IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EDWARDS BRAGGS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	2:14-CV-00601-MHT-TFM
JEFFERSON DUNN, in his official capacity as Commissioner of the Alabama Department of Corrections, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' PHASE 2A PROPOSED PLAN TO REMEDY CORRECTIONAL AND MENTAL HEALTH UNDERSTAFFING

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INTRODUCTION

Defendants Commissioner Jefferson Dunn and Associate Commissioner Ruth Naglich appear not to recognize that they have been found to be running a correctional system that provides horrendously inadequate mental health care. They continue to protest – even after the suicide of a named plaintiff during trial – that their system does not cause harm.

Defendants in their submission explicitly refuse to admit that their system is failing in the many ways the Court found (though they admitted many of such failings during trial). Rather than proposing a plan to remedy the correctional and mental health understaffing found by the Court, they offer only to "address correctional and mental health staffing". Throughout their proposal, Defendants show their intent to do little, for a short time, with little oversight. This approach will not be sufficient to remedy the constitutional violations found by the Court.

Correctional and mental health staffing must be determined based on actual need, not just what Defendants unilaterally pronounce is practical or feasible. The failure of ADOC to address its staffing problems, year after year, has created a deficit that ADOC will likely find difficult to overcome. Yet they must overcome it in order to fulfill their constitutional obligations. They must thoroughly analyze what the staffing needs are. As positions are filled, they must continue assessing whether they have enough staff and the right staff.

None of this should be surprising. What is surprising is that Defendants believe that they do not need a remedial order, do not need to be monitored, do not need to fully comply with a remedial order, and ultimately that they do not need to remedy the constitutional violations the Court has found if the Alabama legislature does not appropriate the funds.

Plaintiffs' proposal builds on the steps Defendants have proposed, adding necessary detail, oversight structure and certainty. Such changes are crucial for there to be any chance of ADOC providing mental health care in accordance with the requirements of the Eighth Amendment.

ARGUMENT

I. DEFENDANTS' PROPOSED PLAN TO REMEDY UNDERSTAFFING IS VAGUE, UNSUBSTANTIATED, AND GENERALLY INADEQUATE

The plan Defendants have put forward to remedy correctional and mental health understaffing lacks the detail needed to successfully and efficiently reach compliance with the Constitution. What little detail there is creates significant concerns.

A. Defendants' Plan To Address Correctional Understaffing Is Inadequate

A comprehensive plan that provides for adequate correctional staffing is critical to addressing the "horrendously inadequate" mental health care within the

ADOC. The Defendants' proposal is insufficient and does not amount to such a plan. Defendants' proposed remedial plan for correctional staffing is comprised of three components: 1) a request to continue its current recruitment and retention efforts, 2) a request for the Savages to conduct a staffing analysis of all major ADOC facilities except Tutwiler, and 3) a request for time to submit a staffing plan based upon the results of the staffing analysis. Not surprisingly, this plan is vague and does little to address this Court's concerns regarding the impacts of severe understaffing.

1. Defendants' Proposed Plan to Conduct a Staffing Analysis Lacks Sufficient Detail and Fails to Address the Concerns of the Court

Plaintiffs agree that Defendants should perform a "prompt, comprehensive staffing analysis of all major ADOC facilities." Doc. 1374 at 6. Defendants' Exhibit B (Doc. 1374-2), a set of staffing analyses conducted at Bibb, Donaldson, and Hamilton, provides some insight into the Savages' approach and serves as a guide for what the remaining staffing analyses will look like if performed. Exhibit B presents several concerns that should be addressed if the Court is to rely on a staffing analysis conducted by the Savages for all major ADOC facilities.

As set forth in Plaintiffs' Motion for Expedited Discovery, Defendants' submission with respect to a correctional staffing plan does not provide sufficient information for Plaintiffs to fully evaluate or respond to it, or for the Court to

determine its adequacy. Defendants have provided, in Exhibit B to their Plan, a report prepared by consultants Russ and Meg Savage. The report includes some explanation of their methodology together with three "post plans" setting forth recommended staffing levels for Bibb, Donaldson, and Hamilton correctional facilities. Defendants propose to have the Savages conduct similar analyses at the remaining eleven major male facilities during December, January and February,[1] and to produce their final recommendations by May 1, 2018. Doc. 1374 at 35. Defendants propose that ADOC (but not Plaintiffs) then be allowed to submit a response to their own consultants' final recommendations, including "objections or opposition" to those recommendations if they consider the recommendations to be "impossible, impractical, or infeasible." Doc. 1374 at 35, 11.

What Defendants have produced is not, in fact, a "staffing analysis" at all. It appears instead to be a hasty review performed in an effort to (a) create the impression that something of substance has been done in the months since trial, and (b) entrench the Savages and their approach in order to persuade the Court to accept an inadequate process simply because it is already underway.

A number of the areas in which sufficient information is lacking are also noted in the Declaration of Eldon Vail Regarding Defendants' Correctional Staffing Plan ("Vail Decl."), attached hereto as Exhibit 1. As Mr. Vail explains,

[1] *See* Exhibit C, Doc. 1374-3.

one important omission in the "post plans" for Bibb, Donaldson and Hamilton is that they do not specify whether the number of officers for a given unit is meant to provide direct or indirect supervision of prisoners in that unit. Proper supervision of housing units is critical to ensuring that prisoners in ADOC receive adequate mental health care. During the Phase 2A trial, both Defendants' expert Robert Ayers and Plaintiffs' expert Eldon Vail testified that ADOC does not have enough officers to supervise dorms. Doc. 1285 at 63; *see also* Ayers Trial Tr., 43:25-44:24, 46:5-47:49; Vail Trial Tr., Vol. 1, 35:15-25. They both found the lack of staff inside the dorms unacceptable. *Id*. In light of this testimony, the Court explained in its Liability Opinion that lack of supervision in dormitories directly impacts prisoners' mental health:

> Correctional understaffing, combined with overcrowding, also has a more direct impact on prisoners' mental health. The combination of overcrowding and understaffing leads to an increased level of violence, both because of the difficulty of diffusing tension and violence in an overcrowded open-dormitory setting, and because of the lack of supervision by correctional officers.

Doc. 1285 at 69. The Court further found that "severe shortages of…correctional staff combined with chronic and significant overcrowding, are the overarching issues that permeate each of the…contributing factors of inadequate mental-health care." Doc. 1285 at 301.

Hence, to address the Court's concerns, ADOC needs to provide adequate staffing to effectively supervise its housing units. It is not apparent that this is

fully addressed in Defendants' staffing analysis for Bibb, Donaldson, and Hamilton. Although the Savages' report lists the number of recommended housing unit control officers, it does not clarify whether those calculations are based upon direct or indirect supervision. The distinction between the two models is critically important and has a direct impact on the ability of correctional staff to support the mental health care objectives of the Department.

According to the National Institute of Corrections, direct supervision occurs when "officers are stationed inside the living units with the inmates, not separated from them by a barrier." *See A Comparison of "Direct" and "Indirect" Supervision Correctional Facilities*, National Institute of Corrections – Prison Division, United States Department of Justice, June 1, 1989, https://static.nicic.gov/Library/007807.pdf at I.1-1 (hereinafter "NIC Supervision Comparison"). One of the primary duties in this model is personal interaction with prisoners. "Security is heavily dependent upon the ability of highly trained staff to detect and defuse potential problems. Officers walk through and control the entire living unit, eliminating de facto inmate controlled dormitories." *Id*. In contrast, indirect supervision occurs when officers monitor prisoners from an enclosed control booth. "The primary functions of the correctional officer in indirect supervision facilities is to operate the control systems, observe inmate behavior,

provide limited intervention in response to minor infractions, and call for backup staff response in the event of a major incident." *Id*.

At trial, Mr. Vail testified that analyzing whether supervision in a living unit is direct or indirect is an important factor in conducting a staffing analysis. Vail Trial Tr., Vol. 1, 36:1-16. He further opined that at minimum, "there needs to be at least officer presence in the living units where inmates live." Vail Trial Tr. Vol. 2, at 100:2-17. The National Institute of Corrections agrees that direct supervision is in fact the safest model, particularly in overcrowded prisons. NIC Supervision Comparison at I.1-6.

Defendants' Exhibit B also does not specify the size or custody level of each unit, and whether assumptions differed based on things like custody level or numbers of inmates in a unit. Ex. 1, Vail Decl. at ¶ 7. The report contains no information about assumptions regarding levels of supervision for correctional officers, and in some instances does not specify the rank of officers who would be providing supervision. *Id*. Insufficient information is also available concerning the calculation of relief factors, and the rationale for the recommendation of 12 hour rather than 8 hour shifts. *Id*.[2]

[2] This recommendation is particularly perplexing. In 2016, the Savages conducted a "staffing analysis" of the prisons ADOC hoped to build under the Alabama Prison Transformation Initiative. In it, they explained at length the disadvantages of using 12-hour shifts, and "strongly urge[d]" ADOC to consider an 8-hour shift. Ex. 2 (ADOC APTI Report, including Staffing Analysis) at 28-29.

Mr. Vail also notes two significant areas in which the report either fails to reveal vital information or the lack of information may indicate that very important matters have not been properly addressed. First, Mr. Vail points to the apparent failure to properly engage in detailed discussion about the development of a staffing model before proceeding with facility analyses. As Mr. Vail explains, such close consultation with ADOC's top level officials, is needed to "establish many of the vital policy assumptions upon which staffing recommendations would be based, and provide a baseline so that those policy assumptions can be applied across facility lines and by custody level." Ex. 1, Vail Decl. at ¶8. The report produced by the Savages does not contain information indicating that such detailed consultation has taken place. Indeed, the Savages appear to acknowledge both the need for such a process and the fact that it has not taken place. Their Executive Summary contains the following disclaimer:

> [I]t is important to recognize that any effective staffing plan includes a complete agency-wide review that considers the interdependency of all facilities, along with the controls and resources established by the centralized headquarters function. Further, operational efficiencies may be gained agency-wide through the process of a full staffing analysis, but are not included in the scope of this review. Observations made in this report should not be considered in a vacuum, as any proper staffing analysis must take into consideration the agency in its entirety.[3]

[3] The Savages do not actually even call their report a "staffing analysis," contrary to how it is represented in Defendants' submission. Instead , the Savages title their report an "assessment" of correctional staff needs, and state that they will conduct a "full-scale" analysis later.

Doc. 1374-2 at 4. Defendants' Plan appears also to indicate that substantial consultation toward the development of a staffing model has not happened, as Defendants intend to wait until after the Savages have performed all of the facility analyses and submitted "final" recommendations before being allowed to object to those recommendations.[4] According to Mr. Vail, a reliable staffing analysis should include robust discussions regarding the development of a staffing model as its starting point, and waiting until the end of the process to conduct these consultations makes it much more likely that the "final" recommendations will be rejected by ADOC. *Id*.

The most disturbing deficiency in Defendants' correctional staffing analysis to date is that it appears to have wholly failed to take the Court's Liability Order into account. Instead, the Savages have produced a report and post plans for three facilities that make no mention of the Court's findings, nor of any need to provide increased access to mental health care. *See generally* Doc. 1374-2; Ex. 1, Vail Decl. at ¶9. The Savages have calculated staffing for three facilities based upon their observation of current conditions at those facilities, including activity levels as they currently exist. Specifically, the Savages explain that they have not included any recommendations regarding "programmatic or operational/organizational changes" and that, if there are such changes, their

[4] Additionally, Defendants state that "Commissioner Dunn directed the Savages to immediately begin the staffing analysis process . . . ." Doc. 1374 at 10.

"staffing recommendations [] must be re-evaluated." Doc. 1374-2 at 4. As the Court found, however, the current level of activity and movement with respect to the provision of mental health care is woefully inadequate. Doc. 1285 at 67-68. Any staffing plan, even a short-term plan that is expected to change over time, should address the need to provide sufficient staffing to facilitate access to currently available care for the currently identified prisoners with serious mental health needs.

