No. 20-60086

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERMAINE DOCKERY, on behalf of themselves and all others similarly situated; JOSEPH OSBORNE, on behalf of themselves and all others similarly situated; JOHN BARRETT, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants

EDDIE PUGH,

Intervenor Plaintiff - Appellant

v.

BURL CAIN, Commissioner, Mississippi Department of Corrections, in his official capacity as Commissioner of the Mississippi Department of Corrections; JEWORSKI MALLETT, in his official capacity as Deputy Commissioner for Institutions of the Mississippi Department of Corrections; GLORIA PERRY, in her official capacity as Chief Medical Officer for the Mississippi Department of Corrections; Richard D. McCarty,

Defendants - Appellees

On Appeal from
United States District Court for the Southern District of Mississippi

3:13-CV-326

BRIEF OF APPELLANTS JOHN BARRETT, JERMAINE DOCKERY, JOSEPH OSBORNE, AND EDDIE PUGH

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument as it will help decide the issues presented.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over the action below pursuant to 28 U.S.C. § 1331 because the action asserted claims arising under the laws of the United States, namely, 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the judgment below is a final judgment entered on December 31, 2019 that disposed all claims of all parties. ROA.26457. Pursuant to Fed. R. App. P. 4(a)(1)(A), Plaintiffs timely filed a notice of appeal on January 30, 2020. ROA.26458.

STATEMENT OF THE ISSUES

1. Did the district court err in failing to consider whether the totality of circumstances at the East Mississippi Correctional Facility ("EMCF"), including mutually enforcing effects, exposes Plaintiffs to a substantial risk of serious harm?

2. Did the district court err in dismissing Plaintiffs' claims without considering whether there was a cognizable danger that Eighth Amendment violations would recur?

3. Did the district court err in requiring Plaintiffs' expert witnesses to establish contemporary standards of decency or constitutional standards under the Eighth Amendment and disregarding expert testimony on numerous material issues?

STATEMENT OF THE CASE

For more than seven years, a class of more than 1,100 men incarcerated at EMCF have sought relief from a litany of conditions in which the Mississippi Department of Corrections ("MDOC") imprisons them in violation of the Eighth Amendment to the United States Constitution. Plaintiffs receive systemically inadequate medical care, suffer in solitary confinement, and are subjected to a routine threat of violence and other harms caused by Defendants' deliberate indifference. Despite full knowledge and ample evidence of these and other issues, Defendants, each an MDOC official, have warehoused some of the most vulnerable people in their custody—the most seriously mentally ill—at EMCF.

In March 2018, this matter was tried to the bench. Following post-trial evidentiary proceedings and briefing that lasted nearly two years, the district court dismissed Plaintiffs' claims on December 31, 2019. The district court made several critical errors of law: it did not consider whether the totality of circumstances violates the Eighth Amendment, it did not consider whether there was a risk of recurrence of prior constitutional violations, and it assessed Plaintiffs' expert witnesses under improper legal standards and disregarded their opinions concerning a host of material issues. Plaintiffs now seek reversal and remand of the district court's opinion on three of Plaintiffs' long-running claims concerning medical care, isolation, and protection from harm.

I. Procedural Background

This case was tried to the bench from March 5 to April 9, 2018. *See* ROA.26714, 30330. On August 24, 2018, the district court stayed the proceedings and ordered the parties to submit supplemental expert reports about then-existing conditions at EMCF. ROA.19005. The district court found that, "[h]ad the conditions and practices at EMCF, as alleged by Plaintiffs in their Complaint and described by Plaintiffs' experts in their 2016 reports, continued to exist, Plaintiffs would likely be entitled to injunctive relief on at least some" claims. ROA.19014. However, the district court stated that, at trial, "it became apparent that conditions at the subject prison ha[d] changed" and updated evidence was necessary "to insure that any award of injunctive relief in this case does not run afoul of the Prison Litigation Reform Act." ROA.19005.

On November 16 and 30, 2018, following limited post-trial discovery and additional tours of EMCF, Plaintiffs submitted supplemental expert reports. ROA.19283, 19412, 19534, 19978. On December 21, 2018, Defendants submitted supplemental reports from their experts on protection from harm issues and declarations from EMCF's physician and psychiatrist. ROA.20153. On March 26, 2019, the district court directed the parties to submit post-trial briefs. ROA.20538. The district court issued an order and judgment on December 31, 2019 denying Plaintiffs' claims. ROA.26402.

II. Summary of Trial and Post-Trial Evidence[1]

EMCF is a private prison that houses people in MDOC custody, operated under contract by the Management and Training Corporation ("MTC"). ROA.27924-25. Medical and mental health care is separately contracted to Centurion of Mississippi. ROA.27953. MDOC has designated EMCF to house its most seriously mentally ill people in its custody. ROA.28961-62.

A. Medical Care

At trial, Plaintiffs presented the expert testimony of two witnesses regarding medical care, Ms. Madeleine LaMarre and Dr. Marc Stern. Ms. LaMarre is a registered nurse with more than 30 years of experience in correctional health, including overseeing the provision and quality of medical care in Georgia's state prisons. ROA.29440-46. Dr. Stern has more than 20 years of experience in correctional health, including serving as the medical director of the Washington Department of Corrections. ROA.19397-400. Defendants did not present any expert testimony with respect to medical care. After trial, Ms. LaMarre and Dr. Stern toured EMCF again in the fall of 2018 and submitted supplemental expert reports about then-existing conditions. ROA.19283-408, 19412-530. Defendants submitted no medical expert reports but filed two declarations from their own psychiatrist and

[1] Plaintiffs asserted seven separate claims at trial. The district court's dispositions of three of the claims present errors on appeal: Claim One, concerning medical care, Claim Four, concerning isolation, and Claim Five, concerning protection from harm. The Statement of the Case provides only the background relevant to these three claims.

physician, Dr. Steven Bonner and Dr. Patrick Arnold, which addressed certain issues in mental health and medical care at EMCF. ROA.20156-219, 20245-306.

The evidence supported a wide variety of deficiencies in the delivery of health care at EMCF, including in the delivery of urgent care, episodic care, chronic care, and medication administration, as well as systemic issues with nurses practicing outside the scope of their licensure and expertise. That evidence went largely unrebutted and was often corroborated by MDOC witnesses.

For instance, Plaintiffs showed there were substantial impediments in the "sick call" process, which incarcerated people use to request medical treatment for non-urgent complaints. ROA.19287-90, 19422-26. This could lead to dangerous delays in the provision of necessary medical care. Defendant Dr. Gloria Perry, MDOC's Chief Medical Officer, acknowledged in 2016 that security staff "constantly and repeatedly refus[e] to bring inmates to clinics for scheduled sick call, dental, mental health and chronic care appointments" and that the problem is "almost universal at EMCF." ROA.21765, 21313. At trial, she admitted that EMCF has "difficulty with sick call, the process, and the inmates being seen with sick call." ROA.28977. Likewise, EMCF's physician, Dr. Arnold, admitted at trial that although sick calls are supposed to be seen by a provider within seven days, staff "fall behind" because of lockdowns or simply because "the number of sick calls exceeds our ability to triage them or see them." ROA.30155.

Similarly, Dr. Stern and Ms. LaMarre attested to problems with medication administration that persisted after trial in the fall of 2018. Nearly 97 percent of people held at EMCF are prescribed medication—well above the MDOC-wide rate of 64.7 percent, *see* ROA.21776—for serious medical conditions such as diabetes, hypertension, hypothyroidism, heart disease, and seizures, as well as psychiatric conditions. ROA.19300. Dr. Perry agreed that "nearly all" people at EMCF take prescription medications. ROA.29036. Into late 2018, prescriptions were frequently out of stock, nurses failed to administer medications properly or at all, and medication administration records ("MARs") were unreliable and inaccurate. Dr. Stern reviewed 173 MARs from October 2018 and found that 147 of them reflected that patients "had not been given a very significant portion . . . of one or more medically necessary medications to treat a serious disease." ROA.19298-300. Dr. Arnold replied in his 2018 affidavit that EMCF took steps after trial to improve compliance with medication administration standards and claimed a 93 percent compliance rating in October 2018, but did not explain how that compliance rating was calculated or provide any evidence to corroborate it. ROA.20247-48.

