UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

JAC'QUANN (ADMIRE) HARVARD, et al.,	
Plaintiffs,	
v.	Case No.: 4:19-cv-00212-MW-MAF
RICKY D. DIXON, et al.,	
Defendants.	

PLAINTIFFS' OPPOSITION TO MOTION FOR PROTECTIVE ORDER

FDC's use of isolation subjects people to intolerable risk of harm. Plaintiffs contend that FDC, through its officials including the Secretary, have been deliberately indifferent in violation of the Eighth Amendment by refusing to take reasonable measures to remediate this risk. As the examples below demonstrate , former Secretary Jones and current Secretary Dixon[1] have been intimately involved in scrutinizing FDC's use of isolation and its impact on safety and health, considering possibilities for reform to reduce FDC's use of isolation, and making decisions about whether or not to implement such reforms. Plaintiffs' evidence shows that Mr. Jones and Mr. Dixon were the primary and ultimate decisionmakers

[1] During Ms. Jones's tenure as Secretary and until his elevation to Secretary in 2021, Mr. Dixon was the Deputy Secretary of Institutions.

regarding FDC's use of isolation, also referred to as "Restrictive Housing," in recent years. Because Ms. Jones and Mr. Dixon each have personal and unique information regarding the crucial issues of FDC's knowledge of risk of harm from its use of isolation, and the bases for FDC's subsequent actions and inactions with respect to addressing that risk of harm, Plaintiffs have a compelling need to depose each of them in this case.[2]

STATEMENT OF FACTS

Ms. Jones Personally Led Analysis of FDC's Use of Restrictive Housing and Consideration of Reforms

In 2015, then-Secretary Jones directed FDC's participation in a national survey of state prison systems regarding their use of isolation, including the number of people in isolation, the number of people in isolation with serious mental health issues, and the number of people who had been in isolation for at least three months. *See* Exhs. 1 & 2. Ms. Jones designated Mr. Dixon to manage FDC's response to the survey. She and Mr. Dixon had numerous communications--including some to which nobody else appears to have been privy, as reflected in emails produced in discovery--about how to best to answer some of the survey

[2] Plaintiffs have withdrawn their deposition notice for Mr. Reimers at this time, given Defendants' designation of non-retained experts and Plaintiffs' anticipation that they may be able to obtain information in Mr. Reimers's areas of expertise and experience from the deposition of one of those individuals. Plaintiffs reserve the right to pursue Mr. Reimers's deposition if they are not able to obtain sufficient information through such alternatives.

questions, including out of cell time in Restrictive Housing; the substance of the survey report; and corrections needed for follow-up. *See, e.g.,* Exhs. 3 & 4. The results of the national survey, published in 2016, described the risk of harm from isolation and indicated that FDC isolated 8.1% of its population, which is nearly 60% higher than the national median rate of 5.1%. Exh. 5 at 7, 22.[3] In August 2016, Mr. Dixon forwarded the report to FDC leadership, noting that it was "well worth your time to review," and asking for it to be "fact checked." Exh. 6.

On March 31-April 1, 2016, Ms. Jones attended a "Criminal Justice Reform Colloquium" at Yale Law School. Exh. 7. According to an FDC press release, "Secretary Jones's focus was on the panel on restrictive housing, widely viewed as one of the most important issues facing criminal justice reform today. . . . industry experts and leaders share a commitment to reducing both the number of individuals held in isolation and the degrees of isolation." *Id.* Ms. Jones is quoted as saying, "I welcomed the opportunity to discuss these issues with leading experts and will proactively apply the lessons learned." *Id.*

In the same 2015-2016 time period, Ms. Jones initiated an "Analysis of

[3] Following this 2016 report, FDC declined to participate in the same national survey in subsequent years, which presumably was a decision made by Ms. Jones, Mr. Dixon, or both. Neither of the FDC 30(b)(6) designees on the numbers and amounts of time that people spend in FDC isolation, the process for calculating and tracking this, and reports generated with this information was able to testify as to why FDC stopped participating in the survey. Exh. 45 (Ensley 30(b)(6) Dep. at 20:22-21:4; McLaughlin 30(b)(6) Dep. at 258:24-260:4; 260:19-261:2; 273:8-274:11).

Segregation Processes" to "look at the Department's close management, administrative and disciplinary segregation statuses and the processes used to place, monitor and release inmates from these statuses." Exh. 8 at 3. This analysis extensively reviewed FDC's use of isolation, including the length of time and conditions in which people are held in isolation, and made recommendations for change—in other words, the exact issues at the core of this case.