Plaintiffs do not contend that the Savages lack sufficient qualifications or experience to perform the type of staffing analyses needed in this case.[5] Whether they are likely to do so without succumbing to undue influence by Defendants to produce ADOC's desired result at the expense of adequately addressing the Court's findings remains in serious question. The report submitted by the Savages, much like their earlier work related to the proposed prisons that were intended to be built under the Alabama Prison Transformation Initiative, evidences an unsettling willingness on their part to cut corners at the behest of ADOC. Ex. 1, Vail Decl. at ¶¶ 10-13. For that reason, although Plaintiffs do not object to ADOC's use of the Savages to provide staffing analyses in this case, thorough

[5] It does appear that Defendants have exaggerated their claims that the Savages are the "indisputable" pre-eminent experts with respect to the conduct of staffing analyses. As Plaintiffs understand it, the Savages did not themselves conduct staffing analyses in all the places listed by Defendants, and have not, in fact, personally conducted a large number of such analyses. Plaintiffs find this overstatement troubling, but nonetheless consider the Savages to have adequate qualifications and experience.

monitoring of the process (discussed later in this Response), and the opportunity for Plaintiffs and their expert to have input in the process, is absolutely necessary.

Despite the insufficiency of the information provided by Defendants, Mr. Vail is able to offer some opinions regarding the specifics of the Savages' report. In general, Mr. Vail expresses concerns about levels of supervision. He points out that, at Donaldson, only one sergeant is proposed to be assigned five days a week to a living unit for segregation. Mr. Vail opines that segregation units should have sergeant coverage around the clock, and states that such supervisory coverage for segregation units is common in other jurisdictions. Ex. 1, Vail Decl. at ¶ 11. He further points to the proposal to have no sergeants assigned to general population living units as being problematic. *Id*.

Mr. Vail considers the recommendation in the Bibb post plan to have only one officer in a dorm with three pods to be insufficient, but agrees with the recommendation for an additional officer in the Behavior Modification dorm. *Id*. at ¶ 12. With regard to Hamilton, Mr. Vail opines that both the recommendation for only one officer assigned to segregation and for only one officer assigned to a dorm of 320 inmates are both inadequate. *Id*. at ¶13.

Mr. Vail states in his Declaration that the overall timeline proposed for completing a staffing analysis is "ambitious, but doable," and the proposed period of two years to complete implementation of final recommendations is reasonable.

Ex. 1, Vail Decl. at ¶ 10. However, he believes that interim goals or benchmarks are necessary to keep a plan on track, and to allow the Court and parties to monitor whether the implementation is likely to be complete in the allotted time. *Id*.

Plaintiffs do not object to ADOC proceeding with the Savages as the consultants primarily responsible for developing a correctional staffing model and staffing plans for ADOC's major facilities, so long as there is sufficient monitoring and structure in place so that the Court and Plaintiffs can be assured that sufficient progress toward adequate staffing is being made. *See infra*, § II.A. However, as previously discussed, Plaintiffs and their expert do have serious concerns about the manner in which the work has proceeded thus far. In addition, Plaintiffs object to the lack of any interim benchmarks or a plan or schedule for supplemental analyses that will be necessary as other changes are made to address the Court's findings. Plaintiffs also object to the omission of any real monitoring in Defendants' plan.

In order to encourage both prompt progress in addressing the urgent correctional staffing shortages that currently exist, as well as a logical and organized plan for arriving at a fully adequate staffing plan that accounts for other changes that will necessarily result from the Court's Liability Order, Plaintiffs would be amenable to a modification of the State's Plan on the following bases:

1. The Savages will consult with Plaintiffs' expert Vail to create an appropriate structure for developing the staffing model and plans, and for

conducting staffing analyses at each facility,[6] and collaborate with Vail in conducting the analyses. After consultation between the Savages and Vail, the Savages will conduct thorough preliminary investigation and discussion with ADOC's top officials regarding policy assumptions, anticipated obstacles, and anticipated changes that may impact staffing.

2. Both the consultation with Vail and discussions with ADOC officials, as well as all staffing analyses, will include specific consideration of the findings made by the Court in its Liability Order. Such analyses will be designed to ensure that ADOC provide adequate security staff for all Major Facilities, including adequate staff who are personally assigned to the following activities, tasks and/or living units within the ADOC facilities:

- Individual Counseling Sessions
- Group Sessions
- Residential Treatment Units
- Stabilization Units
- Segregation

[6] Based on the necessary pre-analysis discussion and consultation with ADOC officials, as well as express consideration of the Court's Liability Order, analyses previously conducted by the Savages at Bibb, Donaldson and Hamilton may require modification.

- Hospital Level Care, if provided within an ADOC Major Facility or if ADOC is obligated to provide security staffing to or at an off-site location[7]
- Crisis cells and any other locations where suicide watch or mental health observation takes place
- Scheduled Off-Site Appointments
- Emergency Off-Site Transportation

3. Initial Security Staffing Analysis and any Supplemental Security Staffing Analyses necessitated by changes in facilities, population, programming or otherwise, will be completed with respect to the existing major facilities and any additional facilities which may be created, constructed, or otherwise utilized to house inmates who are not assigned to a work release facility.[8]

4. After conducting staffing analyses at the existing major facilities, the Savages will again collaborate with Vail regarding the creation of an Initial Security Staffing Analysis Report. This report will be completed and submitted to the Court and parties on or before May 1, 2018. The parties will then have until May 15, 2018, to submit any concerns about the report.

5. The Savages and Vail shall continue to consult regarding changes that may necessitate supplemental analyses. Every 12 months after the issuance of the

[7] The Court has set a hearing for December 18, 2017 at 10:00 a.m. to address the issue of hospital-level care. Plaintiffs anticipate that minimum correctional and healthcare staffing needs may be adjusted upward after the hearing.

[8] Although the APTI was not passed by the legislature, Plaintiffs' counsel are informed that efforts to construct new facilities are still happening.

Initial Security Staffing Analysis, the Savages and Vail shall issue any report regarding any Supplemental Staffing Analysis, if necessary under the circumstances. Supplemental analyses will be conducted in the same manner as the initial ones.

6. Upon completion of the Initial Security Staffing Analysis and any Supplemental Staffing Analysis, ADOC must comply with bi-annual benchmarks as listed below. The calculation of the timeframe for each benchmark period would begin from the date of the release of the Initial Security Staffing Analysis:

- Benchmark 1: Within six (6) months after the release of the Initial Security Staffing Analysis, ADOC will employ 55% of the additional security staffing required under the Initial Security Staffing Analysis;
- Benchmark 2: Within six (6) months after reaching compliance with Benchmark 1, ADOC will have 65% of the additional security staffing called for under the Initial Security Staffing Analysis;
- Benchmark 3: Within six (6) months after reaching compliance with Benchmark 2, ADOC will employ 80% of the additional security staffing required under the Initial Security Staffing Analysis any supplement thereto; and
- Benchmark 4: Within six (6) months after reaching compliance with Benchmark 3, ADOC will employ 100% of the additional security staffing required under the Initial Security Staffing Analysis or any supplement.

In the event that ADOC does not comply with any of the Benchmarks, then that Benchmark and each subsequent Benchmark will be extended for a period of six (6) months, until the ADOC satisfies the minimum staffing level for each such Benchmark.

2. Defendants' Exclusion of Tutwiler from Their Staffing Analysis Plan Is Improper

Defendants contend that a staffing analysis at Tutwiler, called for under a Consent Decree in another case, makes it unnecessary to include Tutwiler in its remedial plan in this case. Plaintiffs object to the exclusion of Tutwiler from any remedial plan adopted by this Court.

Pursuant to a consent decree between ADOC and the U.S. Department of Justice in *United States of America v. State of Alabama*, Case No. 2:15-cv-368-MHT-TFM, a staffing analysis of Tutwiler Prison for Women was presumably conducted by and finalized on September 1, 2017. Ex. 3 (*United States of America v. State of Alabama*, No. 2:15-cv-368-MHT-TFM, Doc. 27-1) at 9-11. A staffing plan was also finalized and is scheduled for adoption on November 28, 2017. *Id.* Given Defendants' position that they will not conduct a separate staffing analysis for Tutwiler in this action, Plaintiffs are seeking discovery regarding the analysis conducted in the other litigation. Plaintiffs appreciate the fact that Defendants have conducted a staffing analysis and developed a staffing plan for Tutwiler. However, Plaintiffs are currently unable to ascertain whether that staffing plan addresses the constitutional violations found by the Court in this action.

Based solely upon the documents available at this time, Plaintiffs do have some specific concerns about what is likely contained in the Tutwiler analysis and staffing plan. For example, the Tutwiler Consent Decree only requires "rounds by

corrections staff and security supervisors in all areas of the prison, including dormitories," and not direct supervision. Ex. 3 at 25-26. [9] As this Court noted in its Liability Opinion, both Defendants' expert Robert Ayers and Plaintiffs' expert Eldon Vail opined that lack of direct supervision in dorms is unacceptable and results in "incredibly dangerous and out of control" conditions. Doc. 1285 at p. 63. Because Plaintiffs have not seen the staffing plan for Tutwiler, they cannot determine whether a direct supervision staffing model was actually adopted. Therefore, Plaintiffs reserve all objections until they have the opportunity to review the staffing analysis and staffing plan.

3. Defendants' Proposed Plans for Recruitment and Retention are Vague and Fail to Address the Concerns of the Court

Defendants report in their Plan that "ADOC is currently engaged in other efforts" to increase correctional staff (but which they apparently contend are unrelated to their remedial plan to increase correctional staffing). Doc. 1374 at 12. These efforts are somewhat vaguely described as analyses of ADOC policies, practices, and procedures affecting recruitment and retention of correctional staff, and of compensation and benefits for such staff. *Id.* at 12-14. While ADOC has much to say regarding the qualifications of the consultants they have engaged to conduct these analyses, they have little to say about how this work will be done,

[9] The consent decree only requires direct supervision in Dorm A which is the intake dorm. Ex. 3 at 25-26.

nor have they provided any engagement letter or memorandum of understanding with either consultant that outlines the scope of the work.

Defendants also state that ADOC anticipates receiving recommendations from its consultants within 120 days after the submission of the staffing analysis and plan proposed to be developed by the Savages (around September 1, 2018, almost a year from now, and well over a year after the entry of the Liability Order). There is no indication that Defendants intend to share these recommendations with Plaintiffs or the Court, and Defendants' implementation of the recommendations remains subject to all of the same disclaimers and caveats asserted with respect to the Plan itself.

Plaintiffs submit that matters related to ADOC's ability to recruit and retain correctional staff are central to their ultimate redress of the gross inadequacies found by the Court. Moreover, the quality and sincerity of Defendants' efforts to correct those inadequacies cannot be ascertained if Defendants are permitted to shroud their efforts in secrecy.

B. Defendants' Proposal Regarding Mental Health Staffing Lacks Crucial Details and Staff Categories

The Court has identified mental health understaffing as a key factor contributing to the constitutionally inadequate mental health care provided in Alabama's prisons. Doc. 1285 at 49-59, 109, 231. A remedial order must require increases in mental health staffing as well as increases in staff to perform CQI and

supervision, both in the mental health vendor's regional management office and in the ADOC Office of Health Services. Mental health staffing increases should be based on ratio-derived estimates, derived from experience and expertise. Such estimates must consider the reality that ADOC's mental health caseload *must* grow to reflect the actual number of prisoners with mental illness. *See* Doc. 1285 at 43 (finding inadequate identification and classification of prisoners with mental illness). In order for the caseload to grow and adequate mental health care to be provided, mental health staffing levels must exceed what is required for the actual caseload size at given time. Additionally, while staffing levels may be based on ratios and estimates, there must be regular assessments by a monitor to determine whether the needed services are in fact being provided as the staff numbers increase.

1. Mental Health Staffing Increases Should Meet Benchmarks Related to What the Caseload Size Should Be

A mental health staffing remedial plan must include hiring benchmarks to facilitate identification of those not yet on the caseload and to accommodate a growing caseload. Plaintiffs do not know what caseload size the July 2017 RFP was contemplated to serve. *See* Doc. 1374-5. And Defendants' mental health staffing proposal does not indicate the mental health caseload size contemplated by

their consultants or acknowledge the inevitable growth of the caseload after implementation of mental health remedies. *See* Docs. 1374 at 16-22; 1374-4.

