Nos. 81-2224, 81-2380, 81-2390

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID RUIZ, et al.,

Plaintiffs-Appellees

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

v.

W. J. ESTELLE, JR., et al.,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is scheduled for December 14, 1981.

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QUESTIONS PRESENTED

1. Whether the district court correctly concluded that conditions of confinement within the Texas Department of Corrections (TDC) violate the Eighth Amendment and, if so, whether the remedies it ordered were appropriate?

2. Whether the district court correctly concluded that TDC's continued use of the Huntsville Unit Hospital (HUH) is unconstitutional and, if so, whether it appropriately ordered TDC to improve conditions at HUH to acceptable standards or use it only as an infirmary?

3. Whether, in light of TDC's systematic failure to comply with the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974), the district court correctly ordered TDC to make and preserve tape recordings or other verbatim records of disciplinary proceedings?

4. Whether the district court correctly found that TDC unconstitutionally interfered with inmate access to courts?

5. Whether the district court correctly ordered TDC to comply with certain state health and safety laws?

6. Whether the district court erred in ordering the reorganization of TDC into 500-man units and in placing restrictions upon the size and location of new units?

7. Whether the district court properly appointed a special master to monitor implementation of the relief ordered?

8. Whether the cumulative effect of rulings by the district court during discovery and trial denied TDC a fair trial?

9. Whether the district court failed to make specific findings of fact sufficient for appellate review?

10. Whether the district court correctly permitted the United States to intervene as a party plaintiff?

11. Whether the Texas Board of Corrections and its individual members are proper parties defendant?

STATEMENT

1. Procedural history

This action challenging conditions of confinement in the Texas Department of Corrections was filed by inmate David Ruiz in June 1972 (R. 4).[1/] In the spring of 1974 the court consolidated the case with those of seven other TDC inmates (R. 112, 114) and ordered the United States to appear as amicus curiae (R. 112). In December 1974 the court granted the United States' motion to intervene as a party plaintiff (R. 169) and certified the case as a class action (R. 191). Defendants are the Director of TDC, the Texas Board of Corrections, and its individual members.[2/]

In January, 1975, TDC moved to dismiss the United States from the case (R. 250). The motion was denied in February, 1975 (R. 394), and the State's petition to this Court for a writ of

1/ "R." refers to the number assigned to a page in the record by the district court clerk; the testimony of witnesses is referred to by the last name of the witness and the page of the transcript, e.g., Ruiz at 14; exhibits are cited according to the party introducing it, e.g., PX 10; USX I-10; DX 10.

2/ For convenience, we will sometimes refer to defendants-appellants collectively as "TDC," "the State," or "Texas."

mandamus to prevent the United States from further participation in the case was denied in June, 1975. In re Estelle, 516 F.2d 480, cert. denied, 426 U.S. 925 (1976).

Trial commenced in Houston on October 2, 1978, and concluded on September 20, 1979. The district court issued its memorandum opinion on December 12, 1980. Ruiz v. Estelle, 503 F. Supp. 1265.

The court ruled that the prison system was unconsitutionally overcrowded (id. at 1274-1288); that it failed to satisfy minimal constitutional standards for assuring the personal safety of inmates (id. at 1288-1307); that its health care system was constitutionally inadequate (id. at 1307-1346); that its disciplinary system did not meet constitutional requirements (id. at 1346-1367); that it did not afford inmates adequate access to the courts (id. at 1367-1373); that it failed to provide a fire safety system satisfying minimal constitutional standards (id. at 1373-1374, 1382-1383); and that it failed to meet the requirements of state health and safety laws governing food service and processing and certain industrial and agricultural operations (id. at 1375-1382). The court indicated generally the relief to be granted, and stated that it intended to appoint one or more special masters to supervise and monitor implementation of its remedial decree (id. at 1389-1390). The court afforded the parties the opportunity to agree on a proposed judgment (id. at 1390).

On February 23, 1981, the parties filed a proposed consent decree addressing issues relating to health care (except for

the Huntsville Unit Hospital), special needs prisoners, [3] solitary confinement, the use of chemical agents, work safety and hygiene, and administrative segregation (R. 7849). On March 3, 1981, the court tentatively approved the consent decree and ordered a hearing be held to consider any objections to the decree (R. 7950).

On April 20, 1981, a hearing was held concerning the proposed consent decree (R. 8474). After the hearing, the court issued five documents: (1) an order approving the partial consent decree (R. 8386); (2) a supplemental memorandum opinion declaring unconstitutional certain TDC disciplinary rules (R. 8442); (3) a decree granting equitable relief and a declaratory judgment (R. 8393); (4) an order appointing a special master to monitor implementation of the relief ordered (R. 8434); and (5) an order denying TDC's motion for a stay (R. 8419). [4] The court amended its remedial decree on May 1, 1981 (R. 8512).

On June 1, 1981, the State filed a notice of appeal from the remedial order and order of reference of April 20, 1981, and the amended decree of May 1, 1981 (R. 8577).

On June 5, 1981, TDC filed in this Court a motion to stay most of the district court's remedial order. On June 26, 1981, the Court stayed portions of the trial court's order relating to

3/ I.e., those who are mentally retarded, physically handicapped, developmentally disabled, or who require psychological or psychiatric care.

4/ The court treated the conditional motion for a stay in TDC's proposed remedial decree as a motion for a stay (id. at 2 n.3).

overcrowding, the managerial reorganization of TDC, the construction of new facilities, and inmate work assignments. Ruiz v. Estelle, 650 F.2d 555. Private plaintiffs' application to Justice Powell to vacate the portion of the stay relating to the double-celling of inmates was denied on August 3, 1981 (No. A-95).

On September 22, 1981, TDC filed a notice of appeal from an amended order of reference entered July 24, 1981 (Appeal No. 81-2380). On September 28, 1981, TDC filed a notice of appeal from an order entered July 29, 1981, designating the amended decree of May 1, 1981, as a final judgment (Appeal No. 81-2390). This Court consolidated the three appeals on October 21, 1981.

On October 26, 1981, the State filed in this Court a second motion for stay, seeking relief from provisions of the district court's order requiring it to reduce the number of inmates confined in dormitories, provide single cells for inmates in administrative segregation, increase the overall guard-to-inmate ratio, implement specified staffing patterns, and cease its practice of allowing inmates to use keys. On October 29, 1981, Judge Ainsworth granted the motion pending full consideration by the Court and directed appellees to respond within ten days. The United States filed its response on November 9, 1981.

On November 2, 1981, the State filed a fourth notice of appeal from the district court's order of September 3, 1981. This order denied Texas' motion to vacate an order entered July 2, 1981, which specified that plans required by the court's orders be referred to the special master for review. TDC has requested that this matter be handled as a separate appeal (No. 81-2451).

2. Decision of the district court

In the remainder of this statement, we describe below the pertinent factual findings, legal conclusions, and remedial orders of the district court, under the following captions (which generally follow the order in which they are discussed in the opinion below and Texas' brief): the TDC system and inmate population; overcrowding; security and supervision; health care; disciplinary hearing procedures; administrative segregation; access to courts; fire safety; sanitation and work safety; totality of conditions; unit size, structure, and location; and special master. Because the State challenges the court's findings of fact as clearly erroneous, we have set out those findings in some detail. We also indicate those portions of the remedial decree that have been stayed pending appeal.

a. The TDC system and inmate population

TDC operates 18 prison units, 16 for men and 2 for women. 5/ All but one of these are maximum security units. The smallest unit houses about 800 inmates, the largest about 4,000. TDC conducts extensive farming and industrial operations with the use of inmate labor at most of these units. Responsibility for the management of the system is vested in the TDC Director, subject to the control and supervision of the Texas Board of Correc-

5/ The Beto Unit for male inmates is presently under construction and is only partially occupied.

tions. Each unit has a warden, who is responsible for the day-to-day management of the unit (503 F. Supp. at 1274).[6/]

In 1978, 96% of the system's 24,575 inmates were male. The mean age of TDC inmates was 29.58, with 41% of the population younger than 26. More than 61% of the new admissions in 1978 were first offenders. The average maximum sentence of all inmates was 23.54 years. According to TDC, approximately 20% of the inmates were incarcerated for "violent" crimes, 65% for "property" crimes, and 15% for "other" offenses (id. at 1274-1275).

b. Overcrowding

The district court found that TDC has been severely overcrowded since at least March, 1977. Director Estelle testified in August, 1979, that approximately 1,000 of TDC's 26,000 inmates were sleeping on floors. These inmates are housed in cells and dormitories holding almost double the number of persons for which they were designed (id. at 1277).[7/]

Virtually all TDC inmates are housed in either traditional cells with barred doors or large dormitories. Almost all of the 9,000 cells are nine feet long, five feet wide, and seven feet high. These cells were originally designed to hold one inmate, but a second bed has been added. Almost without exception, these cells house at least two inmates. Typical cells are equipped with

6/ In this Statement, a citation to the district court's opinion or remedial order at the end of a paragraph indicates that all of the information in the paragraph is contained on the page(s) cited.

7/ The inmate population now exceeds 31,000. Appellants' Motion for Stay, p. 21 n.8.

two steel frame bunks (one above the other), a sink, a toilet, a narrow shelf above the front bars, and a lightbulb. The usable, unobstructed space in the cell amounts to an area about seven and one-half feet long and three feet wide, or about 22.5 square feet (id. at 1277-1278). 8/

When three inmates were confined to a single cell, 9/ as frequently occured, the third would sleep on a mattress in the aisle. Occasionally, four or five inmates were assigned to one cell. When four were present, two would sleep on the floor, across the width of the cell, with their feet under the lower bunk. Because the cells are only five feet wide, these two could not stretch out fully during the night. With five inmates, three would sleep on the floor, between the bars in the front and the toilet in the rear of the cell. Inmates have been confined five-to-a-cell weeks at a time. Most of these inmates had been placed in administrative segregation, TDC's non-punitive detention status (ibid.).

TDC dormitories vary in size and house between 10 and 136 persons. 10/ A typical dormitory is a large rectangular room contain-

8/ Other cells vary in size from 40 to 66 square feet. The Ellis Unit has 120 cells that are 90 feet square. Originally designed to hold two inmates, these cells at the time of trial held at least four persons each (id. at 1277-1278 n.7). Confining two or more persons in a 45 - to 60 - square foot cell is contrary to the minimum standards of every organization that has promulgated criteria for the design of prisons and jails. Many of the standards recommend a minimum space of more than 45 square feet for one person (id. at 1282).

9/ As a result of the district court's decree in this case, TDC's practice of confining more than two inmates in a 45-square-foot cell has been eliminated.

10/ If dormitories at TDC were populated according to the standards of the American Public Health Association and the American Correctional Association, which require 75 square feet of living space per inmate, the maximum number of inmates who could be housed in an average dorm would be 19 instead of the current average of 66 to 69. If requirements for providing 35 square feet of dayroom space per inmate were included in calculations, the maximum allowable number of inmates would drop to 15 (id. at 1282-1283).

ing rows of narrow beds or double-decker bunks, a day-room area, and a toilet area. None of the men's dormitories has partitions or screens. Because the aisles between the rows of beds are narrow and the beds are situated close together, inmates in dorms are not easily visible to guards stationed in the halls or at picket locations, which are outside the dorms (ibid.).

The district court found overcrowding within the dormitories severe. At the Central Unit, for example, two rows of double-decker bunks, directly adjacent to one another, run down the middle of the dorm. The scene was described by one witness as resembling one giant bed. In the less crowded dorms, single beds are used instead of double-decker bunks. In such dormitories the head of each inmate's bed ordinarily is against a wall; each side of the bed is only a few inches from the sides of those adjacent to it, and its foot is only a few feet away from the bed across the aisle (id. at 1278-1279). Several experts testified that they had never seen dormitories as crowded as those at TDC (id. at 1282-1283).

The sanitary and recreational facilities in dorms are inadequate for the numbers of TDC inmates who use them. In a Central Unit dorm, for example, four toilets, four sinks, and a long trough-type urinal serve 69 inmates.

There is essentially no recreational space in dorms (id. at 1279). What little recreational space once existed has been virtually eliminated by the placing extra beds placed in dorms wherever possible. Inmates without beds sleep on mattresses placed on wall ledges (often above the toilet) or wedged between the mattresses of two inmates whose bed frames have been pushed together (i.e., three mattresses on two frames) (ibid.).

In 1976, the space available for each inmate in TDC dorms ranged from 17 to 60 square feet, including dayroom, toilet, and storage space. The average was 40 square feet. At the time of trial, TDC's population had increased by about 5,000 inmates from the 1976 level and the square footage per inmate in the dorms had generally decreased (ibid.).

Inmates remain in their living quarters a great portion of their time. Those who work regularly are still in their cells or dorms almost ten hours a day. Because of a shortage of civilian guards who can be deployed in the agricultural fields to supervise working inmates, the full number of inmates assigned to work in the fields cannot actually work on any given day. At many units, therefore, inmates work on a rotating basis. As much as one-half to three-fourths of the inmate agricultural force remains idle in the living quarters on any particular day. Inmates on cell restriction (a minor form of punishment) occupy their free time in their cells; unassigned inmates (i.e., those without a job assignment) and those on medical lay-in status (i.e., those who cannot work for health reasons) pass the greater part of the time in their living quarters; and those in administrative segregation or solitary confinement spend virtually the entire day in their cells (id. at 1279-1280).

Almost all cellblocks are occupied at double, and some even triple, their design capacity. Thus, adjacent dayrooms, designed for recreational purposes, must serve double and triple the number of inmates for which they were built. Access to indoor gymna-

siums, outdoor playing fields (located at only some of the units), craft shops, and libraries is similarly limited because of the increasing number of inmates. These facilities are consequently available only on restricted bases to inmates, sometimes only to building tenders (see pp. 22-25, infra) or other privileged inmates. The dining rooms are almost always crowded (id. at 1280).

The district court found that the high levels of overcrowding at TDC are harmful to inmates in a variety of ways. Penologists who testified were virtually unanimous in their condemnation of double- and triple-celling under the conditions that existed at the TDC. Director Estelle acknowledged that double-celling increases the opportunity for predatory activities and creates problems of supervision and control.

TDC inmates are often subjected to brutality, extortion, and rape at the hands of cellmates. Some of the worst examples have occurred in triple-celling situations, where two-on-one confrontations often occur. Violence also occurs in double-celling situations, where one inmate often dominates the other. Even if inmates were doubled-up in cells large enough to accommodate two persons, the effects of violence and the climate of fear would remain. This is so because TDC's rudimentary inmate classification system [11/] is inadequate to assure the compatibility of cellmates

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11/ TDC's classification system designates 95% of the inmates as maximum security prisoners. The only factors considered in deciding which maximum security institution to assign an inmate to are age and recidivism. No account is taken of the character of an inmate's crime or crimes, the length of his sentence, or his propensity toward violence, if any. Thus, in any given facility, first offenders, youthful inmates, violent and non-violent persons, handicapped offenders, and recidivists are often housed in the same dormitories or cells (id. at 1282 n.18).

and because TDC's security and supervision capabilities fall short of protecting inmates from violence at the hands of cellmates (id. at 1281-1282).[12/]

Inmates living in dorms are exposed to the same threats of violence as those living in cells. The risks encountered by dormitory residents are even greater than those faced by inmates in cells. Assaultive inmates are present in every dormitory. Because the dorms are practically unsupervised, violent inmates have free access to other inmates. Sexual molestations, brutalities, and extortions are common in dorms (id. at 1282).

A number of qualified expert witnesses testified persuasively about the negative physical and psychological effects of overcrowding. Among the consequences were the spread of disease, increased stress, tension, hostility, depression, and aggressive behavior. These experts concluded that overcrowding at TDC has substantially contributed to increased rates of disciplinary offenses, psychiatric commitments, and suicides. These witnesses were also of the view that these effects interfere with rehabilitation and cause serious behavioral and disciplinary problems (ibid.).

12/ See pp. 17-27, infra.

TDC officials have failed to use the award of good time and the work release program to reduce the prison population (id. at 1284-1285). TDC's plans for the construction of new facilities are inadequate to overtake the rising prison commitment rates, and offer little hope in the foreseeable future for significant relief from the overcrowding. TDC has no minimum security facilities, no honor farms or work camps, no halfway houses or urban work release centers, and no plans for the construction or use of any such facilities (id. at 1280-1281).[13/]

On the basis of these findings, the court ruled that the overcrowding within TDC is unconstitutional. The court analyzed the relevant cases and concluded that confinement of inmates in spaces of less than 50 square feet occasions great concern and careful judicial scrutiny. No hard and fast rule is appropriate, however, and all of the surrounding circumstances must be considered (id. at 1286).

13/ According to Defendants' Brief (p. 51), the Texas Board of Pardons and Paroles has recently received $1.25 million to implement a program under which 1,500 TDC inmates will be released to halfway houses throughout Texas.

The court noted that inmates double-celled in 45-square-foot cells have 22.5 square feet apiece, and those housed three, four, or five to a cell have much less. Prisoners living in the dorms on the average are accorded less than 40 square feet of space per person. The court stated that these space allocations are so far below the 50-square-foot level that little doubt exists as to their unconstitutionality (ibid.).

The court ruled that none of the other conditions of confinement at TDC alleviate the effects of overcrowding. Inmates spend a substantial amount of time in their living quarters. Even when away from housing areas, they get no relief because the other facilities in the prisons are likewise intensively crowded. Security is so inadequate that inmates in multiply-populated cells and crowded dormitories cannot be properly supervised or prevented from brutalizing one another. Nothing at TDC serves to ease the psychological harm that results from overcrowding. Accordingly, the court concluded that overcrowding at TDC violates the Eighth Amendment. (503 F. Supp. at 1286-1287). 14/

To remedy the unconstitutional overcrowding it had found, the court required TDC to take all steps in its power to reduce the number of inmates it houses. Among other things, the court

14/ The court for the most part agreed with the State that TDC institutions are kept clean. The court commended TDC for its efforts to insure cleanliness, but concluded that the cleanliness of cells and dormitories does not compensate for the fact that they are "disgracefully overcrowded" (id. at 1286 n.31). In the court's view, "[e]ven under the cleanest conditions, the confinement of two or three persons to forty-five square foot cells is unhumane" (ibid.).

ordered TDC to expand its work furlough program and its temporary furlough program. The order required TDC to file with the court a plan for the establishment of minimum security institutions, honor farms or units, halfway houses, urban work or educational release centers, community treatment centers, and the like by November 1, 1981 (R. 8514-8516). 15/

Under the court's order, TDC was required to reduce the overall inmate population to a figure equal to twice the number of general population cells, plus the number of prisoners who can be housed in dormitories affording 40 square feet per person (excluding bathing, toilet, and activity areas) by November 1, 1981. By November 1, 1982, TDC must reduce the inmate population to a figure equal to 1.5 times the number of general population cells plus the the number of prisoners who can be housed in dormitories affording 60 square feet per person. By November 1, 1983, TDC must reduce the inmate population to the number of general population cells, plus the number of prisoners who can be housed in dormitories affording 60 square feet per person (R. 8517). 16/

The court required TDC to end quadruple-celling of prisoners by May 1, 1981, and triple-celling by August 1, 1981. By August 1, 1982, no more than half the TDC inmate population may be double-celled in cells of less than 60 square feet. After

15/ These portions of the order dealing with the release of inmates were stayed pending appeal. Ruiz v. Estelle, supra, 650 F.2d at 570-573.

16/ Portions of the order relating to population limits were also stayed pending appeal (650 F.2d at 567-569).

August 1, 1983, no prisoner may be double-celled in a cell of less than 60 square feet (R. 8517-8518).[17/]

By November 1, 1981, TDC was required to afford each inmate in a dormitory at least 40 square feet of living space, excluding areas used for bathing, toilet, or recreation activities; and by November 1, 1982, at least 60 square feet (R. 8518).

c. Security and supervision

The district court found that TDC prisons are severly understaffed. During the years 1973, 1974, and 1977, TDC had the highest inmate-to-staff ratio of any state prison in the country. During the summer of 1979, TDC employed approximately one uniformed guard for every 12.45 inmates. The average inmate-to-guard ratio for the nation is five-to-one (503 F. Supp. at 1290).[18/] Director Estelle recognized that the TDC inmate-to-guard ratio is among the highest in the country; in 1976 he characterized a ratio of twelve-to-one as "extremely dangerous" (id. at 1291).

The shortage of security staff means that fewer inmates are dispatched to the fields on a given day than would be otherwise. In addition, TDC's deployment of its guards leaves few officers available to supervise the cellblocks and dormitories (ibid.).

17/ The provisions of the order concerning double-celling were also stayed (650 F.2d at 567).

18/ A five-to-one ratio does not mean that there is a separate guard on duty for every five inmates. It indicates only the ratio between the total number of inmates and the total number of uniformed security officers in a prison (id. at 1290 n.42).

During the day, it is common for one guard to be responsible for supervising two to four cellblocks [19] or dormitories. Guards responsible for cellblocks are ordinarily stationed outside the cell area and can usually see only into the first four or five cells. Guards are never stationed inside the dorms, even though activities inside cannot be adequately observed from the outside (id. at 1291-1292).

At night, most inmates are locked in their cells or dorms. Each nighttime guard is assigned to supervise several hundred inmates, virtually all in doubly- or triply-occupied cells or in crowded dormitories. A single guard will often be responsible for as many as four cellblocks, each of which contains three tiers (id. at 1292).

As a result of TDC's staffing patterns, inmate activities within the housing areas are almost entirely unsupervised. No security officers keep watch over dorms and it is virtually impossible for one guard adequately to supervise two, three, or four cellblocks. According to one of the State's own exhibits, "with only one officer assigned to two or four cellblocks, the majority of inmates can do as they please when the officer is searching and counting those coming in or out." It is difficult for one guard safely to supervise even one cellblock, because inmates on more than one level cannot be observed simultaneously (id. at 1292).

19/ A typical TDC cellblock consists of three tiers, with 20 or 30 cells on each tier (ibid. at n.45).

This lack of supervision means that aggressive inmates are free to do as they wish in the living areas, and their victims are threatened, subjected to extortion, beaten, or raped, in the absence of protection from civilian personnel. Thus, inmates live in a perpetual climate of fear and apprehension because of the constant threat of violence. To escape threatened physical attacks, several inmates have gone to the extreme of cutting their arms, legs, or heel tendons to achieve temporary transfers to administrative segregation, solitary confinement, or the hospital (id. at 1292-1293).[20/]

The record contains many examples of the inability of TDC staff to protect inmates from physical harm. Three of the worst incidents involved physical torture and sexual abuse of inmates by their cell partners over a period of days.[21/] In an adequately staffed institution, these types of prolonged torture would be quickly discovered. In several cases the official TDC reports of violent incidents include statements to the effect that no officers were assigned to the areas where the events occurred because of shortages in personnel. The record also contains several examples of suicides that were undiscovered for several hours, even though an officer was obliged to check the cells for suicidal inmates at least once an hour (id. at 1293). Although TDC has a

20/ Expert witnesses testified that TDC has an unusually high number of suicides, attempted suicides, and self-mutilations (id. at 1293 n.48).

