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IN THE DISTRICT COURT IN AND FOR PITTSBURG COUNTY,
18th JUDICIAL DISTRICT, STATE OF OKLAHOMA

IN RE: BENJAMIN R. COLE,)
)
) Case No. CV-2022-140
)
Inmate No: 489814)

TRANSCRIPT OF PETITION FOR
WRIT OF MANDAMUS HEARING
HAD ON SEPTEMBER 30, 2022
MCALESTER, OKLAHOMA
BEFORE THE HON. MICHAEL HOGAN

A P P E A R A N C E S

TRIAL JUDGE:
Hon. Michael Hogan
District Judge
McAlester, Oklahoma

FOR THE PETITIONER:
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Mr. Thomas Hird, &
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I N D E X

30th, SEPTEMBER, 2022

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1 What we can extrapolate, though, are a few
2 principles that lead us to ultimately understand that the
3 standard is lower than preponderance of the evidence, which
4 would make it potentially akin to reasonable suspicion or some
5 articulable facts that support the proposition.

6 I get that from a few places. One of those is
7 *Cooper v. Oklahoma* which is 517 US 348, a 1996 case. And, in
8 that case, they say that the standard of the insanity for
9 execution trial is preponderance of the evidence. The standard
10 has to be lower than that to get to the trial itself. It can't
11 be the same as that standard or higher than that.

12 *In re: Gary Thomas Allen* gives us a good
13 example of that. Which is -- give the Court the case number --
14 it's a Pittsburg County case number C-05-510, a 2008 case, that
15 was -- the proceeding I'm referencing is explicitly the
16 insanity for execution trial. So the trial that we are
17 contemplating here today.

18 In that case, the government made the argument
19 for the trial that it was preponderance of the evidence. They
20 cite *Ford, Bingham versus State* -- the cases that we've talked
21 about -- that say that the clear and convincing standard was
22 unconstitutional. So they agreed that the standard was
23 preponderance of the evidence for that proceeding.

24 And then from that argument, the Court crafted a
25 jury instruction that we have that tells us that the standard

1 at that trial was -- that the burden of proof is on Gary Thomas
2 Allen or his representative to establish by a preponderance of
3 the evidence that he was presently insane, as the term is
4 defined in the instructions.

5 So that's the standard from those cases for the
6 trial. This has to be lower than that. What I think that that
7 evidence really means is that there is some -- what that
8 standard means is that there are some legitimate evidence as
9 opposed to -- well, that that legitimate evidence is satisfied
10 by expert reports and evaluations as opposed to an inmate's
11 mother calling the warden and saying, my son's crazy, don't
12 kill him or a cell mate saying or just murmuring through
13 people. That would not be enough.

14 What this statute contemplates is expert reports
15 and understands that that is the evidence that it contemplates
16 when it wants to evaluate whether there is good reason to
17 believe.

18 The *Cole versus Trammell* case that we have
19 talked about that was litigated on for this -- for this client
20 is *Cole V. Trammell* 358 Pacific 3rd 932. And I'm pin citing to
21 Paragraph 21. In this case, there are fleshing out -- talking
22 about standards in *Panetti* and *Ford*, and they're talking about
23 the hearing, and it says: Such a hearing must afford a person
24 an opportunity to be heard, consistent with the basic
25 requirements of due process. These basic requirements include

1 an opportunity to submit evidence and argument from the
2 prisoner's counsel -- argument from the prisoner's counsel,
3 including expert psychiatric evidence that may differ from the
4 State's own psychiatric examination.

5 So the Court of Criminal Appeals contemplates
6 that that is what that evidence is that they're looking at.
7 It's expert opinions. And it doesn't need to be
8 uncontroverted.

9 I think the State is tending to argue that we
10 have to make a showing that it's uncontroverted because they'll
11 point to Dr. Orth's report and say: Well, there's another
12 report that says something different, that says he is
13 competent, so they haven't made the showing to surpass that.
14 But the statute contemplates that there will
15 be -- excuse me -- the Court of Criminal Appeals contemplates
16 that there could be conflicting expert reports.

17 So the expert reports, the fact that those
18 exist, I think is the evidence that that standard contemplates,
19 and that's what it's looking for when it says: What is that
20 threshold? What is that high showing? It's not simply
21 statements or suspicions that somebody is incompetent. It's
22 expert reports. It's specific findings. It's a lengthy
23 history of medicine treatment with regard to mental health.

24 So the standard, Judge, is lower than a
25 preponderance of the evidence and akin to reasonable

1 suspicious.

2 THE COURT: You may proceed.

3 MS. WILLIS: Thank you, Your Honor.

4 Your Honor, I'd first note that *Cooper v.*
5 *Oklahoma* is a competency to stand trial case and I do not
6 believe it is relevant here for what we're here for today. And
7 what she cited from the *Cole v. Trammell* case, which is 2015
8 OKCR 13, Paragraph 20, where they're discussing *Ford* and
9 *Panetti*, specifically says that once you make a substantial
10 threshold showing of insanity, that procedural due process
11 allows him to move on to a hearing. And the hearing that she
12 was referring to in Paragraph 21 is where they have the
13 opportunity to be heard, consistent with the basic requirements
14 of due process, where they can present evidence.

15 Your Honor, the Petitioner is presumed competent
16 in this case, and they must overcome that -- that presumption
17 by making a substantial threshold showing. And while the --
18 the case law is unclear as to what a substantial threshold
19 showing is, it is not a low burden. *Ford* says, as we said
20 earlier, it is a high burden, and -- let's see, I had that --
21 that is *Ford v. Wainwright* 477 US and the pincite is 417.

22 And, Your Honor, we argue that the Petitioner
23 must meet that substantial threshold showing. The case law is
24 not clear, but that is the Supreme Court law, that they have to
25 make that substantial threshold showing before they are

1 entitled to a hearing. And then to overcome that, it is
2 high -- it is a preponderance of the evidence. It is
3 51 percent or higher more likely than not.

4 Just look over my notes really quick.

5 THE COURT: You gave me a cite a second ago, 215
6 Oklahoma CIV CR --

7 MS. WILLIS: OK CR 13, and I'm citing to
8 Paragraph 20. And that's the *Cole v. Trammell* case.

9 Thank you.

10 THE COURT: Are you ready with your first
11 witness?

12 MS. BLUMERT: Yes, Judge.

13 THE COURT: Call your first witness.

14 MS. BLUMERT: Petitioner calls the warden, Jim
15 Farris.

16 THE COURT: Warden Farris, if you will step
17 right up here, I'll swear you in. I notice you got some
18 documents with you. Just be advised you're not allowed to look
19 at those unless you're asking to refresh your memory. You can
20 put them up there, just -- you're not allowed to just start
21 reading through them during your testimony. That's kind of a
22 whale, you have to pull that chair back.

23 Raise your right hand, please.

24 WARDEN JIM FARRIS,

25 being first duly sworn, was examined and testified as follows,

1 to wit:

2 THE COURT: All right. If you please have a
3 seat.

4 You may inquire.

5 **DIRECT EXAMINATION**

6 BY MS. BLUMERT:

7 Q. Can you please state your name for the record.

8 A. Jim Farris.

9 Q. What is your job, Warden Farris?

10 A. My position is warden of the Oklahoma State
11 Penitentiary and also the Jackie Brannon Corrections Center.

12 Q. Do I call you Warden or Mister? What title do you
13 prefer?

14 A. Warden would be fine, but you can call me anything
15 you need to.

16 Q. Warden, what sort of education do you have to do that
17 job?

18 A. I have a Bachelor's degree in criminal justice,
19 psychology and sociology.

20 Q. Do you have any training in psychiatry?

21 A. In psychiatry, no. Just the basic psychology.

22 Q. Some of the things that are part of the criminal
23 justice degree?

24 A. Yes.

25 Q. You're not a mental health professional?

1 A. No, ma'am, I'm not.

2 Q. Tell us about your duties as a warden of those
3 facilities.

4 A. Well, if I told you all the duties, we'd probably be
5 here a few weeks.

6 Q. Sure. And you can give us the highlights. Just
7 broadly, what are your duties?

8 A. The main duties are, basically, the care of the
9 inmates that are assigned to me at the correction center. Make
10 sure that they have the proper care until they're, you know,
11 officially discharged or whatever process the Court sets forth
12 in those.

13 Duties is extremely large in a roundabout way.
14 It's -- it's -- with the staffing, the budget, many different
15 things that we do as far as properly educating the inmates and
16 getting them ready to leave, if they're going leave, and follow
17 the -- basically, the main thing is what we are -- what's court
18 appointed for us to do with that inmate. If it's mainly
19 focused on the education or a GED, we always look at those
20 things to try to do to get those inmates processed out.

21 But as far as overall duties, it's extreme.
22 Just like sitting here today is one of my duties. I think the
23 most important thing that I go in in a facility each day is to
24 ensure my staff and the inmates stay safe every day.

25 Q. (By Ms. Blumert) Would you say that, broadly, your

1 role is more administrative and less, in terms of direct,
2 inmate interaction?

3 MS. BURNS: Objection; leading.

4 THE COURT: Overruled.

5 Go ahead. You may answer.

6 THE WITNESS: Basically, I would say I think, if
7 you looked at a description for a warden with the Department of
8 Corrections, your basic line is going to be different with
9 every warden in corrections. I'm a little bit different than
10 some wardens. Of course, it's administrative; that's just part
11 of it. But I always take my role a little bit deeper than
12 that. With the inmates, I've been around corrections for
13 33 years, inside it. So many of the inmates, the long-term
14 inmates, I know well, so various times I'm on the yard, you
15 know, and I'm visiting inmates. And a lot of it is inmates
16 that, you know, I've known a long time, maybe see what
17 information that they got and how our facility's going and what
18 processes we need to fix.

19 So, yes, it's administrative, but I take pride
20 in being out there with the inmates also.

21 Q. (By Ms. Blumert) Are you aware of a man who lives in
22 your facility named Benjamin Cole?

23 A. Yes, ma'am.

24 Q. What unit does he stay on?

25 A. H unit.

1 Q. And tell the Court what H unit is.

2 A. H unit is our -- basically, our high max unit. We --
3 we have some death row, and we also have inmates that have been
4 classified that can't be dealt with. In a simplified way, or
5 explaining this, is is inmates that can't be deal with at the
6 medium security level or the minimum security level.

7 Q. Would it be fair to say that a bulk of the death row
8 inmates stay on H unit?

9 MS. BURNS: Objection; leading.

10 THE COURT: Overruled.

11 THE WITNESS: Would you say that again, ma'am?
12 I couldn't hear.

13 Q. (By Ms. Blumert) Would it be fair to say that a bulk
14 of the death row inmates get assigned to H unit?

15 A. At one time, yes, that was considered the spot where
16 death row -- we also have two other units that we have tried --
17 with the way the nation's going with death row inmates -- to
18 get them different types of things that may be -- for instance,
19 the exercise piece of it, to maybe see more daylight, to
20 actually be out on a yard where you can see other inmates.

21 So normally in a past process, yes, H unit would
22 be the death row. Now, we have another unit that we're
23 actually putting death row inmates on to try to get them a
24 little bit more communication with -- with everybody. A little
25 bit more life, I'd guess you'd say.

1 Q. Would that be A unit?

2 A. Yes, ma'am.

3 Q. And you said there was another unit that some folks
4 are going to; which one is that?

5 A. A unit.

6 Q. Okay. Is there a second one?

7 MS. BURNS: Objection, Your Honor, relevance.

8 THE COURT: I don't know what -- if it is
9 relevant.

10 MS. BLUMERT: May I respond, Judge?

11 THE COURT: Yes.

12 MS. BLUMERT: Judge, the whole issue here is
13 what the treatment is of inmates, what the warden knows about
14 his facility, what he knows about the folks who are staying at
15 his facility, particularly, those that are on death row that
16 are on H unit or A unit, how much interaction he has with them
17 and what he knows. This whole hearing is about what the warden
18 knows. So I think it's important to talk about --

19 THE COURT: You can inquire on that issue, but
20 not where he's housing -- I want to know where Mr. Cole is.

21 So the objection is sustained as to relevance on
22 that particular question.

23 Q. (By Ms. Blumert) Would you describe A unit. It's a
24 bit looser, right, in terms of restrictions?

25 A. Somewhat. Somewhat looser. And when you say

1 "restrictions," there's different things. Like with the
2 exercise piece of it, that is a part of it, and that's -- I
3 wouldn't say it's a step down as far as H unit, but it gives us
4 a little bit more of the inmate feeling he's getting a little
5 bit to see or do.

6 So you could call it a step down. We do not
7 call it a step down, but that's kind of the process.

8 Q. Right now, what unit is Mr. Cole on?

9 A. H unit.

10 Q. To your knowledge, has he ever been on A unit?

11 A. To my knowledge, has he ever been on A unit?

12 Q. Correct.

13 A. Yes.

14 THE COURT: Did you say, "yes"?

15 THE WITNESS: Yes, sir.

16 THE COURT: He has been on A unit? Is that a
17 "yes"?

18 THE WITNESS: Yes.

19 THE COURT: Okay. Thank you.

20 Q. (By Ms. Blumert) When I say, "been on A unit," was
21 he housed in A unit?

22 A. I do not -- you're going to have to -- I don't know
23 what you're trying to say.

24 Q. Do you understand whether Mr. Cole has ever been
25 housed on A unit?

1 A. I know what -- where Mr. Cole has been my two years
2 at Oklahoma State Penitentiary.

3 Q. And is that H unit?

4 A. Yes, ma'am.

5 Q. In 2019, there was an effort by your facility to move
6 some folks to A unit out of the highly restriction H unit; is
7 that fair?

8 MS. BURNS: Judge, I'm going to object again as
9 to the relevance of this line of questioning.

10 THE COURT: At this point, the objection's
11 overruled. I'm not sure what the relevance is. I need to --
12 you can develop that.

13 Q. (By Ms. Blumert) The time you talked about where
14 there was a tendency or a push to move folks to less
15 restrictive units, was that around 2019?

16 A. I believe it was. Now, I was not at the facility at
17 that time, but I know that that was kind of a push to do.

18 Q. And was there a policy that would determine which
19 inmates moved to A unit versus stayed on H unit?

20 A. Most of the decision making in that was looked at --
21 maybe -- there was many things that were brought in to that
22 protocol, and a lot of it was based on if the -- if there had
23 been something set with the inmates with the execution time or
24 different things like that. A lot of it was the behavior, what
25 level the inmate's on and what we felt security -- or what they

1 felt at that time was the security protocol they needed to
2 be -- piece of that.

3 Q. Were some of the things you considered for that were
4 an inmate's mental health, their risk of victimization, whether
5 they were high profile, things like that?

6 A. At that time -- again, I was not at Oklahoma State
7 Penitentiary when they first did the movement. So I'm sure
8 that that was what they did look at, but I -- again, I cannot
9 speak for the previous warden at that time when that was done.

10 Q. As warden, you have access to the records of the
11 facility and the records of previous wardens, correct?

12 A. There's some records that for previous wardens may
13 be -- may be difficult to look at or get, but it's a fine line
14 between records that I would be trying to get, you know, as far
15 as mental health and different things like that; although, I do
16 have access to those type records. What I do rely on as a
17 warden of a facility, I rely on my staff and the professionals
18 in those areas to give me the correct information. And I feel
19 like I -- my staff have done that very well at the Oklahoma
20 State Penitentiary.

21 Q. The policy that a warden may implement would persist
22 unless those -- unless there was another policy that changed
23 that, correct?

24 MS. BURNS: Judge, I'm going to object again.
25 I'm just not seeing where this is going as relevant to this

1 hearing.

2 MS. BLUMERT: May I respond, Your Honor?

3 THE COURT: Yes.

4 MS. BLUMERT: Judge -- and without just,
5 essentially, testifying -- but what I'm ultimately trying to do
6 is show that there are criteria that the facility uses to put
7 people in H unit versus A unit and the fact that Mr. Cole is
8 still on A unit is significant, and there's a record that
9 indicates his specific retention on H unit.

10 THE COURT: He's on H unit; you said A.

11 MS. BLUMERT: Excuse -- I did. His retention on
12 H unit is significant because there's reasons for that, and we
13 have a document that's redacted, and I would like to ask the
14 warden about that and let him talk about that.

15 THE COURT: Well, he can answer if he knows, but
16 he's been there two years.

17 MS. BLUMERT: I understand that, Judge.

18 THE COURT: Just answer the questions you know
19 about, not what you've heard from someone else.

20 THE WITNESS: Yes, sir.

21 THE COURT: You may restate the question.

22 Q. (By Ms. Blumert) You understand that when you came
23 in that there were policies that had been in place prior to
24 your tenure, right?

25 A. Yes, ma'am.

1 Q. And unless you decided to change those, those would
2 persist?

3 MS. BURNS: Objection; lack of foundation.

4 THE COURT: Overruled. Guys, we're in -- I know
5 you're trying to make a good record here, but this is a
6 non-jury trial. I need to get this testimony on at some point,
7 so just keep that in mind when you make your objections. I'm
8 the trier of fact and the decider of what the law is, as far as
9 this hearing's concerned, and I'm -- I know how to do that.

10 So let's proceed.

11 MS. BLUMERT: May I approach the witness?

12 THE COURT: Yes.

13 MS. BLUMERT: For the record, I have previously
14 marked Petitioner's Exhibit 25. I provided, prior to the start
15 of this hearing, binders with all the documents that I intend
16 to admit to the judge and to counsel.

17 Q. (By Ms. Blumert) Warden Farris, I'm handing you
18 what's been previously marked as Petitioner Exhibit 25. Please
19 review it for a moment.

20 Do you recognize this document?

21 A. I do not recognize this document. And the reason --
22 I'm not saying that this document is not there. This document
23 did not come from me. It was from the previous warden up
24 through -- looks like through the director -- the then
25 director, Scott Crow. But I've not seen this particular

1 document.

2 Q. What is it?

3 A. It's basically a -- basically a --

4 MS. BURNS: Your Honor, I'm going to object at
5 this time. His --

6 (Crosstalk.)

7 THE COURT: Hang on. Hang on.

8 MS. BURNS: He doesn't --

9 THE COURT: There's another objection, so let
10 me -- don't keep talking. It's very difficult for the reporter
11 to get that testimony down.

12 Go ahead.

13 MS. BURNS: He doesn't recognize this document,
14 and so I'm objecting to lack of foundation. He does not
15 recognize it. He doesn't -- didn't compile it. And now she's
16 asking him questions about a document that he has no personal
17 knowledge of.

18 THE COURT: Okay. I don't think we're to that
19 objection yet. If you do not recognize the document --

20 THE WITNESS: I do not.

21 MS. BLUMERT: May I respond, Judge?

22 THE COURT: I don't need a response. I need to
23 get this evidence on. So you may inquire.

24 Q. (By Ms. Blumert) When was this document created?

25 A. It looks like -- says October 23rd, 2019.

1 Q. Okay. And what does it show? What do you understand
2 it to show?

3 A. It's -- it looks like it's different phases for the
4 pods. The Department at times -- and this is -- like I said,
5 this is not my document, but guessing on what this is, the
6 Department usually goes with phases on a lot of different
7 things, you know, to either phase down from a particular level
8 or phase up. So without looking at exactly what the phases are
9 saying, that's what I'm guessing this is talking about.

10 THE COURT: Warden, I'd ask that you not guess.
11 If you don't know, don't guess.

12 Q. (By Ms. Blumert) You review documents like this in
13 in your tenure as the warden, correct?

14 A. Yes.

15 Q. And you would have had access to previous wardens'
16 documents, right?

17 A. Some. Yes.

18 MS. BLUMERT: Okay. Move for admission of
19 Exhibit 25.

20 THE COURT: Any objection?

21 MS. BURNS: Yes, Your Honor. Based on lack of
22 foundation and the fact that, you know, he has not personally
23 reviewed this document. He was guessing as to what it's
24 contents could possibly be.

25 THE COURT: What's the legal basis for your

1 objection?

2 MS. BURNS: Lack of foundation and lack of
3 personal knowledge.

4 THE COURT: The objection will be overruled. It
5 will be admitted for what weight it might possibly have.

6 Q. (By Ms. Blumert) Warden, I'd like to turn your
7 attention to that document, and that document specifically is
8 entitled that it's the relocation of death row inmates,
9 correct?

10 A. Excuse me, could you repeat that?

11 Q. Entitled that it's the relocation of death row
12 inmates.

13 A. Yes, ma'am.

14 Q. And specifically talks on the second page about the
15 criteria for which inmates are going to be moved to A unit,
16 correct? Do you see that part there on the second to last
17 paragraph on the bottom?

18 A. Yes, where they were asked, is that what you're
19 saying, that paragraph there?

20 Q. Well, it says the criteria for determining that is
21 mental health, risk of victimization, high profile, et cetera.

22 A. Okay. I'm not seeing that part.

23 MS. BLUMERT: May I approach the witness, Judge?

24 THE COURT: Yes.

25 Q. (By Ms. Blumert) This paragraph here. And in the

1 paragraph below that, it discusses interviewing the inmates in
2 preparation for making the determination which unit they will
3 be on, correct?

4 A. Yes.

5 Q. And in the two pages after that, there's specific
6 inmate names, right?

7 A. Yes.

8 Q. List of inmates that were on death row at that time,
9 regardless of unit?

10 A. Yes.

11 Q. And on the second page of that listing, it mentions
12 Benjamin Cole, Inmate Number 489814, correct?

13 A. I'm trying to see where his name's at.

14 Q. It's the third name down from the top on the second
15 list of names -- excuse me, the second page of names.

16 A. Second page of names? Yes.

17 Q. And it says: Staff believes that inmate has, blank,
18 blank, and his age makes him susceptible to victimization.

19 Do you see that part?

20 A. I do.

21 Q. Do you know what is redacted from that section?

22 A. No, I do not. This is not my document.

23 Q. Do you know why a redaction like that would be made?

24 MS. BURNS: Objection. Judge, I'm sorry, there
25 is zero foundation for this.

1 THE COURT: Sustained.

2 Q. (By Ms. Blumert) Do you know why, specifically,
3 Mr. Cole is remaining on H unit this summer and this year and
4 to the present day?