Plaintiffs also showed that, when they do treat patients, EMCF medical staff systematically fail to meet minimally acceptable standards of care. ROA.19290-96, 22314-20. In his 2018 report alone, Dr. Stern identified more than two dozen instances of dangerously inadequate care by EMCF's licensed practical nurses

("LPNs"), registered nurses ("RNs"), nurse practitioners ("NPs"), and physician. ROA.22314-20. Likewise, after trial, Ms. LaMarre continued to identify many instances of "seriously inadequate care." ROA.19434-36. Nurses at EMCF frequently practice outside the scope of their licensure and make clinically unjustifiable decisions, the frequency of which exposes systemic failings. ROA.19290-93, 22312-21, 28664-65, 29466. Further, in their 2018 post-trial reports, Dr. Stern and Ms. LaMarre both identified serious failings in Dr. Arnold's own care of patients following his hiring in late 2017, calling into question both any alleged improvements in care and Dr. Arnold's own credibility in attesting to them. ROA.19293-95, 19441-43.

B. Isolation

Isolation, also known as solitary confinement, consists of conditions in which a person is confined in a cell for at least 22 hours a day. ROA.28284-85. Dr. Terry Kupers was qualified at trial as Plaintiffs' expert in the "psychiatric effects of the conditions of solitary confinement on prisoners in general and at [EMCF]." ROA.28261. Dr. Kupers is a clinical psychiatrist with approximately four decades of experience studying the psychiatric effects of solitary confinement, including in prisons in 20 states across the country. ROA.26076-89. The conditions in solitary confinement at EMCF are the worst Dr. Kupers has ever seen. ROA.28284. Defendants presented no expert testimony regarding isolation. In addition, Plaintiffs

proffered the expert testimony of Dr. Bruce Gage on mental health issues, including psychiatric impacts of isolation at EMCF. Dr. Gage is a psychiatrist with three decades of experience, including as the chief psychiatrist of the Washington Department of Corrections. ROA.22071-77.

The unrebutted evidence at trial showed that, even in people without pre-existing mental health conditions, isolation causes serious psychiatric symptoms including anxiety, depression, aggression, and nightmares. ROA.22754-59. Clinical research indicates that nearly half of people held in isolation suffer hallucinations and perceptual distortions. Suicide is roughly twice as common as in the general prison population. ROA.22754-56. The psychiatric impacts of isolation are even worse for those with serious mental illness, who should not be placed in isolation, as both the American Bar Association and American Psychiatric Association have acknowledged. ROA.22779-81. EMCF mental health staff agreed that isolation causes serious psychiatric harm, especially in people already suffering mental illness. ROA.30077.

Reflecting this consensus, the National Commission on Correctional Health Care ("NCCHC") states that keeping any person in isolation for more than 15 days, regardless of his mental health status, "is cruel, inhumane, and degrading treatment, and harmful to an individual's health," and, moreover, that "mentally ill individuals . . . should be excluded from solitary confinement of any duration."

ROA.22779. The psychological harm of isolation continues to increase with the length of time a person is held there. ROA.28300-3. Yet people at EMCF are regularly placed in isolation for two, three, or four years or more. *See* ROA.28300, 27773-74, 28210, 28535, 28896. These extreme stints are frequently extended due to staff failures to review the status of people held in solitary confinement and process their reclassifications, in violation of policy. ROA.21729-30, 22770-71, 28366-67, 24884-86.

Dr. Kupers and incarcerated witnesses testified that people held in isolation are often denied the amount of time prescribed by policy for out of cell recreation (one hour per day, five times a week) and for showers (three per week). ROA.24201-3, 28286-87, 28361-64. MDOC's correctional expert witnesses acknowledged they could not rebut this finding, owing in part to MDOC's concededly poor documentation. ROA.30007-9, 30246. This deprivation of minimal privileges further exacerbates the risk of harm to the mental health of those in isolation. ROA.28363-64. The routine absence of staff and failure to respond to basic needs also heightens psychiatric symptoms. ROA.28358-62. The result is that people held in isolation frequently engage in extreme behavior to attract attention and assistance, such as self-harm, intentionally overflowing sinks and toilets, throwing feces, and setting fires. ROA.27558-60, 28186-87, 28218-20, 28226-28, 28313-15, 28897-99, 28922-23. In one 16-day period in February and March 2017, there were an average

of more than four fires per day on EMCF's Unit 5, where people in isolation are housed. ROA.24893.

EMCF policies and practices further exacerbate this cycle of despair and self-destructive behavior. For instance, EMCF staff punish those who engage in self-harm with even more time in isolation. When people on Unit 5 require medical care for self-inflicted injuries, they are placed back in isolation cells immediately afterward. ROA.24230-31, 28109-10.

The psychiatric effects of isolation on Plaintiffs, especially those with serious mental illness, were undisputed and persisted after trial. In his post-trial 2018 inspection of EMCF, Dr. Gage "saw *more* evidence of the seriously mentally ill being placed in restrictive housing and remaining in isolation in the infirmary during this assessment than previously." ROA.20011 (emphasis added).

C. Protection from Harm

At trial, evidence showed that violence pervades EMCF and MDOC fails to adequately protect people incarcerated at EMCF from physical harm. A primary cause of this risk is a chronic and systemic staffing shortage. Eldon Vail offered expert testimony that provided the district court with context for the staffing deficiencies and related problems. Mr. Vail's corrections career spanned the 1970s through the 2010s and culminated as head of the Washington Department of Corrections. ROA.23362.

Evidence at trial and after trial showed two categories of staffing problems at EMCF. First, on each shift, the staffing plan prescribes an inadequate number of "mandatory posts"—roster positions that must always be filled by security staff. ROA.22953-60, 26899-90. Mr. Vail opined that to operate the prison safely during daytime shifts, EMCF should have at least four mandatory posts assigned to each of Units 1 through 4, eight mandatory posts on Unit 5, and five mandatory posts on Unit 6. ROA.19565-66. Instead, Defendants staff at about half that level. ROA.26956-8. MDOC and EMCF staff, including the contract monitor responsible for ensuring EMCF complies with MDOC requirements and the manager of Unit 5, agreed that the prison is systemically understaffed, affecting safety. ROA.21752-56, 28063-65.

Second, too often, many of the mandatory posts that do exist go unfilled. ROA.19548-51. Mr. Vail found that one or more mandatory posts were unfilled on 65 percent of all shifts between January and August 2018, covering the period immediately before, during, and after trial. ROA.19549. A senior MDOC official acknowledged at trial that the designated number of mandatory posts has "been deemed the minimum number of staff necessary to operate the prison safely," so a failure to staff them compromises safety. ROA.27980. Warden Frank Shaw noted at trial that he had hired 41 extra staff not required under the contract, but did not deny that these staff could be let go at any time because they were not contractually

required. ROA.29841-43. In any event, even if extra staff were hired, Mr. Vail found in 2018 that no more staff were actually working at the prison on any given shift. ROA.19546-47.

Chronic understaffing contributes directly to a multitude of risks to which people at EMCF are exposed. First, in lieu of adequate staff, gangs have assumed control of EMCF, making housing decisions, controlling access to food and showers, and working in isolation units against policy. ROA.27146-47, 27424, 27885-901, 21250, 21745-46. Defendants' failure to staff EMCF adequately for the number of people incarcerated has forced staff to *depend* on gangs to maintain control. ROA.28490-97. One gang member who was identified in an October 2015 email as "calling the shots" on his housing unit was still living there at trial in March 2018. ROA.27888. Defendants' decision to cede control has resulted in many assaults and instances of extortion. For instance, officers failed to intervene for four hours while a man was tied up and sodomized by gang members. Later, the individual who was raped and extorted was moved to isolation. ROA.28171-85. Many others testified to similar experiences. ROA.27506-10, 28430-32, 28544-46.

EMCF staff also fail to ensure that cell doors close and lock properly, allowing people to come in and out of their cells at will. ROA.27148-49, 27499-503, 27573-74, 29240. Between late 2017 and January 2018, one person was assaulted twice by the same individual who both times was supposed to be locked in his cell.

ROA.28901-7. Another witness testified that the night before he appeared in court, someone on his unit came out of a cell that was supposed to be locked. ROA.27767-69. The cell doors at EMCF are industry-standard, but staff fail to check the doors and remove any impediments placed in the locking mechanisms. ROA.30037-39, 30058. As a result, incarcerated people can prevent doors from closing. MDOC's own expert witness testified that staff inaction is the only reason EMCF has this basic problem that other American prisons do not. ROA.30058-59.