21/ These incidents are described at 503 F. Supp. 1293 n.49.

low homicide rate, this does not relieve inmates of their apprehension of extortion, assault, and rape, and does not preclude a finding that TDC institutions are unsafe and charged with a climate of fear (id. at 1294).

Brutality by security officers is widespread in TDC prisons. The record contains evidence of many inmates being unnecessarily beaten with fists and clubs, kicked, and maced by officers. Many of the injuries so inflicted have required extensive medical care (id. at 1299).

TDC officers use unwarranted physical force in a number of situations. First, they use physical abuse as summary punishment to control and supervise inmates. Second, they brutalize inmates such as writ writers whose activities, although not in violation of any institutional rules, are objectionable to TDC officials. Third, security officers frequently respond with excessive force to violence or resistance by inmates, retaliating against the inmates by teaming up with other staff members or building tenders[22/] to inflict brutal beatings on them. Many of these beatings occur well after the elimination of the situation which may have legitimately necessitated some physical force. Fourth, officers often meet what they perceive as major disturbances (e.g., escape attempts and any concerted action or refusal to act by groups of inmates) with dislays of force whose primary purpose

22/ A building tender is an inmate who is given a specific job involving custodial and supervisory duties (id. at 1290 n.39). See pp. 22-25, infra.

and effect are punitive rather than remedial (ibid.).[23]

TDC's practices encourage staff brutality in two ways. First, TDC officials rarely investigate reports of violence and brutality involving civilian staff and commonly fail to take corrective disciplinary action against officers known to have brutalized inmates (id. at 1302).

Second, TDC's two-week training program for guards fails to instruct officers in the proper use of limited physical force to quell inmate disturbances. Guards are not given any physical training or practice in the proper use of physical force. They receive little instruction concerning verbal, non-physical means of dealing with problems. In other institutions such programs have lessened the frequency of over-reaction and physical violence (id. at 1289-1290, 1302).

According to several former correctional officers, the policies and practices they learned on the job differed markedly from those learned at TDC's two-week training program. For example, these officers were taught at training school that all inmates should be treated equally and fairly. At the units, however, they were directed to keep an especially close watch on writ writers[24] and to deal harshly with their infractions, while at

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23/ Examples of each of these types of prisoner abuse are set out at pages 1299-1302 of the court's opinion.

24/ A writ writer is an inmate who complains about prison problems to outsiders, such as the courts, state legislators, or representatives of the news media (id. at 1290 n.38).

the same time awarding special privileges to, and largely ignoring violations by, favored inmates such as politicians [25] and building tenders (id. at 1290).

TDC has compensated for its shortages of civilian security personnel by using inmates to perform security functions. This occurs in spite of a Texas statute that expressly prohibits the use of inmates in a supervisory or administrative capacity (id. (id. at 1294). These inmates are generally referred to as building tenders. Most building tenders at a unit are selected by the warden, but the selection must be approved by the TDC State Classification Committee. Violent, corrupt, and brutal inmates have often been approved (id. at 1295). [26]

In addition to assisting officers at routine tasks, building tenders are used by TDC officials to gather intelligence concerning the activities, expressions, and attitudes of other inmates. More importantly, building tenders often serve in the capacity of guards. According to one of the State's own experts, these inmates do the guards' "dirty work," serving as enforcers of the ranking officers' will in the living areas, and harassing, threatening, and physically punishing inmates perceived as troublemakers (ibid.).

25/ A politician is an inmate who gets along well with, and performs services for, security officers and who in turn is protected by them (id. at 1290 n.39).

26/ One particular building tender was characterized by a former warden of the Eastham Unit as the most violent inmate he has ever known (id. at 1295 n.57).

Building tenders have unofficially been given such powers as issuing orders to other inmates, assisting in taking daily counts of the population, keeping track of inmate movements, escorting inmates to different destinations within the prison, and distributing correspondence and commissary scrip. Some are authorized to be in possession of keys outside the presence of civilian personnel, and others operate the automated opening devices that control access to cell blocks, day rooms, and other parts of the institutions. Building tenders control the day rooms. For example, they enforce order and silence, operate the controls of television sets, and regulate the games that can be played (id. at 1296).

The fact that building tenders work closely with civilian security personnel gives them several significant advantages, which they frequently abuse. Their greater contact with prison officials often permits them to arrange or influence job and housing changes of prisoners and to sell their influence over such matters to other inmates. Some have access to records concerning inmates' financial resources and others are authorized to assist in preparing and editing disciplinary reports. Certain building tenders are able to view inmates' files and to use the information to operate extortion, prostitution, and usury schemes (ibid.).

Another common practice of building tenders is to "run stores," i.e., to sell to inmates, at exhorbitant prices, commissary items in high demand. Building tenders have the power to punish inmates who refuse to deal with them on the demanded finan-

cial or sexual bases. The building tenders' power in this regard extends to causing the loss of privileges or even the infliction of physical punishment. The decisions of building tenders concerning inmates under their supervision are almost always upheld by TDC officers (ibid.).

Building tenders are often permitted to carry weapons, such as knives, chains, pipes, and wooden bats, which are frequently used to threaten and discipline other inmates. At some units building tenders have used such weapons at the express direction of prison officers. At other units, guards choose not to see building tenders enforcing discipline on other inmates by the use of weapons. At still other units, the building tenders' use of weapons results from inadequate supervision by guards. The ability of building tenders to keep and use weapons contrasts with TDC's generally effective system of curbing the presence of arms and other contraband among the general inmate population (id. at 1296-1297).

The availability of weapons, as well as the other concomitants of power possessed by building tenders, allows them to engage in indiscriminate acts of brutality towards other prisoners. The record reflects many incidents of brutality by building tenders (id. at 1297).[27/]

In return for their assistance to prison authorities, building tenders are afforded special privileges: i.e., they have

27/ Several of these incidents of inmate abuse by building tenders are summarized at page 1297 n.64 of the court's opinion.

greater mobility and access to facilities than do other inmates; they may elect when to eat within the hours allotted to serving meals; in many instances they are permitted their choice of a cell location and may have a single cell, even when other cells have one or more inmates sleeping on the floor; they have been permitted to keep extra furniture in their cells, to keep pets, and to wear extra clothing; they are seldom searched; except for the most obvious, grievous offenses, they ordinarily are immune from most disciplinary action; and a significant punishment for even their serious rule infractions is rare (ibid.).

Expert witnesses for all parties described the harms resulting from the building tender system. According to this testimony, giving one group of inmates authority over others invites resentment, misunderstandings, physical confrontations, and clashes between the two inmate classes (id. at 1298).

On the basis of these findings, the district court concluded that TDC had failed to provide inmates with constitutionally adequate security and supervision. The court ruled that state officials have a duty to protect inmates from violence and the reasonable fear of violence. The climate in TDC is one of fear and trepidation, engendered by the occurrence of frequent physical and sexual assaults, intimidation, bribery, and rule by threats and violence. The court ruled that a number of TDC practices have allowed this situation to develop. Texas has failed to employ sufficient numbers of security officers to provide any systematic supervision of inmate activities, particularly in the overcrowded housing

areas. This has produced practically unlimited opportunities for assaults upon inmates by their cell or dormitory mates. Compounding the resulting sense of insecurity is the fact that the only order in the living quarters is enforced through the building tender system. Finally, TDC staff have engaged in widespread unwarranted acts of brutality on many of the system's inmates. The court concluded that all of these factors combine to create a situation of inadeqate security that violates the Eighth Amendment (503 F. Supp. at 1303).

To remedy the unconstitutional deficiencies in security and supervision it had identified, the court required TDC by November 1, 1981, to hire and train sufficient security staff officers so that the staff-prisoner ratio exceeds one uniformed staff member for every ten prisoners. By May 1, 1982, this ratio must exceed one-to-eight, and by November 1, 1982, one-to-six (R. 8518).

Under the order, by November 1, 1982, TDC must maintain specified minimum staffing patterns in all housing areas to which maximum security prisoners are assigned. Variations from these patterns may be authorized by the special master, whose decision is appealable to the district court (R. 8519-8520).

By August 1, 1981, TDC was required to file with the court a plan and timetable for the training of new security officers and the re-training of existing security officers. The order required TDC to file with the court by June 1, 1981, standards governing the use of force by TDC personnel against prisoners. The decree

specifies certain limitations on the use of deadly force and mechanical instruments of restraint, and prohibits the use of force to impose discipline (R. 8520-8522).

The court's order required TDC to abolish the building tender system immediately. Under the order, no prisoner may be placed in a position to exercise administrative or supervisory authority over another prisoner. If inmates are assigned duties previously performed by building tenders that do not involve administrative or supervisory authority over other inmates, these duties must be rotated among inmates at least every 30 days (R. 8523-8524). 28/

The order required TDC to file with the court by August 1, 1981, a plan setting forth an adequate classification system and a timetable for its implementation. The plan must insure that only minimum security prisoners are assigned to live in dormitories (R. 8524).

d. Health care

The health care issues in this case, other than those involving the Huntsville Unit Hospital, were resolved by consent decree. See pp. 4-5, supra. Accordingly, only those findings, conclusions, and orders relating to HUH are set out below. 29/

28/ The portion of the order relating to the rotation of work assignments was stayed pending appeal (650 F.2d at 569-570).

29/ The court found that TDC's entire health care system evinced deliberate indifference to serious medical needs of inmates. See 503 F. Supp. at 1307-1346.

In the district court's view it is questionable whether TDC's hospital at Huntsville can accurately be called a hospital. The court found that HUH violates state hospital licensing requirements and lost its Texas Hospital Association (THA) accreditation many years ago. Although TDC's highest officials have been aware of its gross inadequacies, they have used HUH as the system's primary health care facility for many years. HUH is antiquated, poorly designed, unacceptably equipped, deficiently maintained, and severely overcrowded (id. at 1314).

Reports by the Texas Hospital Association 30/ in 1974 were extremely critical of conditions at HUH and made extensive recommendations for improvements. In its 1974 report THA found, among other things, that sanitary, safety, and privacy concerns necessitated extensive renovation and repairs of HUH. Nevertheless by by mid-1978 TDC had effected or begun only minimal changes there. Many of the conditions criticized in 1974 and thereafter still exist, e.g., lack of proper aseptic techniques in the isolation area, generally unsanitary conditions and inadequate cleaning methods, and shortcomings in medical records and charts. The primary accomplishments of TDC in the five-year period

30/ The court mistakenly referred to the Texas Hospital Association as the Texas Joint Committee on Prison Reform (ibid.).

since these reports were issued have been the improvement of surgical room facilities and the painting of the hospital (ibid.).

Witnesses from both sides generally agreed that the facility was old, in disrepair, inadequately staffed, insufficiently organized and lacking in the most basic emergency equipment. An important deficiency is the absence of adequate firefighting equipment or safe means of exit from the hospital in case of a fire. 31/

At the time of trial, TDC ran the Huntsville Hospital with no registered nurses (RN's). This situation resulted in part from TDC's policy of refusing to hire female nurses to work at male units. Because male nurses comprise only one percent of all the RN's in the country, the pool from which TDC can attract applicants is severely limited. In spite of its all-male policy, TDC was able to employ five male RN's and several male licensed vocational nurses (LVN's) at HUH during the years 1975-1977. These nurses found conditions at HUH intolerable. By the end of 1977, all had left TDC. One group, which resigned en masse, stated that they resigned because of the inadequacy of the physician staff, the absence of any formal procedures, and TDC's lack of commitment toward improving the level of care. Thereafter,

31/ Defendants state in their brief (pp. 83-84) that this deficiency has now been remedied.

TDC administrators ceased to request budget authorizations for RN and LVN positions (id. at 1309).[32/]

HUH relies heavily on the use of inmate "nurses." These inmate nurses do not have the requisite qualifications, training, or supervision to work in the hospital, and their use interferes with the effective treatment of inmate patients. These inmates regularly perform a wide variety of medical functions, and consistently perform procedures for which they are not qualified. At HUH, inmate nurses are responsible for the bulk of all care to patients on the weekends (id. at 1311).

When inmates are admitted to HUH, no entries are made on their charts to indicate the care provided, nor are admission and discharge summaries made. Also lacking are entries to indicate whether a particular test or procedure was in fact completed as ordered (id. at 1323). While defense witnesses testified that some efforts had been initiated to organize HUH records and to standardize the record-keeping process, these efforts have not resulted in significant improvement (id. at 1324).

Pharmaceutical procedures at HUH are also deficient in several respects. The responsibility for administering individual doses of medication to inmate patients has been left to inmate nurses or non-medically trained security officers known as "pill bosses" or "shot bosses." This practice is medically hazardous because the potential for diversion or inaccurate administration

32/ Even during its peak employment of RN's, HUH did not have enough licensed nurses to qualify as a hospital (id. at 1309 n.90).

of medications by these unqualified persons is high. In many cases inmate patients never received prescribed medications, either because the inmate nurses neglected, or deliberately failed, to give them.[33/] Because the administration of drugs is frequently not recorded, it is almost impossible for medical personnel to determine if medication orders have been properly carried out (id. at 1327).

On the basis of these findings, the district court concluded that inmate health care provided at HUH was constitutionally inadequate. The court ruled that the Eighth Amendment imposes upon a state the obligation to provide medical care for those whom it incarcerates. To state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evince deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97 (1976). The inmates in this case challenge the system of health care provided by TDC. The court found that the record contains many examples of deliberate indifference to serious medical needs manifested by improper handling of individual cases and by failure to correct persistent, systemic deficiences. These

33/ A review by an inspector of the Federal Drug Enforcement Administration of twenty randomly selected medical records at HUH in March 1978 disclosed that approximately half the patients had not received medications that had been prescribed for them. Several inmates underwent surgery without the benefit of prescribed pre-operative pain-killing medications because inmates working in surgery deliberately diverted the medications for their own use. The same thing has occasionally happened with post-operative pain-killing medications (id. at 1327 n.137).

faults, well known to TDC, have resulted in a medical system so inadequate for the inmates' needs that their sufferings are inevitably increased and prolonged. The individual examples constitute a continuous pattern of harmful, inadequate medical treatment (id. at 1330-1331).

The record also reflects systemic defects of HUH's medical system that result in harm to inmates. These deficiencies include the general inadequacy of the HUH facility; the insufficiency in the number of physicians and licensed medical support personnel; the reliance upon untrained inmates to perform skilled medical tasks; the interference by officials with legitimate medical treatment of inmates, in the name of exaggerated security concerns; and the failure to keep an accurate system of medical records. The court concluded that on the basis of the evidence presented and the applicable law, the Huntsville Unit Hospital fails to comply with the Eighth Amendment to the Constitution (id. at 1331).

To remedy the constitutional violation it had identified, the court ordered that, by November 1, 1981, HUH must be downgraded to use as the unit infirmary and must not be used for care of prisoners from other units, unless by that date it could be brought into compliance with the standards of the Texas Hospital

Association or the Joint Commission on Accreditation of Hospitals (R. 8525).[34/]

e. Disciplinary hearing procedures

In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court held that inmates are entitled to certain due process rights at prison disciplinary proceedings if loss of good time or other serious sanctions may result from a finding of guilt. The Court required that inmates facing serious disciplinary charges be given at least 24 hours advance written notice of the alleged violation, a written statement by the fact finders setting forth the evidence relied upon, and the reasons for any disciplinary action taken. The Court also required that the inmate be permitted to call witnesses and present documentary evidence in his defense unless it would be unduly hazardous to institutional safety or correctional goals. The Court recommended, but did not require, that a disciplinary committee set out its reasons for refusing to call a witness. Decisions as to whether to permit cross-examination and confrontation of witnesses were left to the discretion of prison officials. Finally, the Court required that some form of substitute counsel be available in situations where the complexity of the issues makes it unlikely that the inmate will be able to collect and present the necessary evidence, or to assist illiterate inmates.

The district court found that, although TDC's disciplinary rules comport on paper with the requirements of Wolff, these

34/ On October 19, 1981, the district court stayed this portion of its decree (see p. 114 n. 91, infra).

rules have never been routinely followed at any of the TDC units (503 F. Supp. at 1350).

To remedy the deficiencies it had identified in TDC's disciplinary practices, the court ordered TDC immediately to conform these practices to the requirements of Wolff v. McDonnell for proceedings in which prisoners might be subjected to solitary confinement, loss of good time, or demotion in rate of earning good time (R. 8526-8529).

The decree provides that, until further order, all disciplinary hearings must be recorded by tape recorder or other means of preserving a verbatim record of the proceedings. Such tape recordings or other records must be made available upon upon the request of the special master or counsel (R. 8529).

f. Administrative segregation

Inmates in administrative segregation are segregated by TDC from the general population for ostensibly non-punitive reasons. An inmate may be placed in administrative segregation (1) for his own protection; (2) while awaiting trial for an offense committed in TDC; or (3) if for any reason he cannot be safely housed with the general population. An inmate may also be held in administrative segregation for no more than three days "pending investigation" of potential disciplinary charges (503 F. Supp. at 1365).

The court found that inmates in administrative segregation are not permitted many of the privileges available to inmates in the general prison population. They can leave their cells only to shower and, occasionally, to go to the writ room. No

opportunity for recreation or exercise is afforded these inmates. At the time of trial it was common for two, three, or even more inmates to be housed in a single cell for weeks and months at a time (503 F. Supp. at 1364). Inmates have spent as much as 30 months in administrative segregation, often for no identifiable reason (ibid. at n.194).

The district court found that TDC's procedures for placing inmates in administrative segregation and for reviewing the status of these inmates failed to meet the requirements of Wolff v. McDonnell (503 F. Supp. at 1365-1366). The court also found that even if accomplished according to appropriate procedures and for valid reasons, long-term confinement of inmates in administrative segregation without opportunity for exercise constitutes cruel and unusual punishment. The court also ruled that an additional Eighth Amendment violation occurs on those occasions when two or more inmates are housed in a 45- or 60-square-foot administrative segregation cell (id. at 1367).

To alleviate the constitutional deficiencies it had identified, the court ordered that any prisoner confined in administrative segregation for more than three days be afforded the opportunity for regular outdoor exercise. Segregated prisoners must be allowed to leave their cells at least once a day for physical recreation of at least an hour's duration unless, in an individual case, fulfillment of the requirement would create an immediate and serious threat to prison security (R. 8530).

The order required TDC to terminate the triple-celling of inmates in administrative segregation cells of 60 square feet or less by May 15, 1981. Double-celling of such inmates was prohibited after August 1, 1981 (ibid.).

g. Access to courts

The district court found that the evidence shows a persistent pattern of TDC interference with attempts by inmates to pursue legal actions. Practices and policies at the various units restrict the times and places inmates may work on legal matters, inhibit communication among inmates about legal matters, encumber inmate efforts to have legal papers notarized, encourage the discriminatory harassment of inmates who file complaints with courts, and intrude on communications between attorneys and their inmate clients (503 F. Supp. at 1367).

TDC has no system-wide rules about where and when inmates may work on legal matters. Such decisions are left to the discretion of officials at the individual units. Most units permit legal work to be done only in the law library, or "writ room." Inmates in these units are not allowed to attend to legal matters in their cells or to store legal materials there. If legal materials are found in a cell, the inmate may be charged with possession of contraband, and the materials confiscated. Even letters from attorneys may not be kept in the cells; after they are read by the inmates concerned, they must be stored in the writ room (id. at 1367-1368).

Other units have the opposite policy of requiring that all legal work be done in the cells. Inmates must request specific

books from the law library, a few at a time, which are delivered to their cells. The cells are small and overcrowded and have no desk or other writing surface. These limitations make legal research and the preparation of legal documents a difficult, if not impossible, task (id. at 1368).

For those inmates in units in which work is permitted only in the writ room, the time they can spend on legal matters is limited. Space limitations do not justify the rules, for there are frequently empty seats in the writ rooms. Many units forbid or severely limit communication between inmates in writ rooms, and possession of legal materials and work on legal matters outside the writ room is often a disciplinary violation. Opportunities for inmates to talk or work together on legal matters are therefore almost entirely foreclosed (ibid.).

Burdens on inmate litigation efforts also result from inadequate and intrusive procedures for the notarization of inmate legal documents. Many notaries, who are often high-ranking prison officials, read documents submitted for notarization and harass inmates seeking notarization to discourage their recourse to legal action. On occasion, officials have refused to notarize documents and have even confiscated them (id. at 1368-1369).

In addition to instituting and enforcing practices and policies designed to limit inmates' opportunities to pursue legal activities, TDC officers routinely harass and punish prisoners they perceive as litigious. These inmates, known as "writ writers," are earmarked by TDC officials as troublemakers and are harassed wherever they go within the prison system. Inmates have received

less favorable job assignments, or lost relatively good jobs they already had, because prison officials disapproved of their legal activities. Conversely, the promise of a better job has been offered to inmates who agree to desist from litigation efforts (id. at 1369).

Some writ writers have been moved from the general population to administrative segregation, where they have spent months, or even years, for no discernible legitimate reason. The record shows frequent incidents where these inmates were groundlessly charged with disciplinary violations. Writ writers typically draw disproportionately more severe sentences than other inmates when they are found guilty of disciplinary violations. TDC officials have also caused writ writers to be attacked by other inmates in retaliation for their legal activity (ibid.).

TDC officials have also imposed unreasonable and unnecessary hardships on inmates who attempt to communicate with their attorneys. Prisoners and their lawyers cannot have confidential conferences; security officers stand within earshot as they confer. Documents may not be passed directly between the attorney and his client. Facilities for attorney-inmate interviews are inadequate. Attorneys experience difficulty scheduling appointments at the prison and often have to wait hours before they are allowed to see their clients. Occasionally they have been forbidden interviews altogether. Attorneys are not permitted to interview inmates in punitive segregation and are not allowed to interview more than one inmate at a time. Attorneys are also

forbidden access to their client's prison file absent court order (id. at 1370).

While this case was pending, the district court issued injunctions to restrain many of the TDC retaliatory and restrictive practices regarding inmate access to courts. The court found that TDC officials had disregarded many of these injunctions (ibid.).

On the basis of these findings, the district court ruled that TDC has violated the Constitution by unjustifiably thwarting inmate access to the courts. The court observed that the Supreme Court has repeatedly struck down restrictions on inmate access to the courts and required remedial measures to insure that such access is adequate, effective, and meaningful. Access to courts involves a variety of related rights, including the right of access to a law library containing basic legal materials, the right to legal assistance, the right to communicate with the courts, attorneys, and public officials (id. at 1370-1371).

The district court noted, notwithstanding the existence of law libraries at each TDC unit and two separate attorney assistance for programs TDC inmates, there remain significant

infringements upon inmates' opportunities to exercise their right of court access (503 F. Supp. at 1371). More particularly, it ruled that TDC hampers inmates' opportunities to engage in productive legal research, to obtain notary services, and to communicate about legal matters with other inmates. The court found these restrictions unconstitutional because TDC had failed to establish that they were necessary for institutional security and that no alternative means of safeguarding security was reasonably available (id. at 1371-1372).

The court also ruled that it is a violation of inmates' rights unreasonably to restrict their opportunities to communicate with legal counsel. The court held that TDC had shown no valid reason for the various practices through which its officials have hampered inmates' consultations with legal counsel. It therefore held these practices unconstitutional (503 F. Supp. at 1372). The court further ruled that TDC's efforts to discourage inmates from legal activity by harassing and punishing them violates the Constitution (503 F. Supp. at 1372-1373).