5 A. In my two years, I have seen where -- one thing I
6 would say in just my interpretation of it -- again, I can't go
7 on what previous wardens looked at. I'm looking at the way I
8 look at it.

9 Now, with H unit, H unit is all high max
10 security. A unit and C unit are also maximum security areas.
11 So the removal from him to me at that time, he is set, you
12 know, for the execution process. So in my mind, I'm not
13 looking at -- particularly within my two years of trying keep
14 up with 800 -- or possibly 800 inmates and 800 at the Jackie
15 Brannon -- exactly why there's not a particular inmate moved.

16 MS. BLUMERT: Objection; nonresponsive.

17 THE COURT: Are you -- are you finished?

18 THE WITNESS: Yes, sir.

19 THE COURT: Okay.

20 Q. (By Ms. Blumert) Do you know why Benjamin Cole
21 remains on H unit?

22 A. Benjamin Cole remains on H unit at this time because
23 he is set for execution. He is currently in the protocol for
24 an execution. We have the cells outlined in our execution
25 process that they are assigned to.

1 Q. Part of the execution protocol is the 35-day mark,
2 correct?

3 A. Yes.

4 Q. Has significance?

5 A. Yes.

6 Q. At that point, an inmate is moved to a different
7 cell, right?

8 A. He's -- it's a different cell, yes. Now, if --

9 Q. And so --

10 If I may, actually, Judge, I'd move to treat
11 this witness as hostile under 12 OS 611. I think we'll be here
12 for long periods of time if I'm not allowed to ask pointed,
13 legal questions.

14 THE COURT: That's the position I took from the
15 start of this, so you can -- you can proceed with questions.

16 Q. (By Ms. Blumert) So, Warden Farris, he was moved to
17 that 35-day cell, would've been, earlier this month, correct?

18 A. I believe -- I believe the dates was September 15th,
19 I believe.

20 Q. So this summer, let's say from May to about July,
21 Mr. Cole was not in the 35-day cell, correct?

22 A. No, ma'am.

23 Q. He was on H unit that he's been on for some time?

24 (Court reporter requests verbal response.)

25 THE COURT: There needs to be -- did you answer?

1 THE WITNESS: I'm -- I'm just listening to her.
2 Was there a question?

3 What are you asking me?

4 Q. (By Ms. Blumert) He was on H unit for some time
5 prior to that window, correct?

6 A. Yes.

7 Q. How long has been Mr. Cole been at OSP?

8 A. I couldn't tell you the exact day. I know it's been
9 many years that he's been there.

10 Q. Far prior to your tenure, correct?

11 A. Oh, yes.

12 Q. Your facility would have fairly lengthy records about
13 him, right?

14 A. I wouldn't say lengthy, but there would be records
15 that do go back. I'm not sure how far they would go back, but,
16 yes, we do have records of -- we keep records for a while.

17 Q. Oklahoma State Penitentiary keeps records about all
18 kinds of things, correct?

19 A. Correct.

20 Q. Down to staff interactions, canteen orders, medical
21 visits, things like that, right?

22 A. There can be, depending on the circumstances. If you
23 say canteen, it -- a lot of that depends on if there was an
24 issue with it, whether there was an actual report done on it.
25 But there is certain records that we do not have, so I can't

1 say we have everything.

2 Q. I'm not asking if you have everything, Warden, I'm
3 asking if you do keep records about those types of things.

4 A. If there -- yes, if we see it as a reason to keep it.

5 Q. There are certain things that happen in that facility
6 that, every time it happens, a staff member makes a record,
7 whether that's a mental health visit or canteen visit, there's
8 some type of things that require a record every time, correct?

9 A. Should be, yes.

10 Q. Sometimes those records are requested by outside
11 groups or you might send them to a legal department, things
12 like that --

13 A. Yes.

14 Q. -- that's what those records are for?

15 Have you personally interacted with Mr. Cole?

16 A. I have attempted to.

17 Q. Tell us what that means. What do you mean by
18 "attempt"?

19 A. Basically, to have a conversation with Mr. Cole, to
20 go to the cell and, like I would do with all inmates, you know
21 to check. The interaction -- basically, interaction as far as
22 communication-type interaction was basically during the 35-day
23 protocol when we started it. He -- he interacted with me. Mr.
24 Cole, with staffing and everything, is pretty consistent. It's
25 just kind of depends on him. There's some staff members at

1 times he'll communicate with and there's sometimes they won't.

2 Usually -- if it is something, usually, it's
3 possibly a canteen issue. He knows exactly if something's done
4 wrong with his canteen, so he will express that, you know, to
5 the canteen officer or the officer himself.

6 We have a unit manager that he's opened up to a
7 little bit, you know, within the last few months also. So it
8 just depends on -- on Mr. Cole.

9 Q. You don't sit down and have lengthy conversations
10 with him out on the yard or anything, right?

11 A. No.

12 Q. Mr. Cole has been in -- is in a wheelchair, correct?

13 A. Yes, he is.

14 Q. He's fairly lean?

15 A. Yes.

16 Q. Has messy, unkempt hair and beard?

17 A. I would not say that. It depends. And I think you
18 could look at that as every inmate at the correctional
19 facility. You may be at a cell one time and their hair's going
20 all different ways or -- I think with Mr. Cole, some of the
21 things that you see, sometimes it may be up, sometimes there's
22 a headband around his head, sometimes it's scattered. The main
23 things that I've seen, especially during the 35-day protocol,
24 was he was very clean. He always has been. He -- we refer to
25 it -- he doesn't like want to come out, you know, and do

1 showers and stuff like that, but we always refer to it in
2 corrections, as I've stated many times, as bird baths, where he
3 cleans himself like that. Some inmates do that because they do
4 not want to come out.

5 Q. Would you say like using the sink and their hands?

6 A. To -- yeah, to wash, and, basically, do those things.

7 Q. His cell often has food and other assorted items in
8 it, correct?

9 A. Yes. And explaining that, Mr. Cole is a very -- he's
10 a little bit more -- it's difficult to say that. We have some
11 inmates that their cells are immaculate. We have some inmates
12 that are just not, you know, very clean, sanitary. So with
13 Mr. Cole, it's -- it's very odd. A lot of his is with -- with
14 the eating. He has the religious beliefs, the fasting process.
15 So those always worry me because I want, you know, to ensure
16 our inmates are eating and doing that. And with fasting,
17 fasting always kind of worries me a little bit, you know,
18 because some inmates do fast, and they fast for quite a while.
19 Mr. Cole, when he is fasting, you know, when we deliver the
20 meals, we try to give him every opportunity, you know, to eat
21 those meals and so forth. He gets most of it off canteen,
22 so...

23 Q. Warden, I'm going to stop you there. There's times
24 where Mr. Cole will hoard many, many meals in his cell,
25 correct?

1 A. At times, there has been where he has done that, and
2 I think that the process in that is just sometimes Mr. Cole
3 likes to sleep for the most part --

4 Q. And that's not my question, Warden.

5 A. -- during the day.

6 Q. Warden, there are food boxes that stack up in his
7 cell, correct?

8 A. I wouldn't say just just enormous, but there is times
9 where it is left in the hope that, you know, even if he may be
10 fasting, he may want to eat.

11 MS. BLUMERT: Objection, speculation, Judge, and
12 nonresponsive.

13 THE COURT: Well, overruled. These are
14 open-ended questions so he's giving an open-ended answer.

15 Q. (By Ms. Blumert) Would you consider 147 food boxes
16 in his cell to be a normal amount?

17 A. 147 food boxes?

18 Q. Yes.

19 MS. BURNS: Judge, objection to the form of the
20 question. I don't know if this is a hypothetical or if this
21 actually -- I'm not sure if this is even an actual question
22 based on actual facts.

23 THE COURT: What's the legal basis for your
24 objection?

25 MS. BURNS: Form of the question.

1 THE COURT: Overruled.

2 THE WITNESS: When you say 147 boxes, I'm not
3 sure exactly how you're interpreting that. If you say, is
4 there 147 food trays from food service in there, yes. But
5 there's times when inmates will order their canteen, sometimes
6 it'll go over the allowed amount, sometimes, you know, it's in
7 that amount. So when we say 147, there probably is some things
8 like that with the canteen items. Sometimes he will order
9 canteen and it may not be touched for several, several days on
10 that. So --

11 Q. (By Ms. Blumert) Warden, are you aware of whether at
12 any point Mr. Cole had 147 meals in his room? Not canteen.
13 Meals.

14 A. Meals, I am not aware of that.

15 Q. Your knowledge of Mr. Cole comes from things your
16 staff have told you and from records, right?

17 A. The majority of it, yes.

18 Q. Inmates in OSP can have visitors, right?

19 A. Excuse me?

20 Q. Inmates -- and I say OSP, Oklahoma State
21 Penitentiary, the facility you're over -- inmates at OSP can
22 have visitors, correct?

23 A. Yes, ma'am. Unless there is some security reason for
24 that or a visitor has been suspended. But, yes, they can.

25 Q. And to your knowledge, Mr. Cole would decline visits

1 often, correct?

2 A. Yes.

3 Q. Visits from his lawyers?

4 A. Yes.

5 Q. Visits from doctoral staff?

6 A. Yes.

7 MS. BLUMERT: May I have a moment, Judge?

8 THE COURT: Yes.

9 Q. (By Ms. Blumert) Warden, we talked a little bit
10 about the records that you have in the facility and the records
11 that you rely on. You have access to -- you have access to
12 records in your facility that you did not personally make,
13 correct?

14 A. Yes.

15 Q. Records that your staff makes?

16 A. Yes.

17 Q. And you would rely on those things -- well, excuse
18 me -- the staff rely on those records amongst themselves to do
19 their job, correct?

20 A. Yes, to an extent. Yes.

21 Q. And you rely on some of those records to do your job,
22 as well?

23 A. Of course.

24 Q. You would have reviewed files about Mr. Cole as part
25 of this process that we're here about today, correct?

1 A. I have reviewed numerous files on Mr. Cole or the
2 processes. I will explain that, if I can. Is that my main
3 process was -- looking at Mr. Cole, is what I have determined
4 in the last few years, both -- both groups or both -- all
5 attorneys and myself agreed with the -- with the evaluation of
6 Mr. Cole by Dr. Orth. We all agreed to that. We all done
7 that. I relied extremely on Dr. Orth's report that we all
8 agreed to do. And I rely on my staff; I rely on my mental
9 health; I rely on my doctor that talked to me about different
10 things. And it's been consistent with Dr. Orth's report and
11 consistent with my staff of the -- how I make my judgment.

12 Q. Some of those records might include letters or
13 e-mails in there as staff are discussing Mr. Cole, things like
14 that, correct?

15 A. E-mails, no, I don't -- I'm not looking at e-mails.
16 I don't know -- incident reports, different things like that.
17 E-mails, I don't look at staff's e-mails.

18 Q. If there's an e-mail that's extrapolated and put into
19 Mr. Cole's file, would you see something like that?

20 A. If -- if it's extracted, yes. A lot of times.

21 Q. And I'm not -- I'm not asking whether you go into
22 staff's e-mails and look for certain things. If there as an
23 e-mail that has been put into a file of Mr. Cole's, you would
24 see that in there, correct?

25 A. Not necessarily. Unless -- if I'm looking at

1 particular something on that, I may see that. If it's
2 particular things that I'm needing from medical or something
3 I -- it would be a particular file or particular information
4 that I'm needing. So I can't say I would actually see that.

5 Q. You have the ability to look at that, correct?

6 A. The ability to look at it?

7 Q. Yes.

8 A. If it's there, yes.

9 Q. I'm not asking if it's there. If something's in a
10 file, you have the ability go look at that item, correct?

11 A. Yes.

12 Q. Sometimes some of the things that you have might be
13 correspondence from attorneys, correct?

14 A. Some of the things that I have -- that I can look at,
15 is that what you're saying? Of course. It's sent to me.

16 Q. Right. But you will get, sometimes, correspondence
17 from attorneys about inmates in your facility, correct?

18 A. Occasionally, yes.

19 MS. BLUMERT: May I approach, Judge?

20 THE COURT: Yes.

21 MS. BLUMERT: For the record, I am handing the
22 witness Petitioner's Exhibits 19 through 23 inclusive.

23 Q. (By Ms. Blumert) If you could peruse those for a
24 moment.

25 A. Can I comment on this?

1 Q. Not yet, Warden.

2 Do you recognize what these documents are?

3 A. I recognize it's -- it's a document that was sent in
4 2016 to an interim warden at that time.

5 MS. BLUMERT: And just for clarification -- I
6 apologize for the record -- I did not hand the witness Number
7 23, which I'm doing right now.

8 Q. (By Ms. Blumert) Do you recognize what these
9 documents are? These documents are e-mails from Counsel to a
10 warden, correct?

11 A. Yes.

12 MS. BURNS: Objection; foundation, leading --

13 THE WITNESS: A previous warden.

14 THE COURT: I'm sorry. What's the objection?

15 MS. BURNS: Leading. And she's trying to lay
16 the foundation for him.

17 THE COURT: Well, the objection as to leading is
18 overruled.

19 Q. (By Ms. Blumert) These are e-mails from Counsel to
20 the warden of OSP, correct?

21 MS. BURNS: Same objection, Your Honor; lack of
22 foundation. He has to provide that foundation.

23 THE COURT: You can -- the objection's
24 sustained. You can lay a foundation if he's able to provide
25 one.

1 Q. (By Ms. Blumert) Do you recognize what these
2 documents are?

3 A. It looks like it's e-mails to the -- not even the
4 previous warden, but the warden before that.

5 Q. What are the dates on those documents?

6 A. One's December 15th, 2017. One's December 20th,
7 2017. Previous warden was Terry Royal.

8 Q. Those are various dates between 2016 and 2017, right?

9 A. It's what, ma'am?

10 Q. Various dates between 2016 and 2017, right?

11 A. The ones I see, if there's another one here. But it
12 looks like you've got two -- December 20th, 2017 --

13 Q. Number 19 is --

14 A. And excuse me, December 20th. Well, it looks like
15 both of these are on December 20th, 2017.

16 Q. Petitioner's Exhibit 19 is dated June 9th, 2016,
17 correct?

18 A. I'm not seeing a 2016.

19 Q. Do you have 19, 20, 21, 22 and 23?

20 A. I've got -- 19, 23 and 22 here, but 23 is only two
21 pages. That's the e-mails.

22 Q. Okay. Where are the others that I handed you?

23 A. These are all the rest of them.

24 Q. Okay. You have in front of you Petitioner's 19, 20,
25 21, 22 and 23, correct?

1 A. I do.

2 Q. And the date on Number 19 is what?

3 A. It's June 9th, 2016, to Kevin Duckworth, Interim
4 Warden.

5 Q. And the date on 20 is May 18th, 2016?

6 A. May 18, 2016, yes.

7 Q. 21 is January 11th, 2016?

8 A. Yes, ma'am.

9 (Court reporter requests clarification.)

10 THE WITNESS: 2016 was from Warden Chrisman.

11 Q. (By Ms. Blumert) And I'll get to that, Warden. I'm
12 just asking you what the dates are right now.

13 Number 22 is December 15th, 2017, correct?

14 A. Yes.

15 Q. And Number 23 are dates in December of 2017, correct?

16 A. Yes.

17 Q. You were not warden during these letters, correct?

18 A. No, ma'am.

19 Q. But your facility, your office, would maintain
20 correspondence that the warden receives as the position,
21 correct?

22 A. Yes. These particular things, we should have a
23 record of. I have not seen these particular documents, but...

24 Q. You don't have -- there's no policy in the warden's
25 office of destroying correspondence that you would receive,

1 right?

2 A. No.

3 Q. You don't have policies of ignoring them?

4 A. A policy of ignoring?

5 Q. Ignoring correspondence that comes in.

6 A. A policy of ignoring them?

7 Q. You don't have one of those, right?

8 A. No.

9 Q. Okay. You don't have any reason to believe that
10 these are not in your files, right?

11 A. No. There's no reason that they're not somewhere in
12 the files. No, I don't.

13 MS. BLUMERT: Move for admission of 19 through
14 23, inclusive.

15 THE COURT: Objection?

16 MS. BURNS: Your Honor, I'm going to object as
17 to the lack of personal knowledge, lack of foundation as to
18 trying to introduce these through this witness and also
19 hearsay.

20 THE COURT: Tell me how that's an exception to
21 the hearsay rule since it's not a document generated by his
22 facility.

23 MS. BLUMERT: Judge, they're documents that he
24 keeps in the course of his business as a government agency
25 under 2308 Subsection, I believe, 7. 12 OS 2308 Subsection 7,

1 government records exception. I'm not indicating that the
2 warden created these, but, essentially, that he maintains them
3 as part of his business, that he has them. He testified that
4 he -- the office keeps them, that they review those things, and
5 that, essentially -- really, though, these are not hearsay.
6 They're not offered to prove the truth of what's in them.

7 But the point is that the warden is aware of
8 them and he is -- has -- would be on notice about these
9 documents and have access to them. That's the whole purpose of
10 this hearing.

11 THE COURT: I disagree with your citation to
12 2803 Subpart 7. That refers back to Subpart 6. That's not an
13 exception to the hearsay rule. These are not documents he
14 generated. He wasn't even a warden then.

15 MS. BLUMERT: No, he wasn't, Judge.

16 THE COURT: I -- you've made your point that
17 they're in his record. They're in his record.

18 Is that what you're trying to prove?

19 MS. BLUMERT: Yes. Just that he has -- these
20 are the records he has access to because the whole hearing is
21 about what he knows.

22 THE COURT: Well, they're -- I think that
23 point's been made. But we're in 2022, these are from 2016, so
24 if that's your point, I'm -- I've got that written in my notes.

25 MS. BLUMERT: So for clarification, Judge, are

1 they --

2 THE COURT: They are not admitted.

3 MS. BLUMERT: Okay.

4 THE COURT: Warden, do you have Exhibits 19
5 through 22 -- 23?

6 THE WITNESS: I do. 21, I don't. Oh, there it
7 is. My bad. I do have them.

8 THE COURT: Yes, sir.

9 Q. (By Ms. Blumert) Warden, some of the records that
10 your facility keeps are mental health records, right?

11 A. I -- I do not keep the mental health records. Mental
12 health would keep those records of that. I do not keep the
13 mental health records in our areas.

14 Q. And, Warden, I'm not asking if you keep them. Your
15 facility keeps those, correct?

16 A. Yes.

17 Q. You keep those --

18 A. They should.

19 Q. -- keep those to run your facility and provide
20 medical treatment to inmates, right?

21 A. Yes.

22 Q. Right?

23 A. Yes.

24 Q. The folks who work in those units are the ones that
25 make those records?

1 A. Yes.

2 Q. They keep notes about things like visits with
3 inmates?

4 A. Yes.

5 Q. And to your knowledge, in March of this year,
6 Mr. Cole was taken to the OSU Medical Center to have his brain
7 scanned?

8 A. Yes. I'm not correct on those -- exactly sure on
9 date.

10 Q. If I estimated March, would that jive with your
11 understanding?

12 A. Probably pretty close to that.

13 Q. If I told you March 30th, would you have any reason
14 to disagree with that?

15 A. Well, I wouldn't have a reason to disagree with you,
16 but I couldn't tell you if you were correct or not on the date.

17 Q. Mr. Cole is regularly seen by physical medical
18 doctors and mental health doctors, correct?

19 A. Yes.

20 Q. Do you know how often?

21 A. Their protocol, the majority of time, is when they
22 see -- when they see inmates is, basically, if there is an
23 issue or something that they have to do -- check per their
24 protocol. If there's an inmate that's having an issue -- and
25 I'll just use -- throw this out there to get an understanding

1 of it -- but, naturally, if there's an inmate that has cancer,
2 that they have to do certain treatments on that. There's a
3 different protocol for every inmate.

4 I don't know how many times they have actually
5 went to check on Mr. Cole. I do know what my doctor has told
6 me, the physical doctor, about Mr. Cole and his evaluation of
7 Mr. Cole. And that's not me reading the documents; I went with
8 his observations of him through the years and actually here
9 recently.

10 Q. What doctor's that?

11 A. Dr. Payne.

12 Q. So you -- just to make sure I understand your
13 testimony correctly, you're saying that you reviewed records of
14 Dr. Payne's evaluations of Mr. Cole or you spoke with
15 Dr. Payne?

16 A. I spoke with Dr. Payne.

17 Q. Okay. And as you spoke with him, were you guys sort
18 of looking through records together?

19 A. No, Dr. Payne does that. Like I said, I can't tell
20 you if he does it for eight hours a day or what it is. But I
21 had a conversation with Dr. Payne -- actually a few
22 conversations -- but the main --

23 Q. Let me stop you, Warden, and kind of back to the
24 question is: Do you know how often a doctor like Dr. Payne
25 sees Mr. Cole?

1 A. No, I don't know the exact times, no.

2 Q. Do you know how long the visits are?

3 A. Well, with -- with Mr. Cole, it's usually -- kind of
4 depends on what he's checking for.

5 Q. So the question is: Do you know how long the visits
6 are?

7 A. No, I couldn't tell you how long they are, no.

8 Q. Do you know which providers see him?

9 A. With Mr. Cole, the providers that do see him is
10 mental health, and, basically, the doctors. Mr. Cole's not on
11 any mental health medication and has always refused that. So
12 there's -- even with the mental health piece of it, I think our
13 processes are, basically, we -- we do above the standard for
14 what it would normally be.