Staffing deficiencies also contribute to systemic failures to conduct prisoner counts, a basic, critical safety task. For 32 straight months between 2014 and 2017, counts were documented as being conducted improperly, too infrequently, or both. ROA.24874-75. After trial, in 2018, Defendants' own expert witness found EMCF non-compliant with count policies. ROA.20231-33. Witnesses confirmed that EMCF staff conduct counts inconsistently and improperly. ROA.27556-58, 27430-32. Staff often delegate the task to incarcerated people. ROA.27478-79, 28497-98, 29200-2. The risk to Plaintiffs created by these failures is apparent. The rate of assaults overall is very high at EMCF. ROA.26916-33. People are often housed in the wrong cells, a problem that Mr. Vail never previously encountered, and which puts people at risk of assault or other harms. ROA.27011. People are also held hostage and assaulted in their cells. ROA.27572-74. When he examined the facility

in 2018 after trial, Mr. Vail noted that the risks contributing to the high rate of assaults had not been addressed. ROA.19560-61.

III. The District Court's Opinion

The district court issued its opinion on December 31, 2019, in which it denied each claim, finding "that the alleged constitutional violations that may have existed at the time this lawsuit was filed no longer exist and, therefore, that the injunctive relief sought by Plaintiffs has not been shown necessary." ROA.26402.

With respect to medical care, the district court dismissed the expert testimony of both Dr. Stern and Ms. LaMarre because, it found, their "personal opinions" about whether care was adequate "do[] not establish a standard for decency." ROA.26419. The district court observed that MDOC had changed medical contractors and hired Dr. Arnold, based upon whose uncorroborated testimony the district court concluded that sick call, urgent care, routine care, and emergency care all occur in an appropriate and timely fashion. ROA.26420-21. The district court further credited Dr. Arnold's uncorroborated statement that EMCF had a 93 percent medication compliance rate in October 2018 (without reconciling Dr. Stern's and Ms. LaMarre's contrary findings). ROA.26423-24.

With respect to isolation, the district court found that Dr. Kupers' opinions about the appropriate length of isolation did not "create a benchmark for determining whether any constitutional rights have been violated." ROA.26431. Without making

factual findings about most of the conditions in which people are held in isolation at EMCF, the district court observed that "longer periods of continuous cell time have been found constitutional." ROA.26431-32. The district court concluded that Plaintiffs did not show a constitutional violation "based on either the length of time they are housed in solitary confinement, or the conditions of that confinement." ROA.26432.

With respect to protection from harm, the district court noted that EMCF was designed for "indirect" supervision, where staff are not stationed on housing units at all times. ROA.26438-39. It also observed that EMCF, including its staffing plan, have been accredited by the American Correctional Association. ROA.26440. The district court thus concluded that Defendants' staffing plan was not deliberately indifferent. ROA.26440. The district court acknowledged the separate argument that EMCF is not adequately staffed even according to its staffing plan, but noted that the warden testified that staff sometimes call out from work or fail to report for duty; that the number of EMCF staff on payroll had increased; that EMCF can require backup staff to report to work to fill empty posts; and that nonmandatory staff can be reassigned to mandatory posts. ROA.26441-42. On this basis, the district court concluded that staffing failures did not constitute constitutional violations. ROA.26442.

SUMMARY OF THE ARGUMENT

The district court made three distinct errors, each of which independently calls for reversal and remand.

First, the district court applied the wrong legal standard by asking whether individual, discrete conditions at EMCF violated the Eighth Amendment. The long-established test in prison conditions cases requires a court to consider whether the totality of conditions, including any "mutually enforcing effect[s]," coheres to deprive incarcerated people of "a single, identifiable human need." *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004). To properly consider the totality of circumstances, "the court [must] make a detailed inquiry into all of the conditions of a prison, as well as the circumstances that have created the conditions." *Stewart v. Winter*, 669 F.2d 328, 335-36 (5th Cir. 1982). The district court erred by failing to make this detailed inquiry, as it entirely disregarded numerous conditions that were proven by substantial portions of the evidence. It also erred by applying the wrong analysis to the conditions it did consider, in that it only addressed each condition seriatim rather than considering the totality of circumstances to which they contribute. The totality of circumstances showed that conditions at EMCF violate the Eighth Amendment.

Second, in determining that there were no Eighth Amendment violations, the district court focused solely on conditions that existed at the time of and immediately after trial, but failed to consider whether there was a risk of recurrence of earlier

violations. An injunction should issue where "there exists some cognizable danger of recurrent violation." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 59 (1975). The determinative issue is not whether there is a violation at the precise moment of judgment but, rather, whether there is a risk of a future violation that an injunction would prevent. *See U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The district court failed to consider or find if there had been prior violations of the Eighth Amendment or whether there was any cognizable danger that such violations would recur. Even assuming *arguendo* that the conditions at and after trial were constitutional (they were not), the evidence showed both that prior conditions did violate the Eighth Amendment (as the district court itself effectively acknowledged, *see* ROA.19014) and that a cognizable danger of recurrence existed.

Third, the district court erroneously disregarded Plaintiffs' expert testimony with respect to medical care, solitary confinement, and protection from harm because it found that such testimony did not "establish a standard for decency" or "create constitutional standards." In doing so, the district court misapplied the Supreme Court's ruling in *Rhodes v. Chapman*, 452 U.S. 337 (1981), to inappropriately limit its consideration of expert testimony. Moreover, Plaintiffs were not required to "establish a standard for decency" because the Supreme Court has long held that deliberate indifference to the denial of medical care is, as a matter of law, "inconsistent with contemporary standards of decency." *Estelle v. Gamble*, 429

U.S. 97, 103-04 (1976). Likewise, Plaintiffs' experts on isolation and protection from harm were not proffered to prove either a "standard of decency" or to "create constitutional standards." As is routine in prison conditions cases, the expert testimony was provided to prove the relevant Eighth Amendment standard—that conditions at EMCF subject incarcerated people to a substantial risk of serious harm and that Defendants are deliberately indifferent to it. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The district court erred in dismissing the expert witnesses simply because their opinions did not create a standard of decency or a *per se* constitutional floor on acceptable conditions.

STANDARD OF REVIEW

Each of the issues in this appeal presents a question of law that this Court reviews de novo. Though a district court's factual conclusions are subject to review for clear error, whether it applied the proper legal analysis to the facts is a question of law receiving de novo review. *See, e.g.*, *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224-25 (5th Cir. 1986) (lower court's fact findings about jail conditions reviewed for clear error, but whether those facts violate the Constitution subject to de novo review). Factual findings predicated on an erroneous conception of the law do not receive clear error review. *See, e.g.*, *Barto v. Shore Constr., L.L.C.*, 801 F.3d 465, 471 (5th Cir. 2015) ("Despite this court's typical deference to a district court's factual findings, a judgment based on a factual finding derived from an incorrect

understanding of substantive law must be reversed.") (citation and internal quotation marks omitted); *Tyler v. Ins. Co. of N. Am., Inc.*, 539 F.2d 1072, 1074 (5th Cir. 1976) ("Any fact findings based on an erroneous legal standard cannot be credited.").

ARGUMENT

I. The Order and Judgment Should Be Reversed Because the District Court Failed to Consider Whether the Totality of Circumstances, in Combination, Violates the Eighth Amendment

A. The District Court Was Required to Consider the Totality of Circumstances Created by Conditions at EMCF

When assessing whether prison conditions violate the Eighth Amendment, a district court must consider the totality of circumstances and any "mutually enforcing effect[s]" that conditions may have in depriving incarcerated people of "a single, identifiable human need." *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004). The district court failed to do so for two separate reasons: (1) it did not make sufficient findings of fact to meaningfully conduct that analysis in the first place, and (2) it did not properly analyze the totality of circumstances created by the findings of fact that it did make.

This Court has held for decades that a "totality of circumstances" test is the appropriate one for assessing whether conditions of confinement are unconstitutional. A court must consider not just specific acts or omissions in isolation but whether, in combination with the "general conditions in the prison," they create a circumstance that violates constitutional norms. *Ruiz v. Estelle*, 679

F.2d 1115, 1139 (5th Cir. 1982), *vacated in part on other grounds*, 668 F.2d 266 (5th Cir. 1982) (discussing *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). Therefore, courts "need not separately weigh each of the challenged institutional practices and conditions, [but] instead look to 'the totality of conditions.'" *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986) (quoting *Ruiz*, 679 F.2d at 1139). "This test requires the court to make a detailed inquiry into all of the conditions of a prison, as well as the circumstances that have created the conditions." *Stewart v. Winter*, 669 F.2d 328, 335-36 (5th Cir. 1982).