In October 2017, as part of her "Department of Corrections Senate Appropriations Presentation," Ms. Jones represented the need to "reduce the use of restrictive housing" that has "negative impacts on the health and wellness of an inmate." Exh. 9 at 30. She listed "action steps" to reduce its use by March 2019, including "initiat[ing] revision processes, procedures, rules" and requesting funding in Legislative Budget Requests "to appropriately staff six facilities to national standards and reduce the use of restrictive housing." *Id.* Also in 2017, Ms. Jones authored a document entitled "Last Two Years," outlining challenges and accomplishments during her first two years at FDC, and challenges and goals for the remainder of her term. Exh. 10. One of the points she highlighted was "[p]lanning for litigation reduction/mitigation" specifically with respect to Restrictive Housing, including implementation of "programming stepdown to normalize and improve behavior which lowers operational costs." *Id.* at

EHA00380101. Ms. Jones also acknowledged that "FDC has a critical staffing shortage" affecting operations and safety. *Id.* at EHA003801014.

In May 2018, Ms. Jones moderated a panel on Restrictive Housing at the American Society of Correctional Administrators (ASCA) Southern Regional Conference. Exh. 11. In November 2018, Ms. Jones attended the ASCA "All Directors Symposium," including a "Restrictive Housing Roundtable." Exh. 12.

Plaintiffs seek to depose Ms. Jones about these experiences, the basis for her various statements about isolation and Restrictive Housing, what she learned regarding potential harms of isolation, the basis for her initiation of the analysis of FDC segregation, what she learned about isolation practices in FDC, and how all of these impacted her decisions about whether and what types of isolation reform to seek. Such information is uniquely known by Ms. Jones, not obtainable from other sources,[4] and directly relevant to the issue of whether Defendants knew of a

[4] Plaintiffs asked multiple lower-ranked deponents who worked on the Analysis of Segregation Processes project, including the current Director of Institutional Operations and Intelligence, the Region 1 Director of Institutions, and the FDC 30(b)(6) designee on classification with respect to segregation/Restrictive Housing, about the reasons for FDC's efforts to reduce Restrictive Housing or limit the amount of time people spend in that status, and they were unable to provide answers beyond it being "the right thing to do." *See, e.g.,* Exh. 45 (Gartman Dep. at 63:25-66:12; Gordon Dep. at 91:23-92:18; McLaughlin 30(b)(6) Dep. at 129:5-130:10; 304:7-305:3). Robert Lee Adams, who was an FDC Bureau Chief and also worked on the Analysis of Segregation Processes project, testified that he attended a meeting in which Secretary Jones said that she had been interacting and attending meetings with corrections administrators from other states and stated that she believed that FDC needed to try to reduce the use and duration of Restrictive Housing, but did not explain her rationale. Exh. 45 (Adams Dep. at 94:3-19; 97:20-100:4; 101:14-23). Mr. Dixon also spoke at this meeting, and made similar statements to Ms. Jones. Exh. 45 (Adams Dep. at 100:5-101:7; 101:24-102:3).

substantial risk of serious harm as a result of FDC's isolation practices, and whether they acted reasonably to address the risk.

Mr. Dixon Directly Managed FDC's Analysis of Segregation, Determined Which Reform Recommendations to Present to Secretary Jones, and Oversaw Implementation and Termination of Pilot Programs

From email communications Plaintiffs obtained through discovery, it appears that Ms. Jones delegated Mr. Dixon (then Deputy Secretary of Institutions) to manage the analysis of FDC's use of isolation begun around 2015. In January 2016, Mr. Dixon introduced Ms. Jones's "Analysis of Segregation Processes" report to FDC leadership, informing them it included recommendations "consistent with the National effort to reduce the number of inmates housed in segregation and the amount of time in which they spend in this status." Exh. 13. He further stated that FDC would develop subgroups to make additional recommendations for reducing Restrictive Housing. *Id.* The subgroups reported to Mr. Dixon, who reviewed their potential recommendations, provided feedback, and was responsible for deciding which recommendations to present to Secretary Jones. *See, e.g.,* Exh. 14. One of the reports generated during this process included the statement:

> Evidence-based research shows that holding people in isolation with minimal human contact for extended periods of time is exceptionally expensive and in many cases counterproductive as long-term segregation can create or exacerbate serious mental health problems and antisocial behavior among incarcerated people, have negative outcomes for institutional safety, and increase the risk of recidivism after release. Therefore the FDC is piloting an alternative

> to long-term segregation in an effort to transition its current practices concerning long-term segregation into viable alternatives that can maintain the same or similar amount of control and effectiveness while simultaneously reducing the overall number of inmates who fall into the category of "long-term" segregation status. When a determination is made that an inmate must be segregated from the general population, that inmate should be housed in safe, humane conditions, that, ideally, prepare the inmate for reintegration into both the general prison population and society at large. For this purpose, "Long-Term" is considered to be more than 60 consecutive days in a segregated status.

Id. at EHA00039496.