To remedy the constitutional violations it had identified, the court ordered TDC to ensure that its policies and practices provide inmates with adequate access to state and federal courts, legal counsel, and public officials. Under the order, defendants may not interfere with, harass, punish or otherwise penalize any prisoner as a result of participation in litigation, either as a party or a witness. Mail addressed by any prisoner to an attor-

ney, a court, or public official, and mail addressed from such persons to any prisoner, may not be read by defendants or any TDC employee. TDC must maintain appropriate facilities for confidential interviews between prisoners and their attorneys or authorized representatives, and must provide inmates with reasonable access to notary public services (R. 8531-8532).

Under the order, prisoners must have access to and use of an adequate law library. TDC must permit prisoners to retain a reasonable amount of legal material in their cells or dormitories or, at the prisoner's election, in the unit writ room or some other secure place provided by TDC. Defendants must provide inmates in segregated status with reasonable access to legal materials and services. TDC must also permit prisoners to assist other prisoners with the preparation of legal matters, subject to reasonable regulation of the time, place, and manner of such assistance (R. 8532-8533).

TDC was also required to report to the court the manner in which it provides inmates with access to courts and public officials by November 1, 1981 (R. 8534).

h. Fire safety

The district court found that TDC prisons have an insufficient number of fire exits from its buildings. The few available exits in the housing areas are too small and inadequately constructed to serve effectively in case of fire. Extremely long corridors leading to the exits increase the likelihood of persons becoming trapped by fire in the dead-end corridors. According to the experts, inmates who are unable to exit the building within

five minutes are likely to perish if a serious fire occurs. Inmates have cotton mattresses, papers, and other combustible materials in their cells; they commonly smoke in their cells, and deliberately set fires on occasion. The possibility of a fire at TDC is therefore not remote (503 F. Supp. at 1373).

The court found that the potential for serious injury was illustrated in January 1978, when a natural gas explosion occurred in a dormitory at the Ramsey I Unit. The explosion caused a large portion of the second floor ceiling of the dormitory to collapse, blocking the only stairway. Inmates attempting to escape the ensuing fire had to jump from the second floor balcony to the first floor. One inmate received second and third degree burns and was immediately sent to John Sealy Hospital. TDC reports of the incident indicate that it was miraculous that more inmates were not injured in escaping the building (ibid.).

Work areas in TDC also lack readily accessible fire exits. The fire evacuation plan at the tag plant, for example, consists of having inmates break through a plexiglass wall if a fire occurs in the front part of the plant. Expert inspectors noted that in several other industrial facilities fire doors were inoperative or inaccessible. The inspectors observed many defective fire extinguishers and unsafe storage of flammable materials. Although TDC has made some efforts to correct these deficiencies, many continue to recur (id. at 1374).

The district court ruled that the State has a constitutional obligation to house inmates in facilities that reasonably guarantee their personal safety. Failure to provide adequate

safety from fire violates this duty. The evidence demonstrates the inadequacy of TDC's fire evacuation facilities and plans and the resulting risks of death and injuries to which TDC inmates are exposed. The court concluded that TDC's failure to afford inmates the minimal protections to which they are entitled violates the Eighth Amendment (503 F. Supp. at 1383).

To correct the constitutional deficiencies it had identified, the court ordered defendants immediately to develop specific fire safety regulations and evacuation plans, construct adequate fire exists to ensure the safety of prisoners and staff, and otherwise comply with the current edition of the Life Safety Code of the National Fire Protection Association. TDC was required to file with the court by November 1, 1981, a report stating the measures taken or planned, with timetables for completion, to assure compliance with the applicable provisions of that Code. As of May 1, 1982, no prisoner may be confined in any unit or assigned to any work or program activity area that is not in compliance with the Code (R. 8534).

Under the order, the report filed with the court must provide for (1) the inspection of all TDC facilities on a regular basis by an independent qualified fire safety officer to assess compliance with fire and safety standards and a weekly fire and safety inspection by a TDC employee; (2) the prompt release of prisoners from locked areas in case of emergency; (3) an assessment of fire fighting plans, procedures, and equipment on hand

or readily available; and (4) an evacuation corridor at least four feet wide between rows of beds in dormitory housing (R. 8534-8535).

i. Sanitation and work safety

The court found housing areas in TDC units are kept clean, but noted that experts had testified that housing areas are not adequately heated and cooled and lack sufficient ventilation and lighting. These problems, however, are not severe enough to threaten inmates' health or safety (503 F. Supp. at 1374). Although experts criticized several aspects of the water supply system at TDC units, most of the shortcomings had been corrected at the time of trial (id. at 1374-1375).

The court found that the food served to TDC inmates is generally adequate in terms of quality and quantity. Expert inspections, however, revealed many violations of state health standards in the food service departments at most TDC units, including improper settings on dishwashers, deficient handling and storage of food, incomplete cleaning, and insect and rodent infestations. TDC kitchen facilities are not regularly inspected by state or local authorities to determine compliance with public health standards (id. at 1375).

TDC produces most of its own food. Beef, pork, and poultry are raised, slaughtered, and processed on TDC units to feed TDC inmates and employees. Vegetables, fruits, grain, and cotton are also grown on the prison farms, and a canning plant preserves surplus crops for use throughout the year within the TDC system. TDC also operates dairies and pasteurizes the milk produced by

its cows. Chickens raised on several units provide eggs for the system. Excess food is sold to other state agencies (id. at 1375-1376).

The expert inspectors found TDC's food processing operations in violation of state public health law in several respects, including faulty equipment, inadequate safeguards against contamination of food, and poor sanitation procedures (id. at 1376).

In addition to its food processing operations, TDC conducts an extensive manufacturing business. Its industrial shops produce, among other things, mattresses, brooms, textiles, soap, machinery, and furniture. TDC also has its own construction division, to which over 2000 inmates are assigned, which performs construction work in the system. The evidence shows that many practices and conditions in TDC work areas violate health and safety standards in state laws, and that a number of serious accidents have occurred in TDC workplaces because of unsafe or improperly used equipment (id. at 1376-1377).

The court found that TDC lacks an adequate program for safety inspections and for the supervision of work safety programs. Safety inspections occur infrequently. Few work related accidents are ever investigated, and there is no recordkeeping system to assist in the routine correction of health and safety deficiencies. There are no regular inspections of TDC facilities by state occupational safety officers (id. at 1377).

The court ruled that, under the doctrine of pendent jurisdiction, it had the authority to address the question whether

conditions relating to the health and safety of TDC food and work areas violate state public health laws. The court ruled that certain Texas health and safety statutes apply to operations in the food and work areas at TDC institutions (503 F. Supp. at 1377-1381).[35/] The court ruled the evidence does not indicate that more stringent standards than those contained in the applicable state statutes need be enforced to remedy harmful conditions, and therefore found it unnecessary to decide plaintiffs' contention that conditions concerning the health and safety of TDC food and work areas violate the Constitution (id. at 1382).

To eliminate the deficiencies it had identified, the court ordered TDC to comply with the state statutes in question. By November 1, 1981, defendants were required to file with the court a plan for regular inspections of all TDC facilities by independent inspectors to ensure compliance with these statutes (R. 8536).

j. Totality of conditions

The district court observed that many courts hearing prison cases have determined whether the totality of conditions is such as to violate the Constitution, rather than viewing each

35/ The statutes in question are the following articles of Tex. Rev. Civ. Stat. Ann. (Vernon's 1976): art. 4476-5 (Food, Drug and Cosmetic Act); art. 4476-7 (Meat and Poultry Inspection Act); art. 4476-9 (sterilization of dishes, broken or cracked dishes, and unlaundered napkins); art. 4476-10 (sanitation of employees where food or drink is handled); art. 4477-1 (minimum standards of sanitation and health protection measures); art. 4420 (entry and inspection); art. 5173-5179, 5182, 5182a (industrial safety and hygiene); art. 165-3 (Texas Milk Grading and Labeling Law); and art. 165-8 (Texas Egg Law) (503 F. Supp. at 1378 n.212).

area of prison life separately. It noted that in this case separate constitutional violations had been found in the areas of overcrowding, security and supervision, health care delivery, discipline, and access to the courts. The court stated that these violations basically exist independently of one another, although the harms caused by each have been exacerbated by the others. Even if the conditions in any one of these areas are not sufficiently egregious to constitute an independent violation, in the court's view their cumulative effect upon TDC inmates contravenes the Constitution (503 F. Supp. at 1383-1384).

k. Unit size, structure, and location

TDC's prison system contains 16 units for male inmates, each housing between 800 and 4000 inmates. These units are typically located on large tracts of land in rural areas so that extensive farming operations may be conducted. Every TDC unit is administered by its warden, who has one or two principal assistants. The lines of authority in each unit are centralized. Thus, even in units housing thousands of inmates, the warden and his principal assistants have the responsibility for supervising all phases of activity (id. at 1385).

The court noted that, with few exceptions, TDC unit prisons are constructed according to the "telephone pole" configuration. This design is characterized by centralized facilities located adjacent to long halls. The halls are intersected at right angles by housing wings, each of which is also a long hall (ibid.).

Penological experts testified that effective operation of a prison unit requires the warden to be acquainted with all inmates and employees of the unit and with all of the units' operations. Expert witnesses for both sides testified that not more than 400 to 800 inmates should be housed in one institution. Units of greater size decrease the warden's ability to oversee, inspect, and give personal direction to unit programs and activities. Absent close supervision by the warden, deficient performance of duties by his subordinates may go undetected, resulting in hazardous or unhealthful conditions for inmates. In institutions of great size, it becomes exceedingly difficult for the warden to obtain adequate personal knowledge of the characteristics of the unit's officers (id. at 1385-1386).

Penological experts also emphasized that the warden should be acquainted with the individual inmates in his unit. According to the experts, this personal knowledge enables the warden to understand the inmates' everyday problems and to assist them with their difficulties. These experts also testified that such knowledge tends to neutralize inmates' feelings of alienation and assists the warden in judging which inmates need close observation and supervision (id. at 1386).

The evidence indicated that the "telephone pole" prison design is disfavored by prison planners and administrators because it accentuates centralization and mass movement and control. Architects testified that the modern trend in prison architecture is toward modular, decentralized prisons, a concept which attempts

to ameliorate the negative effects of institutionalization. Most new prisons are designed according to a modular or "pod" concept, in which small groups of fewer than 50 inmates live, eat, work, and study (ibid.).

The evidence indicates that, in the last ten years, no other prison system in the United States has built institutions designed to house more than 1,000 inmates. Most correctional standards received in evidence recommend a maximum of 400 inmates in a single institution. A number of prison systems are converting their large, traditional prisons into modular prisons by an architectural process known as retrofitting (ibid.).

The court stated that modern correctional philosophy may have as its goal a personalized, decentralized prison experience, but the Constitution has not been interpreted to require the achievement of these goals. The evidence that TDC prisons are highly regimented and that an inmate confined in TDC loses his sense of individuality does not establish that the size or structure of TDC prisons creates harms of constitutional magnitude. Because many of the conditions of confinement in TDC have been determined to violate the Constitution, the question arises whether these conditions can be effectively and completely remedied without modifications in the existing structures of TDC management (id. at 1387).

The court stated that the relief in this case will require many changes in TDC's operations that cannot be accomplished under TDC's existing organizational structure. Each of the organiza-

tional components of the TDC system must be of such a size that the warden and his chief assistants are able to supervise all of the staff closely and to communicate with the inmates individually. On the basis of this evidence, the court concluded that TDC units must be broken down into much smaller organizational entities than now exist, and each new component must have its own manageable supervisory structure (id. at 1387-1388).

The court also observed that sufficient numbers of qualified professionals and paraprofessionals in nearly all disciplines required for constitutionally adequate prison management and support services have not been present at various TDC units. According to the testimony of expert witnesses, the remote and isolated location of the units was a significant factor leading to the shortages. Without the skills and experience of these individuals, the court ruled, TDC units cannot be brought into compliance with constitutional standards. In addition, because these units are located far from population centers, opportunities for employment of inmates in a work release program are greatly reduced (id. at 1389).

On the basis of this analysis, the court provided in its remedial decree that TDC may not make final selection of a site or begin construction of any new housing units for prisoners unless it files a report with the court indicating that the following conditions are met:

(a) the population of the unit will not exceed 500 prisoners, or the unit will be structured so that the population

of each organizational subunit will not exceed 500 prisoners;

(b) the unit will not be located more than 50 miles from a Standard Metropolitan Statistical Area with a population exceeding 200,000, unless the report shows that TDC is able to recruit and maintain adequate numbers of qualified professionals, paraprofessionals, and others to assure that the unit is operated in a constitutional manner;

(c) all maximum security prisoners are confined to single cells of at least 60 square feet;

(d) all minimum security prisoners will be confined in single cells of at least 60 square feet or in dormitories providing at least 60 square feet per prisoner, excluding bathing, toilet and recreation areas; and

(e) the facility will comply with the fire safety standards of the current edition of the Life Safety Code of the National Fire Protection Association (R. 8536).

TDC was required to file with the court a report providing the above information for the Beto Unit (now under construction) and the proposed Grimes County Unit by August 1, 1981 (R. 8537).

Under the order TDC must not begin construction of any new facilities or cellblocks for housing prisoners on existing units unless it has filed with the court a report demonstrating that conditions (c), (d), and (e) above are met. In addition, the report must show that defendants are able to hire and retain adequate numbers of qualified professionals, paraprofessionals, and others to operate the unit in a professional manner (ibid.).

The order required TDC to submit a plan to the court providing for the reorganization and decentralization of each TDC unit housing more than 500 prisoners by November 1, 1981. The plan must assure that the units are subdivided into units of no more than 500 prisoners, that the warden of any unit is responsible for no more than 500 prisoners, that each organizational component of the unit is administratively and programmatically decentralized with its own manageable supervisory structure, and that the architectural modifications and retrofitting necessary to create the sub-units and their reorganization will be completed before November 1, 1982 (R. 8539).[36/]

1. Special master

In its memorandum opinion, the court indicated that it would appoint one or more special masters to monitor implementation of the relief to be ordered. The court stated that implementation of this relief would be a long and complex process requiring careful supervision, and that the court lacked the resources necessary effectively to supervise the day-to-day details of the execution of its decree (503 F. Supp. at 1389). The court noted that special masters have been appointed to monitor and oversee defendants' compliance by a number of courts ordering remedies requiring substantial changes in prison or jail operations and conditions (503 F. Supp. at 1390).

36/ The provisions of the decree pertaining to the reorganization of TDC and the construction of new facilities were stayed pending appeal (650 F.2d at 573-574).

In its Order of Reference entered April 20, 1981, the court designated Mr. Vincent M. Nathan as the special master and delineated the powers conferred upon him (R. 8434). The appointment was made pursuant to Rule 53, Fed. R. Civ. P., and the inherent authority of the court. The court subsequently appointed four monitors to assist Mr. Nathan.

INTRODUCTION AND SUMMARY OF ARGUMENT

There can be no real disagreement that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," Procunier v. Martinez, 416 U.S. 396, 405 (1974), and that prison administrators are entitled to "wide-ranging deference in the adoption and execution of policies and practices" designed to achieve penological objectives. Bell v. Wolfish, 441 U.S. 520, 547 (1979). When presented with an appropriate case, however, courts have an obligation to scrutinize claims of cruel and unusual conditions of confinement and must order appropriate relief to remedy any constitutional deprivations that are determined to exist. This does not give courts license to "assume that state legislatures and prison officials are insensitive to the requirements of the Constitution," Rhodes v. Chapman, 49 U.S.L.W. 4677,4680 (U.S. June 15, 1981), but when violations are discovered the courts must "discharge their duty to protect constitutional rights" (ibid., quoting Procunier v. Martinez, supra, 416 U.S. at 405-406).

The district court, as we have recounted at some length, entered detailed findings describing its determination that Texas' prisons are being operated in a manner which has a substantial

deleterious effect on the lives of some inmates, the health and well-being of many, and the safety of all. The court, concluding that the method of operating the prisons was unconstitutional in several ways, entered a specific remedial injunction designed to alleviate these conditions.

In this Court, Texas, as well as raising issues regarding the proper application of the Eighth Amendment (e.g., Br. 26-34) and the specificity of the remedial order (e.g., Br. 65), complains that it did not receive a fair trial (Br. 107-115) and that the United States was improperly in this lawsuit (Br. 116-121). However, although the State says (Br. 15) that all of the findings below are clearly erroneous, it does not successfully deal with the detailed factual determinations which underlie the remedial order.

In the arguments which follow, we generally rely heavily on these findings, discussing them at some length on those occasions where the State suggests they do not justify the relief ordered (e.g., Br. 82, Huntsville Hospital) and supplementing them with evidence from the record on those occasions where the State complains of overgeneralization (e.g., Br. 73-79, widespread staff brutality).

We conclude that the court was faithful to the evidence and the law, and, with a few exceptions noted below, properly exercised its equitable powers in tailoring relief to the constitutional violations found. In particular, our review convinces us that the remedial steps in the areas of overcrowding (except as

noted below), security of inmates, medical needs, disciplinary proceedings, exercise, access to courts, and fire safety were warranted. Likewise, we contend that the United States was properly in this lawsuit and that the State received a full and fair opportunity to present its contentions below. Finally, we conclude that the circumstances of this case--including the need for five interlocutory injunctions to protect inmate-plaintiffs during this litigation--warrant the appointment of a special master.

In three areas, we have determined that the remedial order exceeded proper bounds: 1) two overly specific requirements governing the manner of relieving overcrowding (see pp. 93, 94-95, infra); 2) an improper delegation of authority allowing the special master to modify the staffing patterns ordered by the court (see p. 133, infra); and 3) provisions limiting the size, structure and location of prison units (see pp. 126-127, infra). With these exceptions, 37/ we urge affirmance of the order because we find it supported by the record and carefully tailored to remedy the systemic violations of the rights of the plaintiff class.

37/ We also concur (see pp. 146-147, infra) in the State's argument that the Board of Corrections, as distinguished from its members, was improperly maintained as a defendant. We take no position on the question whether the court properly required TDC to comply with certain state health and safety laws (p. 125, infra).

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT CONDITIONS OF CONFINEMENT WITHIN THE TEXAS DEPARTMENT OF CORRECTIONS VIOLATE THE EIGHTH AMENDMENT, AND THE RELIEF IT ORDERED WAS GENERALLY APPROPRIATE

The district court found that overcrowding within TDC inflicts serious harm on the inmate population (503 F. Supp. at 1277-1288); that inmates suffer significant injuries as a result of TDC's failure to provide adequate security and supervision (id. at 1288-1307); that TDC fails to provide inmates with sufficient protection from the risk of fire (id. at 1373-1374, 1382-1383); and that inmates in administrative segregation are confined for extended periods without opportunity for exercise (503 F. Supp. at 1364-1367). As we show below (pp. 58-83), these findings are supported by substantial evidence. Accordingly, they are binding for purposes of this appeal. Rule 52(a), Fed. R. Civ. P. Taken together, these findings compel the conclusion that conditions of confinement within TDC inflict pain without penological purpose, and, as such, violate the Eighth Amendment (pp. 83-86, infra).

Under the law of this Circuit, the court appropriately addressed each of these conditions in its remedial decree. With certain exceptions, these portions of the court's order should be affirmed (pp. 87-103, infra).

A. The district court correctly found that TDC is severely overcrowded and that the overcrowding harms inmates

The district court found that TDC is severely overcrowded and that the overcrowding harms inmates in many ways (see pp. 8-17, supra). The State does not challenge the district court's factual findings concerning the degree of overcrowding existing within TDC.[38] It contends, however, that the district court made no findings that overcrowding within TDC actually harms inmates and that, in any event, there is no evidence of record that would support such a finding (Br. 30-41). Both assertions are incorrect.

First, in that portion of its memorandum opinion captioned "Effects of Overcrowding," the district court found:

> (1) The present extreme levels of overcrowding at TDC are harmful to inmates in a variety of ways, and the resultant injuries are legion (503 F. Supp. at 1291);
>
> (2) TDC inmates are routinely subjected to brutality, extortion, and rape at the hands of their cellmates (ibid.).

38/ We note in this connection that a recent comprehensive study of prisons and jails by the National Institute of Justice indicates that in 1978 Texas was the most overcrowded prison system in the country. American Prisons and Jails, Vol. I, pp. 62, 63 (National Institute of Justice, 1980).

> (3) Potentially assaultive inmates are present in great numbers in every dormitory, and since the dormitories are practically unsupervised, violent inmates have free access to their fellows. The record indicates that these risks frequently turn into the repulsive actualities of sex malpractices, barbarous cruelties, and extortions, all of which have been shown to be commonplace in the dormitories (id. at 1282); [39/] and
>
> (4) A number of highly qualified expert witnesses presented persuasive testimony relating to the incremental negative physical and psychological effects of inmates' continued close confinement in too-intimate proximity with their fellows. Included among the consequences were the spread of disease and the enhancement of stress, tension, anxiety, hostility and depression. Among the distinguishable manifestations of hostility and depression, the experts found, were increased blood pressures, aggressive behavior, and extreme psychological withdrawal. These expert witnesses also concluded that overcrowding at TDC has substantially contributed to increased rates of disciplinary offenses, psychiatric commitments, and suicides (ibid.; footnote omitted). [40/]

Second, the record adequately supports the district court's findings concerning the harmful effects of overcrowding upon TDC inmates. For example, Garvin McCain, a psychology professor at the University of Texas, studied the relationship between the TDC

39/ See our discussion of violence in TDC, pp. 75-80, infra.

40/ These findings, of course, may not be set aside unless clearly erroneous. Rule 52(a), Fed. R. Civ. P. Moreover, an "appellate court must be especially reluctant to disregard a factual finding based upon the evaluation of testimony that draws credibility into question * * *." Scott v. Moore, 640 F.2d 708, 729 (5th Cir. 1981). See also United States v. Wiring, Inc., 646 F.2d 1037, 1041 (5th Cir. 1981).

suicide rate and inmate population levels. Comparing the period 1968-1972 with the period 1973-1977, he concluded that the population level increased 34% and the suicide rate doubled--a statistically significant correlation (McCain, April 25, 1979, at 51). Comparing the period 1964-1970 with the period 1971-1977, and using data from one of defendants' own exhibits, Dr. McCain found that a 40% increase in TDC's inmate population level was accompanied by a 478% increase in suicides (id. at 49, 51-53).

Dr. McCain also studied the relationship between TDC disciplinary infractions and population levels from 1969-1978. He concluded that "as population increased disciplinary infraction rates increased, and the rates increased disproportionately to the population. * * * [W]here you almost doubled the population, you at least quadrupled the disciplinary infraction rate" (id. at 20, 21). 41/

41/ Defendants are therefore incorrect in asserting (Br. 39-40) that Dr. McCain "had [not] studied the conditions at TDC." In this connection, we note that all of the citations on page 40 of defendants' brief are incorrect. For example, it was Dr. McCain, not Dr. Cox, who testified concerning the "withdrawal factor." This testimony was not--as defendants assert (Br. 40)--that "crowding actually reduces violence." Rather, Dr. McCain testified that the available data suggests that "intensely crowded situations" may produce withdrawal, whereas less crowded situations produce aggressive behavior (McCain, April 25, 1979, at 163-164). He explained that studies with animals showed that "[y]ou have a U-shaped function in terms of aggression, that as crowding increases aggression increases and then decreases" (id. at 163).

