IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

EVERETTE SHRADER, ALBERT BOISSEAU, KENT EDWIN EVANS, MERLON JOSEPH, DENNIS ADAMS, and RUSSELL VINNEDGE, on behalf of themselves and all others similarly situated,

Plaintiffs,

CIVIL ACTION NO. 82-0247-R
Magistrate's No. 83-0001-L

v.

FRANKLIN WHITE, ROBERT M. LANDON, Acting Director, Virginia Department of Corrections, TERRY C. RICHTMEYER, Regional Administrator, Virginia Department of Corrections, ELWOOD BOOKER, Superintendent, Virginia State Penitentiary, RUFUS FLEMING, Assistant Superintendent, Virginia State Penitentiary, EDWARD WRIGHT, Institutional Security Chief, Virginia State Penitentiary,

Defendants.

O R D E R

In accordance with the memorandum filed herewith, it is ORDERED that this case be, and the same hereby is, DISMISSED.

Let the Clerk send a copy of this order, along with the attached memorandum and appendixes, to all counsel of record.

David G. Lowe
UNITED STATES MAGISTRATE

Dated: 29 JUN 1983

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M E M O R A N D U M

Everette Shrader, Albert Boisseau, Kent Edwin Evans, Merlon Joseph, Dennis Adams, and Russell Vinnedge, inmates confined to the Virginia State Penitentiary, bring this action on behalf of themselves and all other similarly situated inmates, seeking to declare the conditions at that institution to be violative of the Eighth Amendment to the Constitution and that they have been denied their rights under the Fourteenth Amendment. They seek declaratory and injunctive relief only.

The defendants are the Director of the Virginia Department of Corrections, the Warden of the Virginia State Penitentiary, and various other correctional officials. Jurisdiction is appropriate pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

The Virginia State Penitentiary is operated by the Virginia Department of Corrections, and is located in the center of the City of Richmond, Virginia. Its origin dates to the 1800's. In 1905, what is now known as A-Building was opened. In 1906, construction of the Administration Building was completed, and in 1939, the original women's facility was torn down and replaced with what is now B-Building. Further construction followed, including the recreational and shops building, and C-Building. The growth of the Penitentiary is typical of the patchwork expansion of other penal institutions attempting to adapt to changing demands without changing locations. The Penitentiary has an inmate population of approximately 900.

The Court's analysis of the conditions at the Penitentiary is twofold. First, the Court must explore the physical dimensions of the institution itself; the mortar and brick used to separate these men from society. A second and more difficult question for the Court involves the conditions inside the walls as created by the occupants themselves. The analysis will focus upon the impact of placing dangerous men in confinement with other men of violent tendencies. This twofold analysis is made after review of days of testimony, hundreds of exhibits, and several visits to the institution itself. We are guided by the principles set forth by the Supreme Court in Rhodes v. Chapman, 452 U.S. 337 (1981).

There is conflicting evidence involved in every factual discussion of these issues. As such, the resolution of these issues must

be determined by weighing the credibility of the evidence presented by the concerned parties.

As operated today, the Virginia State Penitentiary has two general housing units, A-Building and B-Building. In addition, there is a special housing unit for emotionally-disturbed inmates in B-Building, Basement Section. Space in C-Building is provided for inmates requiring isolation from the general population, either because of disciplinary problems, administrative needs, or for protective custody. In addition to the housing units, the Penitentiary has an infirmary and hospital, dentists and physical therapy facilities, an educational building, a recreational section, a shops building, a mess hall, and a recreational field. The entire institution is surrounded by a solid perimeter, either consisting of a separate brick wall, or a part of one of the buildings.

The housing units are constructed entirely of steel, concrete and slate. The buildings are divided into four equal sections by means of steel walls. Each of the four sections consist of four tiers, plus a ground floor, or a total of five tiers of cells. The cells run lengthwise down the center of the building and face outward toward the walls. Directly in front of the cells, and running the entire length of the tier, is a catwalk. There are 79 cells and five showers per section in A-Building. The Northeast and Northwest sections of B-Building each contain 99 cells and five showers. The Southeast and Southwest sections of B-Building each contain 134 cells and five showers.

The cells in A-Building measure five and one-half feet by seven and one-half feet. In B-Building, they are six feet by nine feet. The cells are formed by three solid steel walls, a steel ceiling,

television set, picnic tables and benches are located at each end of each section. Along the exterior walls, there are telephones, and, at the far end of each yard, there are deep sinks with hot and cold water. Hot water is also available from the showers on each tier.