During the analysis of segregation process, Mr. Dixon implemented and monitored several pilot programs stemming from the subgroups' recommendations. Mr. Dixon also briefed Ms. Jones regarding FDC's progress in reducing Restrictive Housing as a result of the recommendations originated by the subgroups. *See, e.g.,* Exh. 15. Based on emails obtained through discovery, Ms. Jones and Mr. Dixon directly discussed these programs and their impact on FDC's use of isolation, and one or both made decisions about whether they would continue or terminate the programs.[5]

[5] Plaintiffs asked multiple lower-ranked deponents who each participated in the Analysis of Segregation Process subgroups, including the Region 2 Director of Institutions, the former Bureau Chief of Admission and Release who now consults on Classification Management, the FDC 30(b)(6) designee on classification with respect to segregation/Restrictive Housing, and the Assistant Warden of Florida State Prison about the reasons for FDC's analysis of segregation processes and why various subsequent recommendations were or were not implemented, and they were unable to provide answers beyond their own speculation, if any. *See, e.g.,* Exh. 45 (Palmer Dep. at 186:15-187:16; 199:17-200:14; 201:3-17; Adams Dep. at 132:22-133:22; 141:25-143:6; 155:10-159:10; McLaughlin 30(b)(6) Dep. at 207:8-208:22; McClellan at 49:24-52:3).

For example, in May 2016, Mr. Dixon issued an "Alternative Housing Pilot Directive" memorandum to introduce a program that provided an alternative to disciplinary confinement, "thus decreasing the overall number of inmates placed in long term segregation." Exh. 16. On the same date Mr. Dixon issued the memo, Ms. Jones and Mr. Dixon discussed the program. Exh. 17. In 2017 and 2018, Mr. Dixon reviewed and considered whether staff were appropriately using the program, and whether and how the program should be expanded for statewide implementation. *See, e.g.,* Exh. 18. In 2018, Mr. Dixon received an "Alternative Housing Briefing Sheet" that recommended the "current locations continue operating under the pilot" after there was an "increase in staff support." Exh. 19 at EHA00349099. However, in May 2019, statewide implementation of the Alternative Housing pilot program was "disapproved."[6] Exh. 20.

Similarly, after a recommendation from a subgroup that certain individuals in Restrictive Housing be identified for release from their cells without full restraints, Mr. Dixon oversaw the implementation of a "Reduced Restraint Pilot." Exh. 21. FDC piloted this program at four institutions. In 2017, Mr. Dixon

[6] Plaintiffs asked multiple lower-ranked deponents who worked on the Analysis of Segregation Processes project, including the current Director of Institutional Operations, the Region 1 Director of Institutions, and the FDC 30(b)(6) designee on classification with respect to segregation/Restrictive Housing, about the reasons for the implementation and discontinuation of the Alternative Housing Pilot, and they did not have the relevant knowledge to answer. *See, e.g.,* Exh. 45 (Gartman Dep. at 122:10-20; 127:11-128:19; Gordon Dep. at 93:25-96:4; McLaughlin 30(b)(6) at 395:14-399:19; 409:17-410:5; 413:8-415:4).

requested a briefing on this program and was told there were "no problems." Exh. 22. However, in May 2019, the Reduced Restraint pilot program was "disapproved."[7] Exh. 20.

During this time period, in addition to the work of the subgroups, Mr. Dixon also engaged in additional research and analysis regarding FDC's and other states' isolation practices that appears to have affected his decision-making regarding FDC segregation. For example, in March 2016, Mr. Dixon requested information regarding other states' use of tablets and video visitation, including for people in segregation, resulting in a memo produced in discovery.[8] Exh. 23.

An October 2016 draft memo to FDC Regional Directors and Wardens from Mr. Dixon included the statement:

> Simply stated, we confine too many inmates for too long a period of time and without adequate programming for the confined population. In terms of positive behavioral outcomes, these practices are of questionable value. In fact, our practices often undermine our commitment to preparing inmates for their eventual release back into

[7] Plaintiffs asked multiple lower-ranked deponents, including the current Director of Institutional Operations, the Region 1 Director of Institutions, and the FDC 30(b)(6) designee on Restrictive Housing operations, about the measures for success of the Reduced Restraint Pilot and the reasons for its termination, and they did not have the relevant knowledge to answer. *See, e.g.,* Exh. 45 (Gartman Dep. at 130:22-132:2; Gordon Dep. at 92:10-93:20; Kirkland 30(b)(6) at 340:19-342:17).

[8] Plaintiffs asked multiple lower-ranked deponents, including the current Director of Institutional Operations, the Region 2 Director of Institutions who chaired the subgroup that recommended FDC provide people in CM with tablets and video visitation (EHA00039529), and the Assistant Warden of Florida State Prison about the reasons for providing limited numbers of tablets and not providing video visitation, or whether FDC has considered video visitation, for people in isolation, and they did not have the relevant knowledge to answer. *See* Exh. 45 (Gartman Dep. at 194:5-8; Palmer Dep. at 178:23-181:9; McClellan Dep. at 169:22-25).

