was a vertical divider in the cell blocks (Egeler 1, 2 and 3), it would affect the concentration of the build-up in smoke in the air space generated or resulting from the plume. *Id*. at 320. Such a vertical divider would increase the concentration of the plume by having the smaller air space to fill. *Id*. You would have the potential to fill the block faster. *Id*.

306. Mr. DiMascio expressed an issue with Dr. Mowrer's visibility calculations because of the presence of the 12" television, the 2" x 3" calculator, and the prisoner ear phones in the prisoner's allowed property. *Id*. at 316. Apparently, Mr. DiMascio did not realize that Dr. Mowrer's modeled fire included all of the property listed in Appendix D of Dr. Mowrer's report (Defendant's Exhibit 1, Appendix D).

307. It is Mr. Carson's conclusion that the prisoner population in the cell blocks can be evacuated before the situation becomes untenable. *Id*.

IX. Degree of Risk from Current Conditions

308. The degree of risk has been described throughout the Defendants' proposed findings of fact above, several times due to the nature of the outline structure required of the parties' submission. No expert or lay person offered testimony putting a percentage on the "risk" of serious injury from smoke or fire although the parties appear to agree that short duration contact (15 minutes or less) is not likely to cause serious injury. Walden dep, p. 142.

309. Experience in the United States has disclosed no examples of a fire in a multitiered fully sprinkled cell block ever causing a prisoner's death who was not the arsonist. (DiMascio) Tr. II, p. 320; (Carson) Tr. I, p. 198. Therefore, the parties are required to consider what might happen in a cell block fire and what the consequences of such a fire might be.

A. Description of the condition

1. Fire

310. No significant risk because 1) cell fires do not produce enough heat to cause combustion in neighboring cells; and 2) fire suppression by the sprinkler system, staff and local fire department fire suppression would prevent fire-related injuries. Defendants' Exhibits 1, 5-9.

2. Smoke

a. Toxins

311. Primary toxin is carbon monoxide. The modeled fire generates only 16.9 ppm. NIOSH standard for workers allows 50 ppm/8 hour day and for 40 hours per week. Tr. II, p. 243. Dr. Pramstaller believes that 400 ppm carbon monoxide in the ambient air could cause lethal consequences and the SFPE handbook for fire protection engineers sets a lethal carbon monoxide level of 5,700 ppm in the ambient air. Defendants' Exhibit 1.

312. Dr. Pramstaller, having reviewed the fire drill reports, reviewed the fire model report of Dr. Mowrer with regard to the amount of smoke that would be generated by the modeled fire and with his understanding of the status of the prisoners who are housed in 8 Block of the Parnall Correctional Facility concluded that the prisoners in that block are not at a substantial risk of serious injury from smoke or fire. Tr. II, pp. 272-73.

313. Dr. Pramstaller formed his opinion in part by considering the amount of smoke that is generated in the area in which the smoke is going to dissipate and considering the actual concentration of the smoke that prisoners would inhale for the length of time that they might be exposed. Tr. II, p. 273. Dr. Pramstaller acknowledged that people certainly move a little bit faster in a real fire situation than they do in a drill. Tr. II, p. 274.

314. Then, even assuming that an evacuation took 20 minutes, based on the concentration of particles in the air from the smoke and based on the concentration of carbon monoxide that is generated as predicted by Dr. Mowrer's fire model, Dr. Pramstaller did not believe that those concentrations presented a significant risk. Tr. II, p. 274.

315. When Dr. Walden testified on direct about his estimation or opinion that persons identified in the HC-251 or HC-261 were at a particular heightened risk of harm from contact with smoke, he was not factoring into his judgment any evaluation or consideration of the length of time that they might have been exposed to that smoke. Walden dep, pp. 89-90, yet he said that a person suffering from hypertension was at minimal or no risk of injury from exposure to smoke for 15 minutes or less. Walden dep, p. 142.

316. Dr. Pramstaller noted that there are prisoner patients with significant pulmonary conditions that smoke cigarettes all the time and in smoking a cigarette there is an inhalation of far more concentrated smoke and particulate matter than there would be in this fire situation as modeled by Dr. Mowrer. In addition, there are 400 ppm of carbon monoxide inhaled in smoking a cigarette whereas Dr. Mowrer's fire model

predicted a maximum of only 16.9 ppm of carbon monoxide generated by a cell fire. Dr. Pramstaller pointed out that patients who have chronic pulmonary disease and smoke cigarettes do not put themselves in any immediate risk. Tr. II, p. 274.