15 Q. And let me stop you, Warden. The question is: Do
16 you know who sees him?

17 A. Are you talking about the people or the positions?

18 Q. Both. Do you know either of those things?

19 A. Yes. I actually -- the mental health person that
20 does most of the visits name's Tina Fuller. I've also had
21 many -- or discussions with her, you know, about she sees with
22 Mr. Cole. I've actually got --

23 Q. And she's not the only doctor, correct?

24 A. No, there's -- there's other doctors. We had a --
25 we've just had one that retired that --

1 Q. And there's other staff that sees him, as well?

2 A. Staff, yes. But we have all staff that do checks
3 with corrections officers to canteen officer to unit managers
4 to case managers.

5 MS. BLUMERT: May I approach, Judge?

6 THE COURT: Yes.

7 MS. BLUMERT: I'm handing the witness
8 Petitioner's Exhibit 26.

9 Q. (By Ms. Blumert) Do you recognize these documents,
10 Warden?

11 A. It's a mental health narrative from Dr. Smash, who
12 has retired. But do I need to read it?

13 Q. Do you recognize those and the pages behind it, as
14 well? It's a, I believe, five-page document.

15 A. As far as recognizing the documents, yes.

16 Q. Now, what are these documents?

17 A. These are clinical notes from Dr. Smash. And a lot
18 of that is what they see when they actually do their checks,
19 different things like that. So it's -- one thing with these,
20 you're liable to see --

21 Q. Who creates these documents, that you can tell?

22 A. Well, this right here is the mental health
23 professional, or one of them.

24 Q. And who is that?

25 A. Dr. Smash.

1 Q. Who creates the other ones?

2 A. Tina Fuller. We've got -- trying to think of her
3 last name -- Angela, I can't remember her last name, but could
4 actually create the mental health piece note like this.

5 Q. Can you look on that and tell who wrote that note for
6 each one?

7 A. I got Dr. James Smash. It's got -- I think it
8 says -- my eyes are not real good -- Dennis Deakins, I believe,
9 and I've got, on this one -- I'm trying to read what it says
10 here. Oh, Patty Stem. I was looking for where she put her
11 name.

12 Q. Do you recognize those names as folks that work in
13 your facility?

14 A. Recognize the names? Yes.

15 MS. BLUMERT: Move for admission of Exhibit 26.

16 THE COURT: How many total pages is Exhibit 26?

17 MS. BLUMERT: I believe it's five, Judge. Five
18 pages.

19 THE COURT: The reason I ask, on my Exhibit 26,
20 there's a tab that also has 27. Is that separate?

21 MS. BLUMERT: Yes. We added that late. I
22 apologize, Judge. It's the five pages of 26.

23 MS. BURNS: I have no objection, Your Honor.

24 THE COURT: No objections? Okay. Exhibit -- so
25 is it Exhibit 26 through 27 or is it --

1 MS. BLUMERT: Just Exhibit 26. I apologize for
2 the confusion, Your Honor. 26 is five pages long. 27 is
3 separate.

4 THE COURT: Is 27 the mental health service
5 levels classification?

6 MS. BLUMERT: Yes.

7 THE COURT: Okay. This tab is on the wrong
8 exhibit.

9 MS. BURNS: I'm sorry, Your Honor. I don't -- I
10 don't -- I'm not sure I have an objection. I thought we were
11 discussing the mental health progress notes from 3/29 of '22,
12 it's marked as 26. Is that -- but it's only one page.

13 THE COURT: Yeah. Take your -- that tab that's
14 on your document --

15 MS. BURNS: Okay.

16 THE COURT: -- take it off and move it to mental
17 health service classification. So the record she's submitting
18 it five pages in -- five total pages.

19 MS. BURNS: I'm good with that, Your Honor.

20 THE COURT: Those are admitted without
21 objection.

22 Q. (By Ms. Blumert) Okay. The first page there, the
23 one that has the sticker on it --

24 A. Yes.

25 Q. -- is a mental health progress note for Ben Cole,

1 correct?

2 A. Correct.

3 Q. Created by James Smash, Ph.D., the clinical
4 coordinator?

5 A. Correct.

6 Q. This is on March 29th, right?

7 A. Yes, it is.

8 Q. Is it the day before he's taken for his brain scan at
9 OSU Medical Center, right?

10 A. Like I said, it is around that time. I couldn't tell
11 you the exact date on the scan.

12 Q. That's fair. What does that paragraph say? The part
13 that's yellow.

14 A. Do you want me to read it?

15 Q. Yes.

16 A. Inmate was seen in his cell. He was being moved to
17 medical for a shower. Inmate cell was -- was moderately
18 filthy. The door floor had area condiments, bottles filled
19 with liquids at the base of the floor. There were trays of
20 food that he had not turned in for pickup. He had more trays,
21 food unopened and food opened in the corner by the bunk that he
22 has -- that he doesn't sleep in.

23 Inmate was unable to fully position himself in
24 the wheelchair without help from security officers. Inmate's
25 clothing looked dingy and perhaps dirty. However, his

1 fingernails were clean and so was his hair. His beard was free
2 of debris and looked combed as well as brush -- brushed, excuse
3 me.

4 His sweats and top were dingy looking. There
5 were no unpleasant odors, surprisingly.

6 Q. The next note -- I think you may have, kind of, mixed
7 your pages up.

8 The note I'm referring to, for everyone, is from
9 March 27th, 2019, which is the date just below that long line.
10 This one is a wellness center weight check for Mr. Cole,
11 correct.

12 A. You -- the 3/27?

13 Q. Yes. Right next --

14 A. Do I need to read it?

15 Q. No. Just right next to the date, it marks it as a
16 wellness center weight check, correct? It's the very --

17 A. I think I'm looking at the wrong one. I don't --
18 I've got a 3/27, but I think there was another one here, 3/27.
19 Not sure I'm looking at the right one that you're talking
20 about.

21 Q. Yes, you are. And just right next to that date at
22 the very top --

23 A. Yeah. Yes. Wellness check, yes, wellness and weight
24 check.

25 Q. Done by Dr. Deakins?

1 A. Yes, ma'am.

2 Q. Where he makes a note, third line: I reviewed his
3 mental health and medical entries to 2014, essentially,
4 unchanged.

5 Correct, it says that?

6 A. Yes.

7 Q. The third page --

8 MS. BLUMERT: And for everyone, it is from
9 April 3rd, 2017, entitled: Mental health progress note soap.

10 THE WITNESS: Soap, yes.

11 Q. (By Ms. Blumert) What does soap mean, Warden? Do
12 you know? Is it an acronym for something, soap?

13 A. What does "soap" mean, is what you're asking?

14 Q. Yes. Do you know?

15 A. Soap is a -- an item to clean your body with.

16 Q. So that -- it just means the word "soap," it's not an
17 acronym for anything?

18 A. Not -- I don't know.

19 Q. You're not positive?

20 A. No.

21 Q. Okay.

22 A. I know what I use soap for. I know what most people
23 use soap for.

24 Q. This particular note was signed by Patty Stem, the 2
25 coordinator, correct?

1 A. Correct.

2 Q. And cosigned by a variety of other providers, which
3 we note at the bottom?

4 A. Yes. Cosigned electronically, yes.

5 Q. And in this one, Ms. Stem notes, when she's cleaning
6 him, the things that he's talking about, correct, in that
7 second line here? He's saying, "wash and comb," "wash and
8 comb?"

9 A. Yes.

10 Q. And he repeats that and also says, "sink and toilet;"
11 those are the things that he's talking about?

12 A. Yes, ma'am.

13 Q. Ms. Stem asked him about the hoarded food in his cell
14 and he didn't respond, correct?

15 A. Correct.

16 Q. The objective data, the little --

17 A. At the canteen part, yeah.

18 Q. And the objective data below, it notes that he
19 appears disheveled and has an anxious mood, correct?

20 A. Yes.

21 Q. A blunted affect and mumbled speech and poverty of
22 speech, correct?

23 A. Yes.

24 Q. The 4th page of this exhibit.

25 MS. BLUMERT: Turn everyone's attention to the

1 narrative from April 3rd, 2017, also.

2 Q. (By Ms. Blumert) It's the second one. It's very
3 short. That's a mental health progress narrative, correct? Do
4 you see that one, Warden?

5 A. Yes.

6 Q. And that one indicates that the inmate had 147 kosher
7 meals in his cell and canteen foods, correct?

8 A. Yes. But I'd also like to add to that, this is in
9 2017, so I would have not known -- or I didn't have any
10 knowledge --

11 Q. Warden, that's what the record says, right? Correct?

12 A. Yes.

13 Q. And the final page of this exhibit is a record from
14 March 11th, 2014.

15 A. Are you -- is that the one that's got "soap" too?

16 Q. Yes.

17 A. Yes. Okay.

18 Q. This is one's signed by Dr. Kirby and cosigned by the
19 chief medical officer, correct?

20 A. Yes, one -- one was retired.

21 Q. That's who writes it, correct, Warden?

22 A. Yes. 3/11/2014, correct?

23 Q. Yes. And down towards the bottom of that yellow
24 portion, there's an italics heading called: Comments on
25 subjective findings.

1 And this notes indicates that the mental health
2 level of zero appears to be incorrect. He has a mental health
3 level of B at Age 39. So his mental health level at Age 48
4 should not be zero.

5 Do you see the part where I'm reading?

6 A. Yes, I do.

7 Q. And so Ms. Stem indicates at January 14th he had a
8 diagnosis suggesting -- of a psychotic disorder, correct?

9 A. I do see that.

10 Q. He was not fully psychotic that day, but did refuse
11 to speak and had oppositional behavior consistent with the
12 possibility of paranoid thinking, right?

13 A. I see that, yes.

14 Q. His conduct could also indicate his social isolation
15 that is typical of schizophrenia?

16 A. Yes, typically.

17 Q. And that they would continue to monitor his medical
18 status -- or his mental health status, excuse me, right?

19 A. Correct.

20 Q. That note talks about something that's the mental
21 health levels; are you familiar with those, Warden?

22 A. With mental health levels?

23 Q. Yes.

24 A. Somewhat.

25 Q. That they exist in the facility for classifying the

1 amount of treatment an inmate gets, right?

2 A. Yeah. And the majority of it is exactly for -- not
3 exactly -- but is for the treatment and how they are treated
4 and what kind of medication that they do get.

5 Q. To help the staff know which ones are higher need or
6 slower need or what types of needs, right?

7 A. Correct.

8 MS. BLUMERT: May I approach the witness, Judge?

9 THE COURT: Yes.

10 MS. BLUMERT: I'm now handing the witness
11 Exhibit 27, which is the last two pages of your binder.

12 Q. (By Ms. Blumert) Do you recognize that document,
13 Warden?

14 A. Yes, I do.

15 Q. That is -- tell the Court what that is.

16 A. This is -- basically, what I'm looking at is the
17 levels of mental health. It all has a description on how each
18 level might come to from a professional -- mental health
19 professional on what type of treatment that they may need.

20 Q. And that's a record that you use in the course of
21 your work at OSP, correct?

22 A. Well, it is used for certain things for behavioral
23 type issues. The thing that would come into play for myself,
24 or my staff, with the security piece of it, is depending on the
25 mental health level that may be extreme to where there may be

1 different precautions that we need to use with this inmate
2 that --

3 Q. Sure. And let me kind of refine the question,
4 Warden. This categorization is something your facility uses in
5 its day-to-day business, correct?

6 A. Well, mental health does it, and they make us aware
7 of something that would be something that would -- we need to
8 know security-wise.

9 MS. BLUMERT: Move for admission of Exhibit 27.

10 MS. BURNS: I have no objection, Your Honor.

11 THE COURT: Exhibit 27 will be admitted without
12 objection.

13 Q. (By Ms. Blumert) Warden, Level B in there --

14 (Court reporter requests clarification.)

15 MS. BLUMERT: B as in Baker. Which actually
16 says MH-B (Baker).

17 Q. (By Ms. Blumert) Do you see that part?

18 A. Yes.

19 Q. Okay. Indicates that that is a level where someone
20 requires psychotropic medications?

21 A. Yes.

22 Q. Has current major diagnoses, things like that?

23 A. Yes, ma'am.

24 Q. Requires prescribed scheduled treatment or therapy,
25 maybe suicide attempts or ideations?

1 A. Yes.

2 Q. And that those folks in that category can be seen on
3 an outpatient basis, correct?

4 A. Yes.

5 Q. At some point, it's your understanding from those
6 records that Mr. Cole was on Level B, correct?

7 A. Yes.

8 Q. And at some point that he was moved down to Level A?

9 A. Yeah.

10 Q. And Level A still requires a mental health diagnosis
11 or treatment at some point, correct?

12 A. Yes.

13 Q. Okay. And symptoms may be acute or episodic; do you
14 see that?

15 A. Yes. And not chronic, yes.

16 Q. MH-0 or 0 at the top indicates inmates who do not fit
17 the following criteria, correct?

18 A. Yes, ma'am.

19 Q. So inmates that just don't fit anything that's on
20 this list, right?

21 A. Correct.

22 Q. And that that last record in 26 indicated that it
23 looked like his level was zero, but the -- Ms. Stem and the
24 other doctors indicated that that wasn't correct, right?

25 A. Yes.

1 Q. Warden, in May of this year, you received a letter
2 from Mr. Cole's attorney, correct?

3 A. Mr. Hird?

4 Q. I'm sorry. Say that again.

5 A. Mr. Hird? Mr. Cole's attorney, Mr. Hird? Yes.

6 Q. Yes. And that letter came by e-mail and by physical
7 mail, correct?

8 A. Yes.

9 MS. BLUMERT: May I have a moment, Judge?

10 THE COURT: We've been going about an
11 hour-and-a-half. The Court's going to be in recess. The time
12 now is 10:30. We'll be back on the record at 10:40. We're off
13 the record.

14 (Whereupon, proceedings recessed.)

15 THE COURT: Okay. The Court's back in session.
16 Where is our witness?

17 MS. BURNS: He ran to the restroom, Judge. He
18 should be right back.

19 THE COURT: Warden Farris, I would remind you
20 you're still under oath. You may inquire.

21 Did we lose a lawyer or -- just be advised the
22 Court tries to run this on schedule. And, actually, I'm two
23 minutes late. So when we take a break and I say 10:40, I
24 intend to be back on the record at 10:40.

25 MS. BLUMERT: May I proceed, Judge?

1 THE COURT: Yeah, we're waiting on you.

2 MS. BLUMERT: My apologies.

3 THE COURT: Yeah, if we go off the record and I
4 say 10:40, I intend to be back on the record at 10:40.

5 MS. BLUMERT: I apologize, Judge. I thought it
6 was 10:45. Excuse me.

7 Q. (By Ms. Blumert) Okay, Warden, I believe we were
8 talking about the letter you received from Mr. Hird, correct?

9 A. Yes, ma'am. I believe you mentioned that.

10 Q. And then it came by e-mail and then by physical mail,
11 correct?

12 A. Yes, ma'am.

13 MS. BLUMERT: What I did, Judge, is I just gave
14 the witness the binder so I can just refer to those numbers.
15 Is that acceptable?

16 THE COURT: Yes.

17 Q. (By Ms. Blumert) Turn to Tab 1, Warden. Do you
18 recognize that document?

19 A. Am I looking at the tab wrong? It's just got your
20 list.

21 Q. The document that's behind the tab.

22 A. Okay.

23 Q. But it has, in the bottom right-hand corner, the
24 yellow Petitioner's Exhibit sticker.

25 A. Okay. Oh, okay. Yes. Are you talking about the

1 e-mail?

2 Q. Yes.

3 A. Yes.

4 Q. Okay. What is that? What is the document that is
5 Exhibit 1?

6 A. It's -- it's an e-mail with supporting documents that
7 Mister -- that basically come from Mr. Hird.

8 Q. And it was an e-mail that you received?

9 A. Yes.

10 Q. When was it sent to you?

11 A. May 20th.

12 Q. Who sent it to you?

13 A. Tom Hird.

14 MS. BLUMERT: Move for admission of Exhibit 1.

15 THE COURT: Any objection?

16 MS. BURNS: No, Your Honor.

17 THE COURT: Exhibit 1 is admitted without
18 objection.

19 Q. (By Ms. Blumert) Behind Tab 2, Warden, do you
20 recognize that document, Petitioner's Exhibit Number 2?

21 A. Yes.

22 Q. Do you recognize that document?

23 A. Yes.

24 Q. What is that?

25 A. This is a document, basically, from the Public

1 Defender's Office that was sent to me via e-mail, regular US
2 Mail and basically outlining the attachments, some of the
3 affidavits from doctor -- Dr. Hough and some of the
4 neurologist's report that was kind of tied in together that --
5 and this was -- basically, I would call it a face sheet for
6 that.

7 MS. BLUMERT: Move for admission of Petitioner's
8 Exhibit 2.

9 THE COURT: Any objection?

10 MS. BURNS: No objection.

11 THE COURT: Exhibit 2 is admitted without
12 objection.

13 Q. (By Ms. Blumert) Do you recall, Warden, those six
14 documents that are listed there, whether this letter actually
15 came with those documents?

16 A. If I recall correctly, I believe the documents were
17 with everything. I don't think -- I don't believe they come
18 separate. I believe they all came together.

19 Q. And you don't have any memory of any one of those
20 missing, right?

21 A. No. No.

22 Q. Petitioner's Exhibit 3, flip to that next tab, if you
23 would, Warden.

24 A. Yes.

25 Q. Do you recognize that document?

1 A. I do.

2 Q. Okay. What is that document? What's it called?

3 A. This is basically a declaration by Dr. Snyder, who
4 was -- did the -- the MRI, and basically explaining, basically,
5 his qualifications. And then went into, actually, the
6 structure of -- without getting into detail, the structure of
7 the brain or lesion that he was talking about in the MRI.

8 Q. And you reviewed that when you received it, correct?

9 A. Yes, ma'am.

10 MS. BLUMERT: Move for admission of Petitioner's
11 Exhibit 3.

12 THE COURT: Any objection?

13 MS. BURNS: No.

14 THE COURT: Are you offering 3 through 6?

15 MS. BLUMERT: I believe it's 3 through 8, Judge.
16 They were all those attachments, and I don't mind admitting
17 them as a group, if Your Honor would like.

18 THE COURT: Just for time purposes, yes, I would
19 prefer you did, in that manner.

20 MS. BLUMERT: Okay.

21 Q. (By Ms. Blumert) Warden, look at the documents
22 behind Tab Number 4, please.

23 MS. BURNS: We have no objection to these, Your
24 Honor.

25 THE COURT: To Exhibits 3 through 8, is there an

1 objection?

2 MS. BURNS: No objection, Judge.

3 THE COURT: Exhibits 3 through 8 are admitted
4 without objection.

5 Q. (By Ms. Blumert) These documents, Warden, are the
6 ones that --

7 A. Ma'am, did you say 4? Is that what you said, 4?
8 Document 4 or --

9 Q. I did. But I backed up to 3 through 8 as a whole.

10 A. Oh, okay.

11 Q. Those are the documents that came with the letter
12 that you received in May, correct?

13 A. Yeah. I hadn't looked at the 5, 6, but from that
14 list, yes.

15 Q. And you reviewed those when you received the letter?

16 A. Yes.

17 Q. You read the reports that are detailed in here,
18 correct?

19 A. Yes, ma'am.

20 Q. I'm sure it probably took a little bit, right?

21 A. Yes, ma'am.

22 Q. And were you able to note in those -- the other
23 reports that they mentioned or other materials that they talked
24 about, correct?

25 A. Yes.

1 Q. And in many of those reports, they talk about the
2 other documents that they relied on in making certain opinions
3 or findings, right?

4 A. Yes. And that would kind of take a little
5 explanation, and I don't know if y'all want me to do that.

6 Q. Well, so some of them -- for example, Number 7, if
7 you'll flip to that.

8 A. 7. Okay. I'm on it.

9 Q. That's the competency to be executed evaluation of
10 Dr. Hough from 2016, correct?

11 A. Yes, ma'am.

12 Q. And in that report, Dr. Hough makes an ultimate
13 opinion about whether Mr. Cole is competent to be executed,
14 right?

15 A. Yes, he did.

16 Q. And his opinion is that he is not?

17 A. Correct.

18 Q. Dr. Hough talks about a whole slew of things, but
19 talks about a bunch of biographical information about Mr. Cole,
20 right?

21 A. Yes, ma'am.

22 Q. Previous evaluations from other doctors that he
23 reviewed, correct?

24 A. Yes.

25 Q. And those have mixed results. Some of those say

1 competent, some say not competent, right?

2 A. Correct.

3 Q. You don't have all of those reports he referenced,
4 but you were able to read that he did look at them?

5 A. Yes, ma'am.

6 Q. And he kind of talks through in there what the gist
7 of that report was, correct?

8 A. Yes.

9 Q. He also notes in there -- he notes some of the
10 reports that he received from lawyers that reported
11 difficulties with communicating with Mr. Cole, correct?

12 A. Yes. And -- well, I'm sorry. I was adding stuff.
13 Go ahead.

14 Q. And he also makes notes that he reviewed staff
15 observations of Mr. Cole, and that's on, I think, Page 7 of
16 that report?

17 A. Yes. I'm not sure what page.

18 Q. The report's pretty long, but there's page numbers
19 and that is on Page Number 7, that he notes he reviewed records
20 that staff --

21 A. With the prison staff, yes.

22 Q. Yes. Staff of the prison -- excuse me, notes that
23 the staff at the prison had made. He also notes on Page 9
24 notes from some cellmates, statements that they made about him
25 staying to himself or being kind of nutty or moody?