Drs. McCain, Cox, and Paulus have recently completed a report entitled "The Effect of Prison Crowding on Inmate Behavior," published by the National Institute of Justice (Dec. 1980), which incorporates information concerning their study of TDC. Because the report is not readily available, we are lodging a copy with the Clerk for the Court's convenience and furnishing copies to counsel.

Verne Cox, also a professor of psychology at the University of Texas and an associate of Dr. McCain, was shown photographs of Dormitory 2 at Ramsey II taken in the summer of 1978. He testified (Cox at 55):

> Well, I have never seen a dormitory this crowded in any prison I have been in, but every variable that we think would be operative and produce a negative crowding effect would be present in this dormitory, too little space, too many people visually aware of one another and physically close to one another.

Dr. Cox was also shown photographs of Dormitory 4 at the Central Unit taken around the same time. He testified as follows concerning these photographs (Cox at 57):

> All I can say is everything we have done for eight years would suggest that this is a bad thing to do to people, and it has a lot of negative effects * * *. Everything we have done would say that this would have a deleterious effect on people psychologically.

Dr. Edward Kaufman, Chief of Psychiatric Services at the University of California Irvine Medical Center, also testified concerning the effects of overcrowding in TDC. Dr. Kaufman personally inspected the Huntsville, Diagnostic, Wynne, Eastham, Ellis, Retrieve, Darrington, Central, and Ramsey I and II Units (Kaufman at 34). He observed triple-celling in TDC units and termed the practice "unbelievable" (id. at 138). Dr. Kaufman, who had visited many other correctional facilities besides TDC's, stated (id. at 140-141):

> T.D.C. contains several units which were the most overcrowded that I have seen. Some of these units had what seemed to me to be a relevant shortage of custodial officers, and I thought they were powder kegs both in terms of inmate explosions and inmate psychopathology.

Dr. Kaufman studied TDC records concerning inmate suicides, and listed overcrowding as one of the factors contributing to suicides within TDC (id. at 157, 189).

Arnold Pontesso, Director of the Survey and Planning Center of the National Council on Crime and Delinquency, also testified about the effects of overcrowding within TDC. Mr. Pontesso served in the United States Bureau of Prisons from 1939 to 1967 and was Warden of the federal reformatory at El Reno, Oklahoma, for five years. He testified that he had inspected virtually every cellblock and dormitory within the TDC system (Pontesso at 71-72). He stated (id. at 73) that the dormitories in Central and some of the other units

> appeared just like one big bed where they were all sleeping together and grossly overcrowded, the worst that I have ever seen in this country. There was one I visited in the Juarez Prison in 1956, and it was more crowded than these dormitories at T.D.C., but that's the only one. I have never seen anywhere in the United States where the dormitories were so stuffed with people.

Mr. Pontesso testified that such overcrowding produces many harmful results, including homosexuality (ibid.).

Frederic Moyer, an expert in the field of architectural design for correctional facilities and Director of the National Clearinghouse for Criminal Justice Planning and Architecture from

1971 to 1977, testified that he has visited several hundred prisons and jails and has never seen facilities as crowded as TDC's (Moyer at 55-56). He stated that overcrowding at the Central Unit, for example, would prevent the prompt evacuation of the facility in the event of fire (id. at 40-43).

Dr. Frank Rundle, a board-certified psychiatrist, testified that confining two persons in a 45-square-foot cell ten hours a day is counter-productive to the psychological health of inmates (Rundle at 73-74). In his view, reasonable men would not disagree that confining two or three inmates in a 45-square-foot cell produces harmful stress (id. at 154).

State Senator A. R. Schwartz testified about Director Estelle's representations to the Texas Legislature concerning the problems created by overcrowding within TDC (Schwartz at 174-175):

> Well, he's always stated that overcrowding * * * presents a safety problem to the prisoner, and he's always emphasized that he cannot guarantee in the same way the safety of his prisoners from assaultive behavior on the part of other prisoners in any condition where they're required to be two in a cell where there's only supposed to be one or three in a cell where there's only supposed to be two, and that's the major concern that he's addressed to us, aside, of course, from the fact that it's difficult to maintain the same kind of health standard or the same kind of behavior patterns. * * * [I]t's a hostility-building condition, and I think he's expressed in every way that he could express it, his concern about that condition.

Director Estelle's own testimony is consistent with the district court's findings concerning the harmful effects of overcrowding within TDC. Mr. Estelle testified that the TDC assault rate "increased dramatically" during the period 1974-1976 (Estelle at 158), and that single-celling is desirable because it "reduces the opportunity for inmates preying one upon the other" (id. at 131). Even defense expert witness Fred Wilkinson did not deny that overcrowding in TDC has a debilitating effect upon inmates (Wilkinson, August 16, 1979, at 163).

In light of this testimony, the district court's finding that TDC inmates suffer serious harms as a result of overcrowding is not clearly erroneous. 42/

42/ Defendants rely heavily upon the testimony of TDC employee Dennis Barrick that there is no relationship between violence and population density within the prison system (Br. 39). Professor McCain criticized Mr. Barrick's study extensively (McCain, September 11, 1979, at 34-45) and concluded that he would not accept it as a master's thesis (id. at 44-45). The district court addressed Mr. Barrick's study in its memorandum opinion, and concluded that it did not outweigh other evidence of record that overcrowding has a substantial effect on the rate of violent incidents (503 F. Supp. 1282 n.20). Conflicts in the evidence of this nature are for the district court to resolve. Similarly, the testimony of two State witnesses who said they didn't notice any stress or tension among TDC inmates, also relied upon by the State (Br. 40), was but a part of the record addressing this point that was before the trial court. It, too, was weighed in the balance, and in light of the abundant testimony to the contrary, there is no basis to find the court's conclusion clearly erroneous.

B. The district court correctly concluded that TDC failed to provide inmates adequate security and supervision

The district court found that TDC inmates were subjected to "frequent physical and sexual assaults, intimidation, bribery, and rule by threats and violence" (503 F. Supp. at 1303), in part as a result of the failure of the State to hire a sufficient number of security personnel, the use of inmate guards (building tenders), and the commission by TDC staff of "unwarranted acts of brutality" (ibid.).[43] The district court also found that TDC's failure to adopt an adequate system of classifying inmates produced violence between ill-matched cell or dormitory inhabitants (id. at 1282).[44] The record supports the district court's determination that Texas has failed in its duty to take steps to provide reasonable protection to TDC inmates from violence visited upon them by inmates and TDC employees.

These shortcomings have subjected inmates to unacceptable levels of violence and an unreasonable risk of harm.[45] TDC contests this conclusion by citing its own experts (Br. 59-60), yet the testimony reveals that TDC failed to inform those experts fully.

43/ See pp. 17-27, supra.

44/ See p. 12, supra.

45/ See Addendum. To avoid burdening this brief with lengthy citations to the record, we have compiled an Addendum containing citations to incidents of violence in the record.

For example, TDC's expert penologists admitted that they had not reviewed any incident reports in preparing for their testimony (Wilkinson, August 16, 1979, at 174; Fudge at 123-131; see also Bruce Jackson at 268).[46/] They relied on figures provided by TDC, which were at odds with TDC's own reports. For instance, TDC told its security expert, Fred Wilkinson, that it had only 64 assaults in 1975. This figure led Wilkinson to conclude that TDC was a safe prison system (Wilkinson August 16, 1979, at 181-182); but in its own Exhibit 188 TDC reported an additional 76 aggravated assaults with weapons for that year. In a report prepared by TDC's research division, for 1976, the next year, TDC reported 1,172 assaults (USX I-51).[47/]

Additionally, TDC relies heavily on the opinion of Bruce Jackson (Br. at 58-59), who testified for TDC, that TDC ran a safe prison system. Mr. Jackson's opinion, however, was based solely on TDC's homicide rate. He did not consider assaults, rapes or other forms of violence (Jackson at 220, 268). As the discussion in the margin

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46/ By contrast, expert witnesses for the United States reviewed large numbers of incident reports (see Pontesso at 28, 42, 44, 46, 52, 58-59; Sarver at 24-35; Nagel at 61-64).

47/ See 503 F. Supp. at 1294 n.50.

below demonstrates, the high level of violence in TDC is documented in the record by numerous incidents of violence and is attributable to systemic deficiencies produced by TDC's failure to exercise reasonable care in preventing violence.[48/]

1. TDC is understaffed and the staff is poorly trained

In the summer of 1979, TDC employed one guard for every 12.45 inmates that it confined. This 1:12.45 guard-to-inmate ratio was,

48/ Texas argues (Br. 58-60) that TDC is safer than other prison systems, yet the following exchange suggests otherwise (Tisdale at 47-48):

> Q. Mr. Tisdale, you've been in the Mississippi Prison before you came to T.D.C.?
>
> A. Yes, sir.
>
> Q. And then you left T.D.C. and went to the Mississippi Prison again?
>
> A. Yes, sir.
>
> Q. Where would you rather be if you had to go back to prison again?
>
> A. Mississippi.
>
> Q. Why?
>
> A. Why? Well, they treat you like people. They don't harass you the way people do here. They keep you in such a turmoil and keep people at such an edge that it's impossible to live. I mean it's like a nightmare. You're wondering every day if you are going to get beat again or if you're the next person it's going to happen to.
>
> Q. In Texas?
>
> A. Yes, sir.

by far, the worst in the nation.[49] By comparison, the national average is one guard for every five inmates (503 F. Supp. at 1290).

TDC Director Estelle admitted that a guard-to-inmate ratio of 1:12 is "extremely dangerous" and that the assault rate had increased "dramatically" (Estelle at 158). There was substantial evidence at trial upon which the district court properly found TDC's staffing inadequate, but perhaps the most revealing came from TDC's own 1976 justification for its budget request, which stated, in part:

> The situation at Eastham is very similar to that of Ellis, Ferguson, and Ramsey, differing only in degree. The field work force has 976 assigned inmates with 23 squad officers authorized. This means that approximately 401 inmates must be left in their cells daily. To work those inmates daily would require 16 additional officers. Three additional "highriders" would

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48/ (continued)

> Q. Isn't that the same in Mississippi?
>
> A. No, sir.
>
> Q. Mississippi is the place that's been declared unconstitutional.
>
> A. I know that. I'm well aware of that. I've been there twice, and they are not doing people the way they are here.

Mr. Tisdale testified that he witnessed an average of two beatings each night during his stay at Coffield (Tisdale at 67).

49/ See American Prisons and Jails, Vol. III, pp. 102, 108 (National Institute of Justice, 1980).

> be required for 16 additional squads. To insure that 46 field officers, those presently assigned plus the 19 above, were present daily, it would require 10 additional positions for relief. The unit population is now at 2240 when the designed capacity was 1800.
>
> The building has been staffed with one correctional officer assigned to each wing of the building on the two day shifts and to two wings on the night shift. The staffing has never been adequate, not even when the population was 1500 - 1600, and becomes more inadequate as the population continues to increase. The high turnover rate of employees on this unit is largely attributable to this fact. They are grossly overworked, they feel quite uncomfortable knowing that when everyone is present for duty there are only 14 officers in the housing units and halls to control 2240 inmates, and they never know when they report for duty if it will be an eight hour shift or a sixteen hour one. The ideal staffing situation at this facility, with its present classification of inmates, would require an employee assigned to each cellblock three shifts per day and an employee to operate the control panels and secure the pipe chases between cellblocks for each wing of the building. This would require an additional 139 employees. It would require an additional 13 employees to provide the proper relief for those presently authorized.

(DX 76 at 117).

Significantly, the population has continued to climb, but without staff increases. Therefore, at Ferguson, "with only one officer assigned to either two or four cellblocks, the majority of inmates can do as they please when the officer is searching and counting those coming in or out" (id. at 122). At the Eastham Unit, at night there is one officer to supervise 450 inmates, all confined more than one to a cell. The

night captain for that unit conceded that when the officer is not inside the cellblock, which is most of the time, nobody knows what is happening in the cellblock (Herbert Scott at 80).[50/] TDC has also requested additional staffing at Ferguson because "[v]iolent acts between cell partners, homosexual assaults, thefts, escape attempts, etc., require a constant watch by security personnel" (DX 76 at 122).

TDC does not post officers inside the cellblocks or domitories. The evidence showed that an officer stationed outside a cellblock can only see into the first four or five cells of the first tier[51/] and an officer stationed outside a dormitory does not know and cannot control what happens inside (Pontesso at 69-70; Albach at 77-78). Reasonable corrections practice requires stationing officers inside each dormitory and on each tier of each cellblock to provide minimal supervision (Pontesso at 479-480; Sarver at 49, 67-69). See Williams v. Edwards, 547 F.2d 1206, 1213 (5th Cir. 1977); Pugh v. Locke, 406 F. Supp. 318, 333 (M.D. Ala. 1976), aff'd as modified sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev'd in part, 438 U.S. 781 (1978).

The insufficient number of staff employed by TDC has prevented a significant percentage of inmates from leaving their cells or dormitories to work every day because there are not enough guards

50/ See also, Sarver at 67-69.

51/ The usual TDC cellblock consists of three tiers with twenty or thirty cells on each tier (503 F. Supp. at 1291).

to supervise them.[52/] This has undermined TDC's "work ethic" (Br. 64) and meant that significant numbers of guards are needed to supervise dormitories and cellblocks during the day.

TDC's staffing insufficiencies are exacerbated by a guard turnover rate that is one of the highest in the nation. As defendant Estelle conceded, it would be difficult to run a business with so many employees departing (Estelle at 160-161), particularly since "[t]he best ones, the ones with the best future are the ones who leave" (ibid.). The large number of fresh, inexperienced officers in positions in which they come into contact with inmates causes supervision and security to suffer.

Moreover, as the court found (503 F. Supp. at 1289-1290), TDC's training does not adequately prepare new officers for their responsibilities. At the time of trial, officer training had been reduced from four to two weeks and officers receive no training in the use of limited physical force or alternative methods of calming crises (ibid.). Moreover, the court found, based on the testimony of former officers, that new officers find practices at the units so at variance with their training courses that they must "unlearn the policies taught at the training school" (503 F. Supp. at 1290).

52/ These inmates are in addition to the approximately ten percent of the inmate population who are unassigned to work everyday because of disability or illness or because they are newly arrived at the unit (503 F. Supp. at 1292).

2. TDC has employed inmates to supervise and control other inmates

TDC has attempted to compensate for its failure to employ sufficient staff by placing inmates in positions of authority over other inmates.[53] Such inmates are referred to as building tenders.[54] The court found that building tenders act as guards by issuing and enforcing orders. They also assist guards in the performance of sensitive tasks, have access to confidential information that they use for corrupt purposes, and receive special privileges for their efforts. Moreover, they engage in acts of force with virtual impunity.[55] TDC disputes the court's findings and contends that building tenders perform strictly clerical and janitorial functions, and do not enjoy significant special privileges, carry weapons, escape punishment for misdeeds, or exercise authority over other inmates (Br. 66-72).

The record overwhelmingly supports the court's findings. For example, TDC's instructions to its wing floor tenders contains the following sampling of responsibilities. He must: advise officers of any conflicts or problems that inmates have; wake up inmates

53/ For establishment of the link between TDC's failure to employ a sufficient number of staff and the use of building tenders, see the court's undisputed findings at 503 F. Supp. at 1294 n.54.

54/ As used by the court the term building tender encompasses floor boys, wing porters, hall tenders, orderlies, turnkeys, key girls, bookkeepers, count boys, field porters, water boys, lead row workers, and tail row workers (503 F. Supp. at 1295 n.55).

55/ See pp. 22-25, supra, for a fuller explanation of the abuses of the building tender system.

for breakfast; see that inmates report to the hall when called; have "the opposite shift FLOOR TENDER on his shift watch while he is out for chow, shower, or recreation"; operate the television set and see that it and radios are turned off at count time; advise inmates of current and new procedures; and, most importantly, "[h]e shall NOT allow sex malpractice, brewing of alchoholic beverages, gambling, possession of contraband items, or fights in his Wing" (PX 24). This description is undeniably that of a guard's duties. 56/

There is abundant testimony in the record that building tenders break up fights, keep track of inmates' whereabouts, and enforce

56/ Another TDC memorandum provides a further example of the authority that building tenders are required by TDC to exercise over inmates (Carranza at 141).

> "Effective immediately the below outlined procedure will be strictly followed during the building count. Only the head building tender and the building tender on duty when count time is called will be allowed out of their cells when the count is in progress. After the wing has been counted by an officer, everyone is to remain in their cell except the wing porters. As the porters are finished cleaning the wing, they will return to their cells and remain there until the count is clear along with everyone else. The head building tender will be held responsible for the strict following of this order. If it is not enforced, head building tenders along with the guilty party will be subject to punitive action."

In short, building tenders are responsible for ensuring that proper procedures are followed. If someone disobeys, the building tender must enforce the order.

discipline by physical force and threat.[57] As TDC's witness, Bruce Jackson (Jackson at 205, 209-210) said, building tenders do the guards' "dirty work' and can be considered "instutionalized snitches."[58]

While denying that building tenders serve as anything but clerks and janitors, TDC stresses that building tenders are carefully chosen (Br. 68-69). TDC points out that building tenders are nominated by the wardens at the individual units. The nominees' names are submitted to the State Classification Committee, which "undertakes a thorough analysis of the inmate nominated before approving or disapproving the warden's recommendation" (Br. 69). The only assignments reviewed by the State Classification Committee are those of trustys and building tenders (Woods at 121).

Because TDC fails to employ a reasonable number of security staff, it must rely on prisoners to run the prisons (Pontesso at

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57/ E.g., Eckles at 24-32, 53-54, 66-77, 150, 176, 203-216; Heiman at 67; Guerrant at 13, 18, 34; Guerra at 14-16, 45-46, 54, 146-147, 151; Schauer at 12, 13, 28, 36, 37-39, 74, 79, 80, 137; Whitt at 27, 36, 37, 41, 106, 110, 112, 113; Bennett at 23-27, 58; Lagermaier at 44-46; Hubbard at 36; Christian at 13-16, 116; Edward Turner at 96; Lippman at 18-23; Bruce Jackson at 132, 205). See also, Addendum at A-6 to A-10.

58/ TDC quotes at length from the testimony of building tender Lional Lippman to demonstrate that building tenders assist TDC officials by informing them of problems in the units (Br. 70-71). This limited concession by TDC does not square with the assertion that building tenders' assignments are strictly clerical and janitorial (Br. 66).

132-134). As one TDC warden told Bruce Jackson (Jackson at 234), he would not use building tenders to perform security functions if he had "four officers on every one of those tiers * * * but I don't have that many officers." A graphic example of the manner in which inmates run the institutions was offered by inmate Marc Sturdivant who described one incident and the orders that he gave to handle it (USX III-190):

> This morning at 6:45 A.M. I was in the Office of the Hospital typing a prescription that Captain Ridings had just written, when I happened to look up and see Inmate COLEMAN, Michael, TDC # 235035 swing both fists at the Captain, hitting him about his head. I got up from my desk and started towards the Captain and officer Ivan and a few inmates who were waiting outside the Hospital door rushed in and pulled inmate Coleman out of the Hospital. I took Captain Ridings by his arm and lead him out of the room and called for Inmate Knight (who works in the Hospital) to take him back to the first aid room. I then told several of the inmates sitting in the treatment room to go back to their quarters and told Inmate Baker (who works in the Hospital) to lock the door. I then called the Searcher's Desk and asked them to send an Officer to the Hospital. Then I called Major J. A. Williamson's office and told the inmate who answered the phone that Captain Ridings had been hurt and to notify the Major.

Individual building tenders derive their status from the position held by the TDC officer to whom each answers (id. at 1296). Thus, a building tender who works for a major has more status than one who works for a sergeant (Albach at 208-209). Indeed, in many cases building tenders effectively outrank lower level corrections officers. For example, Lt. Garcia, a long-term TDC employee, was assigned to another unit after cursing Warden Christian's head building tender (Christian at 161; 503 F. Supp. at 1296 n.61).

Building tenders are rewarded for their service with special privileges. In an atmosphere in which the smallest privilege assumes significance, building tenders are granted partial immunity from discipline;[59] greater mobility than is afforded the general population;[60] first consideration for single cells and choice of cell assignment and cell partner;[61] access to top officials,[62] and more personal property, including clothes, stereos and pets.[63]

Building tenders are also the principal purveyors of corruption in TDC. The record establishes that they possess weapons

59/ See, e.g., Hill at 20; Stevens at 104-105, 179-180; Hubbard at 62, 223; Ollie Jones at 101-103; Clarence Moore at 20-25, 55-56, 67-68; Lagermaier at 37-39; Eckles at 34-39, 52-53, 233; Guerra at 63-64; Williamson at 146-164; Oscar Turner at 79; see also USX's III-308, 317, 318, and 415. The exhibits contain TDC disciplinary reports in which building tenders were charged with offenses and not punished or released from punishment almost immediately. Many of the victims required medical attention.

60/ E.g., Eckles at 32-33, 169; Guerrant at 13; Guerra at 146-147; Schauer at 89; Emmett Franklin at 56-57, 86-87; Hubbard at 147.

61/ E.g., Christian at 149, 288; Forest at 11; Hill at 12; Lagermaier at 41-42; Ballard at 32, 36; Guerra at 21-22; USX III-105.

62/ E.g., Albach at 118, 207; Pontesso at 113-114; Jeters at 78-82; Christian at 103; Guerra at 51-52.

63/ E.g., Eckles at 39-40; Christian at 150-153; Guerrant at 13; Guerra at 16-17, 23-24, 170-172; Ballard at 33.

(often with the knowledge of officials), illicitly sell food to inmates, peddle influence and control prostitution.[64/]

The use of inmates as guards has also resulted in the infliction of physical violence on inmates. The incidents cited by the court (503 F. Supp. at 1295 nn.57, 60; id. at 1297 n.64) are gruesome examples of the practices documented by the record, which reveals a pervasive pattern of violence inflicted on inmates by inmates acting as guards.[65/] There can be no suggestion that these incidents of violence were few in number or isolated in nature.

The record, therefore, supports the district court's findings that "abuses of authority are inherent in the building tender system,[66/] and that TDC officials are directly responsible for that

64/ E.g., Eckles at 24-31, 42-44, 45-48, 234-235, 239-241; Guerrant at 14, 50, 87; Guerra at 18-19; 161-163, 165-170; Rosa Lee Knight at 24; Crosson at 28, 29, 72-73; Simonton at 27-30; Gibson at 46, 108; Whitt at 51-57, 130-132; Delmar Watson at 70-72, 178; Ballard at 134; Ward at 143; Hubbard at 150-153; Lovelace at 49-52; Robles at 32, 97, 113-114; Oscar Turner at 35.

65/ See Addendum at A-6 to A-10.