3. Real world experience

317. The closest actual on-scene example is prisoner Hughes' experience in the 12/13/04 1 Block fire, set in a cell two cells down from Hughes. He spent about one hour in a closed front cell and was then taken to Duane Waters Hospital. He was examined and found to have a carboxyhemoglobin level of only 3.6%, well within the range of a moderate smoker and needed no treatment of therapeutic value as a result of his contact with the cell fire smoke.

318. Dr. Pramstaller noted that in the reading he has done, the amount of carbon monoxide in the air that has been associated with persons dying is reported at about 400 ppm (Defendants believe this value is actually 4,000 ppm, misstated from the content of carbon monoxide in cigarette smoke. 4,000 ppm is closer to the FSPE literature putting the lethal level at 4,700 ppm. Defendants' Exhibit 1.) When talking about the level of carbon monoxide in the blood, reported as carboxyhemoglobin, a reading is general fatal at 60% and above. Tr. II, p. 275.

319. Dr. Pramstaller testified that he has dealt with patients who have carbon monoxide poisoning and in his experience, a level of 20% results in absolutely no symptoms for that patient. Tr. II, p. 276. Dr. Pramstaller notes that the advance trauma life support course identifies a carboxyhemoglobin level of less than 20% as being without symptoms. Tr. II, p. 276.

320. By way of comparison, prisoner Hughes spent an hour in his closed front cell in 1 Block after the fire had been started and put out two cells from his location. His carboxyhemoglobin level measured just 3.8%.

4. Difficulty in exiting the cell block.

321. Mr. Carson is relying upon the LSC, Dr. Mowrer's report, his evaluation of the facilities, and his experience and involvement with jails and prisons. *Id*. at 199-200.

322. Mr. Pulitzer has **reported** his belief that the standard to be applied to avoid risk of serious injury to prisoners is "everything humanly possible." Tr. II, p. 242.

323. Mr. Pulitzer testified that the minimum requirement for the MDOC is "to provide for the life safety of the prisoners and their staff." *Id*. at 242.

324. Mr. DiMascio testified that if the fourth gallery fire brings the plume down to the fourth gallery and the primary concern is to evacuate the prisoners from the area of highest risk, getting the prisoners down to the third gallery would take the prisoners out of the exposure to smoke and hot gases. *Id*. at 317.

325. Mr. DiMascio did serve on the Technical Committee of LSC 101. *Id*. at 324. As a member of the Committee, he introduced a resolution to mandate existing correctional facilities have installed smoke exhaust systems, vertical dividers to shorten horizontal travel time, and electronic unlocking mechanisms. *Id*. at 324. This recommendation was rejected as not being acceptable to the full membership of NFPA. *Id*.

326. Mr. Michael DiMascio has no medical training. *Id*. at 305, 315.

C. Prisoner population

327. The 8 Block population is Level I general population and able to leave block for chow, yard, work and other activities. Tr. II, p. 244.

D. MSI/SMT Laundry

328. Mr. Fushi also participated in the tour of the MSI laundry located outside of the secure perimeter of the Parnall Facility. *Id.* at 55-56. This laundry stands alone with a fence around it. *Id.* This laundry building consists of a basement, ground floor, and first floor. *Id.*

329. There is one exit that goes directly to the outside from the top floor. *Id.* at 57. There is also a second exit that goes to the floor below (the main laundry area), and from there an individual can go to multiple exits. *Id.*

330. Two means of egress meet the requirements of the Life Safety Code. *Id.* at 58-61; Def. Exh. 29. Any recommendation that the top floor of the laundry requires a second exit directly to the outside is incorrect. *Id.* at 61. The MDOC currently meets the requirements of the Life Safety Code. *Id.* at 58-61.

331. Mr. Carson also opined that he agreed with Mr. Fushi's conclusion regarding the MSI laundry exits. *Id.* The LSC is clear when it uses the word exits. *Id.* The LSC allows movement down or up to another floor to get out of the building, and the MSI laundry meets that provision. *Id.* at 199.

E. MSI/SMT Metal Furniture Factory

332. Mr. Fushi participated in tours of the MSI metal furniture factory with the parties' experts. *Id.* at 45.

333. Xylene is stored in the second floor paint area in the industrial building. *Id*. It is stored in 55-gallon drums in a non-accessible, locked cage. *Id*. The MDOC received two recommendations regarding the storage of the xylene: 1) use of rubber seals for the 55-gallon drums to eliminate vapor escape, and 2) grounding and bonding. *Id*. at 46-47. Both of these recommendations are being adopted. *Id*. at 47. (As noted in section III.D., these recommendations have been implemented.)