1 A. Correct. Third paragraph, yes.

2 Q. Dr. Hough also noted the -- the tumor in Mr. Cole's
3 brain, correct, or excuse me, the lesion?

4 A. The legion lesion, yes.

5 Q. And that is something that you also saw in
6 Dr. Snyder's report?

7 A. Yes.

8 Q. And that's the bulk of Dr. Snyder's report, is
9 discussion of that brain lesion?

10 A. Correct.

11 Q. And both Dr. Snyder and then Dr. Hough notes that
12 it's kind of how that lesion affects a person's behavior or
13 their brain, right?

14 A. Yes. They did have that interpretation of some of
15 the things that -- that they thought could do that. Nothing
16 that I don't think's ever been proven, but in their thought
17 process.

18 Q. Right. As to -- to the best of their knowledge, this
19 is their understanding of what it can do to a brain, right?

20 A. Correct.

21 Q. Dr. Hough also noted that there was a lack of
22 schizophrenia treatment for Mr. Cole, right?

23 A. Yes, ma'am. There -- he did state that, but just to
24 open up on that, he was never classified or never diagnosed
25 with schizophrenia. We can't --

1 Q. Well, now, there are -- there are folks in here that
2 did diagnose him with schizophrenia, correct?

3 A. I've -- all's I've -- I've seen possibly
4 schizophrenic, schizophrenic tendencies, but the full
5 assessment of being an actual schizophrenia, if I missed it, I
6 did, but I have not seen a full fledged diagnosis of
7 schizophrenia.

8 MS. BLUMERT: May I have a moment, Judge?

9 THE COURT: Yes.

10 Q. (By Ms. Blumert) If you will flip to Exhibit 4, and
11 flip to Page 4, which they're kind of cut off, but it's the
12 last page of that exhibit, in Subparagraph 14.

13 A. Now, I'm looking at Exhibit 4, correct?

14 Q. Yes. And it's Dr. Hough's addendum.

15 A. Correct. I seen which one -- what number I'm looking
16 at.

17 Q. So this is the same doctor whose report we were just
18 talking about, right?

19 A. Right. I was just seeing what number you were
20 referring to on it.

21 Q. And there's -- the report's broken out by paragraphs,
22 and there's Paragraph 14; do you see that?

23 A. That's what I was needing. Okay.

24 Q. And Dr. Hough indicates that his current observations
25 were consistent with his previous observations, right?

1 A. Current were consistent -- yes.

2 Q. And what you understand from reading these reports is
3 that Dr. Hough had been able to meet with Mr. Cole on a few
4 occasions; other occasions he was unsuccessful, right?

5 A. I would -- I wouldn't call any of them successful,
6 meetings with doc -- I know the attempt was there, but I don't
7 know that he was successful in what you'd call a meeting with
8 him. I'm still not seeing -- oh, okay. Okay.

9 And I'm reading "consistent." There's things
10 that relay that I've not seen anything where there is a
11 diagnosis of that. He's --

12 Q. Page 6 -- excuse me -- Exhibit 6, Page 4, which is
13 Dr. Hough's evaluation. On page 4 of Exhibit 6, this is his
14 addendum to his eval that was in Exhibit 7. And under his
15 updated opinions on Page 4, Number 1, he says: "Mr. Cole is
16 diagnosed with chronic and persistent schizophrenia that is
17 extreme in severity."

18 Do you see that there?

19 A. Possible. Possible trial of treatment.

20 Q. Say that again.

21 A. Well, he's got possible treatment to express a
22 schizophrenic condition.

23 Q. Okay. Well, on Page 4, it says: "Mr. Cole is
24 diagnosed with chronic and persistent schizophrenia that is
25 extreme in severity," correct? It says that? I'm not asking

1 you to make an opinion about it. That's what it says.

2 A. I know, I'm not seeing it. I guess I'm looking
3 wrong.

4 Q. Tab 6, Page 4.

5 THE COURT: Counsel, is Dr. Hough going to
6 testify?

7 MS. BLUMERT: No, he's not, Judge. The Court
8 indicated that it did not want to hear from experts it has
9 reports from.

10 THE COURT: Right. But do you -- who are your
11 other witnesses?

12 MS. BLUMERT: We have no more witnesses. Just
13 the warden.

14 THE COURT: Okay.

15 Q. (By Ms. Blumert) Do you see that Exhibit 6, Page 4,
16 right?

17 A. Exhibit 6, Page 4. I'm on that, yes.

18 Q. Okay. Point Number 1 at the top says: "He's
19 diagnosed with chronic and consistent schizophrenia," correct?

20 A. Yes, that's what Mr. Hough said, yes.

21 Q. And then Number 3, he talks about the documented
22 brain lesion, correct?

23 A. Correct.

24 MS. BLUMERT: May I have a moment, Judge?

25 THE COURT: Yes.

1 Q. (By Ms. Blumert) Warden, in Exhibit 7 -- I know I'm
2 kind of jumping around. Bear with me.

3 Exhibit 7 is the competency to be executed
4 evaluation by Dr. Hough that we talked about a little bit
5 already, correct?

6 A. Correct.

7 Q. And on Page 4 of that, Dr. Hough indicates in the
8 third paragraph, the large section of text, that he's --

9 A. Page 4, you said?

10 Q. Page 4.

11 A. Okay.

12 Q. Exhibit 7. Dr. Hough indicates that he relied on or
13 reviewed an evaluation by Dr. Morris.

14 A. 2015?

15 Q. Yes.

16 A. Yes.

17 Q. And Dr. Morris in there had met with Mr. Cole and had
18 written a report about those meetings and his diagnoses,
19 correct?

20 A. Yes.

21 Q. And Dr. Morris indicated he'd given him a
22 schizophrenia diagnosis also, correct?

23 A. I don't understand the wording on that, but, in 2009,
24 he opened the diagnosis of schizophrenia.

25 Q. And Dr. Hough was reviewing that and incorporates

1 that into his report, right, the statements from Dr. Morris?

2 A. Yes.

3 Q. You received all these reports in this letter on
4 May 20th, correct?

5 A. I believe that was the day.

6 Q. And May 25th you received another e-mail from
7 Mr. Hird, correct?

8 A. Not sure on exact date, but yes.

9 Q. Sometime after that?

10 A. Yes.

11 Q. I'm going to turn your attention to Exhibit 9. If
12 you'll flip to that one. Does that look like the e-mail that
13 you said you received?

14 A. It looks like the e-mail. I can't -- I can't say I
15 remember this exact e-mail, but it looks like, yes.

16 Q. You don't notice anything about it that's changed or
17 different from your memory, correct?

18 A. Well, he states that basically, on this, there are
19 supporting documents on it and stuff, so -- "Please find a
20 letter with additional supporting documents per our request."

21 Q. Sure. You just -- you received this e-mail that just
22 says this as that text, right?

23 A. Yes. Yes.

24 MS. BLUMERT: Move for admission of Exhibit 9.

25 THE COURT: Any objection?

1 MS. BURNS: No, Your Honor.

2 MS. BLUMERT: And the tab right after that,
3 Petitioner's Exhibit --

4 THE COURT: Hang on. Let me complete my record.
5 Exhibit 9's admitted without objection.

6 MS. BLUMERT: I apologize, Judge.

7 Q. (By Ms. Blumert) Warden, if you'll flip to Tab 10.
8 Do you see that document there? It's one page.

9 A. Yes.

10 Q. What is that document?

11 A. It's -- it is an e-mail that's basically referring to
12 the MRI by Dr. Snyder.

13 Q. It -- was it a letter in the mail or an e-mail?

14 A. I think -- if I remember right, I think I got both.

15 Q. The one we just looked at --

16 A. I know I got a FedEx on it too, but I think I believe
17 it was e-mail too.

18 Q. You've seen this letter that we're talking about?

19 A. Yes. Yes.

20 MS. BLUMERT: Move for admission of Exhibit 10.

21 THE COURT: Any objection?

22 MS. BURNS: No, Your Honor.

23 THE COURT: Exhibit 10 is admitted without
24 objection.

25 Q. (By Ms. Blumert) And when you received that letter,

1 it indicated to you that there was attachments with it,
2 correct, some supplemental documents?

3 A. Yes.

4 Q. If you'll flip to Tab 11, does that look like the
5 documents that you received with it?

6 A. Yes. And I remember this document.

7 MS. BLUMERT: For the record, I'm drawing the
8 warden's attention to Petitioner's Exhibit 11.

9 Q. (By Ms. Blumert) What is that document, Warden?

10 A. It's the declaration of Travis Snyder to basically --

11 Q. It's a second one, a second declaration?

12 A. Yes. But it's explaining basically what -- his
13 professionalism, what he's done basically in his past, and he
14 gives -- he gives also an update kind of on the lesion and
15 different things and trying to explain a little bit about the
16 the numbering system and different things with the -- with the
17 lesion. So...

18 Q. And there's some diagrams that were attached at the
19 back of it, correct?

20 A. When you say "diagrams," it was basically pictures of
21 the brain, basically, with different color system on it.

22 Q. Do you see the last three pages of that Exhibit 11,
23 are those the ones that you received?

24 A. Let me look here. Yes.

25 MS. BLUMERT: Move for admission of Exhibit 11.

1 THE COURT: Any objection?

2 MS. BURNS: I have no objection, Your Honor.

3 THE COURT: It's admitted without objection.

4 Q. (By Ms. Blumert) Warden, I'll draw your attention to
5 Petitioner's Exhibit 12, which is behind Tab 12.

6 What is that document?

7 A. This is mail that came -- believe it came from e-mail
8 and regular mail, but, basically, the requesting on, basically,
9 the information from Dr. Hough that we -- that I proceed with
10 the competency hearing to put forth.

11 Q. Well, that letter in Exhibit 12 you received on
12 August 1st -- well, it's dated August 1st, correct?

13 A. Yeah, but I can't say -- I do not know the exact
14 date.

15 Q. You mean the date that you received it?

16 A. I don't know the exact date that I seen it. I just
17 can't -- I don't remember that because sometimes something may
18 come and I may not see it until possibly a day later or --

19 Q. Sure. That's fair. You can't say the date you
20 actually looked at it, that's what you're saying?

21 A. Right.

22 Q. Okay. It's dated August 1st, so you would not have
23 read it before that, to your understanding, right?

24 A. I don't know how I would have. But -- unless it was
25 sent with a wrong date put on it.

1 Q. You don't disagree with that date, right? Excuse me.
2 You don't have any reason to disagree with that
3 date?

4 A. No.

5 MS. BLUMERT: Move for admission of Exhibit 12.

6 THE COURT: Any objection?

7 MS. BURNS: No objection.

8 THE COURT: Be admitted without objection.

9 Q. (By Ms. Blumert) And that exhibit talks about
10 receiving another report from Dr. Hough, correct, a supplement?

11 A. Yes. But the supplement was responses -- or
12 responses to Dr. Orth. Is that what you're talking about?

13 Q. Yes. Did you receive that?

14 A. Yes.

15 Q. Okay. Flip to Number 13, Petitioner's Exhibit 13.
16 What do you see on that document? What is that?

17 A. It's basically almost like a resume, I guess you'd
18 say, but it was from Dr. Hough and explaining his credentials.

19 Q. Well, what else is in that?

20 A. Basically, some of the stuff, the evaluations that he
21 has done in the past, not just what -- what his qualifications
22 were, but some of the things he has done in the past and some
23 of the things that he -- a few of the things with OSP
24 Corrections Center. So...

25 Q. He also talks in there about his evaluation of

1 Dr. Orth's report, correct?

2 A. Correct.

3 MS. BLUMERT: Move for admission of Exhibit 13.

4 THE COURT: Any objection?

5 MS. BURNS: No objection.

6 THE COURT: Exhibit 13 is admitted without
7 objection.

8 Q. (By Ms. Blumert) And you were able to review
9 Exhibit -- or review the contents of that exhibit when it
10 arrived to you, correct?

11 A. Yes. Again, I can't say the exact day, but yes.

12 Q. And in that report, Dr. Hough goes through Dr. Orth's
13 report, right?

14 A. Correct.

15 Q. And he talks about his critic of the report? Yes?

16 A. Correct, yes. Yes, I had that in both reports from
17 Dr. Orth and Dr. Hough.

18 Q. That he ultimately says that Dr. Orth should be
19 relied upon with a high degree of caution, if at all, right?

20 A. Correct.

21 Q. And he also -- in this supplemental, he attaches some
22 DOC from your facility?

23 A. Correct.

24 Q. Excuse me. DOC records from your facility?

25 A. Correct.

1 MS. BLUMERT: I'd move for admission of
2 Exhibit 13.

3 THE COURT: It's been admitted.

4 Q. (By Ms. Blumert) Warden, I want to draw your
5 attention to Tab 15, Petitioner Exhibit 15. Do you recognize
6 this document?

7 A. Yes. This is -- can't remember the exact date I got
8 it on. It was in July. But, yes, it's from Dr. -- the report
9 that was sent to Judge Frizzell from Dr. Orth.

10 Q. But you got -- and you reviewed this document,
11 correct?

12 A. Yes, I did.

13 Q. And be fair to say that this is Dr. Orth's report of
14 his evaluation?

15 A. Is this -- that I'm looking at now?

16 Q. Yes.

17 A. Yes. I assume.

18 MS. BLUMER: Move for admission of Exhibit 15.

19 THE COURT: Any objection?

20 MS. BURNS: No, Your Honor.

21 THE COURT: Be admitted without objection.

22 Q. (By Ms. Blumert) This is the report that, as you
23 understood it, was made by court order of Judge Frizzell in the
24 Northern District, right?

25 A. Correct.

1 Q. By joint agreement of the parties that asked for it?

2 A. Yes, it was agreement on everyone for this --

3 Q. Agreed not for Dr. Orth specifically, but for an
4 evaluation, right?

5 A. Correct.

6 Q. And you know that because you've reviewed the court
7 order, as well?

8 A. Yes.

9 Q. I'm going to draw your attention to Tab 14,
10 Petitioner's Exhibit 14. And, Warden, Exhibit 14 looks like
11 the court order for that report, correct?

12 A. Correct.

13 Q. Warden, what did you do in response to seeing that
14 letter and the supplements you received from Mr. Hird?

15 A. When I received the information from Mr. Hird? Are
16 you talking about everything or just one particular item from
17 Mr. Hird?

18 Q. As you received all those documents, what did you do
19 in response to that?

20 A. Reviewed them. There's -- there's times within our
21 day that we can -- I can possibly say I'm going to be looking
22 at these documents and possibly spend four or five hours
23 reviewing documents. There's days that I may be able to just
24 get to it 30 minutes and maybe have to review from home. But
25 with documents on these, I reviewed them as quickly as I

1 possibly could.

2 Q. But you ultimately -- you read through those?

3 A. Yes, ma'am. Yes, ma'am.

4 Q. You also reviewed records from the Department of
5 Corrections, specifically the penitentiary that you're over,
6 correct?

7 A. I reviewed -- with Mr. Cole, I reviewed -- I didn't
8 go back and look, pull mental health records back from 2003,
9 2004. I based most of -- majority of my stuff on my
10 evaluations from my staff, from -- I looked focusedly on the
11 court-appointed -- or excuse me, not court-appointed, but the
12 court process where they named a person to look at -- evaluate,
13 which was Dr. Orth, so --

14 Q. How come? Why that one?

15 A. Because that's who everyone agreed to do. That's who
16 y'all agreed to do, as we did.

17 Q. Was there someone that told you to pay more attention
18 to that one?

19 A. No. I paid attention to all of them. But when you
20 look at it and you're trying to balance some things out as
21 basically I have to do as an administrator, I look at, hey, if
22 there's an agreement with both parties and here's where we are,
23 naturally, that's going to be the one that's probably the head
24 of it, because it is agreed by both parties. Y'all -- yours --
25 you'd agree with it, we'd agree with it.

1 So, naturally, I looked at the other reports.
2 I'm not saying that. But what I found in both -- both reports,
3 it's one doctor criticizing another doctor and how they did
4 things. I also looked very heavily in which doctor actually
5 had a personal -- or he had -- was able to communicate to get
6 the things he needed to make a proper diagnosis. So it -- to
7 me, it's not whether -- I've got to do the right thing, try to
8 make the right decision on everything. I'm not going to come
9 up here and say everybody goes to the death sentence or
10 anything like that. That's not -- that's not what I do. So I
11 have to balance those things.

12 And we -- that's what we had. We had Dr. Orth
13 criticizing Dr. Hough. We had Dr. Hough criticizing Dr. Orth.

14 Q. So you were looking at those and trying to kind of
15 make a value judgment of which one seemed more correct; is that
16 fair?

17 MS. BURNS: Judge, I'm going to object to the
18 form of that question. I think that that goes to the ultimate
19 issue in this case. I would ask for her to rephrase.

20 THE COURT: Objection's overruled.

21 You can -- you can answer, if you have an
22 answer.

23 Q. (By Ms. Blumert) Do you need me to re-ask it?

24 A. Please.

25 Q. As you looked through those reports, you were kind of

1 trying to decide which one seemed more valuable or more correct
2 to you; is that fair?

3 A. It's fair to an extent. But when you look at the
4 certain things -- and, again, as everyone has stated, I'm not a
5 mental health professional. And I know that. But what I have
6 to do is what steps one may have taken that may have given them
7 a better look at what's going on with that individual. It's
8 obvious when you look at it, that, in my opinion, Dr. Orth had
9 that better piece of it.

10 Now, Dr. Hough would not say those things. But
11 when you look at it and you're wondering, how do you come up
12 with a diagnosis when they -- he doesn't even talk to you, you
13 know, you're basing it -- you're guessing at it, as I feel like
14 that was part of this on all of that.

15 But I do, I have to weigh in all of that,
16 because there is more than one report, and everything, you
17 know, contradicts things.

18 Q. So you were weighing in to figure out which one of
19 these doctors maybe did it right?

20 A. I can't say -- you know, I cannot say who is -- is
21 the perfect person in this. And also what -- my -- and my
22 decision has to be looked at is what state statutes references.
23 And --

24 Q. Warden, you're not a mental health professional, like
25 you said, right?

1 A. I am, but I'm just explaining, you know, what -- what
2 I have to look at is is does this inmate know that he has an
3 execution coming. Does he know and understand why he's being
4 executed.

5 And I think people get -- they go off key with
6 what is actually state statute on this. And sure, I'm trying
7 to weigh in on everything in the world with mountains of this
8 stuff. But when I look at state statute, when I look at the
9 law in those things right there, it's pretty clear to me with
10 this.

11 And, like I said, I do have to look at what both
12 parties agreed to. I'll do the right thing no matter what.
13 And if I felt he was incompetent, I have no problem with moving
14 that forward. Not a problem at all. But in this case here, I
15 did not see that.

16 Q. So you were looking and you're trying to decide if
17 you think, based on these, Mr. Cole is competent or not to be
18 executed, correct?

19 A. Well, yes. Yes.

20 Q. And so then, ultimately, after you made that -- made
21 that conclusion, you, under the statute, decided not to refer
22 Mr. Cole's case to the Pittsburg County DA, right?

23 A. I -- correct.

24 Q. Because it's your understanding that Mr. Cole had not
25 become insane, as the statute uses those words, right?

1 A. Well, correct. And, basically, like the -- with the
2 state statute and how its wording, yes, I believe he is -- from
3 what I've seen in reviewing all the reports and listening and
4 relying on my staff to what they tell me on a daily basis, from
5 my officers, from my case managers, unit managers, from the
6 mental health, from the doctors, that he is -- he is competent
7 to move forward.

8 Q. And then after you made that decision, you drafted a
9 letter with that opinion, right?

10 A. Correct.

11 Q. And you sent that out to Mr. Cole's attorneys, right?

12 A. Correct.

13 Q. I'm going to draw your attention to Petitioner's
14 Exhibit 17, behind Tab 17. Do you recognize that document?

15 A. Yep, I do.

16 Q. That's your letter, correct?

17 A. It's -- it is my letter, yes.

18 Q. And in that letter, you indicate that you were not
19 going to refer this to the Pittsburg County DA, correct?

20 A. Correct.

21 MS. BLUMERT: Move for admission of Exhibit 17.

22 MS. BURNS: No objection.

23 THE COURT: Exhibit 17 is admitted without
24 objection.

25 Q. (By Ms. Blumert) And in the very last paragraph on

1 Page 2, Warden, you state, about four lines from the bottom,
2 that it's your determination that Mr. Cole has not become
3 insane, correct?

4 A. Correct.

5 Q. And so you decline the request to initiate competency
6 proceedings, right?

7 A. Correct.

8 Q. Is that still your opinion today?

9 A. It is.

10 MS. BLUMERT: May I have a moment, Judge?

11 THE COURT: Yes.

12 MS. BLUMER: Judge, just for clarification and
13 housekeeping, did I admit or were 14 and 16 introduced?

14 THE COURT: 14 was discussed, but not offered.
15 16 was not discussed nor offered.

16 Q. (By Ms. Blumert) Warden, if you'll flip to Tab 14.
17 I believe we talked about that already.

18 MS. BLUMERT: And I move for admission of 14.

19 THE COURT: Any objection?

20 MS. BURNS: No, Your Honor.

21 THE COURT: 14 is admitted without objection.

22 Q. (By Ms. Blumert) And Number 16, behind that tab,
23 Warden.

24 A. 16 or 14?

25 Q. 16.

1 A. 16. Okay.

2 Q. Do you see that report?

3 A. I do.

4 Q. Do you recognize that?

5 A. Not right offhand, I don't.

6 Q. Do you know whether you've reviewed that report?

7 Well, let me ask you this: What is that report, for the
8 record?

9 A. Well, basically, it's a, excuse me, consultation, but
10 it's dated January 21st, 2015.

11 Q. Done by Dr. Raphael Morris?

12 A. Yes. At the top, yes.

13 Q. And that's the report that we talked about Dr. Hough
14 relying on?

15 A. That he referred to, correct --

16 Q. Yes.

17 A. -- he referred to in his reports?

18 Q. Yes.

19 A. Yes.

20 Q. Were you able to review that -- the consultation,
21 Exhibit 16?

22 A. Yes, I do believe I have this one. And, again, in
23 this one here, Dr. Hough referred to Dr. Morris as opened --
24 it's really hard to determine language -- that he opened --
25 basically opened the determination -- opened it up for a

1 determination of schizophrenia, if I remember correctly.