Illumination inside the general population cellhouses is provided by windows on the exterior walls during the day, and at night by high intensity mercury vapor lights installed in the ceilings. There is sufficient lighting at all times to recognize the facial features of individual inmates from any place within a given section of the cellhouse. Each cell has its own interior light fixture as well. Technical measurements of the interior cell lighting revealed the illumination to be approximately one-fourth to one-half that recommended by the American Correctional Association Standards for Adult Correctional Institutions (Second Edition, 1981)(hereinafter referred to as "ACA"). However, lighting inside the cell is relatively good.3/ Moreover, technical measurements of the lighting at the Bench in the courtroom where this case was heard approximated the illumination inside the cells. That lighting was quite sufficient for reading and writing.

Windows, running vertically from about six feet above the floor upward, are located on the far walls of each section. They were designed to operate mechanically, although many of them must now be opened manually. The windows are set in wooden frames and are not screened,

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3/This conclusion is based on the unannounced tour of the Virginia State Penitentiary which took place after 10:00 p.m. Many inmates were reading or writing letters; some were typing material for further consideration by this Court; and, others had extinguished their lights to improve their television viewing.

however, only two inmates mentioned that insects were a problem at all. There is no evidence that they were more than a minor annoyance, and there is a complete absence of medical evidence to indicate that insects created a health hazard.

Evidence concerning air movement is conflicting. One of the plaintiffs' experts testified that, using a linear measurement device, he found no movement of air inside the cells at all. Defendants' experts testified that such a test would not accurately indicate the flow of air and would, in fact, probably give a false reading of zero. Whatever may have been the true flow of air, none of the inmates testified that they suffered any significant discomfort from inadequate ventilation.[4] On each of its visits to the facility, the Court found no evidence of stagnant air, or the odors one might expect to find in such confined areas.[5]

There is a similar lack of evidence concerning the temperature inside the cells during the summer. Dr. Theodore J. Gordon, one of plaintiffs' experts, testified that he found the temperature in one of the cells to be 90 degrees at 9:00 a.m. on the day of his visit. One would have expected at least some complaints from the inmates, if excessive heat were truly a problem during the hot weather. There were none. Moreover, Dr. Gordon testified that the results of such excessive

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[4]/Plaintiff Shrader did mention that it was humid in the summer, and that there was no ventilation in the fall when the windows were shut. He did not seem genuinely concerned about either condition.

[5]/It may well be that the lack of complaints concerning ventilation results from the large individual ownership of fans within the prison population.

heat would have manifested itself in heat stroke, prostration, etc. The record is completely devoid of any evidence of such occurrences.

During the cold months, heating is supplied by a forced air system. Heated air is forced out of vents located along the exterior wall and is drawn through the cellhouse by means of intake vents in the individual cells. There is a conflict concerning the adequacy of the heat in the cellhouse, especially on the ground floors. There was testimony from one inmate that he had to wear clothes to bed and use additional blankets to keep warm in the winter. On the other hand, there is evidence that correctional officers could work comfortably in the cellhouses without additional clothing during the same period. The Court finds that the temperature in the living quarters is comfortable, even in cold weather.

The showers in all living areas leave much to be desired. They represent what is essentially an afterthought on the part of the earlier prison administrators, i.e., they were not an inherent part of the original building. In A and B-Buildings, they consist of "box-like" structures with appropriate plumbing fitted into former cells. The shower heads drip and rust stains are plentiful. There is evidence that mildew or mold may also be present. One inmate indicated that there might be a momentary loss of cold water if a nearby toilet were to be flushed. There is no evidence that any inmate was ever injured from a malfunction of the showers, nor is there any evidence that the conditions of the stalls created a health hazard. One might have expected at least one complaint of athlete's foot, but there were none. Although there are stains on the shower stalls and the plumbing is rusting in many instances, the showers cannot be termed "filthy." The evidence is uncontradicted that daily attempts are made to clean them.

Several inmates complained of pigeons and other birds nesting in A-Building. This problem apparently resulted from openings in the cupolas in the roof, which have since been screened. The problem has now been eliminated as far as the pigeons are concerned. Other birds occasionally come in through the unscreened windows, but there is no evidence that any of the avianic inhabitants created a health problem for the inmates.

There was much testimony concerning leaks in the roof of A-Building. Immediately after one inmate testified that the leaks were so bad that it was "raining" inside the building "right now," the Court recessed, visited the area, and found the building quite dry. The only indication of any leaks appeared in the nature of wet streaks down the sides of the walls. Most of that water appeared to be emanating from the windows rather than from the roof. Water was not spilling onto the floors, nor was there any evidence that it was coming near the cells. It simply was not a problem. In all fairness, it must be said that there was only a light drizzle when the visit was made. There is no doubt that some water runs down the walls during heavy rains or snows, but it is hardly sufficient to cause flooding or to cause more than a minor inconvenience to inmates using the area of the yard within one or two feet of the wall. These leaks have not created any safety or health hazards.