In short, courts cannot simply separate out each condition at a prison, conclude that each one independently meets constitutional standards, and on that basis absolve prison officials of liability. Nor is there a single "definitive index" by which a condition is considered an Eighth Amendment violation, including compliance or non-compliance with broad standards such as "state fire and sanitation codes." *McCord v. Maggio*, 910 F.2d 1248, 1250 (5th Cir. 1990). "Conditions not condemned as unfit for human habitation in the prison setting have been held to still amount to a violation of a prisoner's Eighth Amendment rights." *Id.*

By way of example, when determining whether prison overcrowding was unconstitutional, this Court looked not only to the degree of overcrowding itself, but to "the totality of conditions caused by overcrowding," including the threat of violence, the use of force by staff, and staffing ratios. *Ruiz*, 679 F.2d at 1142. When

determining if heat levels at the Louisiana State Penitentiary violated the Eighth Amendment, this Court considered not just the heat index but its effect on the particular prison population, taking into account things like the prevalence of medical conditions among incarcerated people that would make them susceptible to heat-related illness. *See Ball v. LeBlanc*, 792 F.3d 584, 592 (5th Cir. 2015). And, earlier this year, this Court reversed and remanded a district court's grant of summary judgment in favor of jail officials where material disputed facts existed about several *de facto* policies regarding the screening and intake of detainees. Though each policy, standing alone, may not have violated the plaintiff's constitutional rights, "a jury could reasonably conclude that they had a 'mutually enforcing effect' that deprived [the plaintiff] of needed medical care." *Sanchez v. Young Cnty.*, 956 F.3d 785, 796 (5th Cir. 2020).

B. The District Court Did Not Make Sufficient Findings of Fact to Consider the Totality of Circumstances

Because the district court must assess whether conditions, in totality, conspire to violate the Eighth Amendment, "[i]t is . . . essential that the [district court] make factual findings that elucidate the conditions under which [plaintiff] was compelled to exist in order that the totality of conditions may be assessed." *McCord*, 910 F.2d at 1250.

This requirement echoes Federal Rule of Civil Procedure 52, which requires a court sitting as a finder of fact to "find the facts specially." Fed. R. Civ. P. 52(a)(1).

Under Rule 52, factual "findings may be challenged as inadequate to give a clear understanding of the process by which the court's ultimate conclusions were reached and thus inadequate to permit appellate review." *Curtis v. Comm'r*, 623 F.2d 1047, 1051 (5th Cir. 1980). "Rule 52(a) compels a district court to lay out enough subsidiary findings to allow [the appellate court] to understand 'the basis of the trial court's decision.'" *Eni US Operating Co. v. Transocean Offshore Deepwater Drilling, Inc.*, 919 F.3d 931, 935 (5th Cir. 2019) (quoting *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 515 (5th Cir. 1969)). The district court's factual findings need not address every fact and piece of evidence but "must be sufficiently detailed to give us a clear understanding of the analytical process by which [the] ultimate findings were reached and to assure us that the trial court took care in ascertaining the facts." *Id.* (quoting *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 433 (5th Cir. 1977)). "The more complex the case, the more important the task of articulating detailed factual findings becomes." *Id.* at 936 (citing *Chandler v. City of Dall.*, 958 F.2d 85, 90 (5th Cir. 1992)). It is especially critical that the district court make sufficient factual findings in cases like this one where the relevant legal test requires an analysis of the totality of circumstances. *See B. H. Bunn Co. v. AAA Replacement Parts Co.*, 451 F.2d 1254, 1263 (5th Cir. 1971) (remanding unfair

competition claims where district court made inadequate findings of fact because "unfair competition is a matter of the totality of the evidence").[2]

In light of these principles, the district court did not make sufficient factual findings. The court's opinion ignored entire categories of conditions at EMCF supported by substantial bodies of admitted evidence, without which the court could not coherently assess the totality of circumstances.

1. Medical

The court boiled down Plaintiffs' claims regarding medical care to three discrete complaints:

> (1) they are denied access to treatment for urgent, non-urgent, and chronic medical conditions because there is not a rapid and confidential means for alerting staff of medical problems; (2) they are subjected to "unacceptably long delays" in receiving medical treatment; and (3) the treatments they receive are below the standards set for medical health care providers. ROA.26418.

This summation does not address several categories of problems with medical care that were evidenced at and after trial. For instance, there was substantial evidence showing that nurses are practicing outside the scope of their licensure, causing actual harm. ROA.19290-96, 22088-95. The evidence also showed that

[2] Where a trial court's findings are "not expressed with sufficient particularity" to determine whether its legal conclusions are properly founded, remand is appropriate. *Redditt v. Miss. Extended Care Ctrs., Inc.*, 718 F.2d 1381, 1386 (5th Cir. 1983) (judgment vacated and case remanded where district court denied claims of race discrimination based on a "conclusory finding [that] in no way indicates the factual basis for the court's conclusion" after trial); *see also Eni*, 919 F.3d at 942 (vacating and remanding).

mortality reviews were systemically inadequate, overlooking serious treatment failures that contributed to deaths and therefore unnecessarily exposing future patients to the risk that those same failures may recur. ROA.19296-98.

More critically, even for the categories of problems it recognized, the district court stated its factual findings in a conclusory manner that did not address the substantial volume of contradictory evidence. Without squaring its findings with the multiple contrary reports of Dr. Stern and Ms. LaMarre, documentary evidence, and testimony of numerous witnesses, including both incarcerated people and staff, the court simply concluded: "There is insufficient evidence that prisoners, as a class,[3] are being refused treatment, having their medical problems ignored, or are intentionally being mistreated as is required to succeed on a Section 1983 claim." ROA.26421-22.

Similarly, without analysis, the district court dismissed the evidence that, systemically and routinely, medications are not properly given to patients and not properly documented, although Dr. Stern and Ms. LaMarre both found these issues were rampant into the fall of 2018. ROA.19298-303, 19428-31. In fact, Dr. Stern found that medication administration failures were linked to at least three deaths in

[3] With this phrase, the district court suggests that it dismissed any evidence that related to a particular member of the Plaintiff class, as opposed to the class as a whole. This was also error. A demonstration that Defendants' failures led to actual harm in the case of one or more individuals evidences the substantial threat of harm to class members as a whole. Plaintiffs did not need to demonstrate that this threat became actualized with respect to every class member.

2018. ROA.19297-301. Yet, without explanation, the court apparently credited Dr. Arnold's uncorroborated, summary claim that the medication administration compliance rate had improved to 93 percent, and thus concluded these problems had been resolved. ROA.26423-24.

In short, the district court erroneously disregarded entirely a substantial volume of evidence contradicting its conclusions in order to credit the testimony of one clearly biased witness, Dr. Arnold, who is employed by Defendants and in whose own treatment of patients expert witnesses identified serious failings. ROA.19293-95, 19442-43. Although the district court was entitled to make credibility determinations and weigh the evidence, its opinion gives no indication whether, or how, it reconciled its findings with the substantial contrary evidence. That leaves this Court with a record "inadequate to give a clear understanding of the process by which the [district] court's ultimate conclusions were reached" and, specifically, unable to determine if the district court properly considered the totality of circumstances. *Curtis*, 623 F.2d at 1051.

2. Isolation

On the question of the length of detention in isolation, the district court summarily concluded that Dr. Kupers' opinions did not establish a constitutional limit of 15 days in isolation. That conclusion, however, failed to reckon with the fact that people at EMCF are held in isolation for not just 15 days, but *years* at a time.

See ROA.27773-74, 28210, 28300, 28535, 28896. Likewise, the district court did not address any of the evidence that staff rarely spend any time on the isolation units, which contributes to desperate acts like setting fires, a near-daily occurrence. ROA.24893, 27558-60, 28186-87, 28218-20, 28226-28, 28313-15, 28897-99, 28922-23.

Such extreme behavior is both a symptom of and a contributing factor to the psychological strain of conditions in isolation. Dr. Kupers contextualized these conditions for the district court: in his four decades studying solitary confinement in twenty states, the conditions in solitary confinement at EMCF were the worst he had ever seen. ROA.28284. The district court could not properly assess the totality of circumstances without addressing an expert's unrebutted testimony that the evidence of psychic torment at EMCF was literally unprecedented.

Most glaringly, in disposing of the isolation claim, the district court never addressed the fact that the vast majority of people held at EMCF have a diagnosed mental health condition, including, as of 2017, 99 percent of people placed in isolation. ROA.24982. That fact is critical to determining whether the conditions in isolation are constitutional. The harm caused by isolation is psychological in nature: it causes severe paranoia, delusions, anxiety, depression, and suicidal ideations. ROA.22754-57. These risks are even further heightened in those with preexisting mental health conditions, as Dr. Kupers testified, and as EMCF's mental health

counselor agreed. ROA.22754, 30076-77. Without taking into account that EMCF is MDOC's designated site for mentally ill people, the district court could not properly consider whether conditions in isolation are constitutional.

3. Protection from Harm

The district court limited its factual findings concerning Plaintiffs' protection from harm claim solely to a determination of whether staffing levels are adequate. In so doing it ignored a vast body of evidence showing substantial risks of harm from actual and potential violence affecting people at EMCF.