ADOC's mental health caseload is substantially lower than the national average. Doc. 1285 at 73-74. The Court found that this failure to identify prisoners with mental health needs is the result of a number of factors, including "insufficient mental-health staffing." *Id.* at 78. ADOC's mental health caseload is around 14% of the total prison population. *Id.* at 212; Burns Trial Tr., Vol. 1, 58:12-59:3. The male caseload should be between 20% and 30%. *Id.*; Doc. 1285 at 73-74. Mental illness prevalence among female prisoners ranges between 75% and 80%. Tutwiler's caseload is only around 54% of its population. The Court found that at Tutwiler, like at the male prisons, ADOC underidentifies prisoners with mental illness. Doc. 1285 at 233.

Additionally, around 15% of the caseload should be in residential treatment or intensive stabilization units. Doc 1285 at 86-87; *see also* Patterson Trial Tr., Vol. 1, 269:11-271:10. In September 2016, only around 9% of the caseload was housed in a treatment unit. *Id.* at 86-87; Jt. Tr. Ex. 344 at ADOC0397438, ADOC0397440-41. The Court found that the ADOC is "under-identifying those who need residential treatment – a problem that starts with the inadequate intake screening process." *Id.* at 87. Further, as explained by Dr. Patterson, because there is not much programming available in the residential treatment units – which is a

result of understaffing – patients who could benefit from longer stays in a mental health unit are quickly released back to population, because they have exhausted the little there is in the treatment unit. *Id.* at 87-88.

ADOC has no realistic idea of how many people in its custody need mental health services and how many people need the higher levels of care that should be available in residential mental health treatment units. Therefore, staffing ratios must be based on educated, expert assumptions about how many people *should* be on the caseload and in residential or a higher level of care.

Additionally, the evidence strongly suggests that demand for mental health services has been artificially reduced by the insufficient staffing levels. *See* Doc. 1285 at 100 (noting numerous prisoners' testimony that "'counseling sessions' do not amount to much"). As a result, to determine what the need for services actually is, staffing levels should be targeted slightly above the current needs at any point in time, until the caseload stabilizes at a level that appears to be the result of need, not of the lack of availability.

Further, the evidence showed that current mental health staff are not able to use their time efficiently because of the shortage of correctional staff. Doc. 1285 at 67-68, 101-05. Thus, even if the facilities are staffed with mental health personnel at levels comparable to what is needed in other systems, it is likely that the mental health staff will not be able to do as much as they would in a system with more

appropriate levels of correctional staffing. This, too, supports setting mental health staffing levels slightly higher than what the current caseload at a given time necessitates.

A mental health staffing remedial plan must recognize that the caseload *must* and *will* grow to a size closer to national averages but cannot do so without staffing that out-measures the actual caseload until the caseload reaches a stable size.

Plaintiffs agree, with slight variations, to the mental health staffing ratios proposed by Defendants. However, Defendants have not indicated how they determine the number of patients for those ratios. To the extent Defendants' plan is based on the current caseload size, mental health staffing will always lag behind the number needed to serve the people in need of care. While a person can be moved onto the caseload in a day, it takes weeks, months, and even years to get approval to hire additional staff and to actually make the hire. Further, Defendants have failed to adequately identify prisoners with mental health needs for years. If the intake and referral process are improved (and are themselves adequately staffed), the caseload should increase quickly, exacerbating the problem caused by the delays inherent in all hiring processes.

If there is not adequate staff, whether because the ratios are insufficient or because hiring cannot keep up with additions to the caseload, the system of care will slide back to the same patterns that gave rise to this case: people will not be

referred because there are not enough people to do assessments and provide subsequent care; counselors and psychiatrists will not be able to spend the time necessary with their patients resulting in inadequate assessments of their condition; and people will not be sent to or kept in the mental health units because there is not enough treatment to provide to them, resulting in further cuts to the staffing of the mental health units. Therefore, a mental health staffing remedial plan must include hiring benchmarks to facilitate and accommodate necessary caseload growth.

Plaintiffs propose Defendants initially hire staff to meet the staffing ratios outlined in Exhibit 4 hereto. To avoid the cycle of understaffing leading to under-identification, which in turn would lead to understaffing, Plaintiffs propose the following approach for calculating the prisoner side of the staffing ratio:

- Until the male caseload reaches 18% and the female caseload reaches 64%[10] of the ADOC in-custody population, the staffing ratios will be based on the assumption that 20% of the male population is on the mental health caseload and 75% of the female population is on the caseload;
- Once the caseload reaches 18% for men and 64% for women of the ADOC in-custody population, the staffing ratios will be based on the assumption that 25% of the male population and 77% of the female population are on the mental health caseload;

[10] The male caseload should be between 20% and 30%. Doc. 1285 at 73-74. The female caseload should be between 75% and 80%. *Id.* at 233. The mental health caseload is currently around 54% of the total female in-house population while the male caseload is currently around 14% of the total male in-house population. *Id.* at 73, 233. The female caseload must therefore grow more and more quickly than the male caseload in order to reach national averages. For that reason, separate mental health staffing benchmarks are necessary for male and female populations.

- Once the caseload reaches 23% for men and 72% for women, the staffing ratio will be based on the assumption that 30% of the male population and 80% of the female population are on the mental health caseload.
- At all times, ADOC will maintain sufficient residential treatment beds to treat 13.5% of the presumed caseload (20%, 25%, or 30% for men and 75%, 77%, and 80% for women). Staffing ratios for the residential treatment units will be based on the number of beds;
- At all times, ADOC will maintain sufficient stabilization or crisis beds to treat 1.5% of the presumed caseload (20%, 25%, or 30% for men and 75%, 77%, and 80% for women). Staffing ratios for the stabilization or crisis units will be based on the number of beds.[11]

If the actual mental health caseload reaches at least 25% of the male in-house population and 77% of the female in-house population and stabilizes in size for a period of two years, Defendants may reduce staffing levels to match the actual caseload size. However, a determination that the caseload size has stabilized should not be made until staffing levels have reached what is necessary to serve a caseload of 30% of the male in-house population and 80% of the female in-house population of the total ADOC population, to ensure that the size of the caseload is not simply reaching capacity and again being driven by lack of availability rather than level of need.

[11] According to the testimony at trial, it is to be expected that 15% of the caseload will be in a mental health unit, whether a longer term residential unit, a stabilization unit, a crisis unit or a hospital. Hospital beds have not been calculated here, as they do not impact staffing.

2. Defendants' Staffing Ratios Need to Be Adjusted in Several Critical Areas

Plaintiffs' proposed initial staffing levels vary slightly from Defendants' in several ways. First, registered nurse (RN) staffing levels should be nearly double what Defendants have proposed. RNs are able to conduct assessments and mental status exams, provide certain interventions, and supervise licensed practical nurses (LPNs). Burns Trial Tr. Vol 1, 43:21-44:11, 45:12-22, 240:3-7. RNs should be utilized more at intake, rather than ADOC's inappropriate reliance on LPNs. Doc. 1285 at 74-77; Burns Trial Tr., Vol. 1, 61:25-62:22. There also need to be more RNs to supervise LPNs. Burns Trial Tr., Vol. 2, 60:9-61:1; Patterson Trial Tr., Vol. 1, 34:23-35:6. For those reasons, there should be one RN at all times at reception centers and in all mental health[12] units. There should also be an LPN on duty at all times in the reception centers and SUs. Mental health nursing coverage at all hours is needed in reception centers because newly arrived prisoners are going through dramatic and traumatic change, and the staff does not know the issues each person presents. They are needed 24/7 in SUs for medication passes, assistance to persons in suicide watch, assistance with emergency medications, and other crises. In reception centers and SUs, the total number of RNs and LPNs is

[12] There is not yet a remedial order describing how mental health units should be organized. Defendants have shifted their terminology somewhat, from "residential treatment unit" to "enhanced residential unit" and from "stabilization unit" to "stabilization and crisis unit." Until there is an organizational change, Plaintiffs will continue to use the original terminology. However, for simplicity, when referring to these units together, Plaintiffs refer to them as mental health units.

driven by the need for 24/7 coverage. In RTUs, the total number of RNs is driven by the staffing ratio, which results in more than enough RNs for 24/7 coverage.[13]

Second, a remedial staffing plan must distinguish psychiatrists and nurse practitioners (CRNPs). Defendants offer minimal distinctions between psychiatrists and CRNPs in their proposal, stating only, "Utilization of CRNPs should reflect proper direct supervision by psychiatrists. Outpatient services may include a mix of CRNPs and psychiatrists. Reception screening and assessment services must be provided by a psychiatrist." Doc. 1374-4. To ensure proper direct supervision, in accordance with Alabama law, a quarter of providers (psychiatrists and CRNPs) must be psychiatrists. Ala. Bd. of Nursing Admin. Code § 610-X-5-.04; *see also* Burns Trial Tr., Vol. 1, 33:16-38-24, 40:6-8.

As stated by Defendants, psychiatrists (rather than CRNPs) should staff reception centers. Defendants suggest there should be just one, but there are nearly 700 prisoners coming into the ADOC every month. Doc. 1397-3 at 3 and Ex. 8 (indicating average custody admissions during the fiscal year were 688).[14] Plaintiffs propose a ratio of 1 psychiatrist to every 100 prisoners coming through intake per month. And in enhanced residential treatment units, no more than half

[13] Plaintiffs have adopted the Defendants' proposed relief factor from the Savages' for 24/7 coverage. *See* Doc. 1374-2 at 8. Per the Savages, for a position to be filled 24 hours per day, every day, 4.8 employees are needed for that position. *Id.*

[14] Average intake figures come from the July 2017 ADOC Monthly Statistics, Doc. 1397-3, at 6, plus the August intake numbers, Ex. 8 at 6, averaged over the 11 months of the fiscal year to date. Although the August report shows the number of intakes in August, the year to date numbers did not change from the July report.

of providers should be CRNPs, with CRNPs treating only more stable patients. Both intake and residential treatment of less stable patients necessitate psychiatrist-level training, while CRNPs are more appropriately employed in lower intensity residential treatment and continued treatment in outpatient settings. Burns Trial Tr., Vol. 1, 39:17-40:5.

Third, all social workers should be licensed. The Court found, "The quality of psychotherapy also suffers due to use of unsupervised, unlicensed counselors." Doc. 1285 at 105-07. Even if each facility employs a licensed site administrator and at least one psychologist, there will not be adequate licensed staff to clinically oversee unlicensed social workers and counselors to the degree required. Therefore, all social workers and counselors should be licensed in their respective fields.[15]

Fourth, psychologist and social worker/counselor caseloads at facilities providing only outpatient care should be smaller. The Court has already found that a counselor caseload size of 100 clients, as Defendants have proposed, results in infrequent, brief counseling sessions. Doc. 1285 at 98-101. Having psychologists with caseloads of 200 clients and counselors with caseloads of 100 clients in

[15] Defendants' proposal refers to "Social workers/LCPC". LCPC is a somewhat higher licensure for counselors than an LPC, but it is not available in Alabama. Plaintiffs do not know whether the position that all counselors, including social workers, must be licensed is a variation from what Defendants proposed.

outpatient facilities will only result in infrequent, brief counseling sessions with both counselors and psychologists.

Instead, a ratio of 1:60 will ensure regular, meaningful counseling sessions and reasonable caseload sizes for each counselor. This ratio may be satisfied with a mix of psychologists and licensed social workers/counselors or solely one or the other. Licensed social workers/counselors are adequately trained to provide outpatient counseling and treatment planning. At a 20% caseload size, a 1:60 ratio would only require a few more mental health professionals than Defendants proposed, and, if staffed predominately with licensed social worker/counselors, would be less expensive than Defendants' proposal.

Additionally, each reception center should have one full-time psychologist.[16] Psychologists are the professionals most highly trained in the testing processes that ordinarily take place during intake in correctional systems. Having a psychologist at each reception center will facilitate adequate screening and identification during the intake process.