There is ample evidence that the locking system in A-Building is old and in need of frequent repair. One inmate, who at one time was in charge of the maintenance crew servicing the locks, testified that when the system failed, an inmate might have difficulty opening his door. The problem is not that the doors may fail to lock, it is that occasionally

individual cells may not immediately unlock. There is also sufficient evidence that the defendants, once aware of such problems, take appropriate steps to repair the defective mechanism.

The system itself is antiquated. There are but two options. All the doors on a given tier must be centrally locked, or all the doors must be centrally unlocked. The only manner in which individual cells can be secured is by placing a padlock on the cell door. Inmates are permitted to purchase and use locks for this purpose, and may padlock their cells at any time, although they are encouraged not to do so when occupying them. The size of padlocks, which inmates may possess and use, is limited. See note 6, infra.

There is no evidence that any inmate has ever suffered a loss or damage 6/ of any sort as a result of the poor condition of the locking system, nor is there any indication that such a loss or damage might reasonably occur in the future. Cf. Collins v. Haga, 373 F.Supp. 923 (W.D. Va. 1974)(no constitutional violation where reasonable program to control vermin and rodents).

Interior cellhouse security is maintained by the assignment of three officers to each section. An officer is posted at the section door; one is assigned to the control cage at each section; and, one officer "walks" the tiers in each section. In addition, a supervisor is assigned to the officers in the building. The officers are armed

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6/There is evidence supporting the conclusion that, in one particularly brutal murder, someone managed to lock an inmate in his cell, using a padlock which was larger than permitted. Flammable liquid was then thrown into the cell and ignited. No similar incidents have occurred. Bolt cutters are available in the guard cages which are capable of cutting all but the largest, unauthorized locks.

either with mace or with stun guns.[7] The officer posted at the entrance controls access to and from his assigned section. He is not permitted to enter into the section, because to do so would jeopardize the security of the entire building. He maintains the key to the door which is normally locked. If he were posted inside the section, the inmates would have ready access to the key and, thus, could escape from the section. Each officer assigned to the guard cage is stationed on the side closest to the section for which he has responsibility. Radio and telephone contact with officers outside the cellhouse is available. This officer has direct contact with the control officers in the other sections of the cellhouse. He has the visual capability of seeing most of his section and can see the "walking" officer at all times, except when he is in the stairwell area. If assistance is needed inside his section, he can obtain it from other areas within the institution, including adjacent sections in the cellhouse.

The "walking" officer is charged with the responsibility of walking along the catwalks on the tiers and looking into each cell as he passes. He follows no fixed "rounds," but moves from tier to tier at random.[8] In the event he needs assistance, he blows a whistle to capture

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[7]/A stun gun is a short-barreled, large-bore weapon. When fired, it propels a heavy "bean bag" towards the target. It is designed to strike with sufficient force to "stun" the person hit. It is not designed to kill or to seriously injure when correctly used. Stun guns are now being phased out in favor of mace.

[8]/Because of the design of the cellhouse, i.e., the stacks of tiers, an officer walking along the catwalk cannot see the cells directly above or below him without leaning over the rail of the catwalk.

the control officer's attention. While this system of communication seems somewhat archaic, it is remarkably effective.[9/]

Inmates are permitted into and out of their section of the cellhouse when going to meals or work. Additionally, they may leave or enter when they have passes authorizing visits to other areas, which are obtained from the control officer. Thus, except at mealtime and job changes, movement into and out of the sections of the cellhouse is restricted. Inmates are required to be inside their cells at 6:00 a.m., 3:00 p.m., and 11:00 p.m. for "count." During these times, an officer physically counts the inmates and reports his total to the control officer to determine that all are accounted for. Other than these times, an inmate is required to be locked in his cell only from 11:00 p.m. to 6:00 a.m. He may spend as much time in or out of his cell as he wishes. The cell door remains locked for 50 minutes of every hour, except from 11:00 p.m. to 6:00 a.m. when they remain constantly locked, and from 7:00 p.m. to 11:00 p.m., when they remain unlocked to permit inmates to shower and to visit each other in their cells. An inmate, who chooses not to leave his cell at any given time during the day, will not be able to change his mind until the doors are scheduled to be opened 50 minutes later. Similarly, once an inmate has left his cell, he cannot reenter it until the scheduled reopening of the doors.