The district court did not address, for instance, the documentary evidence, testimony, and Mr. Vail's expert opinions which showed that gangs exert extraordinary control over routine matters like where people will be housed and whether they have access to food and showers. ROA.21744-45, 22938-48, 27146, 27425. Relatedly, the district court did not address evidence of gangs extorting and violently assaulting other incarcerated people with virtual impunity. ROA.27506-10, 28171-85, 28430-32, 28544-46. Nor did the district court address the fact that incarcerated people routinely prevent their cell doors from locking, allowing them to come out and assault others at will, or that this problem is the direct result of staffing failures. ROA.27148-49, 27499-503, 27573-74, 27767-69, 28901-7, 29240, 30058-59. Without considering these facts, the district court could not analyze

whether the totality of circumstances concerning MDOC's failure to protect Plaintiffs from harm cohere to violate the Eighth Amendment.

The district court's factual findings do not allow insight into why it credited the evidence it did, or why it discredited (or simply ignored) entire categories of other evidence relevant to its legal conclusions. This Court cannot know if the district court's conclusions rest on a sound factual foundation. Accordingly, the decision should be reversed and remanded. *See, e.g., Echols v. Sullivan*, 521 F.2d 206, 207 (5th Cir. 1975) (case remanded "for appropriate findings to be made"); *Nickerson v. Travelers Ins. Co.*, 437 F.2d 113, 114 (5th Cir. 1971) (same).

C. The District Court Did Not Properly Assess the Totality of Circumstances and Mutually Reinforcing Effects of the Evidence it Considered

The district court also erred in applying the wrong legal analysis to the evidence that it *did* address. The district court did not consider whether the conditions at EMCF "have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Gates v. Cook*, 376 F.3d at 333. Instead, it categorized the evidence into several discrete conditions and concluded in turn that each was constitutional. That was error.

1. Medical

In rejecting Plaintiffs' medical care claim, the district court failed to reckon with the relevant legal question of whether the totality of circumstances at EMCF,

in concert, creates a substantial risk of harm to Plaintiffs due to constitutionally deficient medical care.

Dr. Stern provided clear examples of how deficiencies in separate categories of medical care cohere to create a single risk of harm applicable to the entire class of Plaintiffs. For instance, in his 2018 post-trial report, Dr. Stern described how one 30-year-old man at EMCF suffered a heart attack due to a confluence of deficiencies in various aspects of medical care. ROA.19296. Due to deficiencies in medication administration, the man went without his hypertension medication for long periods. ROA.19296. LPNs failed to report the missed doses. ROA.19296. Due to systemic deficiencies in the provision of chronic care, an NP failed to review the patient's chart to identify the missed doses. ROA.19296. When the patient later presented with chest pain and high blood pressure, due to deficiencies in acute care, both an RN and an NP failed to examine his heart or lungs to determine if he might be having a heart attack. ROA.19296. Instead, the medical providers "handed him off" to mental health staff because he was agitated. ROA.19296. Two days later, the patient again complained of chest pain and was finally sent to an emergency room, in a prison van instead of an ambulance. ROA.19296.

This is just one illustration of how, working in concert, the failures of the health care delivery system mutually enforce one another to expose Plaintiffs to a substantial risk of harm. Even if each one of these serious errors in medical care, and

many more like them, could be attributed to individual acts of negligence not of a constitutional magnitude, their recurrence and prevalence create systemic failures that expose all men at EMCF to a serious risk of substantial harm. The interaction of each of these systemic failures means that people at EMCF are exposed to a risk much greater than any one failure alone would cause. If the patient simply missed medication doses but medical staff adequately reviewed his chart, or if staff did not review his chart but checked his symptoms, he may have been spared serious harm. But in conjunction, these failures caused him to go days before being diagnosed with a heart attack. The district court did not contemplate these kinds of mutually enforcing effects when it concluded that the deficiencies in medical care at EMCF were not constitutional violations. ROA.26421-24. Correctly considered under the appropriate legal test, the evidence shows that systemic deficiencies in medical care at EMCF cause a substantial risk of serious harm to all people held at EMCF, to which Defendants are deliberately indifferent in violation of the Eighth Amendment.

2. Isolation

With respect to isolation, the district court again looked at each condition independently and found that each did not violate the Eighth Amendment. The district court concluded: (1) people at EMCF are not placed in isolation without justification; (2) it is not, by itself, an Eighth Amendment violation to withhold five hours a week of recreation or three-times-weekly showers; and (3) broken lights in

isolation units, though prevalent, are not due to deliberate indifference. ROA.26431-33. But the district court failed to consider whether each of these conditions, and others it did not address, contribute to a totality of circumstances that *does* violate the Eighth Amendment, as required. *See, e.g.*, *Porter v. Clarke*, 923 F.3d 348, 357 (4th Cir. 2019) (solitary confinement held unconstitutional as characterized by combination of specific conditions found on death row).

Each proven isolation condition contributes to a whole that is "objectively intolerable." *Farmer*, 511 U.S. at 846. Particularly among a mentally ill population, being held in isolation for indiscriminate lengths of time contributes to the sense that there is no order, no authority, and no safety or control, exacerbating decompensation and psychological harm. ROA.22770-72. Likewise, limited access to showers or recreation, being held in cells without functioning lights, constant fires and shouting, absent staff, and exposure to assault each may not violate constitutional standards on their own, but each is a contributor to psychological decompensation that may constitute an Eighth Amendment violation. ROA.22763-69, 22790-94. As just one example, an incarcerated witness testified that due to loneliness compounded with noise, smells, fires, flooding, and other conditions, he suffered intense bouts of rage and felt a compulsion to cut himself when in isolation at EMCF that he never experienced in general population. ROA.28923-25.

The district court erred by only addressing seriatim each of the factors that contribute to this harm, without considering their cumulative impact on Plaintiffs, which cause a substantial risk of serious harm to which Defendants are deliberately indifferent in violation of the Eighth Amendment.

3. Protection from Harm

The district court correctly identified Plaintiffs' contention that there are two fundamental problems with staffing at EMCF. First, the EMCF staffing plan, which designates the number of security staff who must work each day and where, is inadequate. ROA.26438. The district court concluded that the staffing plan was not unconstitutional because it was approved by the American Correctional Association by way of its accreditation of EMCF. ROA.26440-41. Second, the staffing plan is not actually followed, as mandatory staffing posts regularly go unfilled. ROA.26441. The district court concluded that this failure to staff mandatory posts was acceptable because it credited that "the prison has made multiple changes to ensure that all mandatory staff positions are filled," notwithstanding that as late as August 2018, 30 percent of mandatory posts still went unfilled. ROA.26441-42.

On this claim, too, the district court did not properly consider the totality of circumstances. The district court methodically addressed the specifics of EMCF's staffing plan and whether Defendants are meeting that plan, but did not consider the relevant question: whether staffing deficiencies *contribute to* circumstances that,

taken as a whole, expose Plaintiffs to a substantial risk of serious harm. *Cf. Jones v. Diamond*, 636 F.2d 1364, 1373 (5th Cir. 1981) ("A prisoner has a right to be protected from the constant threat of violence and from sexual assault" under the Eighth Amendment.), *overruled on other grounds*, *Int'l Woodworkers of Am. Local No. 5-376 v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986).

Those circumstances include the prevalence of what the court cursorily identified as "gang activity, assault, and violence," without any discussion. ROA.26438. By not addressing the totality of circumstances *caused by* inadequate staffing, the district court elided the key issue that was to be decided: whether Plaintiffs are placed at a substantial risk of serious harm. Instead, it limited its analysis solely to whether EMCF's staffing is adequate "in a vacuum." *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 255 (5th Cir. 2018). The cumulative impact of the effects of inadequate staffing at EMCF, which the district court failed to consider, cause a substantial risk of serious harm to which Defendants are deliberately indifferent, in violation of the Eighth Amendment.

II. The Order and Judgment Should Be Reversed Because the District Court Failed to Consider Whether There Was a Cognizable Danger of Recurrent Violations of the Eighth Amendment

A. The District Court Applied the Incorrect Legal Standard

The district court applied the incorrect legal standard in deciding whether to grant or deny the injunctive relief sought by Plaintiffs. Specifically, the district court

incorrectly focused exclusively on the reforms implemented after commencement of the suit (but before trial) and failed to consider at all whether there was a risk of Eighth Amendment violations recurring in the future. In fact, the district court expressly misunderstood the significance of a risk of recurrence, stating during closing argument, "Any instance can reoccur. That's kind of a statement without a whole lot of meaning." ROA.30344. This was reversible error.