334. It was also recommended that the xylene had to be enclosed in a one-hour rated fireproof room. *Id*. at 48. An examination of NFPA 30 which discusses xylene storage provides that the current storage of the xylene is acceptable. *Id*. at 48-50, 52-54.

335. Mr. Carson also opined that he agreed with Mr. Fushi's conclusion regarding the xylene and other flammable fluids in the MSI metal furniture factory. *Id*. NFPA 30, which is the standard referenced, not only looks at life safety but also property protection, while the LSC looks at protection of people. *Id*.

336. There is an exhaust fan in the caged area that exhausts directly outside. *Id*. at 48.

337. It was recommended that all flammable liquids stored on the first floor of the industrial building be stored in a non-accessible, locked cage. *Id*. at 54-55. This recommendation will be followed. *Id*.

X. Conclusions of Law

In its May 6, 2004 Opinion sending the fire safety question back to this Court, the Appellate court in *Hadix, et al v. Johnson, et al,* (367 F.3d 513 at 525-526 96th Cir. 2004)) provided the following guidance:

> In the context of prison conditions, the Cruel and Unusual Punishment Clause forbids conditions that involve the 'wanton and unnecessary

infliction of pain,' or are 'grossly disproportionate to the severity of the crime…' *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). To succeed in an Eighth Amendment challenge, Plaintiff must establish that (1) a single, identifiable necessity of civilized human existence is being denied (objective prong) and (2) the defendant prison official acted with a sufficiently culpable state of mind. *See, e.g., Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000).

With respect to the objective prong "[p]risoners have the right not to be subjected to the unreasonable threat of injury or death by fire…" *Hoptowit v. Spellman*, 753 F.2d 779, 783-84 (9th Cir. 1985). The contemporary standards of civilized decency that currently prevail in society determine whether conditions of confinement are cruel and unusual. *See Rhodes v. Chapman*, 452 U.S. at 346. It is those contemporary standards, and not courts' own "notions of enlighted policy" that are controlling. *Tillery v. Owens*, 907 F.2d 418, 426 (3rd Cir. 1990). To satisfy this prong, "extreme deprivations are required…," *Hudson v. McMillan*, 503 U.S. 1, 9 (1992), and only deprivations denying "the minimal civilized measure of life's necessities" are grave enough to create a violation of the Cruel and Unusual Punishment Clause. *Rhodes*, 452 U.S. at 347. Harsh and uncomfortable prison conditions do not automatically create such a violation. *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). However, a "remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993). *See also Hill v. Marshall*, 962 F.2d 1209, 1211, 1215 (6th Cir. 1992) (holding that failure to provide prophylactic medication to prevent the possible future development of active tuberculosis is "actual injury," even though prisoner did not develop active tuberculosis).

With respect to the subjective prong, there is no violation of the Eighth Amendment unless the defendant is "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists" and he draws "that inference." *Farmer*, 511 U.S. at 837. Even if the defendant draws such an inference, he is not liable if he took reasonable steps to avert the harm. *Id.* at 835-36. Rather, deliberate indifference can best be compared to criminal law's "subjective recklessness." *Id.* at 839-40. In *Farmer*, the Court, concerned with the subjective component, explained that an "inmate seeking an injunction on the ground that there is a contemporary violation of a nature likely to continue must adequately plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so…" *Farmer*, 511 U.S. at 845-46. In this case, we are concerned with future conduct to

> correct prison conditions. If those conditions are found to be objectively unconstitutional, then that finding would also satisfy the subjective prong because the same information that would lead to the court's conclusion was available to the prison officials.

The Court went on to explain the contemporary standards of decency standard as different from experts' preferences by quoting from a footnote in *Rhodes*, at 348, n. 13:

> Respondents and the District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency. As we noted in [an earlier case], such opinions may be helpful and relevant with respect to some questions, but they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question. Indeed, generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction. We could agree that double celling is not desirable, especially in view of the size of these cells. But there is no evidence in this case that double celling is viewed generally as violating decently. *Rhodes*, 452 U.S. at 348 n. 13 (citations omitted).

The *Hadix* Court then re-focused on the contemporary standards of decency analysis by stating:

> The Supreme Court more recently reiterated its commitment to "contemporary standards of decency" approach to claims of alleged Eighth Amendment violations:
>
> > [D]etermining whether McKinney's conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS. It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate. *Helling*, 509 U.S. at 36. [*Hadix, supra*, at 526]

Plaintiffs' three lawyers and a group of experts have made a vigorous attempt to imagine a scenario that, if there were facts to support it, might create a risk of injury and support some kind of remedy. The problem with their imagined scenario is that it is not demonstrated by the facts and experience in the cell blocks.