66/ The use of inmates in custodial positions is "universally condemned by penologists [because] it breeds fear and hatred * * *." Holt v. Sarver, 309 F. Supp. 362, 373 (E. D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971). That court explained, 309 F. Supp. at 375:

> By virtue of their positions of authority and the functions they perform trusties can make or break [other inmates]. They can make prison life tolerable or they can make it unbearably hard. They can and do sell favors, easy jobs, and coveted positions; they can and do extort money from inmates on any and all pretexts. They operate rackets within the prisons, involving among other things the forcing of inmates to buy from them things like coffee at exorbitant prices. They lend money to [inmates] and then use force or threats of force to collect the debts.

system's continuation" (503 F. Supp. at 1298). By perpetuating the system and placing their imprimatur on selected individuals through the State Classification Committee and failing to control the abuses that inevitably have resulted from the system, TDC has assumed responsibility for the harm resulting from the building tender system.

3. TDC correctional officers inflict widespread brutality on inmates

The district court found that TDC staff unlawfully inflict brutality on inmates by: (1) the administration of summary punishment, (2) capricious attacks on inmates such as writ writers in response to their lawful activities, (3) responding with excessive force to violence or resistance by inmates, frequently long after the need for force has vanished, and (4) responding with punitive force to action by groups of inmates. TDC challenges (Br. 73) the court's conclusion that such violence is routine, but it does not challenge the court's numerous findings that unconscionable and

66/ (Continued)

Such abuses are inherent in a building tender system. As the court in Pugh v. Locke, supra, 406 F. Supp. at 325, found:

> Another result of understaffing is that some inmates have been allowed to assume positions of authority and control over other inmates, creating opportunities for blackmail, bribery, and extortion. Some prisoners are used as "strikers" to guard other inmates on farm duty and as "cell flunkies" to maintain order and perform tasks for prison staff. They are afforded special privileges, including freedom to ignore prison regulations and to abuse other inmates.

punitive force was used against inmates (see 503 F. Supp. at 1299 nn.70, 71; 1300 nn.73, 74, 75,; 1301 n.76; 1302). These incidents were merely examples from the voluminous documentation in the record of the excessive and often capricious force used against inmates.[67] The incidents described by the court together with the hundreds of others testified to at trial establish that inmates at TDC are subjected to a systemic pattern of officially inflicted violence.

The court found that guard abuses in TDC are, in part, attributable to the inadequacy of TDC's staffing, and its failure to train its security force properly (id. at 1299, 1302).[68] The court also attributed staff brutality at TDC to its failure to discipline officers who engage in acts of excessive force (id. at 1303). Although the record contains many incidents of guard force which resulted in inmates receiving medical care, the incident reports repeatedly state that only necessary force was used (id. at 1300 n.75 and 1302 n.78).[69]

67/ For further examples, see Addendum at A-11 to A-16.

68/ See the discussion supra, at p. 21.

69/ TDC challenges (Br. 76) the court's finding (id. at 1302-1303) that mace was routinely used to inflict unnecessary violence. Yet, the State chose not to appeal from this portion of the court's judgment, agreeing in the Consent Decree (R. 8391) to develop and implement standards to ensure against the abuse of chemical agents. For this reason, the court's findings regarding the use of mace remain relevant only as a contributing element to the overall finding of a constitutional violation. Regardless, the record reveals numerous instances of the unnecessary and punitive use of mace (e.g., Lovelace at 75-78; J. Pope at 24-25; PX 15, Part II. C. 4; Rundle at 81-82, 159; Crosson at 20-26).

In short, the plaintiffs and the United States established a pervasive pattern of staff brutality that resulted from systemic practices and deficiencies created and perpetuated by the defendants.

4. TDC's classification system is inadequate

The court found TDC's classification system "totally inadequate properly to assure the peaceful compatibility of cellmates" (503 F. Supp at 1282). At present, TDC relies only on age and recidivism in determining to which unit an inmate will be assigned (Woods at 12, 86; McKaskle at 19, 21; 503 F. Supp. at 1282). There is no formal method of classification once an inmate arrives at the assigned unit. Even this inadequate system, however, has collapsed as a result of overcrowding. The principal criterion is the availability of space (Pontesso at 102, 275; Ralph Gray at 58-59). TDC's failure to operate an adequate classification system produces violence by mixing incompatible inmates and allowing the strong to prey on the weak (Fisher at 64-65, 67-68).[70]

69/ (Continued)

TDC attempts to impeach the credibility of all inmate witnesses by quoting from the testimony of inmate Hardin. TDC does not reveal that Mr. Hardin testified on behalf of the State. The exexchange cited by TDC in its brief occurred on cross-examination of Mr. Hardin by counsel for the plaintiffs, who demonstrated that Mr. Hardin's testimony was not credible.

Although TDC presents the exchange as a quotation, it is, in fact, a paraphrase of five pages of testimony. Mr. Hardin also revealed on cross-examination that he had demanded favors from TDC administrators in exchange for dropping his litigation against them (Hardin at 204-218).

70/ Although TDC contends (Br. at 12-13) that extensive information is compiled on inmates, it is not used to determine cell and dormitory assignments. TDC's citation to McKaskle (Br. at 54) is inapposite, since the cited testimony refers to job, not living assignments.

C. The district court correctly found that fire safety measures at TDC are inadequate

The court's finding of inadequate fire safety measures at TDC (see pp. 41-44, supra) is supported by substantial evidence and, thus, not clearly erroneous. Frederic Moyer, an expert in prison architecture, examined the blueprints of TDC facilities. He testified that only a few units have more than one stairway (Moyer at 41) and that "[a] minimum of two means of egress or exit are required by every code that is promulgated in the United States" (id. at 24). Stairways at many of the units do not meet minimum standards because they are not enclosed in noncombustible material, are not wide enough for the number of people who must use them, and do not exit outside the building (id. at 41-44, 52-53). In many of the units inmates must travel 500-600 feet to exit the building (id. at 45-46, 54-55); the maximum distance between exits should be 200 feet (id. at 51). TDC units typically provide no smoke separations, so that smoke from a fire in one part of a facility can travel to every other part of the facility (id. at 51).[71/]

Samuel Hoover, an expert in the field of public health and a member of the Commission Corps of the United States Public Health

71/ In most prison fires it is smoke, not flame, that causes loss of life. In Brushy Mountain, Tennessee, a vacant cell block was intentionally burned to study the effects of fire in a prison setting. It was found that, as a result of a fire set in a cell on the lower level, "people at the upper levels would have been dead within five minutes from smoke inhalation" (id. at 23-24).

Service, also testified that most TDC units lacked the required second exit (Hoover at 42-43). There were no fire escapes from the second and third floors of the living areas of the units he inspected (id. at 48). See also Silver at 118-127. Even defense expert Fred Wilkinson agreed that every TDC living area should have a second exit (Wilkinson, August 16, 1979, at 158-160).

The State relies upon the testimony of TDC employee Eugene Shepard that TDC units are equipped with ventilation systems that would prevent the spread of smoke or toxic fumes in the event of fire (Br. 95). There is no evidence that TDC tested its ventilation systems to determine if they were adequate to prevent the spread of serious fires. United States' expert Samuel Hoover testified that the ventilation systems in the units he inspected were "usually inadequate" (Hoover at 30), and the district court found that TDC facilities lacked adequate ventilation (503 F. Supp. at 1374).

TDC's fire safety record cannot properly be characterized as "excellent" (Def. Br. at 97). A TDC inter-office communication (USX IV-5) indicates that during the period September 1, 1973, to January 31, 1975, thirteen fires occurred at various TDC units, causing over $217,000.00 in damage. During that same period, a total of 317 fire safety violations were noted at TDC units (ibid.). See also Mc Cann at 109-113 (fire on June 5, 1978, in the Vocational Masonry School at the Clemens Unit); USX IV-46

(fire on February 21, 1978, at the Maintenance Shop of the Brick Factory at the Jester I Unit); and USX IV-11 (fire at Ramsey I Unit in January, 1978).

D. The overcrowding, lack of security and supervision, lack of fire safety, and failure to provide exercise for inmates in administrative segregation subject inmates to conditions that violate the Eighth Amendment

The district court's findings concerning overcrowding, the lack of security and supervision, the lack of fire safety measures, and the failure to provide exercise for inmates in administrative segregation establish the conditions of confinement within TDC that violate the Eighth Amendment. This Court has found Eighth Amendment violations in comparable circumstances. See, e.g., Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (overcrowding, lack of security, including failure to employ sufficient guards, fire and safety hazards, health and sanitation violations); Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) (overcrowding, lack of security, including failure to employ sufficient guards and use of inmates as guards).[72/]

72/ See also, Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971). Regarding security and supervision, in Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973), which TDC cites (Br. 57) as establishing a relevant standard, the court employed a two-part inquiry:

> (1) whether there is a pervasive risk of harm to inmates from other prisoners, and, if so, (2) whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm.

It is noteworthy that, although TDC contends (Br. 57) that a risk of harm is not enough, Woodhous explicitly speaks in terms of a risk of harm and a threat of violence. The distinction is insignificant in this case, since the record establishes that TDC has failed to exercise reasonable care to prevent inmates from harming other inmates and that this breach of duty has produced pervasive harm.

The Supreme Court's recent decision in Rhodes v. Chapman, 49 U.S.L.W. 4677 (U.S. June 15, 1981), is consistent with these prior decisions. In Rhodes, the Court held that confining two inmates in a 63-square-foot cell in the Sourthern Ohio Correctional Facility is not cruel and unusual punishment.

Conditions of confinement at the correctional facility at issue in Rhodes bear little resemblance to those prevailing in TDC. The only significant complaint the Ohio inmates advanced in Rhodes was double-celling. In Rhodes, 38% of the inmate population was double-celled in 63-square-foot cells; double-celling had not significantly reduced the availability of space in the day rooms; there were only isolated incidents of failure to provide medical or dental care; there was no evidence that double-celling itself caused greater violence; and the ratio of guards to inmates was acceptable (id. at 4678). By contrast, the evidence as to Texas showed that virtually all inmates were confined either in a 45-square-foot cell with one or more persons or in an extremely overcrowded dormitory; that overcrowding had severely limited day room space; that the entire health care system evinced deliberate indifference to serious medical needs; that overcrowding caused greater violence; that the guard-to-inmate ratio was among the lowest, if not the lowest, in the country; and that inmates were frequently brutalized by guards and building tenders. TDC and SOCF are plainly worlds apart.[73/]

73/ Texas contends (Br. 28) that the Supreme Court rejected the "totality of circumstances" test in Rhodes. This is incorrect. Justice Brennan's concurring opinion, in which Justices Blackmun and Stevens joined, pointed out that the majority had sanctioned that approach in stating that prison

(continued)

In holding double-celling at SOCF constitutional, the Supreme Court addressed "for the first time the limitation that the Eighth Amendment * * * imposes upon the conditions in which a State may confine those convicted of crimes" (id. at 4678). The Court reviewed its prior decisions interpreting this Amendment and ruled that "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment" (id. at 4679).[74/]

73/ (Continued)
conditions, "'alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities'" (49 U.S.L.W. at 4683 n.10), and the majority did not take issue this this interpretation. See also Hutto v. Finney, 437 U.S. 678, 687 (1978). Thus nothing in Rhodes requires this Court to abandon the approach it has taken in virtually all of the prison conditions cases that have come before it.

74/ All of the remaining overcrowding cases upon which Texas relies (Br. 36) are distinguishable. Bell v. Wolfish, 441 U.S. 520 (1979), involved the double-celling of prisoners in 75-square-foot cells in the Metropolitan Correctional Center, a modern, federally-operated, short-term custodial facility in New York City that housed primarily pretrial detainees. Hite v. Leeke, 564 F.2d 670-671 (4th Cir. 1977), involved the double-celling of inmates in the South Carolina Kirkland Correctional Institution, a facility

> completed in 1975 at a cost of approximately $12,000,000 [that] is said to conform in structure and operations to the most modern penal facilities. Its grounds comprise some forty acres. Its inmates are allowed to move throughout most of the institutional buildings and over most of the grounds during the day * * *.

(continued)

Given the harms that inmates suffer as a result of conditions existing at TDC, there can be little doubt that these conditions inflict pain without penological purpose in violation of the Eighth Amendment.

74/ (Continued)

Crowe v. Leeke, 540 F.2d 740 (4th Cir. 1976), involved the complaint of a single individual who was confined in a 63-square-foot cell with two other persons in Cell Block Number Two at the South Carolina Central Correctional Institution. In affirming the dismissal of his complaint, the court of appeals noted that he had requested to be confined in Cell Block Two in order to be placed in protective custody; that he had been approved for transfer to a new correctional institution upon completion of the prison's construction; and that his complaint did not allege that he had been subjected to mental abuse or corporal punishment or that he had been denied medical care (id. at 741-742).

Defendants misstate the holding of Burks v. Walsh, 461 F. Supp. 454 (W.D. Mo. 1978), aff'd sub nom. Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979). Defendants state (Br. 36) that Burks held that double-celling in 49-square-foot cells was constitutional. The district court actually held (461 F. Supp. at 487, 488-489) that the double-celling of inmates in 47.18 square foot cells was unconstitutional.

The district court in Burks did sanction the double-celling of inmates in one unit in 65-square-foot cells (id. at 487-488). In affirming the district court's judgment, the Eighth Circuit commented (603 F.2d at 63) that, "whether constitutionally required or not, double-celling in that unit ought to be eliminated when practicable."

TDC's synopsis of the decision in M.C.I. Concord Advisory Bd. v. Hall, 447 F. Supp. 398 (D. Mass. 1978)--i.e., "double-celling in 66 square-foot cells held constitutional" (Br. 36)--does not accurately state the holding of the case. That case held that double-celling in 66-square-foot cells in protectve custody, "awaiting action," and holding cells constituted cruel and unusual punishment (id. at 404). The court permitted double-celling in the processing unit on the ground that the inmate's stay within the area "is only temporary and * * * prisoners may remain outside their cells approximately six hours a day" (id. at 405).

The State's contention (Br. 36) that West v. Edwards, 439 F. Supp. 722 (D. S.C. 1977), held triple-celling in 66-square-foot

(continued)

E. The district court's orders to eliminate overcrowding, to improve security and supervision, to improve fire safety, and to require exercise for inmates in administrative segregation were for most part appropriate exercises of its remedial authority

To eliminate the overcrowding within TDC, the district court required defendants to terminate the multiple-celling of inmates, to afford more space to inmates in dormitories,

74/ (Continued)
cells constitutional and "involved less than the 22.5 square feet of living space per inmate that the district court here held unconstitutional" is also misleading. In that case the court sanctioned the triple-celling of inmates at the Kirkland Correctional Institution. Because inmates had virtually unrestricted access to large bay areas and hallways outside their cells, the court concluded "that it is proper to consider the inmates 'living space' as encompassing not only the 22 square feet per person in the cells proper, but also the additional 20.3 square feet allocable to each man from the 'bay areas' and hallways" (id. at 723-724; footnotes omitted).

In short, none of the cases upon which defendants rely has sanctioned overcrowding in circumstances comparable to those existing at TDC. To our knowledge, no such cases exist.

In this connection we note that the list of overcrowding cases on page 36 of defendants' brief does not include any cases from this Circuit--even though the Court has decided many cases involving the validity of overcrowding in prisons under the Eighth Amendment. In addition to those cases discussed by the district court, see Costello v. Wainwright, 525 F.2d 1239 (5th Cir. 1976) (confinement of 12,443 inmates in facilities of the Florida Division of Corrections having a design capacity of 9,313 and an emergency capacity of 10,535); Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) (county jail designed for 432 inmates sometimes housed more than 600); Adams v. Mathis, 614 F. 2d 42 (5th Cir. 1980) (more than 120 inmates in jail designed for 82). Other circuits have adopted a similar view. See, e.g., Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978) (double-celling of inmates at the Maryland House of Corrections, the Maryland Penitentiary, and the Maryland Reception, Diagnostic and Classification Center); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3743 (U.S. April 7, 1981) (widespread failure to provide 60 square feet of living space per inmate).

and to take certain steps relating to the award of good time, work release, furloughs, and community corrections (see pp. 15-17, supra).

The relief ordered by the district court to remedy a proven constitutional violation is entitled to deference. Hutto v. Finney, 437 U.S. 678, 688 (1978). In fashioning appropriate relief, a district court may "address each element contributing to the violation." Hutto v. Finney, supra, 437 U.S. at 687.

Defendants advance a number of general objections to the overcrowding relief entered by the district court. They assert (Br. 55-56) that the Texas Legislature is taking measures to provide additional housing for inmates. We commend these actions by the Legislature, and we are continuing to work with the State in an effort to develop a plan for providing additional inmate accommodations over the next several years, including possible use of surplus federal facilities. It obviously is in the best interest of all concerned for judicial involvement in the operation of the prison system to be discontinued at the earliest moment. The fact that the State now appears to be taking steps to resolve the overcrowding problem does not, however, provide a basis for setting

aside this part of the district court's decree. Overcrowded conditions at TDC plainly exist, and in light of other findings by the district court these conditions are constitutionally unacceptable. The postive actions taken by the State in response to the court's order are, by their own account, only a beginning. It is still too early to consider whether the proposed measures are adequate to cure the violations. In the interim, continued enforcement of the district court order is obviously required.

The State further asserts (Br. 43-44) that compliance with the court's decree "would require enormous monetary commitments, the premature release of potentially dangerous felons, and the aggravation of crowding in municipal and county jails." Such concerns are not to be lightly regarded. They must, however, be measured against the wrong to be redressed. Where, as here, that wrong assumes a constitutional dimension, the perpetuation of which would subject thousands of prisoners at TDC to intolerable and inhumance conditions, the balance clearly tips in favor of the court-ordered relief, as expensive as it might be. As pointed out by this Court in Gates v. Collier, supra, 501 F.2d at 1322:

> That it may be * * * expensive for the State * * * to run its prison in a constitutional fashion is neither a defense to this action or a ground for modification of the judgment rendered in this case.

We would note, moreover, that the district court's order does not direct the State to release any inmates prematurely. Nor does anything in the district court's order require or contemplate the transfer of TDC inmates into municipal or county jails. If defendants, notwithstanding good faith efforts to comply with the court's decree, should face a situation where such measures may be necessary in order to adhere to the order, then the proper recourse is to seek specific relief from the district court through a request for modification of the order. Cf. Battle v. Anderson, 564 F.2d 388, 398 (10th Cir. 1977). Any such modification at this time by this Court would be premature and without record support.

TDC also objects to the district court's order on the ground that it impermissibly interferes with the affairs of state prison administration (Br. 42). There is much force in the "federal interference" argument. Neither the federal courts nor any other branch of federal government should be put, or put themselves, in a position of running state prisons. Where, however, on the basis of a comprehensive record compiled during the course of nearly eight months of trial, it has been established that the State authorities have, in the absence of federal involvement, run the state prison system in a manner that violates the constitutional rights of all prisoners to be free from cruel and unusual punishment, then the federal courts may, and indeed should, step in. This is not to suggest a wholesale substitution of federal supervision,

nor does it indicate approval of undue federal intrusiveness into state affairs. But the district court's hands are not tied, and on a finding of a constitutional violation, appropriate relief by the federal court must be fashioned.[75/]

In this case, the district court in most respects properly exercised its remedial authority in responding to the Eighth Amendment violation. In certain particulars, however, the United States is of the view that the relief ordered below went beyond that which is necessary to redress the constitutional violation, and, as such, impermissibly intruded upon the administrative prerogatives of the State and TDC. Because we are unable to endorse wholeheartedly the district court's relief package, we have separately addressed each of the aspects of the Eighth Amendment remedy.

1. Inmate housing. The district court's order requires TDC, in stages, to reduce its inmate population so that no prisoner may be assigned with another prisoner to a cell containing 60 square feet or less, and that each inmate assigned to a dorm is provided at least 60 square feet of living space. Relief of this nature has been previously approved by this and other courts of appeals in similar circumstances. See, e.g., Newman v. Alabama, supra, 559 F.2d at 288; Williams v. Edwards, supra, 547 F.2d at 1215; Costello v. Wainwright, supra, 525 F.2d at

75/ As Judge Gewin put it in Newman v. Alabama, 503 F.2d 1320, 1332 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975), "the existence of constitutional infirmities deprives the prison deference rule of its indomitably insulating nature and dictates that the rule yield to the remedial power of a court."

1248-1252; Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977). The district court's orders in this regard were therefore well within permissible limits of it remedial authority.

In asserting that these orders were not an abuse of discretion in the circumstances of this case, we do not contend that the Constitution requires that all prison inmates be afforded at least 60 square feet of living space. Rather, our position is that the district court did not err in establishing 60 square feet of living space as a benchmark for the TDC system, in light of the conditions reflected by the evidence.

We note in this regard that compliance with the district court's order to upgrade the guard-to-inmate ratio, to eliminate the building tender system, and to install an adequate classification system might reasonably be expected to reduce the high level of violence prevailing within the TDC system. Should these measures ordered by the district court prove effective, it may be constitutionally permissible to allow double-celling in TDC general population cells.[76/] Similarly, evidence of implementation of a proper security system and compliance with the other provisions of the court's order may in the future warrant relaxation of the 60-square-foot requirement for inmates in dormitories. These are, of course, not issues to be addressed now; they necessarily must await TDC's implementation of the district court's perfectly proper order.

76/ See our discussion of Rhodes v. Chapman, pp. 84-85, supra.

2. Work release and temporary furlough programs. The district court's order required that TDC have a least 300 inmates on work furlough by November 1, 1981; 1200 by May 1, 1982; and 2500 by November 1, 1982. Additionally, the order required TDC to have 300 inmates on temporary furlough by November 1, 1981; 600 by May 1, 1982; and 1000 by November 1, 1982 (R. 8515). This part of the order has been stayed pending appeal.

We agree with the State--and the panel of this Court which decided the stay motion--that the district court's order in this regard unduly interferes with the operation of the State's prison system. "We believe the rule to be that a district court in exercising its remedial powers may order a prison's population reduced in order to alleviate unconstitutional conditions, but the details of inmate population reduction should largely be left to prison administrators." Ruiz v. Estelle, 650 F.2d 555, 570 (5th Cir. 1981). Accordingly, the district court's order, insofar as it requires the placement of inmates on work furlough and temporary furlough, should be reversed.

3. Good time program. In order to reduce the overcrowding at TDC, the district court ordered defendants, by November 1, 1981, to "review the record of every prisoner not having credit for SAT III good time (thirty days overtime for each month served) for the entire period he has served in TDC, and consider whether such prisoner should be credited with some part or all of such good time" (R. 8515).

Defendants state in their brief (p. 50):

> This Court denied Defendants' motion to stay this portion of the decree, "since we construe it to require that TDC only review inmates' records to ensure that all those who are entitled to good time credit have received it." 650 F.2d at 572. TDC agrees with this construction of the order and has complied with the order as so construed. Nevertheless, TDC is concerned that the district court and the special master may construe the order more broadly and seek to use the order, if not reversed, as a device for interfering more comprehensively with the administration of the good time program.

The United States agrees with the panel's construction of this part of the decree. No controversy as to the meaning of the order remains.[77/] There is thus no basis for TDC's fear that the district court and special master may construe the order more broadly, and--as TDC itself states (Br. 50)--any such action "could be made the subject of further appellate review."

4. Community corrections programs. The district court's order requires defendants to "expand TDC's role in community corrections and establish minimum security institutions, honor farms or units, halfway houses, urban work or educational release centers, community treatment centers, and the like" and to file with the court a plan for the establishment of such facilities by November 1, 1981 (R. 8515-8516). This part of the order was stayed.