The Supreme Court has repeatedly held that an injunction should issue where "there exists some cognizable danger of recurrent violation." *Rondeau*, 422 U.S. at 59; *see also Kansas v. Nebraska*, 574 U.S. 445, 466 (2015) (affirming denial of Kansas' request for injunction because it "failed to show, as it must to obtain an injunction, a cognizable danger of recurrent violation") (internal quotations and citations omitted); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 n.3 (1994) (noting that injunction should be granted where "there is a showing that defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a cognizable danger of recurrent violation") (internal quotations omitted). The determinative issue is not only whether there is a violation at the precise moment of judgment[4] but, rather, whether there is a risk of a *future* violation that an injunction would prevent. *See W.T. Grant Co.*, 345 U.S. at 633

[4] As discussed at length, the district court also erred by failing to find numerous violations that existed at the time of trial and judgment. *See supra* Part I.

("The purpose of an injunction is to prevent future violations and, of course, it can be utilized even without a showing of past wrongs.") (internal citations omitted); *U.S. v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction is to forestall future violations. . . . All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur."). Because this is the minimum requirement for obtaining injunctive relief, a district court must consider and determine whether there is a threat of future violation. *Shanks v. City of Dall.*, 752 F.2d 1092, 1097 (5th Cir. 1985) ("To obtain permanent equitable relief, a party need only show that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.") (internal quotations omitted).

Conversely, denial of injunctive relief is not warranted merely because a defendant made alleged improvements during the pendency of the litigation. *See, e.g.*, *Hernandez v. Cremer*, 913 F.2d 230, 235 (5th Cir. 1990) (holding injunction warranted despite improvements to INS policy regarding persons at border claiming citizenship because policies could be rescinded at any time); *McGhee v. King*, 518 F.2d 791, 793 (5th Cir. 1975) ("An injunction may be warranted despite a finding that the updated [jury composition] percentages comply with constitutional standards."); *see also W.T. Grant Co.*, 345 U.S. at 633 ("[T]he court's power to grant

injunctive relief survives discontinuance of the illegal conduct.”). To avoid an injunction in such circumstances, courts require “clear proof” that an unlawful practice has been abandoned, and must guard against attempts to avoid injunctive relief “by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.” *Wilk v. Am. Med. Ass’n*, 895 F.2d 352, 367 (7th Cir. 1990) (quoting *Oregon State Med. Soc’y*, 343 U.S. at 333). Thus, in cases where challenged practices allegedly have been reformed, courts must determine the legality of such past practices and determine whether there remains any risk of recurrence. *See, e.g.*, *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1388 (5th Cir. 1980) (remanding to district court to determine the “legality of . . . discontinued practices” and the appropriateness of injunctive relief based upon whether “there exists some cognizable danger of recurrent violation . . . .”).

This legal standard takes on particular importance in “conditions of confinement” cases brought under the Eighth Amendment given the imbalance of power and vulnerability of the prison population should prison officials decide to reinstitute challenged practices. Thus, in deciding whether prison officials should be enjoined, district courts are required to determine whether there is a risk of a *future* Eighth Amendment violation. *See Gates v. Cook*, 376 F.3d at 337 (rejecting MDOC’s argument that an injunction was not warranted and holding that MDOC’s

discontinuance of past practices did not obviate the need for injunctive relief to prevent future violations); *see also Farmer*, 511 U.S. at 846 n.9 ("[P]rison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm *and that they would not revert to their obduracy upon cessation of the litigation*.") (emphasis added). In cases where prison officials allegedly have made reforms during the pendency of the litigation, the proper question is—in addition to whether the reforms are sufficient to cure the constitutional infirmity[5]—whether there remains any risk that the past violations will recur. *See Gates v. Collier*, 501 F.2d 1291, 1321 (5th Cir. 1974) ("Changes made by [prison officials] after suit is filed do not remove the necessity for injunctive relief, for practices may be reinstated as swiftly as they were suspended."); *see also Porter*, 923 F.3d at 364-66 (holding that Virginia Department of Corrections' previously discontinued practice of solitary confinement violated Eighth Amendment and affirming grant of injunctive relief on ground that there remained a risk of future violation).

The district court wholly failed to perform the legal analysis necessary to properly conclude that no injunction should issue, in two ways. It did not determine whether there had been prior violations of the Eighth Amendment (although it

[5] Here, they were not. *See supra* Part I.

previously indicated that there had been, *see* ROA.19014) and, more importantly, whether there was any cognizable danger that such violations would recur. Instead, the district court focused exclusively on the narrow question of whether remedial measures implemented after commencement of the suit, but before trial, were consistent with the Eighth Amendment.[6]

The district court's order makes clear that the *sole* basis for denying injunctive relief was its determination that prior violations no longer existed at the time of judgment. ROA.26402 ("[T]he Court concludes that the alleged constitutional violations that may have existed at the time this lawsuit was filed no longer exist and, therefore, that the injunctive relief sought by Plaintiffs has not been shown necessary."). In discussing Plaintiffs' specific claims, the district court similarly focused primarily on the alleged reforms implemented without discussing *at all* whether there was any risk of future violation. *See, e.g.*, ROA.26424 (denying inadequate medical care claim because "Defendants have contracted with a new company to provide medical care at EMCF, they have established an in-house pharmacy and new protocols to ensure prisoners are receiving prescribed medication, and requests for medical care are now being timely triaged and answered"). While these considerations may be relevant, they are not dispositive,

[6] As explained above, these measures were not sufficient to cure the Eighth Amendment violations. *See supra*, Part I. Nonetheless, even if they were, the district court's failure to consider whether there was a risk of future violations constituted reversible error.

and the "*necessary determination* is that there exists some cognizable danger of recurrent violation," *W.T. Grant Co.*, 345 U.S. at 633 (emphasis added), a determination the district court neither made nor even discussed.

Tellingly, during closing argument, the district court simultaneously acknowledged the risk of recurrence as a factual matter and made clear that it did not view such risk as a relevant legal consideration. When Plaintiffs' counsel correctly noted that voluntary cessation is insufficient to cure constitutional violations where there is a risk of recurrence, the district court responded: "Any instance can reoccur. That's kind of a statement without a whole lot of meaning." ROA.30344. The failure of the district court to conduct this analysis and apply the correct legal standard alone requires reversal. *See S.E.C. v. Mize*, 615 F.2d 1046, 1051 (5th Cir. 1980) ("The decision to grant or deny injunctive relief will be reversed on appeal only if the district court abused its discretion *or failed to apply the proper legal standard*.") (emphasis added); *McGhee*, 518 F.2d at 793 (reversing district court for failure to apply correct legal standard to claims of racial discrimination in jury selection).

B. The Record Confirms That There Is a Cognizable Danger of Recurrent Violations Warranting Injunctive Relief

Had the district court properly considered whether there was a "cognizable danger of recurrent violations," the record confirms that such danger exists, thereby warranting the issuance of injunctive relief. In determining whether an injunction

against allegedly discontinued practices is appropriate, district courts must consider "the bona fides of the expressed intent to comply," "the effectiveness of the discontinuance," and "the character of past violations." *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73, 78 (5th Cir. 1973) (citing *W.T. Grant Co.*, 345 U.S. at 633). Each one of these factors warrants reversal of the district court's Order denying injunctive relief.

First, EMCF officials only instituted limited reforms *after* commencement of this litigation in 2013. Efforts (largely ineffective) to reduce contraband were not started until 2014, ROA.29850-51; staffing increases (also ineffective) were not begun until 2015, ROA.29840-42; and an acute mental health care unit was not established until 19 days before trial, ROA.20001, 29133-34. Indeed, the district court explicitly found in 2018 that conditions described in the Plaintiffs' 2016 expert reports likely violated the Eighth Amendment. ROA.19014 ("Had the conditions and practices at EMCF, as alleged by Plaintiffs in their Complaint and described by Plaintiffs' experts in their 2016 reports, continued to exist, Plaintiffs would likely be entitled to injunctive relief . . . .").

Moreover, despite implementing limited reforms, MDOC continued to assert at trial that there was *nothing* wrong with the prior conditions. *See, e.g.*, ROA.30388-89 (arguing that pre-reform videos reflected "incredibly clean" conditions that did not "look any different at all" from current conditions despite district court's

disagreement); ROA.30410 (stating that there have never been any constitutional violations at EMCF). Such changes, made in reaction to litigation and without any acknowledgment of past violations, simply do not support the denial of injunctive relief. *See, e.g.*, *Wilk*, 895 F.2d at 368 (affirming grant of injunctive relief based on cognizable danger of recurrence where defendant only discontinued challenged conduct as a result of litigation and continued to assert that the challenged conduct was lawful); *see also Porter*, 923 F.3d at 365 (affirming grant of injunctive relief based on risk of recurrent violation based on prison officials' repeated assertions "that they do not believe the challenged conditions violate the Eighth Amendment").