There should be licensed social workers/counselors at a ratio of 1:100 for every intake per month. These social workers/counselors should conduct both a

[16] As of August 2017, the average monthly female admissions for the 11 months prior were 104. The average monthly male admissions for the same period were 584. Doc. 1397-3 at 6 and Ex. 8. *See supra*, n.14.

detailed mental health screening for every person coming into the ADOC, as well as begin treatment for the individuals who will be added to the caseload.

Finally, crisis and stabilization units should have adequate administrative support/clerical staff. These units are particularly transitory, necessitating staff to process the inflow and outflow of medical records. Additionally, these units provide the most, concentrated treatment, generating more records and requiring more staff to maintain them. For these reasons, Plaintiffs propose an increased ratio of 1:30 for administrative support/clerical staff in crisis and stabilization units.

Finally, Defendants did not identify the category of observers for suicide watch. There need to be adequate numbers of people for these positions. To determine what those numbers are, Defendants should analyze how many person-hours there are each month of prisoners on acute watch, non-acute watch, and mental health observation. There should be enough observers for adequate coverage of all prisoners on suicide watch or mental health observation. The number needed will be dependent on not just the numbers of individuals in crisis, but also the physical layout of the location for suicide watch. For example, in a facility that has two suicide watch cells, if two people are on non-acute watch, there must be a person dedicated to watching those two individuals, because otherwise the observations at less than 15 minutes intervals will not happen.

Further, people go onto and stay on suicide watch at all times of the day and night. The observer staffing needs to be sufficient for coverage at any or all facilities twenty-four hours a day, seven days a week.

The ratios and staffing numbers summarized in the following chart and outlined in detail in Exhibit 4 are levels that have sufficed in other correctional mental health systems for the staff members to be able to provide mental health care. These are, therefore, appropriate baseline staffing levels.

	Plaintiffs' Proposed Variations	**Defendants' Total FTE at 20% Caseload**	**Totals with Proposed Variations**
Registered Nurse		**18.0**	**32.6**
Practical Nurse	Licensed Practical Nurse (LPN)	**36.0**	**46.1**
Psychiatrist	(must distinguish between roles of Psychiatrist and CRNP in some areas)	**45.6**	**27.9**
CRNP	CRNP		**21.7**
Psychologist		**41.2**	**20.4**
Social Worker/LCPC	Licensed Social Worker/LPC	**83.8**	**117.3**
Activity Therapist		**26.5**	**26.5**
Mental Health Paraprofessional		**31.9**	**27.5**
Administrative Support/ Clerical		**23.4**	**24.6**
	Suicide Watch Observers		
Supervisor			
TOTALS		**306.3**	**344.7**

As with correctional staffing, Defendants want the right to object to the consultants' mental health staffing levels if they consider them "impossible, impractical, or infeasible." Doc. 1374 at 35-36, 11. Reaching the staffing levels envisioned here, essentially those that were proposed by Defendants' consultants with small adjustments, will be difficult for the ADOC. But that is because they have underspent and understaffed for so very long. Having established a habit of misery and unconstitutional conditions does not justify failing to remedy the problems when they are finally brought to light.

3. Defendants Are Responsible for 100% Compliance with the Remedial Order's Mental Health Staffing Requirements

Defendants must fully implement any mental health staffing requirements included in the remedial order. As discussed below in § II.D., planning for less than complete compliance with the Constitution is unacceptable. Defendants' proposed remedial plan states, "'Fulfillment of the mental health staffing ratios' means ADOC and/or its contractor met 85% of the mental health staffing ratios with respect to each mental health staffing position." Doc. 1374 at 21 n. 18. As they have in the past, Defendants are free to incorporate substantial compliance terms into a contract with their mental health provider. *See, e.g.*, Jt. Tr. Ex. 185 at ADOC000329, ADOC000448-49. However, Defendants cannot abdicate 15% of their constitutional duties. If Defendants choose to include an 85% compliance

clause in their vendor contract, they must require higher staffing levels than those required by a remedial order in order to ensure that they are fully complying with the remedial order at all times.

4. In Addition to Implementing Ratios, Care Should Be Periodically Evaluated to Ensure That Care Is Adequate and Staff Are Not Stretched Too Thin

Staffing levels are not the end in themselves; having adequate staff is necessary to provide adequate mental health services. The test of whether ADOC is in fact moving toward remedying the constitutional violations found by this Court will be the adequacy of mental health services – adequate identification at the outset of and during incarceration and adequate treatment at the appropriate levels of care.

The necessary mental health staffing level must be determined through an on-going process, starting from a ratio-derived estimate, based in experience and expertise, and recognizing the context in which mental health care is currently provided in the ADOC. Once a starting point is identified, there must be regular assessments to determine whether the needed services are in fact being provided as the staff numbers increase.

Adjustments should be made to staffing levels as needed where deficiencies are identified. Defendants seem to agree with this, as, under their proposal, their "mental health consultants will review implementation of this Plan, which will

include an assessment of mental health staffing needs." Doc. 1374 at 21-22. However, Defendants do not explain what, if anything, should happen if their consultants were to find that the Plan, as implemented, is not adequately meeting mental health staffing needs.

A monitor must be able to come to the facilities, review records and documents as needed, observe operations, and conduct interviews. Based on the information collected through monitoring, the monitor should be able to work with the Parties to adjust the staffing numbers up or down as needed to provide the necessary services.

5. Defendants' Post-Trial Mental Health Staff Hiring Efforts Are Not Evidence that Their Proposed Remedial Plan Is Adequate or that They Will Satisfy Remedial Requirements without a Remedial Order and Close Monitoring

Defendants' mental health staffing levels remain constitutionally inadequate, despite their post-trial efforts to hire more mental health staff. Their mental health staffing levels will continue to remain inadequate until there are appropriate ratios in place with hiring benchmarks.

Defendants report that staffing increases have been made since trial, "even prior to the entry of the Liability Order." Doc. 1374 at 16. Yet they identify only about two-thirds of the positions purportedly added, and provide no information as to whether or when any of the positions were filled. *Id.* at 17. Notably, half of the

positions that were actually identified – 21.00 FTE suicide watch observers – are not the result of Defendants' expediency; these are positions necessitated by the Court's request during trial that Defendants' address the failure to watch people on suicide watch, and the settlement of Plaintiffs' motion for a temporary restraining order regarding the same failure. Naglich Trial Tr., Vol. 3, 232:19-234:17; Doc. 1102-1.

Defendants also point to the terms of ADOC's July 2017 Request for Proposals ("RFP") for health care services as evidence that they are committed to a substantial increase in mental health staffing. Doc. 1374-5. Notably, this RFP was issued after the Court's June 2017 liability opinion. According to deadlines listed on ADOC's website, a vendor was to be selected and notified by October 16, 2017. Doc. 1397-5. At the time the RFP was released, the targeted implementation date for the contract was January 1, 2018. Doc. 1374-5 at 4. It has since been changed, without public explanation, to April 1, 2018. Doc. 1397-5. Defendants have not provided any information about the bidding on and awarding of the contract.

Defendants have a history of awarding contracts that include lower minimum staffing levels than those requested in their RFPs. For example, the 2008 RFP requested a total of 150.26 FTE mental health staff. The contract as awarded required only 139.35 FTE mental health staff. *Compare* Pls. Tr. Ex. 681 at p. 306, PLF007945 (RFP minimum staffing levels) *with* p. 36, PLF007675 (2008 contract

minimum staffing levels). This happened again in 2013, when the RFP requested 144.95 FTE mental health staff and the contract actually awarded required only 126.50 FTE mental health staff. *Compare* Jt. Tr. Ex. 185 at ADOC000477 (RFP Minimum Staffing Levels) *with* ADOC000359; *see also* Houser Trial Tr., Vol. 1, 17:21- 23:19 (describing MHM's input into the 2013 RFP process, and ADOC's request that MHM reduce the staffing levels in its proposal, though MHM believed those levels were necessary). Defendants cannot be trusted to actually contract for the same minimum staffing levels listed in the July 2017 RFP.

6. Defendants' Mental Health Staffing Proposal Omits Several Other Critical Components

a. Defendants' Proposal Omits Increases in OHS Staffing

Mental health staffing remedies must include additional staff in the ADOC Office of Health Services who can monitor contract compliance and the adequacy of the mental health care being provided in ADOC. OHS is "the only ADOC department with responsibility for monitoring mental-health care." Doc. 1285 at 269. OHS has "done almost nothing that resembles 'quality-improvement' or even bare-bones contract monitoring in response." *Id.* This is due, in part, to inadequate staffing.

The OHS staff currently consists of Defendant Naglich, Laura Ferrell, Lynn Brown, Brandon Kinard, and Dr. David Tytell. Naglich Tr. Tr. Vol. 1, 8:3-19. They are responsible for monitoring the adequacy of mental health care provided

in ADOC, though Ms. Ferrell, Ms. Brown, and Mr. Kinard are primarily responsible for overseeing medical care. Tytell Trial Tr., 26:3-27:1. "The only OHS staff member with mental-health expertise is Dr. David Tytell, the chief clinical psychologist." Doc. 1285 at 12, 269. There is no psychiatrist on staff, and thus no one qualified to oversee, for example, mental health medication management. Naglich Trial Tr., Vol. 1, 8:14-16; Tytell Trial Tr., 27:10-18.

If ADOC is going to continue to contract for the provision of mental health care, OHS must have adequate staff to ensure that the contractor is providing constitutionally adequate care. *See* Doc. 1285 at 269-276 (discussing OHS's failure to adequately oversee MHM and address identified deficiencies). Defendants admitted as much at trial. Defendant Naglich testified that she has been asking for additional staff to perform contract monitoring for eight years. Naglich Trial Tr., Vol. 1, 147:17-148:10. She testified that she believes having an independent contract monitor or additional OHS staffing to perform contract monitoring would be beneficial. *Id.* Specifically, she testified that OHS needs at least two psychologists, preferably in the regional offices, in addition to Dr. Tytell to monitor and audit the mental health vendor's contract compliance. Naglich Trial Tr., Vol. 4, 230:10-231:2.

Plaintiffs' OHS Staffing Proposal provides for the two additional psychologists based in the OHS regional offices that Defendant Naglich testified

she needs. The proposal provides for a psychiatrist and regional nursing director to provide clinical oversight to MHM in areas that Dr. Tytell and the other psychologists are not qualified to oversee. Further, Plaintiffs' proposal provides for designated Contract Manager and Quality Assurance Director positions to ensure the mental health provider is complying with the terms of the contract, which, in turn helps to ensure adequate mental health care.

The following OHS staffing levels are necessary to ensure ADOC and its vendor are providing constitutionally adequate mental health care:

OHS Staff Position	**Current Staff**	**Plaintiffs' Proposal**
Director of Psychiatry	0	1
Director of Psychology	1	1
Contract Manager	0	1
Quality Assurance Director	0	1
N. Regional MH Specialist	0	1
S. Regional MH Specialist	0	1
Regional Nursing Manager	0	1
Administrative Assistant	1	2

b. Defendants' Proposal Omits Increases in Vendor Regional Staffing

A remedial order should also require additional staffing in the vendor's regional office. Defendants' proposed staffing remedial plan does not address staffing the mental health vendor's regional management office at all. Defendants' July 2017 RFP does include minimum staffing levels for the vendor's regional office, but several critically necessary positions are omitted.