We agree with Texas that the district court's order in this regard went farther than was necessary to remedy the constitutional violation the court had identified. The order sets a pop-

77/ Private plaintiffs do not dispute this interpretation of the order (Pltf. Br. at 41-42).

ulation ceiling; it should be up to the State to determine how that requirement is going to be met.

We also share the State's view (Br. 51) that "community corrections institutions and conditional release programs can be productive and desirable rehabilitative measures," and trust that it will make maximum use of these measures to reduce the overcrowding that now exists within the prison system.

5. Guard-to-inmate ratio. The district court also ordered the State to employ a sufficient number of trained staff to provide for the security, control, custody and supervision of inmates, taking into account the design of TDC prisons and the level of security in the units (R. 8518). As benchmarks, the court ordered TDC to employ enough guards to establish a one-to-ten guard-to-inmate ratio by November 1, 1981, a one-to-eight ratio by May 1, 1982 and a one-to-six ratio by November 1, 1982. 78/

TDC argues (Br. 65) that increasing its staff is futile because violence can never be eliminated from prisons. However, both the record and common sense indicate that providing a reasonable number of well-trained guards will reduce prison violence. TDC's contrary notion is supported by neither the citations

78/ TDC does not challenge the staff deployment pattern ordered by the court (R. 8519).

to the record offered by TDC in its brief [79] nor the prior decisions of this Court approving court-ordered increases in staff as a proper remedy to improve security. See e.g., Newman v. Alabama, supra, 559 F.2d 283; Williams v. Edwards, supra.

TDC correctly contends (Br. 64) that staffing needs must be determined after examination of the design of the facilities. It neglects to point out that the district court determined that TDC's staffing was inadequate after a careful review of the design of TDC facilities and the responsibilities and deployment of its security staff (503 F. Supp. at 1291-1292). The court's opinion makes it evident that it did not rest its conclusion that security was inadequate on "a purely mechanical assessment of staff ratios" (Def. Br. 64).

79/ Apparently, the experience of TDC employees runs contrary to the position taken by TDC in its brief. For example, TDC Captain Ernesto Carranza testified as follows (Carranza at 157):

Q. Do you know of any incident that has occurred or was caused because there was a shortage of officers?

A. Yes, sir, several.

Q. That occurred because you didn't have enough staff?

A. That is correct.

Q. Are these frequent?

A. Yes, sir.

Moreover, the guard-to-inmate ratios ordered by the court were not as high as those ordered in prior decisions.[80] In support of its contention that the court's relief was disproportionate, TDC cites only two cases (Br. 65). Both involved local jails for which staffing requirements are not comparable to those of a maximum security facility that confines convicted felons for long periods. In conclusion, in this area, as in others, the district court adequately fashioned an equitable remedy designed to eradicate an unconstitutional condition, and the means chosen cannot be faulted.[81] We do not suggest that the guard-to-inmate ratios ordered by the district court are constitutional minima. Rather, our position is that, on this record, the court's order concerning guard-to-inmate ratios was not an abuse of equitable discretion. Of course, during the compliance phase TDC is free to make a showing that some lesser ratio satisfies connstitutional concerns.

6. Abolition of building tender system. The district court's order that the building tender system be abolished is based on well established findings that the use of inmates as

80/ In Pugh v. Locke, 406 F. Supp. 318, 322, 335 (M.D. Ala. 1976), aff'd as modified sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), reversed in part on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781 (1978), the court ordered guard-to-inmate ratios of approximately 1:5 for four institutions. In Williams v. Edwards, supra, 547 F.2d at 1213 this Court did not disapprove at 1:4 guard-to-inmate ratio ordered by the district court, but remanded for reconsideration of the actual number of guards required, since the prison population had declined by the time the appeal was heard. These figures demonstrate the magnitude of Texas' deviance from accepted penological practice and constitutional norms.

81/ See p. 88, supra.

guards has produced corruption and violence in TDC. The order fully comports with the precedents in this Circuit. For instance, in Pugh v. Locke, supra, 406 F. Supp. at 333, the court ordered:

> At no time shall prisoners be used to guard other prisoners, nor shall prisoners be placed in positions of authority over other inmates. [82/]

Moreover, the Texas legislature has outlawed the placement of any inmate in a supervisory or administrative capacity over other inmates, as well as the administration of discipline by inmates. Tex. Rev. Civ. Stat. Ann art. 6184 K-1 (Vernon Supp. 1980). The evidence established that TDC has continued to operate the building tender system in contravention of this law. Viewed against this background, TDC's contention (Br. 72) that the district court's order goes too far must fail. In light of the intransigence of TDC in maintaining the building tender system, it was necessary and proper for the district court to forbid inmates from engaging in specified activities.

7. Use of force. The district court's order (R. 8520-8522) that TDC develop standards governing the use of force by staff was justified by the pervasive pattern of staff brutality that resulted from systemic deficiencies created and perpetuated by

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82/ See also Taylor v. Sterrett, 499 F.2d 367, 369 (5th Cir. 1974), cert. denied, 420 U.S. 983 (1975), in which this Court affirmed an order of the district court that the sheriff of the jail in question not use "corridor bosses to enforce rules and preserve discipline." See also Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971).

the defendants.[83] If TDC's prior practices are to stop, standards are necessary to alert guards and inmates to the occasions where force may be used and the limits of the force that may be applied. The court's order is appropriate in the interest of insuring inmates adequate protection from the infliction of arbitrary and excessive physical harm. See Gates v. Collier, 349 F. Supp. 881, 899-900 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).

8. Classification. The court's order that TDC maintain an adequate classification system so long as it confines more than one inmate to a cell or houses inmates in dormitories (R. 8524) is a proper measure to protect inmates from the effects of overcrowding and TDC's failure to provide adequate security and supervison. The court's order falls within its equitable powers. As this Court recently stated, Jones v. Diamond, 636 F.2d 1364, 1374 (1981), cert. granted sub nom. Ledbetter v. Jones, 49 U.S.L.W. 3968 (U.S. June 29, 1981):

> When prison officials have failed to control or separate prisoners who endanger the physical safety of other prisoners and the level of violence has become so high that exposure to it constitutes cruel and un-

83/ TDC argues that Rizzo v. Goode, 423 U.S. 362 (1976), bars system-wide relief in this case. Rizzo, however, is not a barrier to systemic relief predicated on a pervasive pattern of misconduct against a well defined class of victims. Moreover, the systemic deficiencies that have made staff brutality inevitable--i.e., poor training and understaffing--are so well documented that systemic relief is essential.

> usual punishment, we have approved orders to develop a classification system as part of an effort to eradicate those conditions.

See also, McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), cert. denied, 423 U.S. 859 (1975); Gates v. Collier, 501 F.2d 1291, 1308-1310 (5th Cir. 1974). Moreover, the district court has followed the path of least intrusion into the affairs of TDC by allowing it to develop its own classification plan.

9. Fire safety. The State argues (Br. 96-97) that the court exceeded its authority in requiring TDC to comply with the Life Safety Code of the National Fire Protection Association. The district court, however, could properly address fire safety as an element contributing to an Eighth Amendment violation. In fashioning relief, reference to the current (1981) edition of Life Safety Code was not inappropriate, albeit not constitutionally mandated. Similar relief was mandated for the Oklahoma prison system in Battle v. Anderson, supra.[84/]

84/ Defendants' assertion (Br. 96-97) that "the provisions of the Life Safety Code are not feasible and represent a wholly unnecessary expense" is based on an affidavit that is not part of the record on appeal. Rule 10(a), Fed. R. App. P. In any event, the affiant indicates that he has not seen the 1981 edition of the Code (Shepard Affidavit at 158).

(continued)

10. Administrative segregation. On the basis of uncontested findings regarding conditions in administrative segregation (see pp. 34-36, supra), the district court prohibited the confinement in administrative segregation of inmates for longer than three days without a daily opportunity for an hour of exercise.[85] The court created an exception for individual cases in which "fulfillment of the requirement would create an immediate and serious threat to prison security" (R. 8530). TDC contends that such exercise is not mandated by the Constitution.

84/ (Continued)
Chapters 14 and 15 of the 1981 Code, which are new, deal specifically with correctional facilities. Section 15.1.1.8.1 provides that "[t]he requirements of this section [dealing with existing correctional facilities] may be modified if their application clearly would be impractical in the judgment of the authority having jurisdiction and if the resulting arrangement could be considered as presenting minimum hazard to the life safety of the occupants" Thus the Code does not require TDC to make "impractical" modifications as long as the life safety of inmates is not jeopardized. Accordingly, Texas remains free to seek relief in the district court from the requirements of the Code in appropriate circumstances.

85/ Eddie James Ward languished in administrative segregation for thirty months (Ward at 67). He never saw the sun or obtained any exercise during the whole period (id. at 178). See also Steve Stevens at 5-6; Forest at 45-47; PX 30 at 15; PX 74 at 64.

In Miller v. Carson, supra, this Court upheld an order allowing inmates regular exercise on the ground that the totality of conditions in the Duval County Jail justified the district court's action as one means to help alleviate unconstitutional conditions. This Court stated (id. at 751):

> When the totality of conditions in a penal institution violates the Constitution, the trial court's remedies are not limited to the redress of specific constitutional rights.

See also, Newman v. Alabama, supra, 559 F.2d at 288; Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980). Numerous courts have sanctioned regular exercise as a proper remedy for constitutional violations. See Miller v. Carson, supra, 563 F.2d at 751; Nadeau v. Helgemoe, 561 F.2d 411, 420 (1st Cir. 1977); Hardwick v. Ault, 447 F. Supp. 116, 127 (M.D. Ga. 1978); Sinclair v. Henderson, 331 F. Supp. 1123, 1130-31 (E.D. La. 1971); Rhem v. Malcolm, 371 F. Supp. 594, 626-627 (S.D. N.Y.), aff'd and remanded, 507 F.2d 333 (2nd Cir. 1974). Moreover the record in this case establishes that inmates at TDC suffered physical and psychological harm from prolonged segregation (e.g., Rundle at 71-73; Kaufman at 141-146).

TDC also argues (Br. 87-88) that allowing inmates in segregation out of their cells for limited daily exercise will jeopardize security by permitting segregated inmates to mingle with the general

inmate population. This argument was also raised in Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979), in which the court stated:

> These concerns justify not permitting plaintiffs to mingle with the general population but do not explain why other exercise arrangements were not made. The cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment.

Likewise, TDC has not offered an explanation why it cannot provide exercise for inmates in administrative segregation in a manner that will guard their safety and that of the general inmate population. 86/

In light of all of the conditions existing at TDC, the district court did not err by fashioning a remedy that included a requirement of limited daily exercise for inmates in non-punitive segregation. See Hutto v. Finney, supra, 437 U.S. at 688.

86/ TDC has not challenged the court's order that inmates on death row be allowed regular exercise (R. 8530), although similar security considerations apply.

II

THE DISTRICT COURT DID NOT ERR BY ORDERING THAT THE HUNTSVILLE UNIT HOSPITAL BE DOWNGRADED TO AN INFIRMARY UNLESS IT IS IMPROVED TO ACCEPTABLE STANDARDS

The district court found that the entire range of medical care at TDC was so inadequate as to amount to cruel and unusual punishment in violation of the Eighth Amendment. However, all of the issues pertaining to medical care have been removed from the case by the consent decree, with the exception of the continued operation of the Huntsville Unit Hospital (HUH) as TDC's primary medical care facility. The State argues (Br. 79-84) that the care provided at HUH does not inflict cruel and unusual punishment and it is, therefore, free to continue operating HUH as a full care facility. The court's findings, the record, and the law establish that it is imperative that HUH not continue in operation as a hospital.

The Supreme Court, in Estelle v. Gamble, 429 U.S. 97, 103 (1976), recognized "the government's obligation to provide medical care for those whom it is punishing by incarceration." The Court reasoned that failure to meet an inmate's needs may result in physical torture, lingering death, or pain and suffering that will not serve any penological purpose (ibid.). The Court, therefore, concluded "that deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment (id. at 104).

Although Gamble was a case brought by a single TDC inmate challenging the care that he had received, a standard similar to that enunciated in Gamble should govern the systemic challenge presented in this case. In Gamble, the Court expressly approved the standard applied by this Court in Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975), in which it affirmed a district court finding of a systemic Eighth Amendment violation and the imposition of systemic relief. This Court required a showing that the deficiencies in medical care were not isolated and demonstrated "callous indifference" to the welfare of inmates (id. at 1332; see also Williams v. Edwards, supra, 547 F.2d at 1215, 1216).

In Newman v. Alabama, supra, 503 F.2d at 1323-1324, and Williams v. Edwards, supra, 547 F.2d at 1215-1218, this Court found systemic violations based on the use of inmates to perform medical tasks, the shortage of qualified medical personnel, inadequate and deteriorating equipment, inadequate control over the dispensing of drugs, inadequate surgery facilities, poor record-keeping, access by inmates and security personnel to medical records, and the difficulty of caring for inmates in security cells. These cases indicate that systemic deficiencies in the provision of medical care may be established by showing inadequacies in the medical care delivery system or by showing a pat-

tern of incidents of inadequate medical care. Both showings have been made in this case.[87]

The district court's findings relative to the care provided at HUH (503 F. Supp. at 1331) reflect conditions similar to those described in Newman and Edwards.[88] TDC's own experts testified that HUH is not now adequate and "it never has been" (Garcia at 121) and that it should be replaced (Ralph Gray at 76). Another TDC witness testified that HUH was "largely inadequate" and did not disagree with the following assessment contained in a recent TDC budget request (Driver at 237):

> "A new T.D.C. hospital is required to replace the facility currently in use on the Huntsville Unit. The present structure is obsolete, over forty years old, alarmingly overcrowded, lacking any egress, other than a single stairwell and one unreliable elevator; has completely inadequate wiring and plumbing; prohibits the expansion and/or addition of essential diagnostic and treatment capabilities, and is wholely incapable of functioning as a hospital for the continually growing inmate population."

87/ The State has challenged only one aspect of the systemic remedy ordered by the district court--the continued operation of the HUH. In the discussion that follows, it should be remembered that the downgrading or improvement of Hunstville was but one aspect of a remedy designed to elevate to constitutional compliance the medical care delivered at TDC.

88/ TDC argues (Br. 83-84) that improvements have been made at HUH and the Constitution does not require improving or downgrading HUH, since nothing in its continued operation demonstrates deliberate indifference to the medical needs of inmates (Br. 79-84).

Another TDC medical expert testified that the HUH was "very inadequate" (Brutsche, September 13, 1979, at 31), and stated that HUH could not continue to be run as a hospital without "striking changes" (ibid.). This same TDC expert, who had testified in other cases in which prison medical care had been found unconstitutional, engaged in the following exchange on cross-examination (id. at 172-173):

> Q. In all the cases, particularly, in Alabama, Oklahoma and Mississippi, in which you testified, there were common elements found in TDC, weren't there, such as, using inmates in the medical care delivery system.
>
> A. Yes.
>
> Q. Inmates' access to medical records.
>
> A. Yes.
>
> Q. Inmates' dispensing pharmaceuticals.
>
> A. Right.
>
> Q. Inmates employed in medical delivery services.
>
> A. Yes.
>
> Q. Delays in administration of prescribed medicines.
>
> A. Yes.
>
> Q. Continued inaccuracies of medical records.
>
> A. Yes. Inaccuracies in medical records.
>
> Q. And continued missing elements in medical records.
>
> A. Well, poor medical records. I don't specifically recall what was missing from the medical records back in the occasions, but, yes, poor medical records.
>
> Q. And lack of full-time medical staff?

A. Right.

Q. Lack of licensed staff in the allied health services areas.

A. Yes.

These deficiencies in the TDC medical care system were all present at HUH, which is the hub of that system. The plaintiffs' expert medical witnesses found that HUH was "woefully inadequate" (Della Penna at 26) and did not deserve to be called a hospital (Babcock at 22).

The serious deficiencies that caused HUH to lose its accreditation by the American Hospital Association and the Texas Hospital Association (THA) (USX II-97, II-98) had not been corrected at the time of trial (Babcock at 24-25.).[89/] These deficiencies were exacerbated by poor housekeeping (Della Penna at 27), outdated and poorly maintained equipment (id. at 33-35), lack of space (id. at 40, 43, 44-45), inadequate nursing stations (id. at 45), and inadequate emergency equipment (id. at 45-46).

The effects of the inadequate physical facilities were increased by gross deficiencies in sanitation and infection control. Dr. Babcock, who toured HUH in 1976 and 1978, found that clean linen was transported in the hampers for dirty laundry (Babcock at 24-25); the same refrigerator contained insulin, antibiotics, and culture media for growing bacteria (id. at 28-29); there was inadequate infection control in the dialysis unit (id. at 27);

89/ See pp. 28-29, supra.

and, in one instance, only one sink was available for emptying bed pans and washing hands (USX II-4 at 4).

An inadequate organizational structure and deficient staffing compound the deficiencies at HUH. An expert for the United States testified that the four to five physicians that covered HUH, in addition to handling the Huntsville Unit sick call and referrals from other units, was a grossly inadequate number (Della Penna at 51-52). This shortage of physicians resulted in numerous incidents in which inmates with serious problems never saw a physician or saw one too late (e.g., Goforth at 30; Nigliazzo at 101-103; Ralph Gray at 640; USX II-250).

TDC's failure to employ any registered nurses and its reliance on unlicensed, inadequately trained medical assistants has undermined health care at HUH. TDC witnesses testified that it is common for medical assistants to use a physician's name on a record without informing him (Nigliazzo at 189-191), orders for medication are cancelled by nonphysicians (Goforth at 70-71), and physicians' orders are not carried out (Driver at 136). Medical assistants serve as respiratory therapists, pharmacists, X-ray technicians, and laboratory technicians (Driver at 198). TDC's own experts recommended at least forty new medical positions for HUH and acknowledged that 160 new positions would be required to obtain certification in Texas (DX 611, Part III).

These staff shortages mean that TDC must rely extensively on inmates to perform medical tasks (503 F. Supp. at 1311). Inmates have amputated fingers, set bones, applied casts, sutured, repaired

achilles tendons, given injections, administered medication and kept records (Goforth at 48-58; McDonald at 73-74; Albach at 152-154, 215-217; Poole at 25-28). Inmates also serve as laboratory technicians, X-ray technicians, physical therapists, respiratory therapists, first aid attendants, and medical records clerks (Della Penna at 48, 106-109). Many of the inmates assigned to these tasks are uneducated and many are illiterate (Goforth at 52; McDonald at 75-77).

The extensive use of inmates has inevitably produced medical disasters that inflicted needless pain, suffering, permanent injury and even death on inmate patients. Inmates falsely filled in medical charts when, in fact, instructions had not been carried out (Nigliazzo at 53-58). Their laboratory work was frequently inconsistent and incomplete (id. at 58-59) and they often did not chart vital signs (id. at 90-91). Inevitably, the use of inmates in sensitive medical assignments has produced inmate drug dealing, bribes for services and payments for falsifying lab results to prolong an inmate's stay in the hospital (Poole at 23, 31, 47).

The poor organization of HUH contributes to the deficiencies in the medical care provided to inmates. HUH lacks a manual of standard operating procedures, clear lines of authority and specific job assignments for medical assistants (Della Penna at 110-114; Goforth at 69). Moreover, necessary internal auditing was not conducted (Babcock at 34). These deficiencies have produced chaotic patient care (Della Penna at 114).

The medical records maintained at HUH are incomplete and inadequate to allow a physician unfamiliar with the patient to administer treatment (Della Penna at 121-124). The insufficiency of the records was summed up by an expert for the United States who stated:

> [O]ne of my major problems in reviewing all these records was trying to fathom whether things were done, whether medication was given, whether tests were ordered, whether anybody took responsibility for following through on the orders that doctors made * * *.

(Id. at 78). Although by the time of trial inmates no longer worked in the medical records room, they still handled the files at sick call and read and made entries in them on the floors of the hospital (Della Penna at 128-130, 353-356).

These deficiencies lead to neglect and mistreatment of inmates. One TDC employee testified that he would arrive on Monday mornings to find urine bags overflowing, patients caked with feces and bandages unchanged (Goforth at 58-59). One inmate was referred, but never tranferred, to John Sealy Hospital for tests on his liver. He was not seen by a physician for at least two days preceding his death, but the day before he died an inmate "nurse" noted that "there are white worms crawling around the rectum and cheeks." His death was never investigated (Driver at 385-391, 396, 397).

The morning that Johnny Laston died an inmate nurse wrote "'[p]atient complains of pain in his liver * * *. Patient needs to be seen by doctor as soon as possible.'" A TDC physician cancelled orders that the inmate be brought to his office and did not see him until shortly before his death (Ralph Gray at 892-894). Other examples of indifference toward the medical needs of inmates that resulted in death or serious injury abound in the record (see, e.g., McDonald at 117 et seq.; Nigliazzo at 82-84; Poole at 28-30; Burton at 6-27, 41-52, 64-67, 72-75; Della Penna at 80).

This record amply supports the district court's order. TDC has long known of the deficiencies of HUH, yet it has continued to operate Huntsville as its primary medical care facility. TDC argues (Br. 83-84) that it has improved HUH since the early 1970's. The court found, however, based on a substantial record, that this improvement was too little, too late. Moreover, TDC's position has been that it intended to cease using HUH as a hospital (Ralph Gray at 76; Brutsche at 30; Driver at 239). Even TDC recognized that the ills of HUH could not be cured by piecemeal improvements.

In sum, the continued operation of HUH, in the condition established at trial, reflected unconscionable indifference to the serious medical needs of the inmates. The district court properly concluded that medical care at TDC violated the Eighth Amendment. E.g., Williams v. Edwards, supra; Newman v. Alabama, supra, 503 F.2d 1320; Finney v. Arkansas Board of Correction, 505 F.2d 194 (8th Cir. 1974); Battle v. Anderson, 564 F.2d 388

(10th Cir. 1977); Laaman v. Helgemoe, 437 F. Supp. 269 (D. N.H. 1977); Palmigiano v. Garrahy, 443 F. Supp. 956 (D. R.I. 1977), aff'd and remanded, 559 F.2d 17 (1st Cir. 1979); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

TDC contends that the district court erred by measuring the constitutional violation at HUH against compliance with THA/JCAH standards (Br. 82-83). In this regard, TDC misconstrues the Eighth Amendment holding of the district court in this area. Contrary to the suggestion in TDC's brief, the court below properly applied the constitutional standards enunciated in Estelle v. Gamble, supra, and Newman v. Alabama, supra, 503 F.2d 1320, to find a violation. To be sure, in fashioning relief, the district court turned for guidance to the THA/JCAH standards in seeking to describe adequate medical conditions for a hospital facility. 90/ While we would agree with TDC that the use of such standards to set a minimum constitutional requirement is unacceptable, we do not believe that they are totally without remedial significance. E.g., Williams v. Edwards, supra, 547 F.2d at 1216; Palmagiano v. Garrahy, supra, 443 F. Supp. at 956. To the extent modification of the district court's order might help to clarify possible

90/ The district court found that conditions at HUH contributed to the overall constitutional inadequacy of TDC's medical care system. In remedying the overall condition, the district court is not limited to correcting specific constitutional defects. See Hutto v. Finney, supra, 437 U.S. at 685-688.

confusion in this regard, we believe it might be useful for this Court to do so. TDC should, however, be required to develop a plan for bringing HUH into constitutional compliance, or, in the alternative, for downgrading the facility to an infirmary. Based on recently submitted proposals by TDC on this subject pursuant to the district court's order, the United States is satisfied that constructive efforts are being made to correct the situation.[91/]

III

THE DISTRICT COURT DID NOT ERR BY ORDERING TDC TO TAPE RECORD DISCIPLINARY HEARINGS

After lengthy and careful exposition of the unconstitutional deficiencies in TDC's disciplinary proceedings (503 F. Supp. at 1346-1350), the district court ordered wide-ranging relief (R. 8526-8529).[92/] TDC challenges (Br. 85) only the portion of the order requiring tape recording of disciplinary hearings.[93/] TDC contends (Br. 85-86) that such recordings are not required by Wolff v. McDonnell, 418 U.S. 539 (1974).