2 MS. BLUMERT: Move for admission of Exhibit 16.

3 THE COURT: Any objection?

4 MS. BURNS: Judge, I don't know if -- I don't
5 believe that there is testimony directly to the point of
6 whether Warden Farris reviewed this particular document, if
7 whether it was a factor in him making his determination or
8 giving his opinion today. So...

9 THE COURT: What's the legal basis for your
10 objection?

11 MS. BURNS: Relevance.

12 THE COURT: Objection's overruled. Dr. Hough
13 has indicated he reviewed it and it's part of his evaluation.
14 It will be admitted over objection.

15 Q. (By Ms. Blumert) Warden, on Page 10 --

16 A. Of which one?

17 Q. Of Exhibit 16. I apologize. On page 10 of that, the
18 heading is "Conclusions," can you read the first three lines of
19 that for us.

20 A. I continued to open that Mr., or maybe that's
21 pronounced different, I'm not sure. Is it Opine?

22 Q. Opine.

23 A. Okay. I'm not a good dictionary person. "I continue
24 to opine that Mr. Cole suffers from Schizophrenia, Paranoid
25 Type."

1 Q. Keep going.

2 A. Keep going? "Although I was confident that he
3 suffered from the diagnosis over six years ago, there is even
4 more evidence available at this time. Schizophrenia is a
5 neurolo-" -- excuse me -- "a neurochemical disorder" --

6 Q. That's good. Thank you, Warden.

7 MS. BLUMERT: Nothing further. Pass the
8 witness.

9 THE COURT: How do you guys want to -- I don't
10 know how long you'll be on your exam. So the time now is
11 11:30. We can start that or we can -- we can take a break.
12 It's just -- it doesn't matter to me.

13 Does anyone need a break?

14 MS. BLUMERT: I'm okay to keep going,
15 whatever -- I'll defer to the Court.

16 THE COURT: Are you good, Warden?

17 How about the reporter?

18 Okay. You may inquire.

19 **CROSS-EXAMINATION**

20 BY MS. BURNS:

21 Q. How are you, Warden?

22 A. Been better.

23 Q. Hanging in there? Okay. I want to back up and ask
24 you a few questions on your observations or any communications
25 that you've had with Mr. Cole recently. Okay. And this is

1 kind of a foundation.

2 How often do -- what's the protocol as far as
3 you checking on him to see what his physical and mental state
4 is?

5 A. Well, when we start our -- basically, what we call --
6 our 35-day protocol, it's daily. If -- if there's some reason
7 that I have to be gone out of state or whatever, then I assign
8 somebody that will give me the information; usually it's a
9 deputy warden to make that check, review different things.

10 MS. BLUMERT: I object, Judge, to discussion of
11 the 35-day protocol. I think that's outside the scope of this
12 hearing.

13 THE COURT: Is your objection relevance?

14 MS. BLUMERT: Yes.

15 THE COURT: Do you have a response?

16 MS. BURNS: I do, Your Honor. The 35 -- he
17 testified that the 35-day protocol for this particular
18 execution date was initiated on September 15th, and she
19 discussed that. She discussed the 35-day notification or the
20 protocol in her directive of the warden --

21 THE COURT: There's been testimony about the
22 warden speaking with Mr. Cole within the 35 days, which I
23 understand to be the time frame for the protocol we're here on,
24 so the objection's overruled.

25 Go ahead.

1 Q. (By Ms. Burns) You were talking about -- if you can
2 just explain to the Court, so when the 35-day protocol is
3 initiated, how -- you said that he is monitored on a daily
4 basis?

5 A. Yes, ma'am.

6 Q. And what kinds of monitoring does that consistent of?

7 A. Basically, with the cell that he is placed in, we
8 have an officer that sits there and monitors everything,
9 movement, it's 24/7, monitors everything. That is a
10 determination. If, you know, the meal times they get there,
11 certain responses that do -- the canteen person may come or the
12 case manager may come to do their visits, Chaplin, and so
13 forth. It's a pretty detail of things of what goes on all day,
14 but it's 24/7 surveillance.

15 Q. Okay. And how often are you provided -- when that
16 process is initiated, are you provided with daily updates, or
17 how often are you consulted or do you directly observe
18 Mr. Cole?

19 A. I do my direct observation when I go to there and
20 usually visit with the officer. Mr. Cole's one that -- you
21 know, unless -- unless it may be a canteen issue -- is probably
22 not going to, you know, talk to you unless you actually go in
23 the cell and sit down with him and do those type of things.
24 But with -- with the -- as reviewing the law book, if there's
25 something that comes up that is of concern -- and, for

1 instance, it may be something going on with them medically --
2 then they will notify me immediately to figure out what we need
3 to do with this process and where we need to move forward with
4 it. And it may be anything: I need to get medical up there
5 immediately or maybe having to remove him, take him somewhere.
6 But, basically, to ensure that he is taken care of to the
7 extreme max.

8 Q. Okay. And so Mr. Cole's 35-day notification, this
9 procedure was started on September 15th of this year?

10 A. Yes, I believe that was the day, yes.

11 Q. Okay. And as part of that, was he -- I'm guessing --
12 well, let me ask you: Was he examined by a medical doctor?

13 A. Yes.

14 Q. And who was that doctor?

15 A. The medical doctor was Dr. Payne.

16 Q. Dr. Payne?

17 A. Yes.

18 Q. Did Dr. Payne consult with you about any observations
19 that he had made of Mr. Cole?

20 A. Yes.

21 Q. And were those helpful in you making your
22 determination as to the issue today?

23 A. Yes, it was.

24 Q. And what -- specifically, what was helpful for you?

25 A. It was helpful to get -- trying get an overall

1 understanding of the thought processes that are going on. And
2 some of the things that we -- we have to do as corrections
3 professionals, if we're -- if there's, in a ways, games being
4 played or something that we're trying to be manipulated on a
5 certain extent. When visiting with Dr. Payne, he informed
6 me -- and, again, I'm not a doctor, but he tried to describe
7 the test that you do with reflexes, with certain types of
8 punctures on your legs --

9 MS. BLUMERT: I object to this, Judge.

10 THE WITNESS: -- that he could fully walk.

11 THE COURT: Hang on a second. If there's an
12 objection, you need to discontinue your testimony.

13 THE WITNESS: Okay.

14 THE COURT: What's your objection?

15 MS. BURNS: As to relevance, Judge. He's
16 opining about things that occurred even after his letter was
17 submitted. And that, essentially, anything after that letter
18 is not relevant to the question --

19 THE COURT: Well, I've seen a report from
20 Dr. Payne, a progress note in the records that you've
21 submitted.

22 MS. BLUMERT: I'm sorry. Say that again.

23 THE COURT: I believe one of your progress notes
24 were from Dr. Payne, are they not?

25 MS. BLUMERT: I don't think anything after

1 August 2nd, that I'm aware.

2 THE COURT: Was that prior to the protocol, the
3 35-day protocol, the one from Dr. Payne?

4 MS. BLUMERT: Yes. The 35-day protocol started
5 September 15th. August 2nd is when the warden wrote his letter
6 that he'd made his decision.

7 THE COURT: Okay. Objection's sustained.

8 Q. (By Ms. Burns) When you have check on Mr. Cole,
9 personally, has he ever interacted with you in any sort of way?

10 A. Most of the interactions with Mr. Cole may be -- may
11 be moving his hand to a certain way, may be moving his head to
12 an extent. And never within the cell, and that's pretty
13 typical of all the staff. Like I said, there's some depending
14 on what -- what they're going there for. Mr. Cole will not
15 relay to me about anything. He's not going to talk to me about
16 how he feels and different things like that. He's just not,
17 not going to do that.

18 Again, Mr. Cole, when we started the 35-day
19 protocol where I sit down and he's brought out of the cell and
20 we meet with everybody -- with the mental health professionals
21 and so forth -- Mr. Cole did communicate and did talk where
22 there are certain things that, you know, we go over in a 35-day
23 protocol, and he did -- and --

24 MS. BLUMERT: Same objection, Judge, as to
25 relevance for this time period.

1 THE COURT: Sustained. I want you to stay
2 within the 35-day time period.

3 MS. BURNS: Okay. Yes, Your Honor.

4 Q. (By Ms. Burns) So absent -- we're going to -- I'm
5 going to ask you questions about anything outside of that
6 35-day protocol, okay? And -- but you had kind of other
7 communications and observations of Mr. Cole outside of that; is
8 that right?

9 A. Yes. Yes.

10 Q. Okay. And were those similar to what you had
11 observed, what you just testified about, did he ever
12 acknowledge you, speak with you, anything like that?

13 A. No, not speak --

14 Q. Okay.

15 A. -- no. It -- you would get something from him,
16 whether, like I said, a hand raise or something that would
17 show, you know, he knows you're there, but he's not talking to
18 you. That's the way I always took it in the times I went up
19 there to try to communicate with him.

20 Q. Okay. And did it appear that -- those actions that
21 you've described, did they appear to be in response to
22 something that you had said or something that your staff had
23 said?

24 A. No. I think -- I think his response was basically I
25 know you're there, it's time for you to go --

1 Q. Okay.

2 A. -- that's kind of how I looked at it.

3 Q. Okay. And how often does Mr. Cole -- how often is he
4 checked on by anyone other than you? And I'm talking about not
5 within the 35-day protocol.

6 A. Security does checks. And outside of security,
7 security does checks every 30 minutes.

8 Q. Okay. And would it be fair to say that if security
9 had noticed something -- such as him having mental health
10 issues or seeming to be disoriented or possibly seeing or
11 hearing things -- that they would have notified you?

12 A. Yes. If there is something that is on a dangerous
13 level, then -- then I'm -- I will be notified on that because
14 there will be certain protocol that we will need to do if it
15 becomes self-harm, if it becomes an assault on someone else or
16 another inmate or so forth. With Mr. Cole, there was many
17 things seen at different times. During 30-minute checks,
18 you're going to be see many different things.

19 Typically, if we walked up there today, you
20 would see Mr. Cole laying there, may have the TV on, maybe with
21 his headband on, looking at the wall. But as many times as
22 security goes there, there's times where he's up moving around
23 in his cell, there's times when he's up doing his washing,
24 there's times when he's up doing his eating. So -- and those
25 are things they see. So, like I said, I relay -- or I look a

1 lot on what my staff sees and what they relay to me.

2 Q. Okay. Outside of the 35-day notification protocol,
3 has Dr. Snyder -- was he -- is he the doctor that you consult
4 with at your facility?

5 A. Dr. Snyder?

6 Q. Dr. Payne, I'm sorry.

7 A. I was like --

8 Q. I'm sorry. Dr. Payne.

9 A. Yes. As far as the regular doctor, the physical
10 piece of it, yes.

11 Q. And has he spoken with you about Mr. Cole's physical
12 health at all?

13 A. No. The only thing that has come up with Mr. Cole is
14 when we started -- nothing in the past. There was -- when we
15 did start the 35-day protocol -- I know I'm not supposed to get
16 into that -- but nothing in the past physically or alarming
17 about Mr. Cole.

18 Q. Okay. And so -- and that -- you know, you would
19 obviously been notified if there had been something alarming
20 that he observed?

21 A. Oh, yes.

22 Q. And would the same be true with your mental health
23 professionals or mental health workers that are employed at
24 OSP?

25 A. Yes. Mental health is almost like another entity of

1 corrections, basically. I don't -- they have their own chain
2 of command. Naturally, it's all under my umbrella, but they
3 have a different chain in command in how they do their
4 reporting, how they do things that, you know, might fall under
5 possibly a HIPAA violation or any of those things like that.

6 But if there's something that -- now, I wouldn't
7 be notified, for instance, if an inmate started a light
8 depression medication, you know, something like that. What I
9 would get notified, hey, we've got a -- and I'm just using --
10 I've got a Class C inmate, he's very violent, we think that,
11 you know, there needs to be some more precautions on it. Those
12 are the type things that I would get from my staff.

13 Q. Okay. And so they kind of -- would it be fair to say
14 that they only really involve you if there is a very serious
15 issue that they feel like you need to know about?

16 A. Correct. Correct.

17 Q. Okay. And do you know how involved the mental health
18 professionals that you've testified about, how involved are
19 they in monitoring inmates, raising concerns, you know, putting
20 them on any sort of medication, if they deem it necessary, how
21 involved are they in that process?

22 A. I have always said this in my 32 years, '3 years of
23 corrections in every role that I've played, I've always felt
24 mental health was to the extreme within corrections, and I've
25 felt like a lot of times it was just maybe over-calculations

1 and just excessive, you know, in certain areas. And so when I
2 look at mental health in corrections, I think that I have no
3 doubt in my mind that it's -- it's very, very thorough and
4 overly thorough.

5 Q. Okay. And does that factor into your decision as to
6 whether Mr. Cole understands if he -- that he is being executed
7 and what he is being executed for?

8 A. With my mental health?

9 Q. Uh-huh.

10 A. Not mine personally, but --

11 Q. Yes.

12 A. Yes. Like I said, there's -- there's lots of things,
13 and it's not just -- when I'm trying to put a puzzle together,
14 it's not just the mental health. I relied on them, especially
15 in a case like this, very, very -- but I rely on all my staff,
16 every one of them.

17 Q. And would you agree with me if I said -- if your
18 mental health professionals believed that Mr. Cole either had
19 schizophrenia or some sort of mental health diagnosis, that
20 they would have -- they would have diagnosed him and they would
21 have told you about it?

22 A. Absolutely.

23 Q. And to your knowledge, since the time that you've
24 been warden at OSP, has Mr. Cole ever been on any sort of
25 mental health medication for depression, anxiety,

1 antipsychotics, anything like that?

2 A. Not to my knowledge.

3 Q. Okay. And would it also be fair to say that if your
4 staff felt like he needed to be on those medications, he would
5 be on them?

6 A. Oh, absolutely.

7 Q. Do you recall if any of your staff -- do you have --
8 do you work with a psychologist, psychiatrist? Is there a
9 consultant that you work with at the prison?

10 A. Well, when you say "work with" --

11 Q. Uh-huh.

12 A. -- there is people that I get my information from.
13 The majority that what I did get from -- and like I mentioned
14 earlier, that he's retired -- was Dr. Smash. I know there's
15 several references in there with him. So, you know, now
16 there -- it may be two or three or a couple that -- really,
17 there's a couple that, you know, I really rely on that I -- you
18 know, that -- that are going to give me just detailed
19 information. And what I want to know, I want to know it
20 factual, you know, tell me exactly what's going on. If you
21 deeply -- if you feel that there's a problem. So -- and I'm
22 comfortable -- 100 percent comfortable with them -- probably
23 more than -- and I've been over seven prisons in corrections --
24 more comfortable here than anywhere.

25 Q. Okay. And I'm glad that you brought up Dr. Smash.

1 So he has -- the Exhibit 26 of the Petitioner, it appears that
2 these are, at least in some part, medical progress notes, and
3 one of them is by Dr. Smash.

4 MS. BURNS: May I approach, Your Honor?

5 THE COURT: Yes.

6 Q. (By Ms. Burns) Okay. You got this, but I'm just
7 going to show this to you. It's Petitioner's 26. And did you
8 read on there prior -- in your prior testimony that there was
9 some sort of mental health progress, some sort of evaluation
10 that Dr. Smith -- or that Dr. Smash did on this particular
11 date?

12 A. Are you talking about an evaluation?

13 Q. Or just an observation.

14 A. It was more -- more observation --

15 Q. Okay.

16 A. -- to me. And when -- and when -- and I understand
17 that's all a piece of it. But his observation is something
18 that you see at different times. Now, he talks about, you
19 know, the cell, you know, being -- and, at times, with Mr.
20 Cole, there's -- there's lots of legal things he keeps in his
21 cell. There's lots of stuff like that. He wears -- when you
22 think that -- and you look and you might see -- and that's with
23 all inmates. Sometimes they might be dingy. A lot of times
24 they're older garments. They like to hold on. Not that
25 they're not clean, but they've got an older look to it. But

1 with Mr. Cole, in all the observations I've had, he looks very
2 clean. So I agree with all that. I'm not saying -- I believe
3 his --

4 Q. And the reason --

5 A. -- I believe his information is correct for the most
6 part here.

7 Q. And the reason why -- yeah, I do want to bring that
8 up because in 26 -- Petitioner's 26, says Dr. Smash notes that
9 despite the state of his cell and possibly his clothing, did
10 Dr. Smash note that he did not smell bad? Did Dr. Smash note
11 that --

12 (Court reporter requests clarification.)

13 THE COURT: You need to answer out loud, please.

14 THE WITNESS: Oh, am I waiting or answering?

15 Q. (By Ms. Burns) I'll re-ask the question.

16 A. Okay. I'm sorry.

17 Q. That's okay. Did Dr. Smash note in this particular
18 progress note that Mr. Cole did not have an odor about him?

19 A. Yes, he noted that here.

20 Q. And did he note that his body and his hair appeared
21 to be clean?

22 A. Yes.

23 Q. And that is -- is that consistent, those
24 observations -- are those observations consistent with the
25 times that you have directly observed Mr. Cole, yourself?

1 A. Yes.

2 Q. Have you ever observed Mr. Cole -- at any point in
3 your time at OSP, have you ever observed him to smell, be
4 dirty, unkept hair, anything like that?

5 A. No. And relaying back to that, and I always have to
6 rely back on my staff to inform me of things like that, that
7 would happen to be -- naturally we don't say, hey, we're going
8 to go up there and we're going to do a use of force to make
9 sure that that inmate -- because -- because if he doesn't come
10 out to do the showers, doesn't not necessarily mean he's not
11 clean. I think that's a misconception by a lot. Well, he's
12 not coming out taking a shower. But, with Mr. Cole, he was
13 washing in his cell with the sink and all that.

14 Q. Okay.

15 A. So I have never observed him to be, I guess the
16 proper word would be, nasty, or anything like that.

17 Q. And the fact that you had never observed him to have
18 an unkempt appearance, is that consistent with observation --
19 well, did any of your staff observe him washing in his cell?

20 A. Yes. Yes.

21 Q. Okay. So his -- his physical, clean physical
22 appearance is consistent with the fact that he actively washes
23 himself?

24 A. Yes. Yes.

25 Q. Okay.

1 A. We -- my staff, typically -- we all do -- in
2 corrections, we call it a birdbath, is what we call it. So...

3 Q. Okay. I think that you noted on direct that Mr. Cole
4 primarily eats things from the canteen?

5 A. Primarily, yes.

6 Q. Okay.

7 A. Yes.

8 Q. Do you know if there's any particular reason for
9 that?

10 A. He quotes it or has stated it to other -- other
11 individuals it's because of his religious beliefs.

12 Q. And are you aware of Mr. Cole's religious beliefs?

13 A. I know that he has religious beliefs, and he can --
14 his quotes of them, I've never heard him personally quote to me
15 any. I know he quotes, you know, a lot to different people
16 that may talk to him, so -- when he does open up. But, yes,
17 I'm aware of his beliefs.

18 And he actually does a lot of -- now he's
19 comparing to his religious beliefs -- fasting. So in my -- in
20 my times, I always get nervous about when inmates -- and
21 several do -- go on a fasting deal because of their religious
22 beliefs. Because, you know, it's my job to keep them safe
23 dearly. So I get a little bit edgy, you know, when that's come
24 to me about that.

25 Q. Would you say that it's pretty often for an inmate to

1 go on a fast pursuant to religious beliefs?

2 A. Would I say what now?

3 Q. Does it happen often?

4 A. It depends on your description of often, but it does
5 happen. And what's -- you -- what happens is, the fasting is
6 all different for whatever they may say. It may be a day; it
7 may be a week; it may be until midnight. So they say all kinds
8 of different things.

9 Q. And I think that it was brought up, the topic of
10 Mr. Cole hoarding his food?

11 A. Uh-huh.

12 Q. Have you ever directly observed that?

13 A. I have not actually seen a hoarding of food. Now,
14 there has been times, if you look in there, you might see some
15 canteen items there. I think when we -- when people say that,
16 with the hoarding of food, it's more precautionary on my
17 staff's part and going a little bit overboard.

18 Naturally, when a -- like a morning meal is fed,
19 when a noon meal comes, we take that stuff or it's given back
20 or the tray may be given back. Well, he does so much fasting,
21 it's kind of like, well, should we leave it there a little bit
22 longer, you know, to make sure that he'll eat.

23 Q. Okay. To your knowledge, has Mr. Cole always made
24 sure that he drank plenty of fluids, stayed hydrated?

25 A. Yes, yes.

1 Q. So that's never been a problem?

2 A. Not to my -- not to my knowledge.

3 Q. And kind of going back to the canteen, does he -- so
4 whenever he has items that he's either bought or ordered from
5 the canteen, what's the process as far as what does the staff
6 do to give those items to him? What do they do?

7 A. What happens on the canteen, there's the forms that
8 are delivered to the inmates. They will actually put on the
9 forms what they're ordering. Those will be picked up by the
10 canteen specialist. They'll take -- they'll fill -- not just
11 there, but the whole facility, they'll take those, fill those
12 orders, make sure they got -- you know, with canteen, make sure
13 there's money there on their books, and then it's delivered.