Beyond what Defendants have included in their RFP, one additional CQI assistant is necessary to ensure there is enough staff to conduct CQI in a meaningful way. Additionally, a Director of Nursing and two Assistant Directors of Nursing, one for each region, are necessary to monitor and clinically supervise the vendors' nursing staff. The following staffing requirements for the vendor regional management office are therefore necessary:

Vendor Management Staff	**2017 RFP**	**Plaintiffs' Proposal**
Program Director	1	1
Asst Program Director North	1	1
Asst Program Director South	1	1
CQI Manager	1	1
Northern Regional CQI Assistant	1	1
Southern Regional CQI Assistant	0	1
Director of Nursing	0	1
Northern Regional Assistant Director of Nursing	0	1
Southern Regional Assistant Director of Nursing	0	1

Psychiatrist Director	1	1
Asst Psychiatrist Director (Collaborator)	1	1
Telehealth Coordinator	1	1
Clinical Director/Education Training	1	1
Administrative Coordinator	1	1
Data/Reports Manager	1	1
Administrative Assistant	2	2

C. A Remedial Order Requiring What Is Necessary to Correct the Defendants' Eighth Amendment Violations Will Not Unduly Intrude on the State's Operation of Its Prison System

The Court must issue a remedial order that is adequate to address the gross Eighth Amendment violations the Court has already found. The Court will not unduly intrude on the State's operation of its prison system if it finds that Defendants' proposed remedial plan is inadequate to correct the policies and practices found by the Court to violate Plaintiffs' Eighth Amendment rights.

Defendants' discussion of "second-guessing the decision of those with . . . expertise," "separation of powers," and "comity" boils down to their position that a remedial order requiring anything more of them than what they themselves have proposed would constitute undue interference with the State's operation and administration of its own prison system. Doc. 1374 at 29-32. However, the Court cannot approve a remedial plan that will not "correct the violation of the Federal right" found to be violated. 18 U.S.C. § 3626(a)(1)(A). The Court cannot simply adopt the Defendants' proposed remedial plan wholesale because the proposal is

insufficient to adequately correct the contribution understaffing makes to the ongoing Eighth Amendment violations with regard to mental health care. *See supra*, §§I.A., I.B.

Defendants insist that the Court turn a blind eye to the constitutional violations that will remain if nothing more than their proposed remedial plan is implemented. But "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011). Neither must a court exercise judicial restraint to the point of failing "to take cognizance of valid constitutional claims whether arising in a federal or state institution." *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974), overruled on other grounds, *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

Courts are not required to adopt prison administrators' proposed remedies without reviewing them for adequacy. In *Lewis v. Casey*, the Supreme Court lauded the *Bounds v. Smith* court's method of charging the state with the task of devising a constitutionally sound remedial program as "an illustration of the proper procedure" for formulating remedies to a state prison system's constitutional violations. 518 U.S. 343, 362-63 (1996) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)). Notably, the *Bounds* court's "proper procedure" did not involve simply rubberstamping the state's remedial proposal. Rather, the court considered

objections raised by prisoners and made changes to the plan. *Id*.; *Bounds*, 430 U.S. at 820 & n. 6. In *Bounds*, the Court held that the District Court's order that prison officials develop a plan, subject to the court's approval, for remedying constitutionally inadequate access to the courts for prisoners in North Carolina prisons properly allowed officials to exercise their discretion. *Bounds*, 430 U.S. at 818-19, 832.

Other courts have followed the *Bounds* procedure in system-wide prison conditions cases. *E.g*., *Skinner v. Uphoff*, 234 F.Supp.2d 1208, 1217-18 (D. Wyo. 2002); *Madrid v. Gomez*, 889 F.Supp. 1146, 1280-82 (N.D. Cal. 1995) (finding that "the participation of counsel for both parties, as well as a Special Master experienced in prison administration, will be essential to the formulation of a remedy that is both effective and narrowly tailored."); *see also Henderson v. Thomas*, 913 F.Supp.2d 1267, 1317-18 (M.D. Ala. 2012) (affording "defendants an opportunity to propose appropriate relief to the court and . . . includ[ing] time for both sides to meet and attempt to agree upon relief," which resulted in a remedial settlement agreement). In *Coleman v. Wilson*, after finding that California's prisons were providing constitutionally inadequate mental health care, the district court: ordered "development and implementation of a series of remedial plans within specified time constraints"; appointed a special master to perform the "formidable task" of monitoring compliance with court-ordered injunctive relief; and explained

that remedial time frames would be ordered after consideration of the views of the special master and court-appointed experts. 912 F.Supp. 1282, 1323-24 (E.D. Cal. 1995); *see also Plata*, 563 U.S. at 507-08 (2011) (describing the procedural history of *Plata*, including the appointment of a receiver "to oversee remedial efforts" after the state failed to comply with a stipulated remedial injunction).

So far, this Court has followed the *Bounds* procedure exactly by requiring Defendants to submit a proposed plan and allowing Plaintiffs the opportunity to respond to it. The additional remedial requirements proposed by Plaintiffs, if adopted by the Court, will leave the State with substantial flexibility in implementing the remedial order while ensuring that ongoing constitutional violations are fully corrected. *See Plata*, 563 U.S. at 532-33.

This Court is well within the requirements in *Lewis v. Casey* for balancing its role as "warden of the Constitution" with the State's prerogative to run its own prison system. Doc. 1011 at 197-98. The Court will not unduly intrude on the State's operation of its prisons if it finds that Defendants' proposed remedial plan does not do enough to correct the staffing policies and practices found by the Court to lead to the violation of Plaintiffs' Eighth Amendment rights.

II. DEFENDANTS' PROPOSAL LACKS SEVERAL PROCEDURAL ASPECTS OF AN ADEQUATE REMEDY

Defendants' proposal includes a variety of provisions that would weaken the relief that is so badly needed in this case. Contrary to their assertions, a monitor is

needed. Further, any disputes should be resolved by this Court. Finally, the Defendants must be ordered to fully comply with whatever remedial relief the Court orders, regardless of whether the Alabama legislature appropriates funding to address the constitutional violations.

A. The Court Should Appoint Security and Mental Health Monitors

The Court should appoint monitors to ensure that Defendants are carrying out the remedies it approves. Monitors provide the evidence of defendants' efforts and results in addressing constitutional violations. *See, e.g., Bobby M v. Chiles*, 907 F. Supp. 368, 370 (N.D. Fla. 1995). In so doing, they can help the court modify the remedial orders and narrow the relief as defendants come into compliance. *See id*. at n.4 (finding that one of two facilities had been brought into constitutional compliance, based in large part on the monitoring reports). Monitors can also provide the evidence of where a defendant is not making the progress necessary. *Id*. at n.1 (finding that the other facility had not been brought into compliance, again based on monitoring reports). Monitors "independently verify[] representations [from defendants] regarding progress toward compliance, and examining supporting documentation," helping the defendant move reach compliance and the court evaluate the progress. *Jones v. Gusman*, 296 F.R.D. 416, 426 at n. 43 (E.D. La. 2013); *see also Jones v. Gusman*, No. CV 12-859, 2015 WL

7458605, at *1 (E.D. La. Nov. 24, 2015) (describing monitor Dr. Ray Patterson's role in the Mental Health Working Group's planning).

All too frequently in cases involving systemic violations, departments of corrections fail to comply with courts' orders, and monitors do the work of documenting noncompliance. *See, e.g.*, *Coleman v. Brown*, 938 F.Supp.2d 955, 989 (E.D. Cal 2013) (denying motion to terminate and noting that seventeen years after the original liability finding, "[s]ystemic failures persist," and "based on defendants' conduct to date, the court cannot rely on their averments of good faith as a basis for granting termination."); *Morales Feliciano v. Rossello Gonzalez*, 13 F. Supp. 2d 151, 156–57 (D.P.R. 1998) (finding continued violations, relying on a 1990 report by the Court Monitor); *Handberry v. Thompson*, No. 96 Civ. 6161, 2015 WL 10570793 at *12 (S.D.N.Y. Dec. 2, 2015) (appointing a monitor to assess compliance due to continuing violations, after years of the defendants' failure to address such violations).

1. Defendants' conduct in this litigation demonstrates the need for monitors with a robust mandate.

As more fully discussed in Plaintiffs' Motion for Expedited Discovery, Doc. 1397, Defendants here have already repeatedly shown that their assurances of good faith efforts and progress cannot be accepted at face value. Defendants' insist that they have "implemented a number of measures" since the time of the liability trial,

but they have made similar assertions in the past. *See* Doc. 1397 at 3-8 (documenting the lack of evidence supporting defendants' claim that they have "already developed a series of action items"). Unfortunately, experience shows that such assertions cannot suffice in themselves. *Morales Feliciano v. Romero Barcelo*, 672 F. Supp. 591, 594 (D.P.R. 1986) ("[D]efendants have all too frequently offered the appearance of compliance with its decree as a substitute for obedience, … and vast sums of money, whose expenditure has been repeatedly proffered to the Court as evidence of reformation, have been wasted without bringing about any substantial and enduring change in the reality of daily life in [the defendants'] prisons."). Appointing an outside monitor is the only feasible way to ensure that Defendants remedy the violations found in the Court's liability opinion.

As Defendants point out, "this Court (like all courts) lacks expertise in the administration and operation of a prison system." Docket No. 1374 at page 29. The same is true of the lawyers. Courts and lawyers are not in a position to analyze or to accept or adequately question the selective data submitted by a department of corrections without the assistance of monitors who are experts in the relevant fields. Defendants' repeatedly debunked assurances that they have implemented some process to address constitutional violations lend strong support

the notion that a court appointed monitor is necessary to ensure compliance. Doc. 1397 at 10-12.

2. Defendants' "Reservation of Rights" in their proposal for a remedial plan is yet another indication of the need for robust monitoring.

In a textbook case of shutting the barn door after the horses have all gone, Defendants insist in their submission that "nothing in this Plan shall be construed as an admission of any kind by the State that the [ADOCs'] current or historical staffing in any area (including correctional, medical, mental health, or dental staffing) is unconstitutional or deficient in any way." Doc. 1374 at 1, fn. 1. The Defendants themselves admitted in their trial testimony that both mental health and correctional staffing levels were grossly inadequate, and their own experts and other witnesses they presented agreed.

This Court found, based largely on undisputed evidence *from Defendants and their witnesses*, that the inadequacies it found, "alone and in combination, subject mentally ill prisoners to *actual harm* and a substantial risk of serious harm -- including worsening of symptoms, increased isolation, continued pain and suffering, self-harm and suicide." Doc. 1285 at 45-46. Based again on evidence largely from the Defendants, Court found "systemic and gross deficiencies arising from understaffing have persisted and effectively denied prisoners access to adequate medical care." Doc. 1285 at 262, n. 81.

The actual harms, and substantial risks of serious harm, found by the Court were largely based not on disputed testimony by Plaintiffs and their experts, but on *undisputed* facts, and on the admissions of Defendants and their own expert witnesses. Just with regard to the staffing shortages, these undisputed facts included (among others):

- Defendant Naglich and MHM Program Director Houser agreed that the staffing shortages, combined with persistent and significant overcrowding, contribute to serious systemic deficiencies in the delivery of mental health care. Doc. 1285 at 17.

- "ADOC officials admitted on the stand that they have done little to nothing to fix problems on the ground, despite their knowledge that those problems may be putting lives at risk." Doc. 1285 at 21.

- Plaintiff Jamie Wallace suffered actual harm from lack of staffing. He did not receive the out of cell treatment and close monitoring while in his cell that was prescribed by his treating psychiatrist due to the lack of correctional officers to make it available. After being left alone in an isolated cell, he hung himself 10 days after he testified. Doc. 1285 at 23.

- Defendant Naglich agreed that some of the inadequacies "were problems so significant that they must be fixed as soon as possible because lives are at risk." Doc. 1285 at 44-45.

- "Experts from both sides opined that ADOC does not have a sufficient number of mental-health staff for a system of its size. Dr. Patterson, the defense expert, concluded . . . that ADOC's mental-health care system is significantly understaffed." Doc. 1285 at 56.

- Defendant Naglich admitted that MHM was consistently and significantly understaffed at least since 2013. Doc. 1285 at 59, 251.

- "Witness after witness, *including both defendants*, testified that a significant shortage of correctional officers has been one of the biggest obstacles to providing mental-health care in ADOC." Doc. 1285 at 60 (emphasis added).

- Based on the testimony of defense expert Ayers as well as numerous MHM personnel, the Court found that the "correctional staffing level falls intolerably short of providing adequate care to prisoners who need to be escorted to their mental-health appointments." Doc. 1285 at 68.

- Defendant Naglich admitted that MHM repeatedly informed ADOC, since 2010, that lack of sufficient correctional staffing was "seriously impacting its ability to provide care." Doc. 1285 at 251.