Wolff, supra, 418 U.S. at 565, required "[w]ritten records of [disciplinary] proceedings * * * [to] protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding." It also found written records necessary to ensure that "administrators, faced with possible scrutiny * * * will act fairly" (ibid.).

91/ On October 19, 1981, the district court stayed this portion of its decree and directed that the parties meet to discuss the possibility of a consent decree concerning the continued use of HUH on a limited basis.

92/ The decree requires tape recording or some "other means of preserving a verbatim record of the proceedings" (R. 8529).

93/ See pp. 32-34, supra.

The district court's order was based on its unchallenged conclusion that, although TDC had adopted the procedures required by Wolff on paper, it had steadfastly refused to implement them. The court specifically found that the manner in which TDC's hearings are conducted and the written records of the proceedings are defective. The requirement that proceedings be recorded is an appropriate prophylactic measure to ensure that TDC's resistance to the adoption of the procedures required by Wolff does not continue. The order is necessary both to protect inmates against collateral consequences and to ensure that TDC administrators will act fairly.

The district court's order was adopted, in part, in response to the testimony of defendant Estelle, who could not "think of any real reason why [tape recording] could not be done" (Estelle at 187) and the testimony of experts who endorsed the procedure (Pontesso at 40-42; Sarver at 55-56; Larry Morris at 65).

Although tape recordings are not constitutionally mandated, they fall squarely within the class of actions that courts must be allowed to order to ensure that constitutional violations are eliminated, and to protect against future violations. See Hutto v. Finney, supra, 437 U.S. at 685-688; Miller v. Carson, 563 F.2d 741, 751 (5th Cir. 1977); Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980).

Furthermore, the district court ameliorated any security concerns by expressly allowing TDC to exclude from release to an inmate any portion of a recording containing material recorded

while the inmate was excluded from the hearing for reasons of security. In view of this provision, TDC's concern that sensitive material may fall into the hands of inmates is unsupportable. 94/

IV

THE DISTRICT COURT CORRECTLY HELD THAT TDC HAD OBSTRUCTED INMATES' ACCESS TO THE COURTS

The district court found that TDC had impaired the access of inmates to court by (1) encouraging harrassment of inmates who had resorted to court, (2) limiting inmates' opportunities to work on legal matters, and (3) interfering with communications between attorneys and inmates (503 F. Supp. at 1367). 95/ The court found that TDC had failed to justify any of these burdensome practices (ibid.), and enjoined their continuance (R. 8531-8534).

TDC contends that the incidents of harassment that may have occurred were isolated and unauthorized and do not warrant systemic relief (Br. 89). They also contend that TDC has acquitted its responsibility in this area by providing adequate law libraries or legal assistance. Because TDC disputes the existence of a constitutional violation, it does not attack specific portions of the relief. TDC, however, has failed to establish that the dis-

94/ See pp. 35-41, supra.

95/ TDC's contention (Br. 86) that counsel or TDC employees may release confidential information contained in tape recordings cannot defeat the relief ordered by the district court. Counsel will have access to the information regardless of the recordings. The danger that a TDC employee will disclose information is an internal matter to be handled by TDC's own rules and personnel disciplinary procedures.

trict court's findings regarding harassment were erroneous or that the defendants were not responsible. Additionally, its argument that it has provided sufficient legal assistance to inmates is contrary to the findings of the district court, which are clearly supported by the record.

Notably, the district court was forced to issue five separate orders to protect inmates participating in this case from retaliation by TDC for their legal activities. 503 F. Supp. at 1372. This Court had occasion to review TDC's appeal of the protective order of December 30, 1975, and found that the plaintiffs, as a result of their participation in the suit had suffered

> threats, intimidation, coercion, punishment, and discrimination, all in the face of protective orders to the contrary by the district court and our long-standing rule that the right of a prisoner to have access to to the courts to complain of conditions of his confinement shall not be abridged.

Ruiz v. Estelle, 550 F.2d 238, 239 (5th Cir. 1977). Nor was such conduct limited to this case. Indeed, instances of TDC's harrassment of other inmates seeking legal redress have been before this Court. See Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979).

The testimony produced at trial established that pervasive harassment of writ-writers continues, in spite of the order of the district court that such conduct cease (503 F. Supp. at 1370). Also well established was the fact that inmates suffered brutal retaliation by TDC employees as a response to writ-writing. An

inmate who was instructed by TDC officials to scare a plaintiff off this case proceeded to slit the plaintiff's throat (id. at 1369). This was admittedly an extreme example, but it is not at all uncharacteristic of the type of retaliatory violence recounted by numerous inmates (see, e.g., Ward at 16-22, 40-41, 48-52; Barbosa at 63; Clayton at 33; Ruiz at 33; 49 Ulmer at 6-7).

Nor was physical violence the sole means of punishment used to intimidate inmates who pursued legal action. Thus, writ writers have been removed from the general population to administrative segregation without justification (503 F. Supp. at 1369), have been routinely subjected to more severe punishment for disciplinary violations than non-litigious inmates (ibid.), have been charged groundlessly with disciplinary violations, and have been disciplined for threatening TDC officers with lawsuits or simply mentioning investigations (ibid.).

TDC also placed more subtle barriers in the paths of inmates seeking legal redress. They are strip-searched upon entering and leaving the writ room, even though they remain under constant supervision while there (e.g., Lawrence Pope at 16-28; Gonzales at 123; Ward at 15-16; PX 15, Part II. C.) (503 F. Supp. at 1369). They are forced to carry all of their legal materials with them when leaving the unit to go to court or for medical care (Lawrence Pope at 32-33) (503 F. Supp. at 1369). They have received less desirable job assignments or been removed

from the jobs they held because of their legal activities (Eckles at 21; Lawrence Pope at 26-28) (503 F. Supp. at 1369). Inmates have been offered more favorable treatment if they would drop their legal activities and those who have done so have been rewarded (e.g., Hardin at 205-218; McKaskle at 116-117; Gonzales at 20-21; Guerra at 33-34; Ballard at 11, 14 19-22; Eckles at 20) (503 F. Supp. at 1369).

TDC attempts to establish that such practices were contrary to TDC's policies through reliance on Defendant Estelle's statement to that effect (Br. 89). The testimony of TDC's own officials, such as S.O. Woods, who was a member of TDC's Central Classification Committee (S.O. Woods at 56-57), [96/] and the involvement of large numbers of TDC employees and officials in retaliatory acts against inmates, amply support the district court's findings.

The district court also found that TDC has unduly restricted and interfered with inmates' opportunities to work on legal matters (503 F. Supp. at 1371). TDC does not have system-wide rules regarding the times and places that inmates may work on legal matters, although Rule 3.10 (PX 5) prohibits storage of personal legal materials in cells. The court found, and Texas does not

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96/ The Classification Committee determines unit assignments, participation in special programs, inmate's good time earning status, which inmates become building tenders, and which prisoners receive furloughs (McKaskle at 11-13).

contest, that some units require inmates to do all legal work in their cells, which do not contain desks or any other type of working surface, while others require that all work be done in the writ room (id. at 1367-1368). Inmates in solitary confinement are not permitted to use the writ room and those in administrative segregation may only go when it is convenient for a security officer to escort them (id. at 1368 n.201). TDC does not contest the court's conclusion that these restrictions are not justified by considerations of space or security (503 F. Supp. at 1368).

In those institutions where legal materials are not permitted in the cells, such materials may be confiscated as contraband and read by TDC officials. Moreover, in these units, materials stored in the writ room are read by TDC employees (Hubbard at 12-13, 15-17; Garcia at 37; Ballard at 81-82) (503 F. Supp. at 1368).

The confidentiality of inmates' legal materials is further compromised by TDC's procedures for notorizing documents. Although there are no system-wide rules, the general procedure is to have inmates place documents to be notorized in a receptacle and wait to be called out to get the documents notorized (Ruiz at 31-33; Traylor at 5-6; Guerra at 27; Eckles at 17; Ballard at 15-17; O.D. Johnson at 29-30; Bobby Thomas at 6-9; Yeager at 5-7, 12-13; Paul Brown at 5-6; Lawrence Pope at 13-17). Officials frequently read the documents submitted for notarization (Guerra at 29-30) (503 F. Supp. at 1369).

Moreover, inmates who seek notary services are sometimes harassed and humiliated by TDC officials (Bobby Thomas at 7; Yeager at 7, 9, 14-15). Officials sometimes return, "lose" or confiscate documents rather than notarize them (Ballard at 15-17; Busby at 7-15; Lovelace at 56-61, 160-167; D.L. Watson at 103). Additionally, prisoners may wait up to three weeks to have documents notorized (Eckles at 17) (503 F. Supp. at 1369).

The district court also found that TDC officials have imposed rules and practices that make it virtually impossible for inmates to consult with each other regarding legal matters. 503 F. Supp. at 1368. Rather than attack the district court's findings in this area, TDC argues that the rules prohibiting inmates from assisting one another were held invalid in Corpus v. Estelle, 551 F.2d 68 (5th Cir. 1977). The court was aware of this decision, yet, based on the evidence before it, found that the problem persisted. In fact, these rules were initially invalidated in Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), cert. denied, 409 U.S. 968 (1972), yet in spite of this decision TDC continued to enforce the prohibition. Corpus v. Estelle, 605 F.2d 175, 176 (5th Cir. 1979), cert. denied, 445 U.S. 919 (1980). This Court was forced to affirm a second invalidation of the prohibition in Corpus v. Estelle, 551 F.2d 68 (5th Cir. 1977). In view of this history of resistance and the evidence produced at trial, the district court acted properly in enjoining the practice of impeding inmates' communication with other inmates regarding legal matters.

The district court also found, based upon abundant evidence, that TDC has "imposed unreasonable and unnecessary hardships on inmates who attempt to communicate with their attorneys" (503 F. Supp. at 1370). The district court found numerous abuses in this area that TDC does not contest.[97] It does, however, contest the validity of the court's findings that interview facilities are inadequate and attorneys often must wait unreasonable periods before seeing their clients. Texas relies principally upon the testimony of William Habern, an attorney, who was a former employee of TDC. Habern testified that his status as a former employee placed him in a unique situation that enabled him to operate within TDC without some of the difficulties experienced by other attorneys (Habern at 47-48).

In spite of his unique position, Habern testified that he had waited as long as one and one-half hours for an inmate to be brought to a scheduled interview (id. at 23); filling out the forms required by TDC before he could begin an interview had taken "a great amount of time" (id. at 23-24); the lighting in most interview facilities was bad (id. at 17); the screen mesh between the attorney and his client at the units made interviewing extremely difficult (id. at 18); the interview facilities at Ramsey

97/ See p. 38, supra.

I made interviewing and taking notes very difficult (id. at 14-17); and that he felt that TDC employees made an effort to listen to interviews "with some regularity" (id. at 17-18). When accurately characterized, Habern's testimony, alone, amply supports the district court's findings that attorneys experience delays in interviewing clients and that interview facilities are inadequate.[98/]

This Court has long recognized that "access to the courts is one of, perhaps the, fundamental constitutional right." Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973). Inmates may not, under the Fourteenth Amendment, be subjected to threats, punishment, intimidation or coercion for exercising their rights to gain access to the courts. Hooks v. Kelley, 463 F.2d 1210 (5th Cir. 1972); Andrade v. Hauck, 452 F.2d 1071 (5th Cir. 1971).

The district court correctly held that TDC's practices have violated this fundamental prohibition. See e.g., Bounds v. Smith, 430 U.S. 817 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Johnson v. Avery, 393 U.S. 483 (1969). Inmates access to the courts must

98/ See also the transcript of attorney Janet Stockard, who did not benefit from past employment with TDC and whose difficulties in serving her clients were far more extreme.

be "adequate, effective and meaningful." Bounds v. Smith, supra, 430 U.S. at 822. A violation of the Fourteenth Amendment may exist regardless of the adequacy of the legal materials available to inmates. Under the Fourteenth Amendment, "regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Procunier v. Martinez, supra, 416 U.S. at 419.

Under the law of this Circuit, TDC's practices may survive only if there is "no alternative means of protecting jail security that is reasonably available to prison officials." Taylor v. Sterrett, 532 F.2d 462, 472 n.14 (5th Cir. 1976). TDC has not attempted to satisfy this burden.

The relief ordered by the district court was particularly appropriate when viewed against the long history of TDC's resistance to providing inmates with unfettered access to courts, as demonstrated by the five protective orders that the district court was forced to enter during this litigation and TDC's unwillingness to reform its procedures even in response to court orders. See Corpus v. Estelle, 605 F.2d 175 (5th Cir. 1979), cert. denied, 445 U.S. 919 (1980). 99/

99/ TDC (Br. 89) cites Rizzo v. Goode, 423 U.S. 362 (1976), as a barrier to systemic relief in this case. Rizzo, however, stands for the proposition that a federal court may not enjoin speculative future misconduct based on sporadic past misconduct by local officials against an ill-defined class of victims when the misconduct "is not part of a pattern of persistent and deliberate official policy." Campbell v. McGruder, 580 F.2d 521, 526 (D.C. Cir. 1978). In this case, the past misconduct has been routine, the probability of future misconduct is high and the class of victims is narrowly defined as inmates perceived by TDC as litigious (see 503 F. Supp. at 1369).

V

THE UNITED STATES TAKES NO POSITION WITH RESPECT TO THE DISTRICT COURT'S RULING REQUIRING TDC TO COMPLY WITH CERTAIN STATE HEALTH AND SAFETY LAWS

TDC challenges the district court's order requiring it to comply with various state health and safety laws.[100] TDC contends (Br. 97-103) that it adheres to adequate health and safety standards; that the district court erred in asserting pendent jurisdiction over the question whether these statutes apply to TDC; and that these statutes do not apply to state agencies such as TDC.[101]

In its memorandum opinion, the district court stated (503 F. Supp. at 1382):

> With respect to general sanitation, food processing, and work safety, the evidence does not indicate that stricter standards than those contained in the applicable state statutes need be enforced to remedy harmful conditions. Therefore, a decision as to plaintiffs' constitutional claims on these issues is unnecessary.

The United States did not plead violations of state law in its complaint, and has no special expertise in the state law issues raised by the district court's ruling. Nor is it the position of the United States that this aspect of the case raises any constitutional issues. We, therefore, take no position with respect to the district court's ruling that TDC is subject to the state health and safety laws in question.

100/ The statutes are listed at n.35, supra.

101/ We note for the Court's information that certain issues relating to work safety and hygiene were resolved by consent decree (see pp. 4-5, supra).

VI

THE DISTRICT COURT ERRED IN ORDERING THE REORGANIZATION OF TDC INTO 500-MAN UNITS AND IN PLACING RESTRICTIONS UPON THE SIZE AND LOCATION OF NEW UNITS

The district court's remedial order required the State to submit to the court by November 1, 1981, a plan providing for the reorganization and decentralization of the management of each TDC unit housing more than 500 prisoners.[102/] The court found that the evidence did not establish that the size or structure of the TDC prisons creates harms of constitutional magnitude, but ruled, nonetheless, that the reorganization of TDC was necessary in order to alleviate the many unconstitutional conditions that it had identified in its opinion (see pp. 47-52, supra).

In light of the district court's ruling (with which we agree) that the size and structure of TDC units do not create harms of constitutional magnitude, the United States agrees with TDC that the portion of the court's order calling for alteration of the managerial structure and size of existing TDC units exceeded the judge's remedial authority. The size and managerial organization of state prison systems are matters that, at least in the first instance, are best left to those charged with the responsibility for running the system. While the evidence established that units of 500 or so inmates have many advantages over large units such

102/ This portion of the trial court's order was stayed pending appeal (650 F.2d at 573).

as those operated by TDC, it did not show--and the district court did not find--that larger units cannot be operated in a constitutional manner. This part of the district court's order should therefore be reversed.

For the same reasons, the district court's restrictions upon the size and location of new units (see pp. 50-51, supra) requires reversal.[103] Indeed, given the urgent need for new housing facilities and the difficulties frequently encountered in acquiring new sites for prison construction, this portion of the district court's order may well prove to be counterproductive.[104] In any event, where (as here) no specific constitutional right is implicated, judicial restrictions on the state's ability to to increase prison facilities, of whatever size and at whichever sites it deems appropriate, transgresses the permissible bounds of the court's remedial authority and must therefore be revised.[105]

103/ This portion of the order was also stayed pending appeal (650 F.2d at 573-574).

104/ Although the United States' proposed decree included provisions concerning the construction of new facilities and the managerial reorganization of TDC (U.S. Proposed Decree to 6-7), this was required by the court's order (R. 7727) that the proposed decree effectuate the requirements set out in the memorandum opinion (see 503 F. Supp. at 1388-1389).

105/ Reversal of the district court's order in this regard does not excuse TDC from operating any new unit in conformance with the consent decree and with the portions of the remedial decree that are not reversed.

VII

THE DISTRICT COURT DID NOT ERR BY APPOINTING A SPECIAL MASTER OR AUTHORIZING THE APPOINTMENT OF SIX MONITORS

TDC contends that the district court's appointment of a special master to monitor implementation of its decree was improper because the district court "overlooked" (Br. 104) the requirement of Rule 53(b), Fed. R. Civ. P., that "some exceptional condition" must require such an appointment and because the appointment was premature. It also contends (Br. 104-105) that the appointment constitutes an abdication of judicial authority and that the appointment of monitors conflicts with Article III of the Constitution.

In its opinion, the district court specified the basis for its appointment of a special master (503 F. Supp. at 1389-1390). There the court stated that the comprehensive and detailed nature of the remedy, entailing a long and complicated process of implementation, placed efficient and timely effectuation beyond the resources of the court. The court also referred to TDC's "record of intransigence toward previous court orders" in this action, the strained relations between the parties, the failure of TDC to acknowledge "completely evident" constitutional violations, and the failure of TDC to conform its actual practices to its written policies and procedures.[106/]

106/ See pp. 52-53, supra.

In such circumstances, the court's reference to a special master is plainly appropriate under Rule 53, Fed. R. Civ. P. Implementation of the court's order will be a complex, lengthy process that would overtax the resources and capacity of the court if it were undertaken without assistance from officials who can attend to day-to-day details. See Palmagiano v. Garrahy, 443 F. Supp. 956 (D. R.I. 1977), aff'd and remanded, 559 F.2d 17 (1st Cir. 1979). It is well established that a court may appoint one or more officials to ensure timely and effective implementation of its decree. Gary W. v. State of La., 601 F.2d 240, 244-245 (5th Cir. 1979); see Newman v. Alabama, 559 F.2d 283, 290 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978). By informing the court of difficulties in the implementation process and serving as a vehicle for communication between the parties and the court, the master will undoubtedly assist the timely and thorough effectuation of the decree and limit the occasions for direct judicial involvement.

Moreover, the Supreme Court long ago recognized that, quite apart from their Rule 53 authority, courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties" and have exercised this authority

since "the commencement of our Government." Ex parte Peterson, 253 U.S. 300, 312 (1920).[107/] The Sixth Circuit recently endorsed application of this principle in Reed v. Cleveland Bd. of Ed., 607 F. 2d 737, 743 (1979) (footnote omitted):

> [W]hen litigation exposes constitutional violations in public institutions a court of equity must take steps to eliminate them. In accomplishing this result trial courts frequently issue orders which require fundamental changes in the administrative and financial structures of the institutions involved. In order to accomplish these ends with fairness to all concerned a judge in equity has inherent power to appoint persons from outside the court system for assistance.

The district court properly exercised its inherent appointment authority in this case in naming a special master, and TDC has offered no justification for overturning that action.

The argument that the district court acted prematurely without awaiting evidence of noncompliance with the decree is unavailing. TDC's noncompliance with previous orders in the case (503 F. Supp. at 1389) responds in part. More importantly, the principal purpose and justification for appointing the master was to ensure effective and timely implementation of this complex decree. The district court fully recognized that

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107/ See also Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum.L.Rev. 452, 462 (1958); Special Project: The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, 826, 831 (1978).

the implementation process would be lengthy and complex and would require to day-to-day oversight. Its decision in such circumstances to seek the immediate assistance of someone outside the court system cannot be faulted.

Ironically, Texas cites Newman v. Alabama, supra, 559 F.2d at 289, for the proposition that later appointment of a special master will forestall "an impermissible and continuing judicial intrusion 'upon functions properly belonging to the daily operation of the [prison] system. '" (Br. 105). In Newman, this Court, after ordering dissolution of the 39-member committee established by the district court to oversee the implementation of its decree, suggested to the district court that it appoint a special master, assisted by a monitor at each prison. Newman v. Alabama, supra, 559 F.2d at 290. Such a procedure would appear far more intrusive than that adopted by the district court here, which authorized one special master and a maximum of six monitors to cover TDC's 16 prisons. The role to be played by the monitors was clearly explained in Newman, where this Court suggested that each monitor be given "full authority to observe, and to report his observations * * *" (id. at 290). This is precisely the responsibility assigned to the monitors in this action (R. 8439). Also, following the lead of this Court in Newman (ibid.), the district court has placed supervision of the monitors in the special master. We cannot agree with TDC that these remedial steps taken by the court were in error.

This is not to say, however, that the United States would subscribe to the use of monitors, or even the use of the special master, for any longer than is absolutely necessary. There is undeniably an intrusiveness on the daily operation of the TDC prison system that accompanies judical oversight of the decree. To the extent that there can be an early return to the parties (or their selected independent representative) of the monitoring and managerial functions of the court's order, the United States would encourage and endorse such a move. We are sensitive to TDC's legitimate concerns over undue federal interference in matters that are primarily the responsibility of the State and we would, therefore, favor termination of the present arrangement as soon as it can responsibly be accomplished.

The United States agrees with the final contention of TDC regarding the special master--that he should "not be allowed to supplant either judges or prison authorities in the exercise of their separate responsibilities" (Br. 107). We do not agree, however, that such a transgression has occurred. Since the issue of the special master's performance under the decree is not properly before the court on this appeal,[108/] we will reserve to a later day any further comments we might have with regard to this matter.