Second, while the changes made at EMCF are wholly inadequate (as discussed above), there is also no legal impediment barring MDOC from reversing them. For example, though EMCF increased staffing (at least on paper) during the litigation, Warden Frank Shaw admitted at trial that nothing "prohibits [him] from reducing that staffing number." ROA.29842. In fact, MDOC has not required its contractors to permanently implement *any* of the post-suit changes, as the terms of its operative contracts remain unchanged. *See* ROA.32161, 34022. Nor do Plaintiffs have any mechanism for challenging the reversal of such changes absent an injunction. The Fourth Circuit recently affirmed the issuance of injunctive relief in nearly identical circumstances. *See Porter*, 923 F.3d at 365 (affirming grant of injunctive relief against prison officials because "there is no legal barrier to

defendants returning to the pre-2015 conditions nor is there any pre-implementation mechanism for plaintiffs to challenge such a return").

Third, the egregious nature of the conditions at EMCF warranted particular caution on the part of the district court before denying injunctive relief on the basis of Defendants' limited changes. Such violations included a consistent failure to provide urgent medical care, contributing to numerous preventable deaths, *e.g.,* ROA.19286-95; security staff "constantly and repeatedly refusing to bring inmates to clinics for scheduled sick call, dental, mental health and chronic care appointments," ROA.21765; people held in solitary confinement for years under deplorable conditions, ROA.28300; and near-total control by gangs of other incarcerated individuals' meals, showers and cell locations as well as repeated physical and sexual assaults by gang members in which guards refused to intervene, *see* ROA. 21250, 21745-46, 27146-47, 27424, 27885-901. The severe nature of these conditions made it even more crucial that Plaintiffs have some mechanism to prevent recurrent violations. *See Gates v. Collier*, 501 F.2d at 1321 ("The past notoriety of the protracted inhumane conditions and practices at Parchman reveals the necessity for the continuance of the injunctive order of the district court."); *U.S. v. Laerdal Mfg. Corp.*, 73 F.3d 852, 857 (9th Cir. 1995) (affirming grant of injunctive relief based on finding that cognizable danger of recurrence existed because "past illegal conduct gives rise to an inference that future violations may occur").

The district court's failure to apply the correct legal standard and determine whether a danger of recurrent violations warranted injunctive relief alone requires reversal. Nonetheless, the record confirms that injunctive relief is necessary to prevent future violations and the district court additionally erred in not so holding. The district court's order should be reversed.

III. The Order and Judgment Should Be Reversed Because the District Court Applied the Incorrect Legal Standard to Evaluate Expert Testimony and Erroneously Failed to Give Appellants' Expert Testimony Adequate Weight

The district court erroneously disregarded Plaintiffs' expert testimony with respect to medical care and solitary confinement on the ground that such testimony did not "establish a standard for decency." *See* ROA.26419, 26431. It also incorrectly disregarded plaintiffs' expert testimony regarding protection from harm on the ground that Mr. Vail's opinions on appropriate staffing did not "create constitutional standards." ROA.26440. In doing so, the district court held Plaintiffs to a standard not required by the law and misapprehended the role of expert testimony in cases challenging prison conditions under the Eighth Amendment.

The district court made two distinct legal errors. First, the district court misunderstood the Supreme Court's decision in *Rhodes v. Chapman*, 452 U.S. 337 (1981), to hold that expert testimony should be rejected for failure to "establish a standard for decency." *Rhodes* does not so hold. Second, the district court assumed that plaintiffs were required to establish a violation of "contemporary standards of

decency" in the first place, an assumption entirely at odds with settled Supreme Court precedent. The Supreme Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), makes clear that the deliberately indifferent denial of medical care is itself "inconsistent with contemporary standards of decency" as a matter of law. These legal errors caused the court to ignore Plaintiffs' expert testimony on a host of issues material to Eighth Amendment claims for which courts regularly consider such testimony, leading to the improper dismissal of Plaintiffs' claims.

A. The District Court Applied Incorrect Legal Standards in Disregarding Plaintiffs' Expert Witnesses

1. The District Court Misapplied the Supreme Court's Ruling in *Rhodes v. Chapman*

Citing *Rhodes*, the district court disregarded the opinions of Dr. Stern, Ms. LaMarre, and Dr. Kupers because, it stated, the opinions "do[] not establish a standard for decency," ROA.26419, and "do[] not create a benchmark for determining whether any constitutional rights have been violated," ROA.26431.[7] On

[7] The district court also rejected Dr. Stern's expert testimony because it was based upon his professional experience, as opposed to independent industry standards such as those established by the American Correctional Association or the NCCHC. *See* ROA.26419. This was also directly contrary to settled case law. *See Brown v. Plata*, 563 U.S. 493, 535 (2011) (noting that "[c]ourts can, and should, rely on relevant and informed expert testimony when making factual findings," particularly where "experts testified on the basis of empirical evidence and extensive experience in the field of prison administration"); *Morales Feliciano v. Rossello Gonzalez*, 13 F. Supp. 2d 151, 156, 201 (D.P.R. 1998) (to assess whether a substantial risk of serious harm exists, experts in Eighth Amendment cases may base their opinions on their "comprehensive experience and knowledge" and "statistical data"). It was also inconsistent with the district court's own reasoning in discounting Dr. Kupers' opinion that people should not be held in isolation more than 15 days, which mirrored and relied in part on the NCCHC's identical policy stance. *See* ROA.26431.

the same basis, the district court disregarded Mr. Vail's opinions because "[e]xpert recommendations do not create constitutional standards under the [E]ighth [A]mendment."[8] *Rhodes* in no way supports this outright dismissal, without consideration, of Plaintiffs' expert evidence.

In *Rhodes*, the Supreme Court held that double-celling did not constitute cruel and unusual punishment as judged by contemporary standards of decency, particularly because there was no evidence that the plaintiffs had been exposed to a substantial risk of harm. *See* 452 U.S. at 347-50. In a footnote, the Supreme Court made the uncontroversial point that expert opinions *alone* are insufficient to establish "contemporary standards of decency." *Id.* at 348 n.13. Though both "helpful" and "relevant," the Court noted that "generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction." *Id.* (internal quotations omitted).

Relying on *Rhodes*' limited, footnoted language, the district court dismissed Plaintiffs' expert testimony outright, without considering whether it supported a finding of deliberate indifference, substantial risk of serious harm, causation, or an appropriate remedy, all issues critical to determining the existence of an Eighth

[8] For this proposition, the district court cited *Green v. Ferrell*, 801 F.2d 765, 770 (5th Cir. 1986). ROA.26440. *Green*, in turn, cites the same portion of *Rhodes* cited previously by the district court in support of its disregard of the testimony of Dr. Stern, Ms. LaMarre, and Dr. Kupers. *See Green,* 801 F.2d at 771 (citing *Rhodes*, 452 U.S. at 348 n.13).

Amendment violation. *See* ROA.26419, 26431. Contrary to the district court's order, nowhere does *Rhodes* suggest that expert testimony should not be considered with respect to each of these other issues on the basis that it does not suffice to establish "contemporary standards of decency." 452 U.S. at 348 n.13; *see also Inmates of Occoquan v. Barry*, 850 F.2d 796, 798 (D.C. Cir. 1988) (Wald, C.J., dissenting from denial of en banc review) ("*Rhodes* endorsed as legitimate the use of expert opinion—not to *establish* constitutional standards of decency, but to summarize professional knowledge and norms, and to guide the ultimate judicial judgment . . . .").

The district court's dismissal of Plaintiffs' expert testimony is not only unsupported by *Rhodes*, it also leads to the untenable conclusion that expert opinions could never be considered in determining the existence of an Eighth Amendment violation because they are not *per se* proof of a "standard of decency"—a result which is impossible to reconcile with this Circuit's decades of precedent relying upon expert testimony to find Eighth Amendment violations. *See, e.g.*, *Yates v. Collier*, 868 F.3d 354, 363-64 (5th Cir. 2017) (affirming district court finding that "heat-mitigation measures . . . were ineffective to reduce the risk of serious harm to a constitutionally permissible level" where "experts indicated that the conditions . . . posed a substantial risk of harm"); *Gates v. Cook*, 376 F.3d at 339 (affirming finding of a substantial risk of serious harm to inmates based on expert testimony

that it was "very likely" that an inmate would die of heat stroke or some other heat-related illness).