- Defendant Naglich admitted that she repeated complained, since 2013, "about the chronic shortage of correctional officers interfering with mental health care." Doc. 1285 at 252.

Defendants can, of course, appeal the Court's Phase 2A Liability Order. Arguing in their proposal for a remedial plan over whether they have "admitted" liability merely shows that nothing will be accomplished without a great deal of oversight by monitors, by the Plaintiffs, and ultimately by the Court.

3. Plaintiffs' Proposal for a Monitor and Monitoring Structure

Plaintiffs propose that the Court appoint a Security Monitor and a Mental Health Monitor (collectively the "Monitors"[17]). These monitors will be able to review documents Defendants produce. More importantly, they will be able to visit the facilities, speak with staff and prisoners, review logs and documents on site, or through productions as needed, and determine whether

[17] As other subjects from the Phase 2A Liability Order become the subject of remedial orders, the amount of mental health monitoring necessary will likely become more than one person can reasonably do. It will likely be necessary and more cost effective to assemble a team of people to work with the primary Mental Health Monitor, who should be a psychiatrist. The team should including at least professionals with mental health nursing and counseling expertise. As used herein, "Mental Health Monitor" and "Monitors" include all mental health professionals working under the direction of the primary mental health monitor.

- the ordered staffing levels have been met;
- the actual staffing levels (whether or not the ordered level has been met) are sufficient to meet the needs of the facilities and the prisoner population;
- there is progress toward remedying the constitutional violations; and
- there are any obstacles in reaching constitutional compliance.

Moreover, because other aspects of the liability order will be subject to remedial orders that will require some degree of monitoring and the issues will be intertwined, Plaintiffs propose that the Court appoint monitors at this point who will be monitors for all issue areas for the Phase 2A Remedial Phase.

Plaintiffs propose Eldon Vail as the Security Monitor for the Phase 2A Remedial Phase. Mr. Vail has already been found to be an expert by this Court and has extensive experience evaluating correctional systems. *See* Ex. 5 (Eldon Vail curriculum vitae).

Plaintiffs propose Dr. Pablo Stewart as the Mental Health Monitor for the Phase 2A Remedial Phase. Dr. Stewart is a psychiatrist who has served as an expert in numerous cases, including *Parsons v. Ryan*, *Coleman v. Brown*, and *Graves v. Arpaio*. He evaluated evaluate mental health services to segregated prisoners in the federal prison system for the Federal Bureau of Prisons. He is

currently serving as the court-appointed monitor in Illinois in *Rasho v. Baldwin.* *See* Ex. 6 (Dr. Pablo Stewart curriculum vitae).[18]

Plaintiffs propose the following structure for monitoring[19]:

1) Overview: The Monitors shall conduct the following different types of Evaluations:

   a. Facility Evaluation: A facility evaluation will monitor all of the relevant aspects of one major facility.

   b. Focus Evaluation: A focus evaluation shall constitute the evaluation of one particular process and/or procedure, i.e. suicide prevention, segregation practices, quality assurance, intake and the like, at a series of facilities.

   c. Headquarters Evaluation: A headquarters evaluation will monitor all of the relevant aspects of the management of the ADOC.

   d. Facility, Focus and Headquarter Evaluations shall begin on no later than April 1, 2018, and shall continue pursuant to the process outlined below until the ADOC and each major facility achieves compliance with the remedial order and the requirements of the Eighth Amendment of the Constitution.

[18] Dr. Stewart has confirmed that he is willing and available to serve as the Mental Health Monitor.

[19] There is a relatively small number of professionals with experience monitoring remedial phases of prison conditions cases. Although Plaintiffs propose the following structure, the actual Monitors, once selected, should have the opportunity to review and if necessary revise the monitoring structure.

2) Evaluation Periods:

a. Monitoring shall take place in evaluation periods lasting three (3) months each, with a three (3) month period in between each evaluation period for the writing and submission of a report.

b. During each evaluation period, the Monitors shall conduct up to 6 Facility Evaluations, up to 3 Focus Evaluations and up to 1 Headquarters Evaluation.

c. The Monitors shall provide the parties with the dates and locations of each of the Facility and Headquarters Evaluations at least fourteen (14) days prior to the each evaluation, and shall provide the dates for the Focus Evaluations at least three (3) days prior to each evaluations.

3) Evaluation Guidelines:

a. Two (2) attorneys from Plaintiffs and Defendants may observe each Evaluation. If a Monitor finds that the number of attorneys is negatively affecting the monitoring process, the Monitor can request that the number of attorneys be limited to one per side.

b. The Monitors may conduct interviews of inmates, ADOC personnel or any ADOC vendor confidentially and outside of the presence of counsel.

c. The Monitors shall not provide any medical, mental health, legal or other advice of any kind during the course of any interaction with any inmate. If, during the course of an Evaluation, they come across a person they consider

to be in need of urgent attention, they can inform the appropriate staff during the Evaluation.

d. The Monitors shall identify any inmate, officer or other prison personnel referenced in any Evaluation Report using a confidential identifier which shall identify the individual in a confidential key attached to each Evaluation Report. No Evaluation Report shall include statements, facts or allegations pertaining to any individual without identification of the individual in the confidential key.

e. At least fourteen (14) days before any Facility Evaluation, or three (3) days before any Focus Evaluation, the Monitors shall notify ADOC of any and all documents that they may wish to review upon their arrival at any of the selected facilities. To the extent that the Monitors wishes to review any additional documents during the course of the Evaluation, the ADOC will provide sufficient staff to obtain the requested documents in a reasonable timeframe.

f. The Monitors can request copies of any documents reviewed or requested prior to or during an Evaluation. Copies shall be provided to the Monitors within one week of the request.

g. All documents provided to the Monitors will simultaneously be provided to Plaintiffs' counsel.

h. The Monitors can spend as many days or hours as they find necessary in a facility to accomplish its evaluation.

i. The Monitors shall be entitled to review any process or procedure which is the subject of, or, in the judgment of the Monitor, affects or is related to any of the terms and conditions of the remedial order or the relevant requirements of the Eighth Amendment.

4) Reporting

a. Each Evaluation shall conclude with an exit conference to representatives of ADOC, ADOC's vendor(s) and Plaintiffs. The statements made during the course of the exit conference shall be confidential until the release of a formal Evaluation report.

b. The Monitors shall issue a preliminary written report to the parties within thirty (30) days of the end of each Evaluation Period setting forth their findings during the Evaluation. Any tools utilized in such Evaluation shall be included as attachments to the Evaluation report.

c. The Parties shall have twenty-one (21) days to pose questions or make any objections or comments to the Monitors.

d. The Monitors shall issue its written report to the parties and the Court within fourteen (14) days of the end of each comment or objection period, setting

forth their findings during the Evaluation. Any tools utilized in such Evaluation shall be included as attachments to the Evaluation report.

e. To the extent that the Monitors find any instances of non-compliance, they shall make recommendations and assist with any efforts and/or evaluation of additional measures that shall be undertaken to resolve the instances of non-compliance.

5) Mental Health Reporting Requirements: ADOC shall produce to the Mental Health Monitor any reports of suicides or attempts sufficiently serious that the individual is taken to an outside hospital within 24 hours of learning of the occurrence, and shall subsequently produce documentation related to the review of the individual's care prior to and after the occurrence within three days of the review. Also, on the 20th day of each month during the Phase 2A remedial phase, the ADOC shall electronically produce to the Mental Health Monitor and Plaintiffs' counsel the following information for the prior month:

- total numbers of persons on the caseload at each mental health code at each facility;
- numbers of persons on the mental health caseload in segregation, their mental health codes, and duration of their stay in segregation and the location;
- numbers of persons on the mental health caseload in a crisis cell, their mental health codes, the duration in hours of their stay on each of acute suicide watch, non-acute suicide watch, and mental health observation, and in the crisis cell in total, broken out by facility;

- total number of persons on medications at each mental health code at each facility;
- total number of mental health intake screenings and results;
- total number of mental health evaluations, and results;
- numbers of persons on involuntary medication, by facility and mental health code;
- numbers of involuntary medication hearings, by facility'
- all Multidisciplinary Meeting Minutes;
- all mental health CQI Meeting Minutes;
- all mental health Major Occurrence or Sentinel Event reviews;
- all mental health audits and Corrective Action Plans;
- mental health staffing reports, including hours worked and vacancies
- all mental health policy or mission changes.

6) Correctional Reporting Requirements: On the 20th day of each month during the Phase 2A remedial phase, the ADOC shall electronically produce to the Security Monitor and Plaintiffs' counsel the following information and documentation for the prior month:

- All documents provided to consultants conducting staffing analyses;
- Updated staffing analysis (if any);
- Number of beds per housing unit;
- Daily shift rosters by facility and by each unit within a facility;
- Post plans by facility, and any changes to post plans;
- Leave requests denied;

- Policies, procedures and ARs related to recruiting and retention of security staff, any changes thereto, and related memoranda;
- All incident reports;
- Reports of security staff training related to any mental health activity or issue; and
- Security audits.

Every three months, the monthly production shall also include the following documentation for the prior quarter:

- Quarterly correctional staffing data, by facility and position title, including all security staff positions, both raw numbers and FTEs (to be produced in every third monthly production);
- Quarterly data reflecting terminations in security staff positions, by facility and position title and reason for termination;
- Quarterly report of vacant security staff positions, by facility and position title, including positions on each shift that are not being filled that would be filled if they had full staffing
- Quarterly report of security staff specifically assigned to mental health units or activities, by facility and by unit; and
- Quarterly census of inmates by facility and by each unit within a facility, including security level of each unit.

7) OHS Evaluation Participation: To ensure the eventual transition of monitoring the provision of mental health services from the Mental Health Monitor to the mental health care personnel within OHS, OHS personnel shall assist and/or participate in the conduct of the Evaluations in the following manner:

a. First Stage (lasting at least two Evaluation Periods): Mental Health Monitor conducts all Evaluations with OHS personnel present. OHS does not participate in or attend confidential interviews, but will have an opportunity to discuss the interviews with the Mental Health Monitor.

b. Second Stage (commencing at the determination of the Mental Health Monitor): Mental Health Monitor conducts all Evaluations with OHS personnel assisting under direction of Monitor. One member of OHS attends interviews, but does not participate. OHS will have an opportunity to discuss the interviews with the Mental Health Monitor. OHS will prepare its own report by no later than twenty-eight (28) days after the end of the Evaluation Period. The OHS report will be submitted to the Mental Health Monitor and the parties.

c. Third Stage (commencing when the Mental Health Monitor determines that OHS is capable of taking the lead on the monitoring process): OHS conducts all Evaluations with the Mental Health Monitor overseeing. OHS conducts interviews with one member of Mental Health Monitor attending and, if needed in the judgment of the Monitor, participating. The OHS prepares the preliminary report, about which the Parties can object, comment or ask questions. The OHS prepares a final report, which is submitted to the Court and the parties, with commentary from the Mental Health Monitor. If,

during the Third Stage of monitoring, the Mental Health Monitor determines that OHS is not adequately recognizing remaining compliance issues, the Mental Health Monitor can return the monitoring process to the Second Stage.

8) ADOC Operations Evaluation Participation: To ensure the eventual transition of monitoring the correctional staff support for mental health services from the Security Monitor to the ADOC Operations personnel, ADOC Operations personnel shall assist and/or participate in the conduct of the Evaluations in the following manner:

   a. First Stage (lasting at least two Evaluation Periods): Security Monitor conducts all Evaluations with ADOC Operations personnel present. ADOC Operations does not participate in or attend confidential interviews, but will have an opportunity to discuss the interviews with the Security Monitor.

   b. Second Stage (commencing at the determination of the Security Monitor): Security Monitor conducts all Evaluations with ADOC Operations personnel assisting under direction of Monitor. One member of ADOC Operations attends interviews, but does not participate. ADOC Operations will have an opportunity to discuss the interviews with the Security Monitor. ADOC Operations will prepare its own report by no later than twenty-eight (28)

days after the end of the Evaluation Period. The ADOC Operations report will be submitted to the Security Monitor and the parties.

c. Third Stage (commencing when the Security Monitor determines that ADOC Operations is capable of taking the lead on the monitoring process): ADOC Operations conducts all Evaluations with the Security Monitor overseeing. ADOC Operations conducts interviews with one member of Security Monitor attending and, if needed in the judgment of the Monitor member, participating. ADOC Operations prepares the preliminary report, about which the Parties can object, comment or ask questions. ADOC Operations prepares a final report, which is submitted to the Court and the parties, with commentary from the Security Monitor. If, during the Third Stage of monitoring, the Security Monitor determines that ADOC Operations is not adequately recognizing remaining compliance issues, the Security Monitor can return the monitoring process to the Second Stage.