> society. This memo details changes in the way we use confinement to discipline and manage the inmate population. These, along with other planned changes, challenge long-held assumptions that more confinement is necessarily better, that minimal interaction with confined inmates is preferable, and that confinement is the only means of gaining the compliance of the inmate population.

Exh. 24 at EHA00818052. The final draft of this document Mr. Dixon sent out later that month deleted these statements. Exh. 25.

In 2017, Mr. Dixon researched a step-down program (to transition people out of isolation) in another state.[9] Exh. 26. In 2018, Mr. Dixon approved a new program at New River Correctional Institution, the "Close Management III Step Down Program," that would allow an initial 54 people in CM to participate in programming five days a week with the goal of "eliminat[ing] the need for segregated housing." Exh 28 at EHA00349119. In 2020, Mr. Dixon made recommendations for how to increase access to FDC's step down program and measure its success. *See* Exh. 29. In 2021, he reviewed the plan for closing the FDC step down program.[10] *See* Exh 30.

Plaintiffs seek to depose Mr. Dixon about these experiences, what he learned about isolation practices in FDC, the effectiveness of such isolation practices, the

[9] In October 2016, Mr. Dixon sent an email to Ms. Jones suggesting a number of discussion topics, including "[p]ossible 'step down' programs from DC confinement," to which Ms. Jones responded "Great! Let's keep talking about this." Exh. 27.

[10] The current Director of Institutions, who was in the FDC focus group regarding the New River program, testified that she does not know why FDC identified the need for the step down program, cannot speak to its implementation, and cannot say whether the success of the program was considered in the decision to close it. Exh. 45 (Gartman Dep. at 54:8-55:7; 70:17-72:8; and 79:20-80:8).

potential harms of isolation, the basis for his decisions regarding which reform recommendations to consider and present to Ms. Jones or otherwise implement, the basis for continuation or termination of programs designed to reduce FDC's use of isolation, his understanding of accepted correctional practices for segregation, and how these experiences inform Mr. Dixon's decision-making regarding FDC's isolation practices today. Such information is uniquely known by Mr. Dixon, not obtainable from other sources, and directly relevant to the issue of Defendants' knowledge of a substantial risk of serious harm as a result of FDC's isolation practices, and whether they have acted reasonably to address the risk.

Ms. Jones and Mr. Dixon Personally Developed FDC Strategy Regarding Use of Restrictive Housing

In addition to the specific Analysis of Segregation project, Ms. Jones and Mr. Dixon personally worked directly on FDC Restrictive Housing issues in numerous other ways.

For example, in 2016, Ms. Jones and Mr. Dixon worked together on a document for public distribution that described FDC's use of Restrictive Housing for outside organizations, and included data on the numbers of people and lengths of stay in each type of Restrictive Housing. This document acknowledges that under the definition of 'solitary confinement" used by "multiple national and international professional corrections organizations" (that does not exclude double occupancy cells), FDC's Restrictive Housing units meet the definition of "solitary

confinement." *See* Exh. 31 at 3. It also recognizes the "negative consequences associated with this status for each individual occupant," and the "importance of reducing the use of solitary confinement to the extent possible," but also states that FDC does not have the staff to provide sufficient out of cell time such that the units would not comprise solitary confinement. *Id.* at 1-3. Ms. Jones sent the ACLU a version of this document stating, "FDC will continue to pursue alternatives to segregation and we are confident that Florida will recognize a decrease in the overall use of restrictive housing," apparently in connection with a May 2016 meeting that Ms. Jones and Mr. Dixon had with ACLU representatives. Exh. 32 at 5. Plaintiffs seek to depose Ms. Jones and Mr. Dixon about the bases for the statements in this document, the reasons for creation of this document and its use, any discussions held as a result of this document, and what, if any, related recommendations for change either or both of them considered.[11]

In August 2018, Mr. Dixon proposed to Ms. Jones, and she supported, that FDC should designate maximum security prisons to serve "as an alternative to long term restrictive housing." Exh. 33. In November 2018, Mr. Dixon authored a document entitled, "Population Management," that described FDC's intent to open

[11] Although most of the information in this document came from Classification Management, FDC's 30(b)(6) designee on such information, who was the Bureau Chief of Classification Management, was not able to testify as to the purpose of this document or the reason that it was prepared. Exh. 45 (McLaughlin 30(b)(6) Dep. at 202:6-206:21).

maximum security prisons at four prisons as an alternative to Restrictive Housing, which he projected would reduce assaults, hospitalizations, disciplinary reports, and use of force incidents. Exh. 34. In 2020, FDC implemented an "Alternative Management Unit" at a single prison, explaining that it was intended to divert people from CM where they will have "access to group programming, recreation and education, as well as contact visitation." Exh. 35. Plaintiffs seek to depose Ms. Jones and Mr. Dixon about their rationale for creating this program as an alternative to long term restrictive housing, the reasons for implementing the program at one prison instead of four, what they learned as a result of this experience, and how it affects Mr. Dixon's decision-making regarding FDC's isolation practices.[12]