2. The District Court's Order Is Inconsistent with the Supreme Court's Ruling in *Estelle v. Gamble*

In declining to engage with Plaintiffs' expert witnesses' opinions because they ostensibly failed to establish a standard for decency, the district court's order was also inconsistent with the Supreme Court's ruling in *Estelle v. Gamble*, 429 U.S. 97 (1976). Contrary to the district court's order, the law does not require Plaintiffs to independently establish, through expert testimony or otherwise, that denial of medical care at EMCF violates a "contemporary standard of decency." More than 40 years ago, *Estelle* established that "deliberate indifference to serious medical needs of prisoners" is, as a matter of law, "inconsistent with contemporary standards of decency" and therefore violates the Eighth Amendment. *Id.* at 103-4 (noting that even in "less serious" cases the denial of medical care "may result in pain and suffering which no one suggests would serve any penological purpose").

Accordingly, there is no separate requirement to establish a violation of a "contemporary standard of decency" to succeed on an Eighth Amendment claim for medical care. Deliberate indifference to serious medical needs is *itself* sufficient to establish an Eighth Amendment violation. *Id.*; *see also Morris v. Livingston*, 739 F.3d 740, 747 (5th Cir. 2014) ("In the medical context, to state a cognizable [Eighth Amendment] claim, a prisoner must allege acts or omissions sufficiently harmful to

evidence deliberate indifference to serious medical needs.") (internal quotation marks omitted); *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999) (deliberate indifference to serious medical needs sufficient to state an Eighth Amendment claim). The district court erroneously held Plaintiffs' experts to a legal standard not required by the law.

B. The District Court Erroneously Disregarded Substantial Evidence from Plaintiffs' Experts

The district court's legal errors caused it to ignore Plaintiffs' expert testimony on numerous issues material to each of Plaintiffs' claims for denial of medical care, isolation and protection from harm, leading to the erroneous dismissal of each of those claims.

1. The District Court Disregarded Expert Evidence Regarding Plaintiffs' Medical Care Claim

Plaintiffs' expert medical witnesses, Dr. Stern and Ms. LaMarre, were both qualified in the field of correctional health care and testified to the systemic inadequacies of medical care at EMCF. *See* ROA.29535-36, 28590-91. Defendants did not present any expert testimony with respect to medical care rebutting Dr. Stern's and Ms. LaMarre's opinions. *See Palmigiano v. Garrahy*, 443 F. Supp. 956, 973 (D.R.I. 1977) ("[T]he unrebutted, credible testimony of plaintiffs' two experts in the delivery of medical services in a correctional setting leads inexorably to the conclusion that the system of medical care delivery at the [correctional institution]

is inadequate by any accepted standard to meet the inmates' routine and emergency health care needs."). Yet the district court erroneously disregarded Dr. Stern's and Ms. LaMarre's opinions.

The district court should have considered these experts' testimony for a range of purposes. Courts routinely rely on expert testimony in finding the existence of many of the very conditions that Dr. Stern and Ms. LaMarre described at EMCF, including errors or long delays in treatment, preventable deaths, lack of access to minimally adequate care, poor record keeping practices, staffing shortages, and inadequate training for medical personnel. *See, e.g.*, *Capps v. Atiyeh*, 559 F. Supp. 894, 911-12 (D. Or. 1982) (relying on medical expert to find "systemic" errors in treatment which "amounted to misdiagnoses that delayed proper and, in some cases, any treatment" where the expert "was of the opinion that no reasonable doctor, or nurse supervised adequately by a doctor, could have made the mistakes he found"); *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 893 (E.D. Cal. 2009) (observing that "medical experts noted that medical record reviews demonstrate[d] multiple instances of incompetence, indifference, cruelty, and neglect," where "most deaths were preventable" creating "a public health and life-safety risk to inmates who are housed there") (internal quotations omitted); *Newman v. State of Ala.*, 466 F. Supp. 628, 631-35 (M.D. Ala. 1979) (finding Eighth Amendment violation based on expert testimony and accepting experts' remedial recommendations); *Ramos v. Lamm*, 639

F.2d 559, 576-78 (10th Cir. 1980) (noting that "[e]xpert witnesses uniformly agreed that a four-fold increase in primary physician coverage was necessary, along with additional on-site coverage from specialists" and finding that, "[b]ecause of the staff shortages inmates are effectively denied access to diagnosis and treatment by qualified health care professionals").

The district court's failure to consider Dr. Stern's and Ms. LaMarre's opinions for all these purposes constitutes reversible error. *Cf. Gates v. Cook*, 376 F.3d at 339 (district court properly considered expert testimony for establishing substantial risk of harm).

2. The District Court Disregarded Expert Evidence Regarding Plaintiffs' Isolation Claim

Dr. Kupers offered expert evidence in support of Plaintiffs' isolation claim. His testimony was offered to establish the appropriate duration and negative effects of isolation, a subject upon which courts routinely accept expert testimony. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 684, 686 n.8 (1978) (upholding district court's imposition of a 30-day maximum limit for punitive isolation, finding that "[p]risoners were sometimes left in isolation for months," and noting the lower court's "agreement with an expert witness who testified that punitive isolation as it exists at [the prison] today . . . is counterproductive") (internal quotations omitted); *Nelson v. Collins*, 455 F. Supp. 727, 734-35 (D. Md. 1978), *aff'd in part and remanded sub nom., Johnson v. Levine*, 588 F.2d 1378 (4th Cir. 1978) (relying on

expert testimony to find "unconstitutional deficiencies i[n] the six-cell isolated confinement section" where "many inmates have been confined in isolation for extended periods of time without receiving proper and necessary medical assistance"); *Frazier v. Ward*, 426 F. Supp. 1354, 1367-68 (N.D.N.Y. 1977) (finding Eight Amendment violations based on "considerable testimony of the plaintiffs' experts . . . that the lack of adequate outside yard exercise in the open air may inflict, depending on the strength of the individual, grave physical and psychological harm upon the inmate"). It was error for the district court to disregard Mr. Vail's opinions based on an incorrect legal standard, which prevented it from adequately assessing the evidence concerning the conditions affecting isolation.

3. The District Court Disregarded Expert Evidence Regarding Plaintiffs' Protection from Harm Claim

Similarly, the district court erroneously discounted Mr. Vail's testimony concerning EMCF's systemic understaffing and indirect supervision model and the risks of harm to which it exposes people at EMCF, topics that are routinely the subject of and wholly appropriate for expert testimony. *See, e.g.*, *Ramos*, 639 F.2d at 573 (affirming finding of Eighth Amendment violation on basis that "[t]he expert witnesses, including the former executive director of the Department of Corrections, overwhelmingly concluded that current staffing levels . . . continue to be inadequate and cannot provide a reasonably safe environment for inmates"); *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1076 (9th Cir. 2013) ("Inadequate staffing

can create an objective risk of substantial harm in a prison setting that is sufficient to satisfy the objective prong of the deliberate indifference test.”).

In *Lemire*, for instance, the plaintiffs’ expert witness testified that incarcerated people should not be left without supervision by floor officers for extended periods of time. 726 F.3d at 1076. The expert opined that the officer stationed in the control booth was “too far removed from direct contact and surveillance of [] inmates,” that such indirect supervision posed a substantial risk that people would come to harm, and that anyone suffering such harm would not receive swift medical attention as a result of the inadequate staffing. *Id.* at 1076-77; *see also Palmigiano*, 443 F. Supp. at 968, 980 (noting that experts, “without exception, agreed” that “the layout and present staffing patterns at the [correctional institution] . . . create a situation where control is non-existent”). This closely echoes the concerns articulated by Mr. Vail—not that indirect supervision is itself *per se* unconstitutional because it violates some standard of decency, but that the risks of harm to which it contributes at EMCF are unacceptably high.

It was therefore entirely proper for Mr. Vail to opine that a minimally acceptable staffing plan at EMCF would require four mandatory posts assigned to each of Units 1 through 4, eight mandatory posts on Unit 5, and five mandatory posts on Unit 6, to avoid a substantial risk of serious harm. ROA.19543. *See Albro v. Onondaga Cnty.*, 627 F. Supp. 1280, 1284-85 (N.D.N.Y. 1986) (noting that, at the

time of the hearing, "the jail had the authority to fill 171 slots though only 151 were presently filled," and crediting the correction facility review specialist's testimony that "fights break[] out which were not promptly controlled by the deputies because they were not readily available on the cell blocks"). It was error for the district court to disregard Mr. Vail's opinions based on an incorrect legal standard, which prevented it from adequately assessing the evidence concerning the conditions affecting Plaintiffs' protection from harm claim.

CONCLUSION

The order and judgment of the district court should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users, each counsel for Defendants-Appellees:

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