9) Monitoring fees: Defendants shall pay the Monitors the fees reasonably incurred in the process of monitoring, including, but not limited to: travel, inspections, document review, and report writing. The Monitors' shall be paid at the hourly rates they are usually paid in cases of this nature. The Monitors shall submit an invoice for their fees to Defendants on a monthly basis or

quarterly basis, as determined by the Monitor, and Defendants shall pay it within thirty (30) days. an invoice for their fees

B. Disputes Should Be Resolved by the Court.

This Court has jurisdiction over this matter. This Court will be issuing the order or orders regarding remedial measures. In two years or thereafter, when Defendants seek to terminate any remedial orders, the motion will come to this Court. "A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order." *Plata*, 563 U.S. at 542 (2011). Therefore, if there are disputes in the interim that cannot be resolved among the Monitor and Parties, even with the assistance of a mediator, the disputes should be brought to this Court for resolution. The decisions that will be made in the course of the remedial process will be some of the most impactful decisions made in the case; they will have direct effects on the care or suffering of the prisoner population, the staffing of the prisons, and the budget of the ADOC. Such decisions are properly left in the hands of the District Judge.

Thus, Plaintiffs propose a framework similar to that of the Defendants, except to the extent Defendants propose that Judge Ott's role in the case change

from mediator to special master.[20] Plaintiffs propose as follows:

> If a dispute arises concerning or relating to the recommendations submitted by Defendants' correctional and mental health consultants or by the Monitor, implementation of those recommendations, or compliance with the remedial plan, the parties should in good faith make efforts to resolve the dispute through mediation. The Honorable Judge Ott will serve as the mediator.
>
> If the parties are unable to resolve the dispute in mediation, within fourteen (14) days (or another date and time mutually agreeable to the parties) of mediation ending, the party raising the dispute shall submit a notice of dispute to the Court, identifying the dispute, explaining in detail the party's position as to the recommendation, implementation, or compliance-related dispute, and describing in detail the relief sought. The responding party shall have fourteen (14) days (or another date and time mutually agreeable to the parties), explaining in detail their position as to the recommendation, implementation, or compliance related dispute and the relief sought by

[20] Should the Court determine that a special master is needed, the PLRA sets out clear procedures for selecting and appointing a special master. 18 U.S.C. § 3626(f). Defendants' unilateral proposal that Judge Ott be made the special master does not comply with the PLRA requirements.

the party raising the dispute. ADOC shall comply with the decision of the Court within the time designated by the Court.

If the dispute arises more than two years after the date of the remedial order, and Defendants believe, at the time of the dispute, that the disputes relates to a matter that is no longer an ongoing constitutional violation, Defendants can bring a motion to terminate as it relates to the issue in dispute. 18 U.S.C.A. § 3626. Once liability has been found and a remedial order has been entered, the burden of proof is on the party seeking to change the remedy. *Id.; see also Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992) (the burden is on the party seeking to alter an injunction); *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (same, in case governed by the PLRA). If Defendants seek to terminate the remedial order, they must prove that there is no longer an on-going violation; they cannot simply require plaintiffs to prove the existence of an ongoing violation any time there is a dispute between the parties.

C. The Remedial Plan Cannot Be Contingent upon Legislative Approval and Funding

Defendants' remedial plan cannot be contingent upon approval and funding from the legislature. Defendants, like all officials of all departments of corrections in the country, must comply with the United States Constitution. They must, therefore, resolve the constitutional violations that have been found. Conditioning

the remedial plan upon legislative funding may deny, and certainly delays, crucial relief to the mentally ill plaintiff class and unnecessarily subjects them to an ongoing serious risk of harm.

Defendants propose a remedial plan that is "expressly contingent upon receipt of adequate funds from the Alabama legislature." Doc. 1374 at 33. They refuse to implement any portion of the proposed plan unless and until they have such funding. *Id*. (asserting that "ADOC cannot begin performance of any such requirements until submission and approval of budgetary requests by the Alabama legislature and Governor"). Defendants' refusal to remedy constitutional violations without specialized funding ignores the findings of this Court and amounts to unnecessary delay.

1. Defendants' funding contingency ignores the prior findings of the Court

The funding contingency in Defendants' proposal ignores the Court's order for immediate action and its finding that Defendants are not immune from liability merely because they lack the funds to remedy constitutional violations. In its Liability Opinion and Order as to Phase 2A Eighth Amendment Claim, this Court explicitly stated that the need for relief in this matter is "immediate." Doc. 1285 at 302. Given ADOC's "horrendously inadequate" mental health care, the court emphasized that the need for constitutionally adequate care is both severe and urgent. *Id*. at 299. The Court specifically found that "persistent and severe

shortages of mental-health staff and correctional staff" are two of the overarching issues contributing to the inadequacy of mental health care within ADOC. *Id*. at 301. In its Remedy Scheduling Order, the Court again stressed the "severity and urgency" of the need for adequate mental health care and made clear that the problem of understaffing "must be fully remedied before almost anything else can be fully remedied." Doc. 1357 at 3-5. The Court recognized that fully addressing the problem will take time, but insisted that the necessity of time "further supports the need to move forward immediately." *Id*. at 5.

In addition, throughout this litigation the Court has repeatedly made clear that lack of funds is not an excuse for Defendants' failure to provide constitutionally adequate care. *See* Doc. 1285 at 299 ("In sum, defendants are not immunized from liability arising from ongoing constitutional violations simply because they lack financial resources or the authority to mandate certain specific measures that might remedy the violation.") and Doc. 1011 at 82 ("It is clear that at least in official-capacity suits like this one, lack of funds is not a justification for substandard treatment."). Likewise, lack of funds is not an excuse for failing to remedy a constitutional violation once it is found. *Plata*, 563 U.S. at 528 (recognizing that the state's inability to pay for new prison buildings, the state's preferred remedy for the failure to provide medical and mental health care in the prisons, did not excuse it from its obligation to remedy the violations).

2. Defendants' funding contingency unnecessarily delays relief to Plaintiffs

The need for relief in this matter is urgent. Defendants' proposal to condition such relief upon specialized funding is unnecessary and creates undue delay. For years, the Plaintiffs have suffered from the inadequate mental health care and systemic deficiencies that create an ongoing substantial risk of serious harm within ADOC. Similarly, the need to remedy these deficiencies has been evident to Defendants for many years. Since at least 2013, Defendants have been aware of the need for more correctional and mental health staff. Associate Commissioner Naglich complained to Commissioner Dunn, Commissioner Thomas, and Associate Commissioner Culliver that ADOC needs more correctional staff to assist with the delivery of mental health care. Naglich Trial Tr., Vol. 2, 174:6-175:3; Houser Trial Tr., Vol. 2, 150:8-151:22; Culliver Trial Tr., 64:19-67:10; Dunn Trial Tr., 27:16-28:23. Each month, Defendants also publish monthly reports which have long revealed a significant need for more correctional staff. Jt. Tr. Ex. 463, Expert Report of Eldon Vail, at 37-41. Teresa Houser also complained about the need for more mental health staff and repeatedly requested additional staff which she was denied. Houser Trial Tr., Vol. 1, at 66:4-68:14. Thus, the need for more staff is not a surprise to Defendants. They have long known that they need more staff, but have simply delayed addressing the problem. They now seek even further delay.

Plaintiffs recognize that recruiting and retaining adequate staff will take time and funding. However, Defendants have the ability and authority to implement some measures without legislative approval. For example, Defendants already have the authority to hire some correctional staff notwithstanding the results of a staffing analysis. ADOC does not need legislative approval to fill their existing authorized staffing levels. Filling these positions will require funding. However, it does not require that ADOC wait until the next budget is approved. According to ADOC's Chief of Staff Steve Brown, ADOC receives a lump sum of funding each year, including funds requested because ADOC "need[s] more officers." Brown Trial Tr., at 17:14-18:12. The budget that ADOC submits to the legislature takes into account needs such as raises, more staffing, and construction projects. *Id.* ADOC has the authority and discretion to allocate that funding as it chooses. *Id*. Similarly, Defendants have issued an RFP for mental health care with increased staff after this Court's Liability Order. Doc. 1374-5. Defendants made the decisions about the staffing levels in the RFP. The contract will be executed prior to the legislative session, and may well be implemented prior to passage of a budget. *Id*. at 3-4; Doc. 1397-5. Beyond being contrary to law, Defendants' claim that they cannot begin to implement their proposal until after the legislature approves of funding is contrary to the facts on the ground.

3. If the legislature does not approve funding for the plan, Defendants have presented no alternate to remedy the constitutional violations

Defendants condition their plan on legislative approval of funding. This begs the question: What happens if the legislature does not approve? Because there will still need to be a remedy for the constitutional violations, a new plan will have to be crafted – but, by Defendants' reasoning, if it costs money it will require legislative approval, resulting in yet another year going by before any remedy can be considered, and possibly approved.

Defendants have not indicated how they will remedy the horrendously inadequate mental health system currently leading to pain, suffering and sometimes death, if the legislature does not approve the funding for their plan. They cannot simply continue to violate the Eighth Amendment and blame it on the legislature. *See Plata*, 563 U.S. at 528.

Given the severe and urgent need to remedy the inadequate mental health care within ADOC, the remedial plan cannot be conditioned upon legislative approval and funding. Plaintiffs applaud Defendants' plan to fully remedy the problem of understaffing within 2 years. Doc. 1374 at 12.[21] However, a proposal that allows Defendants to delay implementation, "depart from, or terminate" the plan based solely upon the need for additional funding allows the harm to the men

[21] As noted above, however, the remedial order cannot automatically terminate after two years. *See supra*, §III.B.

and women in the ADOC to continue, perhaps indefinitely. *Id*. at 33. Such a plan ignores this Court's findings and the urgent need to provide relief to the plaintiff class.

D. Defendants Should Be Required to Reach Compliance with the Remedial Order

When this Court enters a remedial order on understaffing in the ADOC, it should expect that the ADOC will fully comply with the order. At the point when Defendants believe they are in compliance and more than two years have passed, they should be able to demonstrate to the Court that they are "in substantial compliance with all constitutional, federal law, and decretal requirements." *Bobby M*, 907 F. Supp. at 370. The court in *Bobby M* found substantial compliance where "reports of the court-appointed monitors reveal that eight years of diligent effort [by defendants] have resulted in substantial advances towards the goal of constitutionality. The goal of constitutionality has been met." *Id*. at 370 n.4. To be in substantial compliance, the purpose of the order must have been achieved. *R.C. ex rel. Alabama Disabilities Advocacy Program v. Walley*, 390 F. Supp. 2d 1030, 1043 (M.D. Ala. 2005). Substantial compliance should be determined at the

time a party seeks to terminate a remedial order; it is only then that the court can determine whether the purpose of the order has indeed been achieved.[22]

Defendants nonetheless propose that it be determined in advance that if they accomplish just 75% of whatever they are ordered to do, they should be considered to be in substantial compliance and the remedial order should be terminated. Doc. 1374 at 23 and n.19. But the question for the Court would remain: Have the constitutional violations been remedied? Seventy-five percent compliance with the constitution cannot be good enough.[23]

[22] In *Parsons v. Ryan*, the court examined the effect of a definition of substantial compliance in a stipulated settlement. There, where substantial compliance was defined as, variously, 80% and 85%, the court explained:

> [T]he Court must turn to the Stipulation's intent. *See, e.g.*, Williston on Contracts 4th, §§ 32:7, 32:9.
>
> As the Court has repeatedly explained, the Court understands that the Stipulation requires 100% compliance with the performance measures and that the graduated compliance rates are the trigger for the imposition of a remediation plan. Put another way, the Court understands that the Stipulation requires 100% compliance and, therefore, its Order on Outside Providers requires Defendants to pursue 100% compliance.