[9/]The whistle is distinctive among all of the other sounds in the cell block. The sounds of the whistle being blown can be heard outside of the cell block, even when all of the windows are closed. A spontaneous demonstration of just how effective the communication system is was provided when the Court visited the institution unannounced. While being escorted from B-Building to C-Building, the loud, piercing shrill of a whistle was heard. It was obvious that it came from B-Building and approximately in the center of the building. The escorting officer explained that the whistle was simply denoting a count was being taken.

Although, the Virginia State Penitentiary dates to the 1800's, there are surprisingly few sanitation problems in the living areas. The inmates take a great deal of pride in their cells. This pride is reflected in the impressive cleanliness of the individual cells and of the living areas in general. There is no evidence of an accumulation of trash, or a denial of cleaning materials. These factors are important in the consideration of the constitutionality of the conditions of confinement. Blake v. Hall, 668 F.2d 52, 57-59 (1st Cir. 1981), cert. denied, __ U.S. ___, 102 S.Ct. 2257 (1982). Complaints concerning cockroaches or other insects inside the cellhouse living areas have been surprisingly scarce. There is a pest control program at the Penitentiary which, quite obviously, has been effective. Absent evidence of infestation, and there is none, plaintiffs have failed to establish a constitutional deficiency simply because an occasional insect or rodent may make a sudden appearance. See Collins, 373 F.Supp 923; cf. Lunsford v. Reynolds, 376 F.Supp. 526 (W.D. Va. 1974)(occasional incidents of foreign particles or objects in food does not constitute cruel and unusual punishment).

There is no evidence to suggest, even remotely, that inmates at the Penitentiary are denied visitation rights. The complaints seem to be around the facilities provided. The state, however, owes no duty to provide a visiting area at all. Clearly, visitors have no right to visitation. See White v. Keller, 438 F.Supp 110 (D.Md. 1977), aff'd, 588 F.2d 913 (4th Cir. 1978). If the inmate has any such right, it is only where the denial of visitation would be of such a magnitude to constitute cruel and unusual punishment. Id. at 115-117 n.8. If the state grants visitation privileges, it may place restrictions, even harsh conditions,

upon the exercise of that privilege. See Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975). The fact that some visitors may have experienced lengthy delays in seeing their inmate relatives because of crowded visiting room conditions, or the fact that the visiting room was not clean, or that the ceiling was unattractive, even ugly, does not constitute conditions where visitation could be described as painful.

Much evidence was taken concerning the risk of fire existing in the Virginia State Penitentiary. In this connection, it must be remembered that the cellhouses are constructed entirely of steel, slate, and concrete.[10]/ There is literally nothing which would burn. The flammable items are those found in the individual cells. Each individual cell, however, is separated from the next by a minimum of one-quarter inch of steel plate and an additional two inches of concrete above and below.

Plaintiffs' expert, Mr. Paul Silver, testified that, in his opinion, a fire in one cell could easily produce enough heat to cause the adjoining cells to ignite. He noted that steel turns into plastic at 1400 degrees Fahrenheit, a temperature easily reached with conventional means. At that temperature, the structural integrity of the construction of the entire cellhouse would be threatened. He did not state the specific facts upon which he based his conclusions.

On the other hand, Mr. William Davis, a structural engineer for the defendants, testified that he had chosen a typical cell in

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[10]/One of plaintiffs' experts was of the opinion that the ceiling might collapse in the event of a large fire, because he believed it was attached to wooden supports. He did not personally inspect the supports. Later evidence established that, in fact, the supports were constructed of steel not wood.

A-Building, inventoried its contents, and then calculated the number of BTUs [11]/ that could be produced, if the contents were entirely consumed by fire. Based on his calculations, he concluded the cell might burn for 10 to 13 1/4 minutes and the temperature rise would be between 400 and 600 degrees Fahrenheit. He further testified that, under the worst possible conditions, including the addition of kerosene, the temperature rise would not exceed 600 degrees. He concluded it was unlikely that a fire in one cell would spread to an adjoining cell, and that the hottest fire which could be produced would not effect the structural integrity of the cellhouse.

Faced with the conflicting testimony, the Court places its confidence in that of Mr. Davis rather than that of Mr. Silver. The Court finds that the risk of fire in the cellhouses is negligible.