Plaintiffs make the foundation of their argument a concept of presumed heightened susceptibility to serious harm because of the health of the prisoners in the cell blocks. This argument fails to be proven. It is asserted only as a concept or speculative construct. Ms. Elizabeth Ferguson has no medical training and has spent most of the last four years as a landscape painter. She reviewed no prisoners' medical records and interviewed no prisoners. Dr. Walden likewise interviewed no prisoners and reviewed no prisoner medical records.

Dr. Walden and Ms. Ferguson relied solely on the MDOC lists known as HC-251 and HC-261. These forms list those persons who are eligible for a special accommodation and who are assigned to a chronic care clinic respectively. Defendants' Exhibits 21 and 24-26. Ms. Hladki explained that these lists could not be used to determine the degree of disability or assess the state of a prisoner's health. Tr. I, pp. 118-120. By way of example she cited a prisoner who had an orthopedic disability listed on the HC-251 but review of his file showed the disability to involve his hand and in discussion with block staff Ms. Hladki learned the prisoner worked as a porter in the block. *Id.*

Plaintiffs' witness Kovaleski who has resided in 8 Block for years has an orthotic accommodation listed on the HC-251. However, Mr. Kovaleski works in the MSI creamery 8-10 hours/day, 5-6 days/week. Tr. II, p. 349. While Ms. Ferguson opined that

her review of the HC-251 list led her to conclude that over 100 prisoners would have difficulty exiting 8 Block in a timely fashion and would probably need assistance to do so, Tr. II, p. 286, Mr. Kovaleski testified that he did not know of any prisoners on the galleries in 8 Block who needed assistance to exit the cell block. Tr. II, p. 350.

Another of Plaintiffs' witnesses, Mr. Davidson, testified he had a heart condition. Tr. II at p. 340. He would certainly be listed on the HC-261 for 10 Block prisoners, yet he walks 2-3 miles per day for exercise. Tr. II, p. 343. While he testified there had been a small fire in the catwalk behind the cell next to his, he did not say he suffered any adverse health effects in spite of his heart condition. Tr. II, p. 343.

Dr. Walden admitted that relying on the information in the HC-261 to come to a conclusion about the severity of a prisoner's health condition was "pure speculation." Walden dep. at 138. Therefore, Defendants contend that Plaintiffs have not demonstrated any heightened susceptibility of the prisoner population in 8 Block beyond that of any group of 250 men of similar age and range of ailments. In other words, a group of general population prisoners.

The Mowrer fire model projected the likely concentration of carbon monoxide released from the modeled fire to be up to 16.9 ppm. Defendants' Exhibit 1. Dr. Pramstaller testified that he had actual experience treating persons who had experienced substantial carbon monoxide poisoning. He testified that the NIOSH standard for worker exposure to ambient air carbon monoxide allowed continuous exposure to 50 ppm for 8 hours/day and 5 days/week. Tr. II at 243.

All of the fire drill and fire incident reports indicated evacuation in 20 minutes or less, Defendants' Exhibits 10-18, if evacuation was even required, so the prisoner

population's exposure to carbon monoxide presents a minor or even negligible risk of harm.

The legal standard is still the contemporary standard of decency, that is, the risk that today's society chooses to tolerate. *Rhodes*, *supra.* Whose evaluation better represents that standard: 1) Mr. DiMascio's suggestion, rejected by his fellow fire safety engineers, or 2) Mr. Carson's alternative which was accepted by the fire safety engineers as a recognition of the real world physical environment of multitiered cell blocks that are fully sprinkled?

Mr. Carson and Mr. DiMascio agree that cell blocks 7 and 8 meet the equivalency standard of the Life Safety Code. Tr. I, p. 192 and Tr. II, p. 315. Defendants contend that compliance with the LSC's equivalency provisions could not possibly still represent conditions that do not meet "the minimal civilized measure of life's necessities." *Rhodes*, *supra*. Therefore, Defendants contend that no additional remedy is required for cell blocks 7 and 8 and the consent decree's fire safety provisions as to those cell blocks should be dismissed.