14 Q. Okay.

15 A. But they fill out the forms for what they want.

16 Q. So in order for Mr. Cole to be able to receive items
17 from the canteen, he would've had to fill out a form?

18 A. Yes.

19 Q. And do you know if he has done that?

20 A. Yes.

21 Q. And does he have to sign anything, like an
22 acknowledgment, when he receives those items?

23 A. Yes, he does.

24 Q. And has Mr. Cole always done that?

25 A. Yes. His writing is very, very large.

1 Q. Okay.

2 A. And it's -- he -- he'll -- if it's "no" or this, he
3 writes very large in his writing and stuff. But yes, he does.

4 Q. And those -- those guards or people that are employed
5 to work there, when they bring him his canteen, has -- has any
6 one -- any one of them ever indicated that Mr. Cole couldn't
7 accept the items, didn't understand what he was asking for or
8 basically just did not understand why he was receiving them?

9 A. No. It's almost the opposite.

10 Q. Okay. Tell me what you mean by that.

11 A. What I mean by the opposite of that, from the canteen
12 specialists, from the unit managers and down, that's one way he
13 will talk to you, if there is a canteen issue. And he knows --
14 sometimes with canteen, when that ordering is made, there may
15 be something that we don't have in the canteen, so there may be
16 a substitution --

17 Q. Uh-huh.

18 A. -- that's actually added on that. He knows every
19 time and he does not want substitutions, you know, on his
20 canteen. So he makes it really aware to whoever is delivering
21 at that time. So it's almost he over --

22 Q. Okay. So he just wants to make sure that he got what
23 he paid for, essentially?

24 A. Yes. Absolutely.

25 Q. Okay. Now, I think that there was some testimony

1 about the fact that he had a wheelchair in his cell?

2 A. Uh-huh.

3 Q. Was that -- was he granted permission by DOC to have
4 that?

5 A. That -- the wheelchair in his -- in his cell was
6 approved by me and me only.

7 Q. Okay.

8 A. I approved the chair to go into his cell because I
9 knew -- even on the information that I had received, I wanted
10 to make sure with our movement -- and, again, I'm referring
11 back to the 35-day, to which I don't know if I'm supposed to.

12 Q. Not if it's within that period.

13 A. Not just that 35-day. Okay. I was talking about the
14 wheelchair in the 35-day.

15 Q. Okay. Okay. I will ask another question. Were
16 there any times that you were responsible for discussing his
17 execution date or reading his death warrant to him?

18 A. Yes.

19 Q. Do you recall if that happened -- or when that
20 happened?

21 A. That was on the 35-day.

22 Q. Okay. Did Mr. Cole -- whenever you were directly
23 observing him, interacting with them, did he ever appear to be
24 afraid of you or of any of your staff?

25 A. No.

1 Q. To your knowledge, has anyone of your staff indicated
2 that he appeared to be afraid of them?

3 A. I've never been approached or anything on being
4 afraid of Mr. Cole.

5 Q. Have your staff ever given you any details about the
6 quality or the types of communications that he's had with them?

7 A. Yes.

8 Q. Has he -- what has his demeanor been like? Has he
9 been rude, polite?

10 A. You know, with Mr. Cole, I would say you couldn't
11 even classify it as either one.

12 Q. Okay.

13 A. I just think it's just real direct. Just for
14 instance, like canteen, it's pretty direct and all that. Not
15 anything that I think is rude or anything like that or
16 disrespectful.

17 THE COURT: Counsel, I'm going to have to stop
18 you at this point. There's a courtroom deputy that's -- his
19 last day is today. I've told him I would buy his meal, so I'm
20 going to have to take a break.

21 The time now is 11:58. Just out of an abundance
22 of caution, if we get held up, let's get back to the record at
23 1:30.

24 Court's in recess. We're off the record.

25 (Whereupon, proceedings recessed for a lunch

1 break.)

2 THE COURT: We are back on the record. It's
3 1:30.

4 And, Warden Farris, if you would, I would remind
5 you you are still under oath. If you can retake the witness
6 stand.

7 THE WITNESS: Yes, sir.

8 MS. BURNS: And, Your Honor, before I continue
9 with my cross-examination of the warden, I just wanted to make
10 a quick record over an issue that came up this morning. I know
11 that this court's ruling was that, as far as for purposes of
12 this hearing, we were not the allowed to get into the 35 --
13 anything that occurred after, I believe, August 2nd. I would
14 ask for this Court to consider the communications that
15 Mr. Cole had with Warden Farris during -- on September 15th,
16 which was the first day of his 35-day notification.

17 And the reason for that is because I think that
18 the information that Warden Farris would be able to provide is
19 directly relevant to this issue, and that's also supported by
20 the fact that, you know, Mr. Cole's competency is fluid. And
21 so he has -- the warden has a continuing duty to monitor and
22 observe Mr. Cole and make sure that the opinion that he
23 testified to is the same opinion that he has as far as
24 competency up until the day of execution.

25 And so I think that confining this particular

1 hearing to only the dates that Defense requested will deprive
2 this court of that relevant information. I think it's
3 necessary. And I understand that if this court does not want
4 to get into that, I would like to make an offer of proof for
5 the record, at least.

6 THE COURT: You don't need to make an offer of
7 proof. That was a very limited ruling with respect to the
8 35-day protocol. That -- there's an abundance of documents. I
9 have 27 exhibits up here that goes into matters way outside of
10 the 35 days, that I think you misunderstood the court's ruling.
11 With respect to the exact subject he was testifying to, it was
12 outside of that and was not contained within that 35-day
13 protocol, which is what you were discussing with him. That's a
14 very limited ruling. I've got a 2015 report in here from a
15 doctor.

16 MS. BURNS: Okay.

17 THE COURT: There's multiple records in here
18 that are outside of 35 days. I'm not saying that you can't ask
19 him about anything that didn't occur within this little narrow
20 window, because his competency is fluid. I've got records from
21 back to 2003, there was a jury trial on competency of
22 Mr. Cole.

23 MS. BURNS: Okay.

24 THE COURT: So don't -- don't think that that's
25 the court's ruling.

1 MS. BURNS: Okay. I guess I misunderstood then.

2 THE COURT: You don't need to make an offer of
3 proof on that. That was very limited to the exact subject that
4 was being questioned about at that time.

5 MS. BURNS: Okay. Yes, Your Honor.

6 MS. BLUMERT: If I may, Judge. I think there
7 may be some confusion. My objection is that I do not believe
8 anything the warden testifies to during the 35-day period is
9 relevant, because he rendered his opinion prior that. And so I
10 think the analysis is about his decision prior to that, and
11 it's my understanding -- correct me if I'm wrong -- but the AG
12 wants to talk about what happened during the 35-day period,
13 which I would object to, but I think --

14 THE COURT: I wan to hear about what happened in
15 the 35-day period because if he becomes incompetent in the
16 35-day period, this is a whole different animal. I mean, it's
17 highly relevant. If he -- if he's not able -- he's got people
18 monitoring Mr. Cole 24 hours a day, that's his testimony. If
19 his condition changed or something occurred, I want to know
20 about it.

21 MS. BLUMERT: Well, so I think she was asking to
22 flesh some of those things out, which we were objecting to, but
23 I think it's -- that's my understanding is that you want to
24 talk about what happened in that period?

25 MS. BURNS: I do. So based on --

1 THE COURT: Well, the objection's overruled.

2 MS. BURNS: Okay.

3 THE COURT: Can we proceed?

4 MS. BURNS: Yes, sir.

5 THE COURT: Okay. Ask your next question.

6 MS. BURNS: I am ready to proceed, Your Honor.

7 MS. BLUMERT: Judge, may I just have a standing,
8 ongoing object to content for the 35-day period?

9 THE COURT: Yes.

10 MS. BLUMERT: Thank you, Your Honor.

11 MS. BURNS: May I inquire, Your Honor?

12 THE COURT: Yes.

13 **CONTINUED CROSS-EXAMINATION**

14 BY MS. BURNS:

15 Q. Okay. Warden Farris, we're going to go back to the
16 35-day notification period, which I believe you testified this
17 morning that it started on September 15th of this year?

18 A. Yes, ma'am.

19 Q. Okay. And can you just explain for the Court what
20 exactly is involved, what happened on September 15th as far as
21 Mr. Cole and this particular protocol?

22 A. With the 35-day protocol, it's basically meeting with
23 the inmates, making sure that the understanding is there of
24 what is happening and what we're going to be moving forward
25 with. That entails reading different things. Some of our

1 protocol with say, for instance, the canteen, the property,
2 burial arrangements, all of those things come into the 35-day
3 protocol, the last meal, you know, those type of requests too.
4 But that -- that meeting with him, along with other
5 professionals -- and when I say that, you know, you've got
6 mental health there also that has that meeting with him and let
7 him know, you know, how they will be checking on him and those
8 type of things. That's the main thing with the 35-day
9 protocol.

10 The inmates, according to our protocol, we move
11 to a certain area of the facility. He is moved from another
12 cell, which is the execution cells. We have four of those,
13 which is aligned with our chamber. So that, making sure he
14 understands going through his property and making sure
15 everything is in compliance with those things, and for me to
16 see is there anything he needs outside of that.

17 Q. Okay. And is this incorporated -- this particular
18 protocol, I'm guessing, it's in DOC policy?

19 A. Yes, ma'am.

20 Q. And is the underlying purpose of this protocol to
21 provide you with continuing information to ensure that the
22 inmate remains competent and understands what is going to
23 happen and why?

24 A. Absolutely.

25 Q. Okay. Okay. Now, on September 15th, you initiated

1 that with Mr. Cole, correct?

2 A. Correct.

3 Q. And so Mr. Cole was taken from the -- I guess the
4 normal cell that he is in and he was taken to one of the
5 execution cells?

6 A. Correct.

7 Q. Okay. And I think that you testified this morning
8 that he has an individual who is monitoring him 24 hours a day?

9 A. Yes, ma'am.

10 Q. And do they keep any records of any behavior that
11 they observe of Mr. Cole during that period?

12 A. Yes. The records will basically be, you know, when
13 people visit with him, if there's anything unusual, then that
14 is placed in there too, did the inmate, you know, eat at a
15 certain time, is it delayed, who actually came up there,
16 whether it be mental health, all those things. There's no
17 limit to what they can put in that log.

18 Q. Okay.

19 A. So some -- as we're logging, we keep the mandatory
20 stuff that we need to know, you know, if there's something that
21 I got to find out quickly, if there's a medical emergency or
22 something there that I've got to make a decision on really
23 quick, I need to know right then. But just the typical deal
24 until I do my observation, I don't need to have all that at
25 that moment.

1 Q. Okay. And is it correct that -- or would you say
2 that this is correct, that the individual who is monitoring
3 Mr. Cole during this period, are they required to make
4 notations or give an update like every 15 minutes?

5 A. Yes.

6 Q. Okay.

7 A. Yes. There will be continuous updates. And it may
8 be status the same or different things on that. So...

9 Q. Okay. And so on September 15th, I believe you
10 testified previously that Dr. Payne did a medical evaluation of
11 Mr. Cole; is that correct?

12 A. Yes, ma'am.

13 Q. And do you know exactly what Dr. Payne noted pursuant
14 to that evaluation? What did he tell you?

15 A. Dr. Payne -- and this -- when I say this with the
16 35-day protocol, it's not that there hasn't been checks before
17 that. I have to get -- as we start it, again, I have to get
18 refreshed on those things. Mr. Payne advised me that with the
19 test that he has done on Mr. Cole, that he is able to function,
20 he's able to walk and he's able to move, and he -- he --

21 MS. BLUMERT: Objection, Judge. We don't
22 have -- this is information and statements he's testifying to,
23 we do not have any documents, notice, anything about this. We
24 requested it in discovery and we have not received any of
25 those. This is the first time I'm hearing any of it.

1 THE COURT: What's the legal basis for your
2 objection?

3 MS. BLUMERT: So it should be excluded because
4 it wasn't provided to us under discovery code, proper notice
5 and that's the remedies exclusion.

6 THE COURT: Were these records provided to the
7 defense team?

8 MS. BURNS: I'm going to allow my co-counsel to
9 answer.

10 MS. WILLIS: Your Honor, if I may respond.
11 Discovery is still ongoing. I don't even have these records.
12 Our discovery deadline is October 19th. And I also believe
13 that these records must be requested via a court order. They
14 cannot be turned over without a court order, so we would need a
15 specific court order for those records.

16 THE COURT: There has to be a waiver of the
17 privilege. I don't have any documents to indicate that that
18 was waived, and I'm going to exclude this evidence based upon
19 several reasons.

20 But it's not been exchanged between the parties.
21 Number two, it's rank hearsay, unless it fits under an
22 exception, which I don't believe it does at this point.

23 Q. (By Ms. Burns) And so after --

24 THE COURT: Hang on a second. It -- I didn't
25 mean to interrupt you.

1 Isn't there one of your records, the progress
2 note from -- I can't find it, but I could have sworn I saw
3 something from Dr. Payne.

4 MS. BLUMERT: May I have a moment, Judge?

5 THE COURT: It's a real short progress note.
6 But in my records, I don't find it.

7 Warden, I know -- I believe you testified to it
8 this morning.

9 THE WITNESS: With Dr. Payne, sir?

10 THE COURT: Yes, sir.

11 THE WITNESS: Yes. Yes.

12 THE COURT: While they're looking, go to your
13 next question, please.

14 Q. (By Ms. Burns) Warden, so he was -- so on
15 September 15th, in addition to being evaluated by Dr. Payne,
16 was he also observed or evaluated by anyone for mental health?

17 A. Yes, Ms. Tina Fuller.

18 Q. Okay. And do you recall about how long Ms. Fuller
19 observed him or performed an evaluation? I don't know which.

20 A. Well, with that particular time on that, when we were
21 starting the 35-day protocol, what she does is explain the
22 processes to him that's going to happen, that he's going to be
23 checked. She didn't actually do the check right then in the
24 35-day protocol.

25 Q. Okay.

1 A. Now, I -- I have talked Ms. Fuller, you know, at
2 times and have gotten the same information from her that is
3 consistent with all the staff members that I've got on the
4 evaluation of it, and she's 100 percent he's -- he's competent.

5 Q. And so the -- when you say that the information you
6 got from Ms. Fuller was consistent with everything else you've
7 been -- I guess you've received from your staff, would it also
8 be consistent with your determination that Mr. Cole is
9 competent for execution?

10 A. Yes.

11 Q. As part of this 35-day protocol -- I kind of touched
12 upon this this morning -- but is part of that you essentially
13 read to him his either judgment and sentence or death warrant?

14 A. Correct.

15 Q. And did you do that with Mr. Cole?

16 A. Yes.

17 Q. And can you tell the Court what happened when you did
18 that and if he ever responded to you?

19 A. In -- in the process that was going, Mr. Cole
20 basically, in how he was sitting basically at the table, didn't
21 ever make eye contact, but in reading it, when I read that, I'm
22 always -- when I'm reading stuff like that, I watch behavior
23 also. Mr. Cole -- after I would read a little bit of it, then
24 I would also always ask, "Are you understanding?" And I'd
25 always get like a head nod for a yes, is what I took it, he's

1 understanding what I'm saying and what I'm talking about.

2 Q. Okay. And as far as the specific questions that are
3 most relevant today, did -- did you ever ask Mr. Cole during
4 this conversation if he understood that he had an execution
5 date set and when that was?

6 A. Yes, he did know what the process was. Of course
7 he's been through the process before, so he knew. The biggest
8 concern with Mr. Cole was to basically get that done, the way
9 it seemed, to get it done, to get out of there. And he wanted
10 to make sure he had certain things before his execution, and
11 those certain things would be to make sure he's warm, which I
12 did approve him to have two coats extra than what he had. So
13 those were the main things, make sure that he could get his
14 canteen, and the other things that, you know, he did not want,
15 you know, which, last meal, and those type of things.

16 Q. Okay. And then kind of I want break down those
17 answers. So did he specifically talk to you about his concerns
18 about being warm when you had this conversation?

19 A. Yes.

20 Q. And he was also concerned about the food that he
21 would get from canteen?

22 A. Yeah. He wanted to make sure -- well, not what he
23 would get from canteen. I'd explained -- but in our protocol,
24 our policy, we can't actually give them canteen until after ten
25 days.

1 Q. Okay.

2 A. So he was concerned about that.

3 Q. That he may not be getting canteen?

4 A. That he may not be getting canteen. But that's not
5 unusual for the protocol on -- for every inmate to not get
6 their canteen for ten days, so it's not something -- that's
7 something you see from every inmate on the canteen part.

8 Q. And he actively expressed concern over making sure
9 that he stayed warm in the execution cell?

10 A. In the cell he was being placed in.

11 Q. Okay. Got ya.

12 A. Because he basically stays cold a lot, so that was
13 probably the biggest concern that he had. He said -- or he
14 nodded that he understood all that process. I felt, you know,
15 it was almost boring to him, you know, to hear this again, you
16 know. But, like I said, I felt that he understood completely
17 what I was saying.

18 Q. Did he ever -- did you ever ask him if understood why
19 he was being executed?

20 A. Why, that was not a question that I personally ask
21 him then. I know it was asked on -- when the stuff with
22 doctor -- Dr. Orth had made sure that those questions were
23 asked and completely understand that. But I did not personally
24 ask that question, "Do you know why?"

25 Q. Was there any other question, other than what we've

1 discussed, that you did ask him during this period?

2 A. Not particularly a question. What I do in those
3 situations too is -- it's a very uncomfortable situation for
4 everybody. It's nothing that anyone likes to do and all that.
5 So what -- what I try to do is -- and Mr. Cole's a little bit
6 different than that, but what I try to do is basically talk,
7 let them know that we're here for them, you know, I'll be there
8 every day. And that's what I reference to him, I'll be up
9 here, you know, to make checks on you every day. Please --
10 please let me know, or my staff know, if there's anything, you
11 know, that we can help you with during this process.

12 Q. And did he appear to understand what you were telling
13 him?

14 A. Yes.

15 Q. Did he ever vocally respond?

16 A. He -- with him, the actual vocalization was all about
17 those type of things -- when I asked him, "Do you understand?",
18 it was a head nod.

19 Q. Okay.

20 A. But the conversations would start up with the
21 canteen, to make sure he's being warm, making sure he had
22 everything with his -- all of his materials, which is one cubic
23 foot that we can allow, you know, in the cell, to make sure he
24 had all that stuff too.

25 Q. And, Warden, the more that you spoke with him during

1 this period, during the 9/15 conversation that you had to
2 him -- had with him, did it seem to you the more that you
3 engaged him in conversation, the more responsive he ultimately
4 became?

5 A. Yes. I think if you -- if you're there with Mr. Cole
6 and you engage in something, he's going to -- he will respond
7 in some way. And sometimes it may not be -- he may -- if he
8 decides he's not going to talk to you, you know, he'll give you
9 a hand, you know, or a nod, you know, and so forth. It just
10 depends on him.

11 Q. Okay. And I know that, you know, you've previously
12 testified that you're aware that Mr. Cole has very strong
13 religious beliefs?

14 A. Yes.

15 Q. And as part of this 9/15/22 conversation, did you go
16 over, or are you supposed to go over, any paperwork regarding
17 burial, cremation, what happens with his things after the
18 execution?

19 A. Yes. Yes.

20 Q. And did you do that with Mr. Cole?

21 A. Yes. And there is -- there is forms that --
22 sometimes when we start that protocol, it's not just, you
23 know -- they don't know exactly at that time. So what we do is
24 we leave them the forms and they'll return them to us when they
25 decide. And sometimes it takes a little while for that. And

1 like Mr. Cole, he basically said right off he did not want no
2 last meal. But I make sure he still has a form in case he
3 changes his mind on that.

4 Q. To your knowledge, did Mr. Cole express any
5 preference or intent as to where he wanted to be buried and if
6 he could have anyone assist with that?

7 A. He -- he was unsure at the time.

8 Q. Was there any point after that time that any of that
9 information came to your attention?

10 A. As far as the burial?

11 Q. Uh-huh.

12 A. Not to my attention. I know that there was some
13 attempts from him, you know, to call, I believe it was another
14 Chaplin that was recommended. I know there was attempts,
15 several yesterday, to make that call, but there was no answer
16 on that part of it.

17 Q. Okay. And just a little bit more details on that.
18 Did your facility -- did y'all provide him with a particular
19 phone number to call the -- the individual --

20 A. Yeah. The numbers will be -- it depends on who is
21 approved for that piece of it too. If it's a particular
22 Chaplin and all that, you know, our Chaplin, you know, kind of
23 organizes that. But the phone process was taken to him on the
24 28th. And, actually, he -- the unit manager actually made sure
25 he knew how to operate that phone. And the main calls, I

1 believe -- I'm not for sure if another went out today or
2 several went out today, but I know some has went out or
3 attempted to go out.

4 Q. And you said that he was given a -- I guess taught
5 how to use the phone on the 28th of September?

6 A. Yes, ma'am.

7 Q. So this month. Okay. And to your recollection, the
8 most recent phone calls he's made happened on the 29th; is that
9 what you said?

10 A. Today's the 30th, correct?

11 Q. Yes. Yes, it is.

12 A. I believe it was the 28th that the calls -- the
13 majority of the calls were attempted.

14 Q. But your -- your facility has documentation that he
15 has made phone calls?

16 A. Yes. Yes. The attempts to make those, yes.

17 Q. Do you know who he was attempting to call
18 specifically?

19 A. Not specifically. I -- what I -- what I was relayed
20 to that that might have been the Chaplin or try to get an
21 attempt to the Chaplin that was recommended to him. So
22 that's -- that's what I was thinking the attempt was made,
23 because he hadn't actually put anybody forth yet.

24 Q. And just for clarification, the Chaplin at your
25 facility was the one who kind of initiated or gave the

1 information of this other one?

2 A. Well, the actual -- with the phone piece of it, was
3 actually the unit manager --

4 Q. Okay. Okay.

5 A. -- the unit manager, you know, which there are daily
6 visits to. Now -- and he has opened up quite a bit, you know,
7 to the unit manager there too. So...