As an FDC Decisionmaker, Mr. Dixon Has Expressed Reluctance to Reduce FDC's Use of Restrictive Housing

Based on emails and documents produced in discovery, throughout at least 2016-2020, Mr. Dixon repeatedly expressed concerns and theories that reduction in FDC's use of isolation did or would lead to increases in violence. For example, in November 2016, Mr. Dixon emailed Ms. Jones [redacted]

[12] Plaintiffs asked multiple lower-ranked deponents, including the FDC 30(b)(6) designee on classification, the current Director of Institutional Operations, and the Region 1 Director of Institutions that oversees the AMU, about the reasons for opening the AMU and any plans to expand and they said they did not know or referred to higher levels officials as the persons with the relevant detail. *See, e.g.,* Exh. 45 (McLaughlin 30(b)(6) Dep. at 509:19-510:15; Gartman Dep. at 182:2-16; Gordon Dep. at 91:8-22).

[redacted] Exh. 36. In response, Ms. Jones [redacted]. *Id.*[13]

In November 2017, Mr. Dixon sent an email to FDC leadership and wardens expressing his concern that some officers "do not feel adequately supported when supervising inmates who violate rules or engage in prohibited conduct." Exh. 37. He posited that "one of three situations could be occurring," one of which was that "some leadership teams may have gone too far in their efforts to be responsive to direction regarding restrictive housing reductions. In this case, thought should be given to striking an appropriate balance between the level of disciplinary action taken and holding inmates accountable, thereby supporting our staff."

In April 2018, Mr. Dixon requested that FDC personnel provide data and information regarding the impacts of reductions in Restrictive Housing beds, and subsequently focused on analyzing the relationship between the decrease in the number of CM beds with the number of assaults by inmates, instructing

[13] The publicly-filed version of this brief contains redactions to this paragraph pursuant to the Protective Order filed in this case.

subordinates to use "whatever [data] supports our narrative the most."[14] Exh. 38 at 2. The response stated, "Our efforts to reduce restrictive housing began in November 2015. At the point of our most significant RH reduction, we realized a decrease in RH beds by 18.98%. Unfortunately, since that time we have experienced a 4.93% ~~increase~~ (sic) decrease in inmate assaults on other inmates…" *Id.* at 1. Mr. Dixon replied "Not going to work…I think I like your original version. Also, we can't say 'unfortunately we've seen a decrease in inmate assaults.' Let's discuss tomorrow." *Id*.

On April 20 and 21, 2018, Mr. Dixon sent emails stating that he was "[g]lad to see folks speaking out against [lax] RH policies" and theorizing that South Carolina being "under a court order to reduce RH" probably contributed "to their issues." Exh. 39. On April 22, 2018, Mr. Dixon forwarded Ms. Jones a third party's commentary claiming that "[m]any managers are reducing Restricted Housing too far and 'rushing to release' inmates from RH too soon." Exh 40. Mr. Dixon prefaced the email with his opinion that "[a]lthough it goes against the national movement to reduce RH and may cause us to stand out subjecting us to litigation, increasing RH would, without a doubt, positively impact operations and

[14] FDC's 30(b)(6) designee on data collection and analysis for Restrictive Housing, the Bureau Chief of Research and Data Analysis, testified that he did not know why Mr. Dixon asked the Bureau to generate numbers on the relationship between confinement and assault. Exh. 45 (Ensley 30(b)(6) Dep. at 71:8-72:3).

improve safety." *Id.* He continued by expressing his appreciation that Ms. Jones "supported a measured approach in FL when looking at RH and that we didn't react too quickly. I think we will see the pendulum swing back the other way on this at some point." *Id.*

In June 2018, Mr. Dixon expressed reservations in response to a suggestion to participate in the National Institute of Corrections "Managing Prison Restrictive Housing Populations" training program because "we [FDC] deviate in some areas" from the National Institute of Corrections/National Institute of Justice rules and recommendations for Restrictive Housing. Exh 41.

In September 2018, Mr. Dixon wrote "I don't doubt it," in response to an email from another FDC official theorizing that one of the "aggravating factors that contributed to the increase in our use of force numbers" was the reduction of disciplinary penalties and "the push to comply with the NIC standards for restrictive housing." Exh. 42.