Parsons v. Ryan, No. CV-12-0601-PHX-DKD, 2017 WL 476598, at *2 (D. Ariz. Feb. 6, 2017), under appeal on other grounds.

[23] Indeed, in *Coleman*, the court noted that significant but incomplete progress indicated that the remedy was working and should allowed to continue. 922 F.Supp.2d 1004, 1034 (N.D. Cal. 2013) (denying motion to vacate on the grounds of significant compliance, and noting that "the effectiveness of the order thus far is not an argument for vacating it, but rather an argument for keeping it in effect and continuing to make progress toward reaching its ultimate goal").

III. THE PLRA ALLOWS THE COURT TO CRAFT A REMEDY OF SCOPE AND DURATION NECESSARY TO ADDRESS THE CONSTITUTIONAL VIOLATIONS

Defendants grossly overstate the limitations imposed by the PLRA. The PLRA does not prevent the Court from ordering relief that will be effective. Nor does it give Defendants the ability to tread water for two years and then escape from judicial oversight.

A. The Needs-Narrowness-Intrusiveness Standard Set Out In The PLRA Does Not Prevent The Court From Crafting Injunctive Relief For The Constitutional Violations Found

In crafting remedies for constitutional violations in prisons, courts are guided by the Prison Litigation Reform Act, which requires that prospective relief "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C.A. § 3626(a)(1)(A). The needs-narrowness-intrusiveness requirement is intended to guide, not strangle, the remedial process. *See, e.g.*, *Gilmore v. People of the State of California*, 220 F.3d 987, 1007 (9th Cir. 2000) (noting that the PLRA "does not eviscerate a district court's equitable discretion and thereby prescribe the rules of decision."). It requires a "fit between the remedy's ends and the means chosen to accomplish those ends." *Plata*, 563 U.S. at 531 (2011). Narrowness and intent to remedy the violations found by the court are the touchstones of a proper remedial plan.

As Defendants argue, 18 U.S.C. § 3626(a)(1)(A) requires the Court to "individually assess each requirement imposed by the relief" to determine whether it meets the needs-narrowness-intrusiveness standard. Doc. 1374 at 32. This does not mean, however, that each provision in a remedial plan must be the resolution for a violation. Extensive and systemic inadequacies, such as those found here, require extensive and systemic relief. In a systemic case with wide-ranging, intertwined constitutional violations, each requirement imposed by a Court relief must contribute to remedying the violations found, and must do so in a way that satisfies the needs-narrowness-intrusiveness standard. Here, the final remedial plan will be reticulated: Each remedial provision will likely affect multiple systemic deficiencies but be insufficient, standing alone, to remedy any particular one of the grave and intertwined inadequacies of defendants' mental healthcare system. "Remedying unconstitutional conditions of confinement is a necessarily aggregate endeavor, composed of multiple events that work together to redress violations of the law." *Jones*, 296 F.R.D. at 431 (citing *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010)). As explained by the Supreme Court in *Plata*,

> constitutional violations in conditions of confinement are rarely susceptible of simple or straightforward solutions. In addition to overcrowding the failure of California's prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures. The *Plata*

> District Judge, in his order appointing the Receiver, compared the problem to "a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern."

Plata, 563 U.S. at 525. Particularly where relief is required to be "narrow and minimally intrusive[,] courts often must order defendants to make changes in several different areas of policy and procedure in order to avoid interjecting themselves too far into any one particular area of prison administration." *Armstrong*, 622 F.3d at 1070. In such circumstances, "the necessity of any individual provision cannot be evaluated in isolation." *Id*. at 1071.

No subject better demonstrates the interconnected nature of remedial provisions than the subject at issue in the instant briefing – staffing levels. In the ADOC, correctional and mental health understaffing (both alone and in combination) lead to a myriad of constitutional violations: failure to identify persons with mental illness; failure to create treatment plans; failure to monitor or provide treatment to persons in segregation; failure to provide treatment to persons on the outpatient caseload; failure to provide adequate treatment in the mental health units; failure to adequately observe individuals on suicide watch or conduct suicide risk assessments. A remedy addressing staffing levels must consider how the remedy affects each of the areas. Further, as remedies on other areas are ordered, the remedy regarding staffing levels will have to be examined, and

possibly amended. For example, any remedial orders regarding segregation are likely to affect the necessary levels of correctional and mental health staffing in terms of escorts of segregation prisoners to mental health appointments, monitoring of segregation, and rounds in segregation.[24]

Despite the complex nature of this case and the needed remedial relief, Defendants assert without explanation that to go "any further [than their plan] runs afoul of the PLRA's need-narrowness-intrusiveness requirement." Doc. 1374 at 33. All that Defendants have suggested is that: (1) they conduct a staffing analysis for correctional staff, apparently without room for comment or revision (despite the already identifiable deficiencies), and then implement it, (2) they create a plan for mental health staffing and implement it, (3) there shall be no monitor; and (4) disputes will be resolved by a special master rather than the Court. *See generally* Doc. 1374 at 5- 23. Defendants provide no basis for their assertion that these four general concepts form the outer limits of what is permissible under the PLRA. They do not. Monitors have been appointed in other cases governed by the PLRA. *See, e.g.*, *Jones*, 296 F.R.D. at 426; *Laube v. Campbell*, 333 F. Supp. 2d 1234, 1239 (M.D. Ala. 2004). Monitors and parties have worked to address staffing shortages through new and expansive measures over the course of a remedial plan.

[24] The Court has set a hearing for January 29, 2018 at 10:00 a.m. to address the issue of segregation. Plaintiffs anticipate that minimum correctional and healthcare staffing needs may be adjusted upward after the hearing.

See Ex. 7 (*Jones v. Gusman* 5th Compliance Report) at 7-8. And of course, Courts have ruled on disputes. *See, e.g.*, *Coleman v. Brown*, No. 2:90-CV-0520, 2017 WL 1398828 (E.D. Cal. Apr. 19, 2017).

While the PLRA guides the process for remedying constitutional violations in prisons, it nevertheless operates in tandem with the traditional understanding that "the scope of a district court's equitable [remedial] power … is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *see also Plata*, 563 U.S. at 542 (recognizing courts' "long-established, broad, and flexible" power over the terms of a remedial order). The Court has authority to approve the complex, tailored remedies needed here.

B. The PLRA Does Not Limit The Relief To Two Years

Defendants assert that their "Plan will terminate two (2) years after the Effective Date and, at any time, ADOC may seek to terminate this Plan with the Court consistent with the provisions of the Prison Litigation Reform Act, 18 U.S.C. § 3626." Doc. 1374 at 23 n.20. Defendants are incorrect about the effect of 18 U.S.C. § 3626(b). It does not result in automatic termination at two years. Rather, it allows a defendant to move the Court to terminate the ordered relief only after two years have passed. 18 U.S.C.A. § 3626(b)(1)(A). After that, unless the party seeking to terminate the ordered relief can prove there is no longer an

ongoing violation, the relief continues as long as the "prospective relief remains necessary to correct a current and ongoing violation." *Id*. at § 3626(b)(3); *see also Coleman*, 938 F. Supp. 2d at 960.

Remedying system-wide violations in state prisons unfortunately often takes time. *See*, *e.g.*, *Newman v. Graddick*, 740 F.2d 1513, 1515 n.2 (11th Cir. 1984) (describing the history of the litigation to address the "host of constitutional violations in the Alabama prison system"); *Coleman*, 938 F.Supp.2d at 989 (denying defendants' motion to terminate under § 3626(b) because "Defendants' current mental health bed plan, current mental health staff plan, and sustainable process for referring inmates to necessary inpatient care were at the result of numerous court orders and years of effort."); *Plata v. Schwarzenegger*, No. C01-1351TEH, 2005 WL 2932243, *1-2 (N.D. Cal. May 10, 2005) (issuing an order to show cause as to why a receiver should not be appointed because of "defendants' failure to achieve any substantial progress in bringing the medical care system even close to minimal constitutional standards" and the "highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system."). The remedial plan should remain in effect for as long as it takes Defendants to fix the many constitutional violations this Court has found.

IV. TO ENSURE THE EFFICIENT AND ORDERLY PRESENTATION OF EVIDENCE TO THE COURT, PLAINTIFFS SHOULD BE ALLOWED EXPEDITED DISCOVERY OF THE MATTERS RELEVANT TO DEFENDANTS' PROPOSAL

In their proposal, Defendants make numerous unsubstantiated or apparently false statements about their efforts to date to address understaffing. *See* Doc. 1397 at 3-9. For example, with respect to correctional staffing, Defendants' contend that "ADOC has implemented a number of different measures" since the time of the liability trial. These include the activities of four unidentified staff members who engage in recruiting activities, an unspecified increased recruiting budget and advertising campaigns, increased autonomy for institutions to conduct their own activities, and having engaged consultants to conduct analyses of ADOC policies and procedures. Defendants claim these efforts have produced "significant staffing gains" at some facilities, and assert that ADOC's efforts have proven effective. Doc. 1374 at 7-8. Specifically, Defendants claim to have increased staffing at Ventress and Easterling. *Id*. However, the publicly available information shows otherwise – according to the publicly available information, the staffing at both facilities has gone down. *See* Doc. 1397 at 4-5. As to mental health staffing, Defendants claim to have increased staffing already by about sixty positions, but fail to indicate what one-third of those positions are. Doc. 1374 at 17. Moreover, Defendants state that they have increased the number of positions, but do not actually say how many of those positions have been hired. *Id*.

Defendants have further engaged in a pattern of misleading the Court and Plaintiffs about their actions. Most recently, Defendants' counsel represented to the Court and Plaintiffs at the September 26 status conference that Defendants had not yet determined whether a staffing analysis would even be part of the plan. However, their submission to the Court shows that September 26 was actually the second day that their staffing analysis was underway. Doc. 1374-2 at 10. This mirrors Defendants' representation in trial that they had already implemented a change to the mental health coding system that would prevent persons with serious mental illness from being placed in segregation – a code change that still has not been implemented. *See* Doc. 1397 at 11.

Additionally, Defendants have engaged in a pattern of conduct that suggests they are concealing information. The most recently available statistical reports on Defendants' website, July and August 2017, omit staffing data for the first time since at least 2000. *See* Doc. 1397-3 (ADOC Monthly Statistical Report, July 2017), Ex. 8 (ADOC Monthly Statistical Report, August 2017); *see generally* http://www.doc.al.us/StatReports.aspx. Defendants have also failed to identify the bidders on the Healthcare RFP, despite the obligation to do so under the RFP itself. Doc. 1397 at 9-10. Nor have they announced the company to which they are awarding the contract, although the ADOC website indicates the decision was to be made by October 16. Doc. 1397-5.

Plaintiffs should be afforded the opportunity to conduct discovery on the matters relevant to Defendants' proposed plan. Without discovery, Defendants will be able to conduct a trial by ambush, presenting partial information to which Plaintiffs have no way to respond effectively and timely. Plaintiffs requests that their Motion for Discovery on an Expedited Basis, Doc. 1397, be granted.

CONCLUSION

Defendants proposal is a start toward finding a way to remedy the severe and persistent correctional and mental health understaffing in the ADOC. But it is just a start. It must be fleshed out with details, oversight, and enforceability. Without these crucial adjustments, Defendants' plan will remain nothing more than words and will not result in the ADOC reaching levels of staffing that will allow for the provision of constitutionally adequate mental health care.

Plaintiffs request that the Court order relief consistent with what is outlined herein. Only with a meaningful staffing analysis, mental health staffing sufficient to treat a reasonable caseload, and structures in place to ensure full compliance with the order will the necessary changes be made.

Dated: October 19, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 19th day of October, 2017, electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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