8 Q. Was that recently?

9 A. Which -- which part, ma'am?

10 Q. He's opened up to the unit manager.

11 A. Yes, it's actually -- it's -- that unit manager --
12 that particular unit manager, that's only been in that spot for
13 the unit management I think approximately two months now. And
14 she's been real thorough about, you know, trying to visit, you
15 know, all the -- and make sure that -- and for some reason, you
16 know, he's -- according to her, he's -- he's opened up to her.

17 MS. BLUMERT: Objection. Objection, Judge.
18 The same objection as discovery. This is all hearsay as well.
19 I have never heard any of this. I've never seen any of these
20 reports. This is the first time I'm hearing all of this.

21 THE COURT: Sustained.

22 MS. BURNS: Your Honor, if I could make a record
23 on that. If the Court would just entertain the fact that, you
24 know, this is being offered to show that he did make phone
25 calls, not necessarily it's offered -- it's not necessarily

1 offered for the truth of what those conversations -- or how
2 they happened or what the content of them were, it's simply to
3 show this Court that he has been engaging with staff of the
4 facility.

5 THE COURT: Okay.

6 MS. BURNS: Thank you.

7 Q. (By Ms. Burns) Okay. I want to talk a little bit
8 about DOC's or OSP's efforts to try and facilitate
9 communication between Mr. Cole and his defense team. Okay.

10 To your knowledge, has this facility, has it
11 ever prevented his defense attorneys or any person on the
12 defense team from being able to meet with him?

13 MS. BLUMERT: Object, Judge. Object to
14 relevance. There are a lot of records about this. And this is
15 certainly an enormous issue. But it's not relevant for the
16 purpose of this hearing.

17 MS. BURNS: It is relevant.

18 MS. BLUMERT: This hearing --

19 THE COURT: The Court will decide whether it's
20 relevant. So let's make that clear, who's the gatekeeper on
21 that.

22 What's the basis for your objection? Relevancy?

23 MS. BLUMERT: That it's not relevant, Judge,
24 because the issue was what the warden knew and what he knew
25 about this facility. Not necessarily what Mr. Cole is saying

1 to us because our communications are not at issue for this
2 purpose. They become relevant at a competency trial, they
3 might become relevant in that circumstance, but this one where
4 we are looking at the warden's decision to make a referral to
5 Pittsburg County, I don't think the other parts of that's
6 relevant.

7 THE COURT: Well, there's documents that I've
8 seen that -- where that issue's been raised. It's been raised
9 in Dr. Hough's -- did I say it -- how do you say his name?

10 THE WITNESS: Hough.

11 THE COURT: Hough. Dr. Hough's report. It's
12 been raised by multiple parties involved with the defense team.
13 So if there's any efforts by OSP to thwart your ability to have
14 contact with your client, I want to know about it.

15 So you may proceed. Counsel, we're covering a
16 lot of the same ground that I heard this morning. This -- a
17 lot of this I've heard. And I promise you, I'm going to read
18 your records. So just keep that in mind with respect to your
19 questions.

20 Ask your next question, please.

21 MS. BURNS: Thank you.

22 Q. (By Ms. Burns) And so, Warden, I believe you said
23 that DOC has never tried to prevent anyone from his defense
24 team from meeting with or communicating with Mr. Cole?

25 A. Never.

1 Q. And the reason I'm asking this is because I know that
2 you reviewed Dr. Hough's reports.

3 A. Yes.

4 Q. And do you recall how many times Dr. Hough came to
5 OSP to attempt to meet with him?

6 A. Not -- do not know the number of times. I know there
7 was never any communication with that. And to -- if I can add
8 to that also, we -- if an inmate refuses to see something as a
9 legal -- unless it's -- unless it's court ordered for me to do
10 something to bring the inmate here or anywhere else, we -- we
11 cannot go in there and remove an inmate and force them to talk
12 to an attorney. We cannot do that. Only -- only if I'm court
13 ordered he's got to be somewhere at a certain time, then we go
14 in there and we make sure that that happens. But we've never
15 done anything to say that they couldn't talk to him.

16 Q. And so did the fact that -- when you reviewed the
17 information, the reports from Dr. Hough, the information that
18 Defense Counsel has discussed with you this morning, did the
19 fact that Dr. Hough never had a substantial or lengthy
20 conversation with Mr. Cole, did that affect your determination
21 of -- or give any more weight to Dr. Orth's report?

22 A. The way Dr. Hough -- in reviewing that and how it
23 was -- how I observed it, it was very concerning. And what I
24 mean by that is if any of us was to walk up and see that at
25 just one hour during the day or just walk up, you would see,

1 most of the time, the same thing from Mr. Cole. And you could
2 say, hey, he's not responding, he's not doing, anything like
3 that.

4 Now, the majority of that is because he sleeps
5 during the day. So it was very concerning to me how this broad
6 evaluation could come out when you're not -- you're not getting
7 no -- you're not hearing nothing from the inmate. He could go
8 to every cell at OSP, maximum security piece, and make that
9 same evaluation right now.

10 Q. And would you agree with me that Dr. Orth's
11 examination is the most recent examination of Mr. Cole?

12 A. Yes, ma'am.

13 Q. And would you also agree with me that, according to
14 his report, it lasted approximately 150 minutes?

15 A. Yes, ma'am.

16 Q. And so Dr. Orth met with Mr. Cole and evaluated him
17 for 150 minutes?

18 A. Yes, ma'am.

19 Q. Do you recall that he put in his -- or reported that
20 he was able to engage Mr. Cole in conversation?

21 A. Yes.

22 Q. Do you remember how Mr. Cole responded to him?

23 A. It was -- the response was -- basically, when you
24 look at the responses, the questions that were asked, it was a
25 normal response, basically like we're sitting down and we're

1 having that conversation --

2 Q. Uh-huh.

3 A. -- you know, where we're talking one-on-one. The
4 questions that were asked, I felt, were very relevant, relevant
5 to state statute, relevant to how we proceed on this, and the
6 main things of, you know, do you understand why you're being
7 executed, you know, and those things, do you understand or know
8 the date you're being executed, and those whole processes in
9 that.

10 Q. Do you recall reading in Mr. -- or in Dr. Orth's
11 report that, from the outset of the evaluation, Mr. Cole
12 indicated that he understood that the purpose of it was to --
13 and I'm going to quote -- "To see if I'm mentally fit for court
14 and competent here to see if I can go ahead and, I guess, be
15 executed."

16 Do you remember reading that?

17 A. Yes.

18 Q. And do you recall reading that he also indicated --
19 and I'm quoting again -- "The State of Oklahoma is executing me
20 for the killing of my daughter"?

21 A. Yes.

22 Q. Do you recall reading in this report also that when
23 Dr. Orth talked about or tried to get his understanding of, you
24 know, what he thinks will happen when he is executed, do you
25 recall him saying that his, you know -- he will cease to exist

1 on this corporeal plane and hopefully he will go home to be
2 with his father?

3 A. You talking about in the reports?

4 Q. Uh-huh.

5 A. Yes.

6 Q. Do you also recall that Dr. Orth noted no delusions
7 that he was some sort of Messiah or divine spirit or anything
8 like that?

9 A. Yes. It did -- that was noted. One thing that was
10 noted too that was -- that really jumped to my attention is
11 that he did understand why he was there and he did make the
12 comment, you know, that Dr. Orth I know is here to make sure
13 that I'm not seeing -- I believe it was little green men.

14 So he knew exactly why he was there. He
15 understood the whole process and so forth.

16 Q. Do you also recall reading that -- you know,
17 discussing what he desires when -- to -- what he desires be
18 done with his body when he is -- when he has passed, he talked
19 about, if it were up to me, I would be buried in a small,
20 modest wooden box in a Jewish cemetery somewhere in Tulsa?

21 A. Yes.

22 Q. Do you recall that Dr. Orth made -- or observed no
23 evidence of any sort of mental impairment?

24 A. Yes.

25 Q. That he diagnosed him with no sort of mental illness?

1 A. Correct.

2 Q. And that was based on this conversation that was a
3 150-minute conversation?

4 A. Correct.

5 Q. And just a couple more questions, Warden.

6 Did it also factor into your decision to
7 essentially give greater weight to Dr. Orth's evaluation, did
8 the fact that he did reference Dr. Hough's prior evaluation and
9 he referenced quite a few other documents prior to meeting with
10 Mr. Cole?

11 A. Are you saying did it have any weight?

12 Q. Did -- did that make an impact on you? Did that make
13 you believe that Mr. Orth was more thorough and probably had
14 more reliable information?

15 A. Oh, in no doubt. And like I said, when I am trying
16 to put the puzzles -- or the pieces of this puzzle together --
17 and, again, when you've got two conflicting doctors, it's
18 almost like you try to see which one was more thorough, which
19 one actually got -- was able to retrieve the most information
20 to make a proper diagnosis.

21 Q. Uh-huh. Did you -- do you recall reading in
22 Dr. Orth's report that Mr. Cole spontaneously indicated to him,
23 as far as execution dates are concerned -- and I'm quoting --
24 "As I understand it, the first execution is on August 25th.
25 Then the next one is September 23rd. So I'm third on the list.

1 So sometime later in October, I believe, possibly the 20th.

2 And that they want to make sure that I'm competent."

3 Do you recall reading that?

4 A. Correct.

5 Q. And do you recall reading that those were Mr. Cole's
6 words?

7 A. Yes.

8 Q. Is the -- are the observations and the conclusions
9 that Dr. Orth reached in his report, are they consistent with
10 the observations of yourself and your staff of Mr. Cole?

11 A. Very consistent.

12 Q. And how so? Can you just kind of explain that.

13 A. Well, what the -- the evaluation of Dr. Orth, when
14 you read it, is something that with long-term viewing of
15 Mr. Cole, his -- and, again, not just the mental health
16 professionals, but everyone involved in that that see certain
17 things, that see certain things that you wouldn't normally see
18 when you -- if you walked up there right now. So I had to
19 weigh all those things and put them all together and do that.
20 But Dr. Orth's related to what every staff member is -- has
21 said in the past, is saying now.

22 Q. Would you agree with me that Mr. Cole consciously
23 decides who he chooses to talk to and who he doesn't?

24 A. In my opinion?

25 Q. Yes. In your opinion.

1 A. In my opinion, yes. And in my opinion, it depends on
2 the circumstances or -- now, one thing that was done -- excuse
3 me -- with Dr. Orth, it was done outside of the facility. So
4 that -- I think that, you know, helped out. I think with Mr.
5 Cole, it's prison staff, prison food, is something that he's
6 not going to really open up to unless it's something that's
7 concerning, a canteen problem, something like that, so then he
8 will open up on that extent.

9 Q. So would you -- would it be your opinion that he
10 opens up and speaks to people based on what his needs are?

11 A. Correct.

12 Q. Okay.

13 MS. BURNS: Your Honor, I'm going to pass the
14 witness.

15 THE COURT: Redirect.

16 **REDIRECT EXAMINATION**

17 BY MS. BLUMERT:

18 Q. Warden, you know the clinical standards for rendering
19 opinions on mental health diagnosis -- mental health
20 professionals?

21 A. Could you repeat that?

22 Q. Do you know the clinical standards for rendering
23 opinions about individual's mental health?

24 A. Do I know the standards of it?

25 Q. Yes.

1 A. No, I could not repeat them to you, the standards.

2 Q. Do you know the clinical standards for diagnosing
3 people with mental illnesses?

4 A. I'm not really understanding what you're asking here.

5 Q. You don't know the medical standards or the clinical
6 standards for diagnosing people with --

7 A. I'm not a --

8 Q. Let me finish, Your Honor -- excuse me -- Warden, let
9 me finish. You do not know the standard for a diagnosis for
10 mental health by professionals, right?

11 A. I do not -- how they -- I do not --

12 Q. You do not? It's yes or no. You don't know?

13 A. -- their solutions, no.

14 Q. Dr. Orth did no testing of Mr. Cole, correct?

15 A. If he --

16 Q. He didn't do any tests, right?

17 A. Any --

18 Q. Testing.

19 A. He -- well, as far as the communication, the
20 observation --

21 Q. He didn't -- do you know what an MMPI is?

22 A. Yes, I do.

23 Q. Did he do that?

24 A. No.

25 Q. Did he do any of these other tests, psychological

1 tests?

2 A. Not that I know of.

3 Q. Okay. And Dr. Hough didn't either?

4 A. Nope, he did not.

5 Q. Do you know the only doctor who did?

6 A. No.

7 Q. Dr. Morris did. Did you read his report, right?

8 A. That did the MMPI?

9 Q. Dr. Morris did testing, correct?

10 A. He did. He did.

11 Q. And he's the only doctor -- excuse me -- let me back
12 up.

13 Dr. Morris did those tests. He found him
14 incompetent and diagnosed him with schizophrenia, correct?

15 A. According to the document, yes.

16 Q. In 2015 is when that was?

17 A. Correct.

18 Q. The mental health folks that come around in the
19 facility often visit Mr. Cole through the bean hole in his
20 door, correct?

21 A. Majority of the time.

22 Q. No doctor from the mental health unit at OSP has done
23 a mental health evaluation on Mr. Cole ever, correct?

24 A. Are you talking about the MMPI?

25 Q. No one's ever done a mental health evaluation on

1 Mr. Cole, correct, at OSP?

2 A. The expanded level of a mental health evaluation, I
3 can't say what exactly they done on everything. I -- when they
4 do their thing with Mr. Cole -- again, I'm not a mental health
5 professional. So their testing techniques and what they do and
6 all that, I -- I am not aware of all the things that it comes
7 up with to determine that. So --

8 Q. So you're not aware of any mental health professional
9 at OSP doing a specific evaluation on Mr. Cole?

10 A. A specific evaluation? No.

11 Q. Okay. You're not aware of anyone at OSP that's
12 diagnosed Mr. Cole with malingering, correct?

13 A. With what?

14 Q. Malingering.

15 A. That he's been diagnosed with it?

16 Q. Right.

17 A. No.

18 Q. The 35-day protocol is for all inmates, correct, all
19 inmates that are at the point --

20 A. Yes.

21 Q. -- of 35 days out from an execution?

22 A. Correct.

23 Q. That's not unique to Mr. Cole?

24 A. No.

25 Q. A lot of that protocol is set up to prevent folks

1 from taking their own lives, correct?

2 A. I think there's -- there's a lot of reasoning for a
3 35-day protocol.

4 Q. But that's part of the reason?

5 A. Correct.

6 Q. To keep a full observation on them, lights on, all of
7 that, right?

8 A. Yes. But that's not determined with the 35-day
9 protocol because something that says, "This person has a mental
10 health thing," that's something that is mandatory for all of us
11 to do --

12 Q. And that's not my question, Warden. The question is:
13 Part of that protocol is to prevent any inmate from taking
14 their own life regardless of their mental health status?

15 A. Every process we do is for that, every process at the
16 facility.

17 Q. When Mr. Cole is actually transported to the 35-day
18 cell, he was taken up there on a gurney, correct?

19 A. When he was taken to his cell?

20 Q. Up to the 35-day cell.

21 A. Yes, ma'am.

22 Q. And there were six guards that took him up there on
23 that gurney?

24 A. There were six guards that took him up there. And
25 the reason why --

1 Q. There -- there were six guards that took him on the
2 gurney, correct?

3 A. They have to pick up the gurney.

4 Q. Right. How long do you think you spent with Mr. Cole
5 doing your packet interview?

6 A. The 35-day piece?

7 Q. Yes.

8 A. Maybe an hour-and-a-half, maybe. I'm not sure.

9 Q. Most of his answers were nods or single words,
10 correct?

11 A. Not single words.

12 Q. Most of his answers were a nod or a single word?

13 A. Depending on what the things were, depending on
14 what -- what was being asked of him.

15 Q. He wasn't saying long sentences or paragraphs or
16 narratives or anything, right?

17 A. No, not -- not -- like when we talked about the cell
18 conditions and stuff like that and how he wanted to stay warm,
19 it was a type of conversation with that. But that was
20 something he really wanted to be engaged in to make sure that
21 he had.

22 Q. That was not my question, Warden. The question is:
23 He did not give long, narrative answers in the bulk of that
24 interview, correct?

25 A. Not to some questions. Or not to some parts of it.

1 Q. So you're telling me that this man that's sitting
2 right here slumped over in this chair was talking at length to
3 you?

4 A. Yeah, I sure am.

5 Q. Long sentences?

6 A. Long -- well, I don't know what you mean by "long
7 sentence," but we had discussions on the cell conditions and
8 the stuff as far as what was going to be allowed in his cell.
9 He actually talked and expressed that stuff.

10 Q. What did he say?

11 A. The exact words?

12 Q. Yeah.

13 A. I'm not going to repeat the exact words on a
14 conversation, but he was concerned about the burial, he was
15 concerned about the property that he could have in his cell, he
16 was concerned -- main concerns were to make sure because he
17 explained how he gets cold, he's always been cold. The cells
18 that we got, there's sometimes they get to a certain --

19 Q. And, Warden --

20 A. Well, you said -- you asked what he said. So I was
21 telling you.

22 Q. You're not telling me what he said. I'm asking you
23 for the words. What did he say?

24 MS. BURNS: Your Honor, I think he is indicating
25 what Mr. Cole said. Now, if she's asking for him to a direct

1 quote, I don't think that's a fair question.

2 THE COURT: What's the legal basis for your
3 objection?

4 MS. BURNS: Lack of -- I mean --

5 THE COURT: There's not one, because you just
6 don't like the answer. He can answer -- if you don't know
7 verbatim, just answer with what you believe, generally, he
8 said. If you know that.

9 THE WITNESS: I just did. I can't repeat the
10 exact words. If I had a recorder, I could let you listen to
11 it, but I can't repeat the exact words. I know what the
12 conversations were about.

13 Q. (By Ms. Blumert) Did you make a report about this or
14 write these things down as he was talking?

15 A. Did I make a report on what he was saying?

16 Q. On your discussion with him.

17 A. No.

18 Q. His concern with warmth was for the cell that he was
19 in right then, correct?

20 A. No. It was for the overall -- what he considered was
21 a standard for, basically, all the cells at OSP.

22 Q. But he's concerned with being warm in the cell right
23 now, right, as opposed to being concerned with being warm while
24 he's being executed, right?

25 A. The deal with him was to stay warm, continuously. In

1 the past when he's in the 35-day protocol, he wanted to ensure
2 because, from what he stated, is that he's always had the
3 experience of being cold. He didn't know what that was. But
4 he felt always cold. And sometimes the vents he felt like were
5 clicked on too high and different things like that. So he
6 wanted to make sure that no matter what the process we were in
7 is to make sure he stayed warm. And I agreed with that.

8 Q. So he wasn't uniquely talking about the day of his
9 execution, right?

10 A. I can't say it was the day. Not saying the day I get
11 executed, you know, I want to make sure I'm warm.

12 MS. BLUMERT: May I have a moment, Judge?

13 THE COURT: Yes.

14 MS. BLUMERT: Nothing further, Judge.

15 THE COURT: Anything further?

16 MS. BURNS: I just have one question, Your
17 Honor.

18 **REXCROSS EXAMINATION**

19 BY MS. BURNS:

20 Q. Warden, Defense Counsel brought up the fact that
21 Mr. Cole was transported via gurney?

22 A. Correct.

23 Q. Now, was there a specific reason why that decision
24 was made and why it took six individuals to do that?

25 A. When -- with Mr. Cole, who's -- basically stays in

1 the wheelchair, it is by a doctor that says Mr. Cole is fine,
2 he can do that movement, it has been seen in his cell. What I
3 did -- the six officers and the gurney was 100 percent my call
4 on that. And that's -- that's what I ordered. And what
5 happens is, in the area that he's going to, there is stairs,
6 and then we got our execution cells, and then the execution
7 room. So the stairs involved -- in my way of thinking, I was
8 going to make sure we do this absolutely correct. And I also
9 got medical down there. And I knew Mr. Cole was not going to
10 get up to go up the stairs. So I got them to assess, is there
11 a certain technique we use to actually pick him up? And they
12 decided that the gurney was the best way.

13 I wanted to make sure that the gurney is not
14 slipped by a certain person or -- so there were six officers
15 there to ensure that we didn't hit a bump or anything like that
16 when we got him up there. So that was 100 percent my call on
17 that.

18 Q. And it was for Mr. Cole's safety?

19 A. It was for Mr. Cole's safety.

20 MS. BURNS: Nothing further.

21 THE COURT: Anything further?

22 MS. BLUMERT: No, Judge.

23 THE COURT: You may stand down. Call your next
24 witness.

25 MS. BLUMERT: Petitioner calls no further

1 witnesses and Petitioner rests.

2 THE COURT: What says the Attorney General's
3 Office?

4 MS. WILLIS: Your Honor, we have no witnesses to
5 call. We rest.

6 THE COURT: Okay. And you're not offering any
7 exhibits since Dr. Orth's report has already -- already been
8 offered?

9 MS. WILLIS: That is correct.

10 THE COURT: You've got an exhibit -- just as a
11 housekeeping matter, Exhibit 19 is not offered.

12 MS. BLUMERT: You said Exhibit 19 is not
13 offered?

14 THE COURT: Has not been offered.

15 MS. BURNS: I believe I offered it and it was
16 not admitted is my understanding.

17 Is that correct.

18 (Court reporter clarifies the record.)