In January 2019, Mr. Dixon sent an email to newly-appointed Secretary Inch, in which he claimed that reduction in the use of Restrictive Housing in FDC was linked to "a rise in assaults, use of force incidents and requests for protection," and that FDC had since "reversed our position" regarding reduction of restrictive housing. Exh. 43. Mr. Dixon continued:

> We've concluded the obvious…that such efforts must be accompanied with adequate resources to provide programs, wellness, etc., for the general population thereby reducing inmate idleness. Like other states, inmate idleness combined with insufficient staffing and extremely high vacancy rates are the major contributors to the issues we've been facing. Under these conditions, we've been pushed into using RH as our primary tool for managing the population.

Id. Mr. Dixon concluded, "[l]ooking forward to discussing this with you and reviewing other options/resources for improving inmate management."[15] *Id.*

These emails demonstrate that, at least since 2015, Mr. Dixon has been intimately and actively involved in decision-making about FDC's use of isolation and consideration of reforms, including recommendations related to risk of harm to persons in Restrictive Housing. Plaintiffs are entitled to explore Mr. Dixon's knowledge and understanding about FDC's use of isolation and the risk of harm it poses, his role in determining FDC Restrictive Housing practices, and the basis for his decisions about such practices, including whether to recommend or implement reforms, and how FDC's ability to access resources such as staff and funding impacts FDC's isolation practices.

ARGUMENT

I. Parties Demonstrating Sufficient Justification May Depose High-Ranking Officials

The "apex doctrine" does not bar depositions of high-ranking officials. *See*

[15] Also in January 2019, Mr. Dixon attended the ASCA 2019 Winter conference, including a "Restrictive Housing Committee Meeting." Exh. 44.

League of Women Voters of Fla., Inc. v. Lee, No. 4:21-CV-186-MW/MAF, 2021 WL 4962109, at *1 (N.D. Fla. Oct. 19, 2021) ("[I]n the Eleventh Circuit, there is no *per se* rule forbidding the deposition of high-ranking government officials.") (citations omitted). Rather, when properly invoked by a qualifying official, the apex doctrine requires a party to affirmatively demonstrate sufficient justification for the deposition. *See id.* The Eleventh Circuit has framed this as requiring a party to "present extraordinary circumstances or a special need" for the official's testimony. *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (citing approvingly Eight Circuit's description of "special need or situation compelling" testimony of high officials in *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982) (describing "specific need" as showing that the Governor possessed information "essential to plaintiffs' case and which could not be obtained" from the Director or other staff members), *abrogated as to other issues by O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996).

Under the Eleventh Circuit standard, "the apex doctrine rarely, if ever, shields a lead official from discovery when the official is directly involved in the event at issue and has ***personal knowledge*** about it." *Kimberly Regenesis, LLC v. Lee County*, No. 2:19-CV-538-SPC-NPM, 2021 WL 5285093, *5-6 (M.D. Fla. Sept. 29, 2021), as modified, 2021 WL 5028204 (M.D. Fla. Oct. 29, 2021) (emphasis in original). Such personal involvement establishes a compelling need

for the official's deposition. *See id.; see also Plaintiff 1 v. Washington Cty School Bd.*, No. 5:07-cv-194-RS-EMT, 2008 WL 11462924, at *4 (N.D. Fla. Feb. 14, 2008) ("Having determined that Mr. McNeil is a high-ranking official, before he can be deposed Defendant must show (1) extraordinary circumstances, or (2) that he was personally involved in the conduct giving rise to this lawsuit in a material way.").

While Defendants reference one district court's recent formulation of the test for deposing a high-ranking official as requiring four conjunctive elements,[16] *see* ECF No. 383 at 7-8 (¶ 16), that court mis-stated the out-of-circuit cases it cited as support for that test. Those cases described various examples of "exceptional circumstances" justifying a deposition, rather than setting forth a list of requirements that must all be proven in each case. For example, the first case *Odom* cited for its four-element test, *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), actually held that, "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition—for example, that the official has unique first-hand

[16] The district court articulated these elements as: "(1) deposing the official is necessary to obtain relevant, 'first-hand' information; (2) the information possessed by the official is important to the case; (3) the deposition would not significantly interfere with the ability of the official to perform his government duties or reasonable accommodations could ameliorate such interference; and (4) the evidence sought is not reasonably available through less-burdensome means or alternative sources." *Odom v. Roberts*, 337 F.R.D. 359, 365 (N.D. Fla. 2020).

knowledge related to the litigated claims ***or*** that the necessary information cannot be obtained through other, less burdensome or intrusive means." (emphasis added). The Second Circuit framed these two elements in the alternative: in other words, either of them satisfies the requirement of an exceptional circumstance. *Bogan v. City of Bos*., 489 F.3d 417, 423 (1st Cir. 2007), held "[d]epositions of high ranking officials may be permitted where the official has first-hand knowledge related to the claim being litigated," and where it is also "shown that other persons cannot provide the necessary information." The First Circuit required these two elements, but did not reference either of the other elements set forth by the *Odom* Court. In *Sweeney v. Bond*, the Eighth Circuit affirmed the district court's holding "that the Governor's qualified immunity protected him from deposition absent a showing by plaintiffs of specific need" and cited plaintiffs' failure to show that the Governor possessed information that was essential to plaintiffs' case and could not be obtained from the Director. 669 F.2d at 546. The Eighth Circuit did not reference the other elements referenced by the *Odom* Court.