108/ TDC's argument in this regard appears to be based on extra-record materials attached as Appendix I to the State's motion for a stay filed in this court. Those materials are not properly before the Court. Plainly, before this Court can entertain the question of the postdecretal activities of the special master, a record would need to be compiled that includes all activities of the master to date, including

(continued)

TDC's only other contention is that it was an impermissible delegation of judicial authority to the special master to allow him to modify the staffing pattern ordered by the court. This Court so indicated in Ruiz v. Estelle, 650 F.2d 555, 565 (1981). The United States agrees with this Court's ruling.

VIII

THE STATE RECEIVED A FAIR TRIAL

Texas contends (Br. 109) that the cumulative effect of many errors committed by the district judge during discovery and trial, "in conjunction with an apparent bias on the part of the trial judge," deprived it of its right to a fair trial. We disagree.

A. Judicial bias

The State asserts that this record is "permeated with favoritism" (Br. 114). In fact, the record reflects that the district court conducted this litigation in an evenhanded and fair manner.

In support of this claim, TDC points to two portions of the trial transcript (Christian at 34 and Eckles at 257-258) which

108/(Continued)
the master's report on overcrowding and the First Monitor's Report of Factual Observations to the Special Master -- Report on Section II, D of the Amended Decree Granting Equitable Relief and Declaratory Judgement. Any consideration of this issue in the absence of such a record would be inappropriate.

it contends contain "direct revelations of bias" (Br. 114). The first relates to testimony of Warden Christian (Tr. p. 34) as revealing that the "judge stated he already had a good idea who was telling the truth before hearing [a] witness's testimony" (Br. 114). At the point in the trial when this remark occurred, counsel for TDC was attempting to elicit from Warden Christian testimony concerning an incident in October 1974 in which plaintiff Ruiz was maced. The following exchange took place between counsel for the private plaintiffs and the court (Christian at 35):

> MR. TURNER: Your Honor, I have an objection that should head off this entire line of inquiry. The court has already heard this testimony and made explicit findings of fact as to what happened.
>
> THE COURT: I sustain the objection. I well remember it.
>
> MR. TURNER: The matter has been litigated once, and that ought to be enough.
>
> THE COURT: I have already made a decision so go ahead to something else.

In response to argument from counsel for TDC, the court stated (id. at 37):

> I have a very good idea about who's telling the truth about it, but go ahead. I'm going to let you go ahead and bring this out.

The Court was referring to a hearing it had held in May 1975, at which Warden Christian testified. In an order entered after

this hearing the court found (R. 807) that

> after a vigorous dispute with Officer Ivison, plaintiff Ruiz was locked in his cell. Afterwards, Assistant Warden Christian appeared and sprayed Ruiz with chemical Mace.

Thus the language relied upon by TDC does not reveal judicial bias; rather it shows that the district court had previously held a hearing and had entered findings of fact concerning the incident about which Warden Christian was being questioned. For the court to decline to "relitigate" that matter suggests of no impropriety and certainly does not smack of "favoritism".

The second alleged indication of bias occurred during the testimony of former TDC correctional officer James E. Eckles, Jr., a witness for the United States. On cross-examination, Mr. Eckles was asked about an altercation between a Lieutenant Rodriguez and an inmate. The following exchange occurred (Eckles at 257-258):

> A. Lt. Rodriguez said something in Spanish, and the inmate answered him, and the Lieutenant hit him.
>
> Q. I don't suppose you would know what it was he said.
>
> A. No, sir, I wouldn't.
>
> THE COURT: Well, it wouldn't make any difference, would it, if someone swung on another one, a guard, a a prisoner, just for some type of verbal provocation? Would that make any difference? Do you excuse the conduct of someone who would do anything like this, a guard on a prisoner for a simple curse word or something like that? I'm asking your opinion. Is that sufficient?
>
> MR. WALSH [TDC Counsel]: Your Honor, there are cases that so hold.
>
> THE COURT: I would be very interested to see them.

The colloquy reflects nothing more than an apparent disagreement between the court and counsel on the question whether verbal prov-

ocations justify physical assaults. It strains the imagination to read into the quoted passage a suggestion of judicial bias.

In support of its bias charge, TDC further asserts (Br. 108) that "[v]irtually every significant ruling during both discovery and trial went against Defendants." Even if this were the case, there are any number of explanations, short of judicial bias, why a litigant might be singularly unsuccessful before the trial court. There is no need to indulge such post-mortems here, however, since defendants' efforts were not nearly as dismal as they portray. For example, the court granted the State's motion for a six-month postponement of the trial date (R. 2140). The court also granted defendants' motion for a change of venue to the Southern District of Texas (R. 2380), and defendants motion to strike in its entirety the testimony of plaintiffs' witness George Wilson was also granted (Wilson at 314).

As yet another indicia of judicial bias, TDC argues that, in resolving conflicts in the evidence, "the trial judge almost invariably adopted Plaintiffs' version and discounted to nothingness the evidence proffered by Defendants" (Br. 108). This is but another way of asking this Court to weigh for itself the evidence before the trial court and second-guess the balance struck below. There are, of course, limitations on how far appellate review can go in this regard. As we have already indicated, the credibility determinations of the district court are entitled to considerable deference (supra, p. 59 n.40).

If after combing the record, this court should conclude that the record lacks sufficient credible evidence to support the decision below -- and we have already argued that such is not the case -- reversal would be warranted because the action taken was clearly erronuous, not because of judicial bias. TDC's efforts to recast its earlier arguments in ad hominem terms adds nothing new, and for the reasons earlier stated, must fail.

Accordingly, the judicial bias argument must be rejected. Cf. Standefer v. United States, 511 F.2d 101, 105-106 (5th Cir. 1975).

B. Cumulative error

The State is also incorrect in asserting (Br. 109-115) that the cumulative effect of numerous procedural and evidentiary errors committed by the district court deprived it of a fair trial.

"The conduct of a fair trial is vested in the sound discretion of the trial judge, and his rulings will not be reversed in the absence of proof of the abuse of discretion." Excel Handbag Co. v. Edison Bros. Stores, 630 F.2d 379, 388 (5th Cir. 1980). "[W]here a controversy is tried to the court, and not to a jury, a showing of an abuse of discretion becomes an even more imposing task." Unitec Corp. v. Beatty Safway Scaffold Co., 358 F.2d 470, 478 (9th Cir. 1966). Errors in evidentiary rulings are not grounds for reversal unless substantial prejudice results. Petrites v. J.C. Bradford & Co., 646 F.2d 1033, 1036 (5th Cir. 1981); King v. Gulf Oil Co., 581 F.2d 1184, 1186 (5th Cir. 1978). Moreover,

"[o]n the hearing of any appeal * * * in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111. Viewed in light of these standards, defendants' "cumulative effect" argument is unpersuasive. 109/

Texas contends (Br. 108) that they are entitled to a new trial before a different judge because the district court (1) placed unreasonable burdens on it during discovery; (2) treated its witnesses unfairly; (3) unduly limited its examination of witnesses;

109/ The State's "cumulative effect" argument contains many misstatements of the record and mischaracterizations of actions by the district court. Some examples are illustrative:

1) Beam at 52-55. TDC contends (Br. 110) that this citation supports the proposition that "the trial judge altogether excluded TDC's proffered evidence on the ground of 'surprise.'" However, the court admitted the evidence in question (DX 545) (Beam at 56).

2) McDonald at 245. TDC cites this (Br. 112) to support the proposition that "[t]he trial judge constantly threatened to cut off TDC's cross-examination and on several occasions actually did so without giving TDC an adequate opportunity to rebut otherwise damaging testimony." In fact TDC's counsel voluntarily terminated his cross-examination of this witness (McDonald at 245).

3) Davis at 60-66. TDC cites this (Br. 112) for the proposition that "the court prevented TDC from cross-examining a witness as to whether the alleged overcrowding he had described was temporary." The transcript reflects that the court imposed no such restriction (Davis at 62-66).

4) Christian at 34. TDC cites this (Br. 112) for the proposition that it "was not allowed to rebut an incident in which prison guards alledgedly used mace." The record reflects that the court permitted the witness to testify about the incident (Christian at 37-38).

5) J.E. Johnson at 25-29. TDC cites this (Br. 113) for the proposition that the "court personally qualified testimony to meet TDC's hearsay objection." No objection of any kind appears on the referenced pages.

(continued)

(4) treated its counsel unfairly; and (5) erred in evidentiary rulings. We address each of these contentions below.

1. Contrary to TDC's assertion (Br. 109-111), the district court did not impose greater burdens on defendants than plaintiffs in answering interrogatories and furnishing outlines of trial testimony to opposing counsel. Rather, the record indicates that the court's orders governing these areas were enforced uniformly. See, e.g., Powell at 15-17, 25 (specificity of answers to interrogatories; trial outlines); R. 4164, pp. 32-41 (specificity of answers to interrogatories); Herriage at 65-67 (failure to respond to interrogatories). Defendants have not demonstrated that they were prejudiced by any of the court's rulings in this regard. And they were not harmed by a delay in receiving answers to interrogatories (Def. Br. at 110-111 n.25), since they received their discovery almost two years before trial began.

2. The court's treatment of witnesses was fair and within the court's discretion to control the conduct of the trial. The court's warning to defense witnesses about the consequences of perjury or contempt of court was proper in the circumstances

109/(Continued)

6) Lovelace at 205-210. TDC cites this testimony (Br. 113) for the proposition that "the judge evinced a determination to help Plaintiffs put on their case." In fact the court assisted counsel for TDC to overcome an objection by an attorney for the United States to the form of a question (Lovelace at 205-207).

7) Abernathy at 59-61. TDC cites this testimony (Br. 113) for the proposition that the court allowed plaintiffs to introduce "hearsay testimony as to bad meat." In fact the court sustained TDC's hearsay objection to this testimony (Abernathy at 60).

8) Estelle at 197-205. Defendants cite this (Br. 114) for the proposition that "Director Estelle was not allowed to explain his testimony * * *." In fact Mr. Estelle was permitted to explain the testimony in question fully on redirect examination (Estelle at 201, 217-223).

(id. at 112). We have not reviewed every transcript to determine if, as defendants contend (Br. 111), the court admonished 75% of their witnesses against discussing their testimony with other witnesses, but less than one-third of plaintiffs' witnesses. Any such imbalance that may exist, however, is probably due to the fact that the court admonished almost all witnesses who testified after George Wilson (plaintiffs' 67th witness) (R. 8511, pp. i-iv)), whose testimony the court struck for violating the rule. In any event, the State has shown no prejudice resulting from the court's treatment of the witnesses.

3. The court did not abuse its discretion in controlling defendants' examination of witnesses. Rule 611(a) of the Rules of Evidence permits a district court to "exercise reasonable control over the mode and order of interrogating witnesses * * *." The limits imposed by the court upon defendants' examinations of witnesses were reasonable and for the most part necessary to "avoid needless consumption of time" (ibid.).[110/]

4. The court did not favor plaintiffs' counsel. Although the court permitted counsel for both the United States and private plaintiffs--as representatives of separate parties--to cross-examine defense witnesses, it prohibited repetition (e.g., Robles at 66; Curry at 44). And although the court occasionally assisted plaintiffs' counsel, it assisted the defense counsel as well (e.g., Newman at 54-58; see also Clayton at 49).

110/ Although defendants assert (Br. 112) that the court terminated their cross-examinations "on several occasions," it did so only once, when cross-examination took over an hour longer than direct (Babcock at 172). The court also terminated cross-examination of Warden Christian by counsel for the United States (Christian at 284).

5. The evidentiary rulings complained of (Def. Br. 113-114) were not reversible error. Although the court permitted plaintiffs to introduce evidence of marginal relevancy, it permitted defense counsel to do the same.[111/] Given the nature of the evidence in question, the magnitude of the record, and the fact that the case was heard without a jury, any error in these evidentiary rulings was harmless.[112/]

Accordingly, there is no substance to the State's argument that it did not receive a fair trial.

IX

THE DISTRICT COURT MADE SPECIFIC FINDINGS OF FACT SUFFICIENT FOR APPELLATE REVIEW

Defendants contend (Br. 115-116) that the district court's findings of fact were not specific enough to permit appellate review. They assert that the district court "found no specific facts" (id. at 116). This argument is belied by the opinion below. The findings set out in the district court's opinion are "sufficiently detailed to give [this Court] a clear understanding of the analytical process by which ultimate findings were reached and to assure [the Court] that the trial court took care in ascertaining the

111/ E.g., McCann at 121-122 (evidence concerning Air Force pilot who ignited hunting ammunition while welding in his garage); Pontesso at 318-320 (evidence concerning TDC educational programs, which were not in issue).

112/ The incident reports about which TDC complains were admitted not "to bolster previous testimony" (Br. 114), but for "the limited purpose of showing what notice was afforded to the Defendant Estelle of anything that might be revealed by the reports themselves" (R. 6483, p. 45).

facts." Curtis v. C.I.R., 623 F.2d 1047, 1051 (5th Cir. 1980); see also Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 516 (5th Cir. 1969). There is simply no basis for defendants' claim of a lack of specificity.

X

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY GRANTING THE UNITED STATES' MOTION TO INTERVENE

Texas now renews its contention (Br. 116-121) that the district court erred by permitting the United States to intervene as a party-plaintiff. It contends that this error necessitates a new trial.

In 1975, this Court denied Texas' petition for a writ of mandamus, in which TDC contended that the district court had abused its discretion by granting the United States' motion to intervene pursuant to Rule 24(b)(2), Fed. R. Civ. P. In re Estelle, 516 F.2d 480, cert. denied, 426 U.S. 925 (1976). Two judges rested their decisions on the inappropriateness of mandamus, but Judge Tuttle reached the merits concluding that the district court acted within its discretion in allowing intervention since the United States had a "claim" in common with the plaintiffs within the meaning of Rule 24(b)(2). In re Estelle, supra, 516 F.2d at 485-487.

Texas relies on cases holding that the United States did not have authority, absent explicit congressional authorization, to initiate suit to vindicate the Eighth and Fourteenth Amendment rights of third persons. See United States v. City of Philadelphia,

644 F.2d 187, 201-203 (3d Cir. 1980); United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977). Even assuming the correctness of those decisions,[113/] reliance on them in the present case is misplaced since it fails to distinguish between standing to initiate a lawsuit and a sufficient interest to obtain permissive intervention under Rule 24(b)(2).

The cases cited were premised primarily on a view that the separation of powers doctrine prevented the initiation by the United States of civil rights suits in the absence of express authorization by Congress. Such reasoning does not, however, lead one to conclude that the United States cannot be allowed, in the court's discretion, to participate in a suit already underway against a state in which the United States has a legitimate interest. This is such a case. Here, the suit was initiated by injured parties as was authorized by Congress under 42 U.S.C. 1983. Congress has made a determination that such private suits may be brought against state officials. There is no threat that the balance of federal-state relations will be upset, nor is there a threat

113/ We note that although it is not necessary to find such authority to establish the right of the United States to participate in this case, numerous courts have held that the United States has authority to initiate litigation to promote its interests in the absence of explicit congressional authorization to do so. See, in the civil rights context, United States v. Original Knights of Ku Klux Klan, 250 F. Supp. 330 (E.D.La. 1965); United States v. City of Shreveport, 210 F. Supp. 36

(continued)

to the "equilibrium established by our constitutional system." United States v. Solomon, supra, 563 F.2d at 1129, quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (concurring opinion of Justice Jackson). Permitting the United States to intervene in these circumstances in no way undermines these principles. See also Halderman v. Pennhurst State Sch. & Hospital, 612 F.2d 84 (3rd Cir. 1979), rev'd on other grounds, 49 U.S.L.W. 4363 (U.S. April 20, 1981).

The United States has substantial interest in and responsibility for the enforcement of civil rights laws and the Fourteenth Amendment. In re Estelle, supra (e.g., 18 U.S.C. 241, 242). Moreover, Congress has now expressed its clear intent that the United States can, and

113/(Continued)
(W.D.La. 1962), aff'd, 316 F.2d 928 (5th Cir. 1963); United States v. Lassiter, 203 F. Supp. 20 (W.D. La.), aff'd per curiam, 371 U.S. 10 (1962); United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962); United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961); cf. United States v. City of Jackson, 318 F.2d 1 (5th Cir. 1963). See also United States v. Bibb County Democratic Executive Comm., 222 F. Supp. 493 (M.D. Ga. 1962) (segregated voting facilities).

The United States' right to sue to protect the public interest has been recognized in United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); United States v. American Bell Telephone Co., 128 U.S. 315 (1888); and In re Debs, 158 U.S. 564 (1895). Additionally, the right of the United States to sue without explicit congressional authorization to protect its contract or property interests has also been recognized. See, e.g., Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818); United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831); Cotton v. United States, 52 U.S. (11 How.) 229 (1850); Jessup v. United States, 106 U.S. (16 Otto) 147 (1882).

should, participate in such suits, with passage, in 1980, of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997. This Act authorizes the Attorney General to initiate or intervene in suits challenging the constitutionality of conditions of confinement. Moreover the Conference Report on the Act confirms Congress' view that the United States already had authority to intervene in suits such as this one pursuant to Rule 24(b)(2) prior to passage of 42 U.S.C. 1997. H.R. Rep. No. 96-897, 96th Cong., 2d Sess. 14-15 (1980).

Nor would any legitimate interest be served by holding that permissive intervention was improper in this case. The evidence offered below by the United States was fully adopted by the private plaintiffs as their own, and, therefore, it could not properly be removed from the record even if it were now determined that the United States should not have been admitted. TDC argues that, rather than allowing the private plaintiffs to benefit from the government's case, appropriate relief would be to order a new trial. Such a solution blinks at reality, and, at best, exalts form over substance. Any new trial of this case would necessarily include the same parties, including the United States (which could now concededly participate under the Civil Rights of Institutionalized Persons Act). It makes absolutely no sense to put the court, the parties and the public through the ordeal

of a "carbon copy" retrial of this case without some indication on the part of TDC that the alleged "prejudice" it suffered by the United States' participation in the first trial can be cured on retrial. The fact remains that permissive intervention was proper here and that defendants are unable to point to any lasting prejudice as a result of the participation of the United States. Judical economy, together with accepted principles of law and equity, compel affirmance of the district court on this point.

XIV

THE INDIVIDUAL MEMBERS OF THE TEXAS BOARD OF CORRECTIONS ARE PROPER PARTIES DEFENDANT

Finally, defendants argue (Br. 121-122) that the Texas Board of Corrections and its individual members are improper parties defendant. As TDC's brief acknowledges (p. 121), the Board, in conjunction with the TDC Director, is "'responsible for the management of the affairs of the prison system and for the proper care, treatment, feeding, clothing and management of the prisoners * * *.'"

We do not take issue with the State's assertion that the Board itself should not be a defendant. An action against a state agency is barred by the Eleventh Amendment, unless it has consented to the suit. Alabama v. Pugh, 438 U.S. 781, 782 (1978). No such consent has been given here. See Tex. Rev. Civ. Stat. Ann. art. 6166i (Vernon). Accordingly, the Board should be dismissed from the case.

The individual members of the Board, however, are in a different legal posture. While suits against the States and their agencies are barred by the Eleventh Amendment, it has long been

settled that actions for prospective injunctive relief against state officials who violate the Constitution are not. Ex parte Young, 209 U.S. 123 (1908). See also Edelman v. Jordan, 415 U.S. 651, 664 (1974).[114/]

In Gates v. Collier, supra, for example, this Court affirmed a judgment in a prison conditions case against the Superintendent and members of the Mississippi Penitentiary Board (501 F.2d at 1291). And, in Alabama v. Pugh, supra, although the Supreme Court ordered the dismissal of the Alabama Board of Corrections from the case, it did not require the dismissal of its Commissioner, its Chairman, and four members, who were also parties defendant (see Newman v. Alabama, supra, 503 F.2d at 1322 n.2). Accordingly, the individual members of the Texas Board of Corrections are proper parties defendant in this suit.

114/ In Quern v. Jordan, 440 U.S. 332, 337 (1979)--cited at page 122 of defendants' brief--the Court recently reaffirmed Ex parte Young's holding that "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law * * *."

CONCLUSION

The judgment of the district court should be affirmed in part and reversed in part,[115] and the case remanded for further proceedings.

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115/ The paragraphs of the district court's remedial order which should be reversed are I.A.4., I.A.5., I.A.6., II.A.3., VII.A.1., VII.A.2, VII.B. (insofar as it relates to size and location of units), and VIII. See pp. 93, 94-95, 126-127, and 133, supra.

ADDENDUM

This Addendum has been compiled to avoid burdening the brief with citations to the record. It contains citations to pages in the record that describe incidents of violence. The Addendum has been divided into four sections: the first contains transcript citations to violent incidents between inmates; the second lists transcript citations to violent incidents involving building tenders; the third reflects transcript citations to violence involving TDC guards; and the fourth contains citations to exhibits reflecting violent incidents.

I. Violent Incidents Between Inmates

Transcript		Pages
Allen	at	89-91
Auer	at	43-44
Ballard	at	50-51, 135-140
Barbosa	at	4, 30-31
Beaird	at	125-142, 220-226
Blanchette	at	21-27
Brown, P.	at	22-26, 59, 77
Brown, R.	at	34-35
Campbell, G.	at	40-43, 47-50, 57-58
Carranza	at	32-35, 53-54, 123-131, 159-160, 161-162, 175-179
Castleberry	at	89-90
Cirilo	at	44-45
Conroy	at	39-40
Cook	at	77, 148
Costilow	at	77, 103-104, 108-116, 161-171
Cousins	at	101-102, 103-104, 106-107, 117-118, 137-156, 191-195
Davis, O.L.	at	16, 55-59 70-71, 77-80, 87-88
Dears	at	40, 42-43, 83-85
Deters	at	76-79
Dixon	at	89-90
Edwards	at	8-12
Forrester	at	15-32, 47-55, 61-63

II. Violent Incidents Involving Building Tenders

Transcript		Pages
Acosta	at	11-28, 47-54
Adams, D.	at	10-19, 39-42
Adams, J.	at	8-12, 15-23, 34-46, 49-51
Albach	at	103-115
Allen	at	26-28, 46-47, 48-51, 71-116, 173-175
Apple	at	22, 28-36, 94-97
Ballard	at	33-39, 41-43, 46-48, 50-51, 53-60, 66, 105-110, 110-112, 112-115, 115-116, 128-132, 132-133, 135-142
Barbosa	at	62-64
Beaird	at	163-169, 169-180
Beeson	at	51-53
Bennett	at	22-25, 26-29, 60-73, 89-90, 93-97
Bradix	at	19-22, 65-66
Bramlett	at	87-90
Brashear	at	18-23, 41-44, 60-68, 90-92
Breen	at	145-149, 159-162, 201
Briggs	at	20-22, 73
Brown, P.	at	31-35, 81-97, 109-110
Brown, R.	at	12-13, 33-35
Busby	at	22-25, 47-54, 74-75
Campbell, R.	at	6-13, 17-23, 31-40, 43, 49-60
Carpenter	at	9-42, 60-91, 98-106
Carranza	at	48-53, 68-88, 96-104, 131-149, 161-162

III. Violent Incidents Involving Guards

IV. Exhibits Involving Violent Incidents

I-86-88

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II-233

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III-1

51-57

61-65

67-72

74-75

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79-84

89

94-95

97-98

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105-108

110-113

115-118

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III-142

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III-255-256

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