19 THE COURT: I've got the wrong exhibit number
20 then.

21 MS. BLUMERT: I apologize, Judge. My
22 understanding is incorrect.

23 THE COURT: Exhibit 18. I wrote down 19.
24 Exhibit 18 has not been offered.

25 MS. BLUMERT: I did not offer 18, yes, Judge.

1 THE COURT: Okay. That needs to be withdrawn
2 from the record. I'm going to provide that back to Counsel.

3 And are you offering this notebook as your
4 exhibits, the one that I have in my possession.

5 MS. BLUMERT: Yes, Judge. As far as the
6 official record for exhibits.

7 THE COURT: I'd remove Exhibit 19. Exhibit 19
8 is being removed from the record.

9 MS. BLUMERT: 18 and actually 24, Judge, I did
10 not admit either.

11 THE COURT: It's 18. I said it again. As well
12 as 24?

13 MS. BLUMERT: 24 was not offered, yes, Judge.

14 MS. WILLIS: And, Judge, our -- I just want to
15 make sure we're on the same page. We have Exhibits 19-23 as
16 not being admitted. Is that --

17 THE COURT: 18.

18 MS. WILLIS: 18. Okay.

19 THE COURT: And 24, a memorandum, one-page
20 memorandum, actually, it's two pages, those will be removed
21 from the Court's records. And there's some -- actually some
22 new records that I have not seen yet. If the Court wants to
23 review --

24 MS. BLUMERT: May I approach to collect those,
25 Judge?

1 THE COURT: Yes. If you'll retrieve those.
2 They're not in the file. And because of that, I don't
3 believe -- I don't want to make a decision here without
4 reviewing these records that I haven't seen before today.
5 There's a few that I haven't seen. And I asked -- inquired
6 earlier about Dr. Payne's report. Did anyone find that?

7 MS. BLUMERT: We scoured our records, Judge, and
8 did not find any report from --

9 THE COURT: I recall the warden testifying on
10 Dr. Payne, a record from him, this morning. Is that not
11 correct?

12 MS. BLUMERT: My understanding is that he just
13 recently got some information from Dr. Payne. I don't know if
14 he's talked to him previously, but we don't have any documents.

15 THE COURT: Okay. You have no --

16 MS. BLUMERT: Correct.

17 THE COURT: -- records from Dr. Payne? And your
18 argument's already been advanced at the first of this hearing
19 regarding the burden of proof.

20 So with that said, is there anything further on
21 the record.

22 MS. BLUMERT: Yes, sir. I would like to make a
23 closing argument.

24 THE COURT: Is your -- you'd like to make a
25 what?

1 MS. BLUMERT: A closing argument, or a
2 statement.

3 THE COURT: Is it not something that I've
4 already heard?

5 MS. BLUMERT: It is not, Judge.

6 THE COURT: Okay. If I haven't heard it, you
7 may proceed.

8 MS. BLUMERT: Do you want me to talk from the
9 podium, Judge?

10 THE COURT: Yes.

11 MS. BLUMERT: Judge, what I provided, and I
12 believe everybody has a copy of, is what is essentially a
13 PowerPoint presentation. But it's in paper format. Does
14 everyone have their copy of that? I'm going to be talking from
15 that so that you all can follow along.

16 THE COURT: You may proceed.

17 MS. BLUMERT: May I begin?

18 Judge, what we were ultimately asking this Court
19 to do is enter a Writ of Mandamus filing. And that is what the
20 original filing was for and that is what triggered this
21 proceeding here before Your Honor.

22 We are specifically asking for an order
23 requiring the warden to refer Mr. Cole's case to the Pittsburg
24 County DA for competency proceedings, ultimately, for a jury
25 trial. Court of Criminal Appeals says a Writ of Mandamus is

1 what is appropriate here under Rule 10.6(b). The legal
2 standard here is abuse of discretion. And under the *Cole v.*
3 *Trammell* case from 2015, that Court defines that as: Any
4 unreasonable or arbitrary action taken without proper
5 consideration of the facts and laws pertaining to the issue.

6 That case is particularly relevant because it
7 was analyzing this exact proceeding that occurred seven years
8 ago. And, ultimately, the Court of Criminal Appeals ruled
9 there that based on what the warden had, she did not abuse her
10 discretion. And the whole test there was, "What did the warden
11 know?"

12 There was at length of testimony and evidence
13 presented, but ultimately the Court said so much of that wasn't
14 relevant because it wasn't before the warden when she made her
15 decision. And that that is what is at issue here, is what was
16 before the warden.

17 Ultimately, Judge, the Warden abused his
18 discretion. There was good reason to believe that Mr. Cole was
19 not competent to be executed. Mr. Cole showed that there was a
20 reasonable probability that he is insane. The warden
21 incorrectly made that finding on his own about Mr. Cole's
22 competency rather than making a determination that there was a
23 question as to competency.

24 Essentially, using the legal standard for abuse
25 of discretion. The warden made his decision to decline

1 referral to the DA without proper consideration of the facts
2 and the law pertaining to the issue.

3 And I'm not saying that he did that maliciously
4 or deliberately. I think he has the question wrong. He
5 misunderstands his task. He is consistently opining about the
6 competency of Mr. Cole and that's not his task. The question
7 before him is whether there is an issue that he needs to refer
8 to Pittsburg County to go flush out. That's the question. His
9 job is to function as a gatekeeper to prevent fraudulent claims
10 of insanity from filling the courts, not to make his own
11 determination about competency.

12 I think of this akin to like police that are out
13 in the field. The police are out in the field deciding whether
14 to arrest someone and present charges to the DA. The police
15 are not deciding that someone is guilty and rendering some sort
16 of judgment. They're saying, Is there a suspicion here, is
17 there something going on and we think, hey, there's some
18 evidence this person committed a crime, we need to go look into
19 it.

20 That's what the Court's for. That's what the
21 task is here. And that is what the task was for the warden.
22 It really was a simple question for him: Is there an issue?

23 He doesn't have to decide if he's competent. He
24 misunderstood what he was supposed to decide. He did not
25 properly consider the law and facts pertaining to the issue.

1 So on the next page of the slide is the question
2 before this Court. So the Court, in deciding whether to issue
3 this writ, is ultimately going to ask whether the warden had
4 good reason to believe that Mr. Cole was incompetent to be
5 executed. The legal standard for that is whether he abused his
6 discretion by not initiating those proceedings. Did he make
7 the decision to decline referral without proper consideration
8 of the facts and the law. And I want be really clear here
9 because I understand the urge is to talk so much about
10 Mr. Cole's competency, and, certainly, that is the bulk of --
11 it's the ultimate issue. But we're not there yet. We are
12 below that. This is not a competency trial. We are not
13 deciding whether Mr. Cole is competent. We are not deciding
14 whether the warden should have believed Mr. Cole was
15 incompetent. This is not a form for a battle of the experts.

16 The weighing that the warden was doing is what
17 the jury does at trial. We do not need to make an analysis of
18 that, and we do not need to weigh that out.

19 So what law applies here? Under the Eighth and
20 Fourteenth Amendments of the Constitution in *Ford versus*
21 *Wainwright*, we cannot execute an incompetent person because, if
22 we do, that violates our standards of decency. We don't -- we
23 don't want to look back on this in a decade and hang our heads
24 in shame over a barbaric decision we make.

25 So to safeguard this idea, Oklahoma has a rule

1 and it is 22 OS 1005 and that is the statute that we have all
2 been talking about at length. It's the statute that we cite in
3 briefs, and it's the statute that the warden looked at. And I
4 imagine his legal counsel gave him advice about what he is
5 supposed to do.

6 There are three times in there that I think are
7 worth flushing out the definition for. The first one is "Good
8 reason to believe what that means," the other is "Becoming
9 insane," and the question of his insanity being inquired into.

10 So the first one: "Incompetent to be executed
11 or insane." And I don't want to get too bogged down in here
12 because the Court doesn't need to answer this question, but I
13 think just defining the term is appropriate. Federal law
14 requires a rational understanding for the reason of the
15 execution. That's all they -- the question isn't: "Does he
16 know what's happening"? The question is: "A rational
17 understanding." And that's different than just a general
18 awareness.

19 Questions or other standards such as just does
20 he have intelligence to understand this or convey information,
21 and some of that kind of comes from the *Bingham* case, but those
22 are not what governs. Federal law is what governs, because it
23 provides increased protections beyond Oklahoma's. And that has
24 to be incorporated into the competency inquiry when it's made.
25 And we're not there yet. But that's just the definition for

1 it.

2 The next definition of the term to flesh out we
3 sort of talked about this morning, but that is: What does,
4 "Good reason to believe," mean? At the very top of that slide
5 is some language from *Cole v. Trammell* and from *Ford*. "A
6 petitioner under sentence of death must make the necessary
7 showing -- substantial threshold showing and standing before
8 he's entitled to adjudication." The talk about this threshold
9 being the trigger process before we have the trial. And what
10 *Ford's* language says is: "A prisoner must overcome the
11 presumption that he is competent and show there is a reasonable
12 probability he is insane."

13 And that's the standard at the competency trial.
14 So this cannot be that high. And I won't rehash it, but the
15 language from -- the concept from *Cooper versus Oklahoma*, which
16 was a -- and I misspoke earlier -- not an execution competency
17 trial, but just a standard competency trial. And then *In Re:*
18 *Garry Allen*, which was an execution competency trial. But the
19 standard there that we can extrapolate, the standard here is
20 lower than preponderance.

21 The evidence that the Court can understand is
22 sufficient is that there are in expert reports and opinions
23 that meet the threshold. That's what's needed as opposed to
24 just someone saying that, "Hey, maybe this person's not well."
25 It's wanting substantial evidence of that, which is a

1 reasonable request. And that's why the statutes and the
2 language and case law goes on and on about it. It has to be
3 some significant evidence. It can't just be a thought or a
4 hunch. And that's what expert testimony is.

5 What is this not? What does this standard not
6 mean? The statute and the case law make no mention of the
7 warden himself personally weighing in on this. The question is
8 not whether the warden himself believes the person is
9 incompetent. The statute doesn't contemplate that. The case
10 law indicates that the warden's role here is to prevent
11 frivolous claims of incompetency from being made. That's all.
12 He doesn't have to have a personal belief of competency. He
13 doesn't have to figure out whether somebody is. He just has to
14 think and consider whether there is good reason.

15 The statute and the Supreme Court contemplate
16 the battling and the weighing of the experts will occur at the
17 competency trial where that standard is preponderance. So we
18 know that ours is lower.

19 The final question here is just a note about the
20 language, the question of his sanity, that comes at the end of
21 that 1005 statute. And it's talking about when that trial
22 occurs, and the trial will be asking the question that his
23 sanity -- excuse me -- asking that the question of sanity be
24 inquired into. And this phrases -- phrase tells us something
25 else. That the warden doesn't have to have an opinion either

1 way about competency. The question is going to be looked into.
2 He just needs to know is there a question to look into. It
3 doesn't have to -- the evidence before the warden doesn't have
4 to rise to some clear and convincing standard. Just that there
5 is a question. That there is an issue. Conflicting expert
6 opinions do not negate this. In fact, they support that
7 concept; there is an issue.

8 The next page in that handout is a case
9 timeline. I'm not going to flush that out. I just thought
10 that would be helpful, as the Court looks at this, to kind of
11 understand it in a more clear way.

12 There is one particular fact at the bottom they
13 did not include, is that on September, I believe, 2nd or 5th --
14 5th -- 15th. The 35-day protocol starts. That happened in
15 early September. So the bulk of this argument, Judge, is:
16 What did the warden know? What was the good reason that the
17 warden had to believe that Mr. Cole, himself, was incompetent?

18 And earlier I was just discussing what the laws
19 are. But now we get into the meat of what the warden
20 understood. It's important to know that his value judgment on
21 these is irrelevant. The fact that they exist is enough.

22 He can opine about which expert report means
23 more and which one is good and real and which one is
24 legitimate. But that is absolutely irrelevant to this
25 analysis. That is something that experts will talk about at a

1 trial. He does not need to make that determination.

2 I know we kind of went on for a while,
3 especially on direct, with the warden. And I know that that
4 was tedious going through that, but I think it's important to
5 know all that because we need to know what the warden knew and
6 what he analyzed.

7 We all have those records. We've been looking
8 at those for months. This Court has. The parties have. The
9 issue, though, is what the warden had and what he understood.
10 And that is what this analysis is. What -- what did he know;
11 did he abuse his discretion in light of what he knew the law
12 and the facts to be.

13 There's two main kind of sections of things that
14 he had. One is all his expert reports. And the second thing
15 is his statements from his staff members over the years and the
16 things that they have noticed in their facility.

17 Now, some of that, of course, is considered by
18 the experts, but the warden looked at that also as he testified
19 on direct about the records he reviewed or didn't review. And
20 the ones that he knew about, both from the reports and just his
21 own look into what his staff is doing. He receives all these
22 records that the Court will certainly -- I'm sure has gone
23 through some already and indicates it will continue to go
24 through -- but he has Dr. Travis Snyder's report, Hough's
25 report, Orth's report, Dr. Morris' report. So many of these.

1 And the results are conflicting. But I think it's important to
2 note that there are varying diagnoses, there are varying depths
3 of reports. Some of them certainly involve testing. Some of
4 them are just, Here's what I can do with what I have. I'm
5 looking at records, I'm doing all these things.

6 And so the fact that these records exist is what
7 is noteworthy and that the warden reviewed them and that he
8 reviewed reports from legitimate medical professionals that
9 find Mr. Cole incompetent. He reviewed reports from legitimate
10 medical professionals that find him incompetent and competent.
11 And it's conflicting. And it's not up for the warden to
12 decide. But he had that before him. He can take those reports
13 for what they purport to be. He doesn't need to dig into -- I
14 don't need to doubt the credentials of this doctor or this
15 doctor.

16 That's what the professionals do when they
17 testify at trials, is they try to undermine each other's
18 reports and their methods. That's not necessarily something
19 the warden needs to do. He doesn't have the training to do
20 that. Nobody expects him to do that. That is an unreasonable
21 burden on a warden, whether it's Warden Farris or any other
22 warden that's going to be over OSP.

23 The second thing he looks at is all the
24 information from his own staff and facilities. And I think
25 it's fair to say that some of it is -- the warden is not aware

1 of all of it. He should be aware of a lot of it. That's the
2 question here is he's supposed to look at what -- is there an
3 issue? And he needs go to his staff and go find out that they
4 have had trouble talking to Mr. Cole for years. That they
5 don't have a specific diagnosis for him from their facility,
6 because they haven't done a full mental health evaluation.
7 They don't know. They know something's wrong with him, but
8 they can't say what it is. They don't say he's malingering.
9 They certainly suspect it, but no one ever diagnoses him with
10 that. They don't have that information.

11 And I know that the State will point to some of
12 that as proof that he's just kind of faking or making his own
13 choices, but those are analyses that experts get to make. We
14 do not have the skill to make those. Warden doesn't, the
15 parties don't. That's what doctors do.

16 The medical records that he looked at would have
17 shown him that Mr. Cole is often catatonic. He is forced to
18 shower at times. He's -- does not keep his cell clean. He was
19 hoarding up to 147 meals at one point. That -- this isn't just
20 inmates hoarding food and items. Inmates do that. And he --
21 you know, the warden understands that and knows that. This is
22 something so unique that the medical and mental health staff
23 were like we need to make a note of this in our report. 147
24 meals is almost 50 days' worth of food, three meals a day for
25 weeks at a time he's keeping in his cell.

1 This is all good reason for the warden to
2 believe that Mr. Cole is incompetent. Just looking at these
3 things, we just have reason to believe it. He doesn't need to
4 think that that's, in fact, true, just that he suspects it.

5 So we're asking this Court to issue that Writ of
6 Mandamus that the warden abused his discretion in failing to
7 refer Mr. Cole's case to the DA of Pittsburg County, so that
8 the question of his sanity can be inquired into. There was
9 good reason to believe that there was a doubt as to Mr. Cole's
10 competency. The warden ignored it or discounted it. He
11 decided which ones -- which opinions he liked better, that he
12 thought were better. But that's not what he's supposed to be
13 doing here. He just looks and says, "Is there a reason to
14 believe this? Yes."

15 I think -- and I think it's important to note,
16 there was that, kind of, exchange where the warden was saying
17 that he believed that Dr. Hough had never diagnosed Mr. Cole
18 with schizophrenia because he was using the word "opine," which
19 means that's what he is theorizing, that's what he is
20 believing. And I think it's just indicative of the way the
21 warden interprets these records. He's guessing as to the
22 meaning. As to the -- he's construing a meaning that he wants,
23 not necessarily what those terms actually mean for medical
24 professionals.

25 He believed -- the warden believed there was not

1 a schizophrenia diagnosis. But as we learned that there was.
2 Doctors have given him that. Not every single one of them, of
3 course. And Dr. Orth doesn't. But doctors do give him that.

4 Death as a punishment is fundamentally different
5 than any other punishment that we implement as a state, and we
6 need to be careful. And I include in this the language from
7 various Supreme Court opinions about how careful we need to be.
8 I understand -- I don't need to -- I understand we all know
9 this is heavy, and this is serious.

10 Finally, I think that it's important to note
11 that Mr. Cole has a right to due process, and this hearing is
12 part of that. But the next hearing is part of that too. The
13 Court of Criminal Appeals said that: Such a hearing must
14 afford a prisoner an opportunity to be heard, consistent with
15 the basic requirements of due process. That these basic
16 requirements include an opportunity to submit evidence and
17 argument from the prisoner's counsel, including expert
18 psychiatric evidence that may differ from the State's own
19 psychiatric examination.

20 And that's what's supposed to happen at the
21 trial. That language is opining about what that trial looks
22 like. So I don't want to conflict that with what we have here.

23 We are asking you, Judge, to issue the Writ of
24 Mandamus, finding that the warden did have reason to institute
25 proceedings with the Pittsburg County District Attorney's

1 Office.

2 THE COURT: Counsel.

3 MS. WILLIS: Very briefly, if I may, Your Honor?

4 THE COURT: Yes.

5 MS. WILLIS: Your Honor, because Counsel
6 discussed the burden of proof, again, I would like to make a
7 few things a little more clear. And I know Your Honor is
8 probably tired of hearing the same words come out of my mouth.
9 But the -- Mr. Cole is presumed competent. And what has to be
10 determined before Mr. Cole is entitled to, or given a jury
11 trial on his competence, is that he must overcome the
12 substantial threshold showing that he is insane. And to
13 overcome that substantial threshold showing, Mr. Cole has to
14 show that he does not have a rational understanding of the
15 reasons for the execution or that he is being executed.

16 And, therefore, to show -- and even the Court of
17 Criminal Appeals said -- and I have it in my notes -- that the
18 Court of Criminal Appeals said that to overcome the substantial
19 threshold showing, Mr. Cole is not entitled to a jury trial,
20 and to do so he must show that -- if he has not met a
21 substantial threshold showing; therefore, he has not shown that
22 he does not have a rational understanding of his execution or
23 the reasons therefore, then this Court must deny the writ.

24 Your Honor, they have not met that burden today.
25 We have -- we have information that Mr. Cole has told Tina

1 Fuller recently that he understands why he's being executed.
2 He told Dr. Orth. And I understand Mr. Cole today does not
3 look like he would have a conversation, but Mr. Cole had
4 conversations, spontaneous conversations with Dr. Orth. He was
5 very clear in why he was being executed. "For the murder of my
6 daughter."

7 He was very clear in what would happen after his
8 execution. He knew the date of that execution. And the fact
9 that Mr. Cole is not -- has chosen not to speak with some
10 people at times, or speak to Dr. Hough, that's Mr. Cole's
11 decision. And Mr. -- Dr. Hough has opined that Mr. Cole is not
12 competent to be executed; however, when Dr. Hough asked those
13 questions of Mr. Cole, Mr. Cole did not respond to him when
14 those questions were asked. The individual who asked those
15 questions for him, mister -- Dr. Hough -- or Dr. Orth did not,
16 specifically, ask those questions; Mr. Cole, himself,
17 spontaneously stated that the Court ordered an evaluation of
18 him to determine if he was competent to be executed, and if he
19 understood why he was being executed. And I know Dr. Orth --
20 Mr. Cole's own statements were quoted for this Court during the
21 warden's cross-examination. And so before a Petitioner can
22 even be entitled to a jury trial, this Court has to find that
23 Mr. Cole has overcome the substantial threshold showing of
24 insanity and found that he does not have a rational
25 understanding of his execution.

1 And, therefore -- because everything before the
2 warden did not give the warden good reason to find that
3 Mr. Cole has become insane. And that's the language. The
4 warden has to find that there is good reason that he has become
5 insane. And that "has become insane," has to do with, does he
6 have a rational understanding of the execution, and the reasons
7 for the execution.

8 And, Your Honor, the warden did not abuse his
9 discretion as all of the information before the warden, from
10 the expert Mr. Cole actually spoke to, and that -- was that
11 Mr. Cole does have a rational understanding of the execution,
12 the reasons for the execution, and that it is imminent. And,
13 therefore, we'd ask this Court to deny the Writ of Mandamus.
14 Thank you.

15 THE COURT: Okay. Counsel, the Court will
16 review the additional documents I've referred to, as well as
17 the case law that has been discussed, with respect to the
18 burden of proof. And I will start on an opinion probably today
19 depending on how long it takes me to get through that. But it
20 won't be ready today. It won't be out, you know -- I'll go
21 through that multiple times before. But hopefully by Monday or
22 Tuesday this next week.

23 We had jury trial scheduled and mine got
24 continued so I've got plenty of time. So I'll be working on
25 that the rest of today, tomorrow -- Monday, as well. Anything

1 further on the record?

2 MS. BLUMERT: Nothing from us, Your Honor.

3 THE COURT: Okay. Let the record reflect --
4 from the AGs?

5 MS. WILLIS: No, Your Honor.

6 THE COURT: Let the record reflect the Court's
7 in possession of the Petitioner's exhibits, with the exception
8 of those that have been withdrawn. I'm going to need to keep
9 these since they're -- this is what I need to review. Once I'm
10 done with that, it'll go to the court reporter, and it'll be in
11 her possession, pending the outcome of this matter. Okay. If
12 there's nothing further, we're off the record. Parties are
13 excused.

14 (Whereupon, proceedings concluded.)

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