The Eleventh Circuit has not set forth or endorsed a test as articulated in *Odom*, but, rather, held that a case must "present extraordinary circumstances or special need" for the official's testimony. *In re United States*, 985 F.2d at 512.

II. Plaintiffs Amply Demonstrate Sufficient Justification for the Depositions Based on the Extensive Personal Involvement of Ms. Jones and Mr. Dixon in the Central Issues of the Case

Compelling need and extraordinary circumstances justify the depositions of both former Secretary Jones and current Secretary Dixon in this case, as amply summarized in Plaintiffs' meet and confer e-mail Defendants excerpted in their motion, ECF No. 383 at 8-9 (¶17).[17] This putative class action concerns an issue of grave public importance: whether the manner in which the state of Florida carries out its public charge of incarcerating people subjects those it places in FDC's isolation units to cruel and unusual punishment in violation of the United States Constitution. In 2017, after extensive analysis of FDC's use of isolation, then-Secretary Jones acknowledged the risk of harm from FDC's Restrictive Housing and represented to the Legislature that it was necessary to reduce its use. EHA00352719 at 30. Ms. Jones and then-Deputy Secretary Dixon personally directed evaluations of FDC's isolation policies and practices, their impacts, and alternatives; personally reviewed, considered, and discussed these findings; and then personally made decisions as to what kinds of recommendations for change and corollary funding to pursue, and which recommendations not to pursue.

Allowing Plaintiffs to take depositions of Ms. Jones and Mr. Dixon in this case—because they were personally, directly, and intimately involved in the policy

[17] Plaintiffs do not dispute that the Secretary of the Department of Corrections is a high-ranking official under the apex doctrine.

and practice determinations that Plaintiffs allege demonstrate deliberate indifference under the Eighth Amendment—does not risk subjecting such high-level officials to "the constant distraction of testifying in lawsuits." *See In re United States*, 985 F.2d at 512. Rather, this is precisely the type of case reflecting "a special need or situation compelling such testimony." *See id.; see also, e.g., Fair Fight Action v. Raffensperger*, 333 F.R.D. 689 (N.D. Ga. 2019) (permitting deposition of Governor on material issues for which he had direct personal factual information and information could not be gained from lower-level officials); *McCollum v. Livingston,* No. 3:12-cv-02037-L-BK, ECF No. 129 (N.D. Tex. Feb. 18, 2014) (permitting deposition of Executive Director of Texas Department of Criminal Justice in individual prisoner case where Director had relevant information that could not be obtained from any alternative witness); *Woolfolk v. Columbia Cty., Florida*, No. 3:07-cv-137-J-25TEM, 2008 WL 11433240, at *2 (M.D. Fla. Feb. 22, 2008) (permitting deposition of Sheriff where he had relevant observations, directions, and involvement in decisions); *Coleman/Plata v. Schwarzenegger*, No. CIV S-90-0520-LKK-JFM, 2008 WL 4300437, at *5 (E.D. Cal. Sept. 15, 2008) (permitting deposition of Governor's Deputy Cabinet Secretary in class action prison reform case because he was "the official in charge of managing the development and implantation of reforms that defendants themselves contend may affect the resolution of the controversy"); *Bagley v.*

Balgojevich, 486 F. Supp. 2d 786, 789-90 (C.D. Ill. 2007) (permitting deposition of Governor where he was likely to possess relevant information as either the ultimate decision maker or at least personally involved in relevant personnel decisions)*;* *Prisma Zona Exploratoria De Puerto Rico, Inc. v. Calderon*, 154 F. Supp. 2d 245, 246-47 (D.P.R. 2001) (permitting deposition of Governor in free speech retaliation case where the qualified immunity legal standard required fact-intensive inquiry); *Atlanta Journal and Constitution v. City of Atlanta Dep't of Aviation*, 175 F.R.D. 347, 348 (N.D. Ga. 1997) (permitting deposition of Mayor of Atlanta where Mayor was "likely to possess pertinent, admissible, discoverable information which can be obtained only from him").