Mr. Carson went through his reasons explaining why he concluded that cell blocks 1, 2 and 3 of the Egeler facility also meet the equivalency provisions of the LSC. Tr. I, pp. 191-199. Mr. DiMascio was silent on cell blocks 1, 2 and 3's compliance with the LSC's equivalency provisions. As Mr. Carson explained, the only criteria in the LSC's regular provisions (Chapter 15) applicable to multitiered correctional facilities that blocks 1, 2 and 3 did not comply with was exit distance because it was a little over 200 feet from the point of the middle of the fourth gallery (the farthest point from the exit) to the exit. Tr. I, p. 193.

Mr. Carson did not believe this distance represented a substantial risk to the prisoner population because the large air volume of the atrium in the cell blocks would dilute the smoke from a fire. Dr. Mowrer's model confirmed Mr. Carson's belief. Tr. I, pp. 195, 197. The model predicted a fire on base to take approximately 20-25 minutes to fill the cell block with smoke down to a level of 2 meters above the floor. Defendants' Exhibit 1. By that time the cell block would have been evacuated. Mr. Carson said there would be expected to be some coughing and watering of eyes but the cell blocks would not become untenable. Tr. I, p. 200.

Mr. DiMascio acknowledged that smoke from a fire on fourth gallery would be avoided by moving prisoners to the third gallery so it would take even less time to get prisoners out of harm's way. Tr. II, p. 317.

All of these scenarios assume that the fire suppression of the fully sprinkled cell blocks and staff response do not happen. If the sprinklers in a cell are not disabled by the arsonist, it would be expected to come on in about 30 seconds and suppress the fire in another 30-60 seconds. Defendants' Exhibit 1.

Mr. Pulitzer testified that the majority of the cell blocks in the federal prison system use manual locking mechanisms as compared to electronic unlocking mechanisms. Tr. II, p. 240. We know from actual experience in cell block 1 that the block can be evacuated in 10-20 minutes and that the solid front cells on base provide much greater protection from smoke than do open front cells. Defendants' Exhibit 12b.

Plaintiffs' suggestion that the Court find that the fire safety conditions in Egeler's cell blocks 1, 2 and 3 amount to cruel an unusual punishment appear to disregard the four substantial improvements made there since 2002. 1) Removal; of unused transformers

and outdated electrical equipment; 2) raising gallery railing heights from 36 inches to 48 inches by installation of a third horizontal rail and additional vertical rails; 3) fully sprinkling the cell blocks; and 4) removal of combustibles from the storage cages at the ends of the cell block.

Plaintiff's suggestion of a current Eighth Amendment violation also appears to ignore the reduction of prisoner property in cell blocks 1, 2 and 3 since Egeler's conversion from a Level II general population cell block with prisoner property equivalent to the amount of property currently possessed by prisoners in 8 Block, instead of half or less that property amount since all Egeler prisoners are treated as Level V prisoners for property. Defendants' Exhibits 3-4.

Finally, Plaintiffs' suggestion that in order to eliminate the conditions in Egeler's cell blocks 1, 2 and 3, the Court should require the Defendants to install remote electronic unlocking mechanisms, a mechanical smoke exhaust system and a vertical dividing wall to allow for shorter horizontal escape from the "smoke compartment" ignores the fact that Mr. DiMascio's suggestion to the LSC committee considering modifications of the LSC for multitiered correctional facilities was rejected for inclusion in the code. Tr. II, p. 324. If the Society of Fire Protection Engineers rejected Mr. DiMascio's suggestion for inclusion in the LSC's provisions as a goal, how can those same suggestions be required to eliminate the much lower standard of the "minimal civilized measure of life's necessities"?

Defendants contend that this Court should find that the fire safety conditions in cell blocks 1, 2 and 3, as in cell blocks 7 and 8 do not violate the Eighth Amendment's

prohibition against cruel and unusual punishment and dismiss all fire cell blocks from the consent decree's fire safety provisions.

Relief

Wherefore, for all of the above stated reasons, Defendants respectfully request this Court to conclude that cell blocks 1, 2, 3, 7 and 8, the MSI/SMT laundry and the MSI/SMT metal furniture factory do not present conditions constituting a violation of the Eighth Amendment's prohibition of cruel and unusual punishment in terms of fire safety. That being the case, Defendants respectfully request the Court to dismiss the remaining consent decree provisions concerning fire safety for these locations.

Respectfully submitted,

Michael A. Cox
Attorney General

s/A. Peter Govorchin (P31161)
Attorney for Defendants

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Govorchin/Hadix 4:92-cv-110/Pleadings-APG/Fire Safety/Findings of Fact and Expert Opinion.Outline 070105