Defendants' only objection to the deposition of Ms. Jones, besides merely invoking her former and current titles, is relevance, claiming that "[i]nformation she may have about 'restrictive housing' in the Florida Department of Corrections during [2015-2019] bears little relevance to the issues in this case which seeks injunctive relief." ECF No. 383 at 11 (¶ 23). The Court has already rejected Defendants' argument that information dating back to January 1, 2015 is not relevant to this injunctive relief case, finding that "Defendants' theory misses the point." ECF No. 98 at 8. To establish an Eighth Amendment violation, Plaintiffs must prove that Defendants were deliberately indifferent to a substantial risk of serious harm resulting from FDC's use of solitary confinement. *Id.* at 9 (citing

Thomas v. Bryant, 614 F.3d 1288, 1312 (11th Cir. 2010)). To prove deliberate indifference, Plaintiffs must show subjective knowledge of the risk of harm on the part of Defendants. *Id.* "Defendants' subjective knowledge can be proven by presenting evidence showing that the 'conduct was longstanding, pervasive, well-documented, or expressly noted by the prison officials in the past,' and that Defendants 'had been exposed to information concerning the risk, and thus must have known about it.'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

The Court also confirmed that Plaintiffs' selection of the timeframe of January 1, 2015, to present is not arbitrary, stemming, in part, from Defendants' participation in a national survey of state prison systems regarding their use of isolation, and Defendants' subsequent undertaking of an "Analysis of Segregation Process," to examine FDC's use of segregation, implementation of changes, and recommendations for changes in the future. ECF No. 98 at 9-10. The Court observed that discovery related to FDC's analysis of its use of segregation "may provide evidence showing that unconstitutional isolation was 'longstanding, pervasive, and well-documented,'" "that prison officials 'had been exposed to information concerning the risk,'" and that "Defendants disregarded the risk of serious harm by engaging in conduct that is more than gross negligence after having subjective knowledge of the risk." *Id.* at 10.

Former Secretary Jones and current Secretary Dixon each have specific and unique knowledge relating to, *inter alia,* FDC's participation in the national survey of state prison systems regarding their use of isolation, reasons for FDC's subsequent undertaking of the "Analysis of Segregation Process," insights gained from that process, and resulting decisions made with respect to FDC's isolation practices, policies, and procedures, including decisions to start and stop certain pilot programs. At numerous significant points, they were each the only people involved in certain convenings, meetings, and communications. Each of them also determined that information would or would not be acted upon, based upon calculations and weighing of risks ultimately known only to them.

Not only is there reason to believe that depositions of Ms. Jones and Mr. Dixon "will produce or lead to admissible evidence," but Ms. Jones and Mr. Dixon will be able to provide such evidence where their subordinates could not. A common theme across Plaintiffs' depositions of lower-ranking FDC officials and 30(b)(6) designees was the inability of the deponents to explain *why* certain decisions were made or policies enacted with respect to FDC segregation, including, for example, the initiation and discontinuation of pilot projects and other reforms to FDC isolation practices. Given the direct and extensive involvement of Ms. Jones and Mr. Dixon in this issue and their control over the decision-making

process, Plaintiffs must be able to question them about the bases for their decisions.

Similar to the Court's previous observations, shielding Ms. Jones and Mr. Dixon from deposition, would preclude Plaintiffs from discovery as to Defendants' knowledge of risk and reasons for "reforms, or lack thereof, during the period where Defendants themselves studied their practice of solitary confinement and recommended changes to their isolation policies and practices." *See* ECF No. 98 at 10. Prohibiting Mr. Dixon's deposition would also extend that discovery preclusion into the present day, given that he continued to serve as Deputy Secretary of Institutions after Ms. Jones left FDC in 2019 until he was elevated to Secretary in November 2021, and impermissibly shield Plaintiffs from discovering facts regarding his more recent and current bases for determining whether and how FDC would reform restrictive housing practices, if at all.[18]

Finally, Plaintiffs' depositions of Ms. Jones and Mr. Dixon will not unduly interfere with their abilities to perform their duties. Plaintiffs noticed the depositions as video depositions, so no travel time will be required. Plaintiffs also noticed the depositions at least six weeks in advance of the proposed dates to allow sufficient time for the parties to find deposition dates that work for the deponents.

[18] *See* Florida Department of Corrections, *Office of the Secretary*, http://www.dc.state.fl.us/secretary.html (last visited Mar. 30, 2022).

Nor have Defendants concretely explained how Ms. Jones and Mr. Dixon participating in one day of deposition, respectively, will compromise their abilities to perform their respective duties. Indeed, FDC's use of isolation is of such significance that Ms. Jones took the time to attend multiple-day conferences on this topic in person during her tenure as Secretary. The first-hand knowledge Ms. Jones and Mr. Dixon have about these issues, as well as the gravity and public importance of the alleged constitutional violations, compel the need for their testimony here.

CONCLUSION

For the reasons described above, Plaintiffs respectfully request that this Court deny Defendants' motion for a protective order with respect to the depositions of former Secretary Jones and current Secretary Dixon.

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Respectfully Submitted,

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Local Rule 7.1(F) Certificate

Under N.D. Local Rule 7.1(F), the undersigned counsel hereby certifies that this memorandum in opposition contains 6,610 words.

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