Although one inmate testified that he was present during a fire and that the smoke and fumes were so thick that he could not see or breathe, the Court does not believe him. There is other testimony that neither smoke nor fumes resulting from fires has ever been so concentrated that one could neither see nor breathe. The volume of space in each of the cellhouses lends credence to the latter testimony indicating that the smoke and fumes would rise relatively harmlessly to the ceiling and then disburse. There is no evidence that a cell fire ever caused panic or even widespread alarm among the inmates confined in either cellhouse. Finally, it is also difficult to believe that anyone would deliberately expose

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[11]/A British Thermal Unit (BTU) has been defined as "the heat necessary to raise one pound of water one degree Fahrenheit at some arbitrarily chosen temperature level." Marks' Standard Handbook for Mechanical Engineers, 8th Ed. 1978, pg. 4-8 (McGraw-Hill, Inc. N.Y.)

himself to a great risk of harm from excessive smoke and fumes by committing arson. Yet, Mr. Silver testified that virtually all fires are deliberately set by inmates who have great control over the materials consumed in the flames. In short, the plaintiffs have failed to prove that they have been exposed to an unreasonable risk of harm from smoke. They have not even established a significant risk of any fire. Compare Laaman v. Helgemoe, 437 F.Supp 269, 281-282 (D.N.H. 1977)(flammable ceilings, supports, etc., create fire hazard).

A great deal of evidence has also been presented concerning the violations of the Virginia Fire Safety Regulations and the degree of the Virginia Code's applicability to the institution. Similar evidence concerning violations of the ACA prison standards abound. Apparently, there are violations of both standards in varying degrees. Plaintiffs' and defendants' experts testified that both the Virginia Code and the ACA require two fire exits be available in each section of the cell houses. It is a fact that only one exit is available and the violation is uncontested. While such violations may be an indication of unconstitutional conditions, see Ramos v. Lamm, 639 F.2d 559, 567 n.10 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), they are not determinative. Ruiz v. Estelle, 679 F.2d 1115, 1152-1153 (5th Cir. 1982); Williams v. Edwards, 547 F.2d 1206, 1214 (5th Cir. 1977); cf. Strachan v. Ashe, 548 F.Supp. 1193 (D.Mass. 1982)(failure to conform to minimum state hygiene standards does not amount to per se constitutional violation).

In the final analysis, the question is not whether the Virginia State Penitentiary has violated any provisions of the Virginia Code or of any private organization. It is whether inmates have been exposed to an unreasonable risk of harm by virtue of the existence of fire

hazards. Ruiz, 679 F.2d 1115. Clearly, they have not. The buildings are concrete and steel, and temperatures in excess of 1400 degrees Fahrenheit would be necessary to produce structural damage. Such temperatures are not obtainable under existing conditions. The evidence establishes that a fire in any given cell in the cellhouse would be unable to spread to an adjacent cell, even under the worst circumstances. Despite the fires which have occurred, there have been no injuries due to smoke inhalation.12/

A great deal of evidence has also been submitted concerning the sanitation in the food preparation and storage areas. It has long been established that inmates must not be denied a nutritionally adequate diet. E.g., Bolding v. Holshouser, 571 F.2d 461, 465 (4th Cir.), cert. denied, 439 U.S 837 (1978); cf. Ross v. Blackledge, 477 F.2d 616 (4th Cir. 1973)(right of Muslim inmates to nutritious pork-free diet). While the food need not be served hot, or in a cosmetically appetizing manner, Stickney v. List, 519 F.Supp. 617 (D.Nev. 1981), it must be wholesome. See Bolding, 571 F.2d 461. The food must be "prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it." Ramos, 639 F.2d at 571.

Meals prepared and served at the Virginia State Penitentiary are derived from a master menu prepared by the Virginia Department of Corrections. The parties agree that the master menu provides an adequate

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12/Mr. Silver, plaintiffs' expert, testified that there have been 17 fires set in A-Building alone. He refused to conclude, however, that the fact that there were no serious injuries was significant. The Court does not agree and finds it highly significant. See Ruiz, 679 F.2d at 1153.

diet for the inmates. They disagree strongly concerning the manner in which the food at the Penitentiary is stored, prepared, and served. The evidence is in conflict in every area.

If one were to believe the plaintiffs' inmate witnesses, rarely a meal is served that does not consist of: 1) raw food; 2) rotten food; or, 3) contaminated food. According to plaintiffs' witnesses, the food storage areas are filthy and vermin infested; cooking utensils are improperly cleaned and in woefully short supply; recipes are not followed; cross connections abound; and, nobody washes their hands. The defendants presented evidence of a Four-Star restaurant with excellent management procedures. In the final analysis, it all boils down to one thing - credibility.

Plaintiffs' nutritional expert testified extensively to her observations of unsanitary conditions in the mess hall area, including: clogged drains; filthy floors strewn with trash; a rotting chicken in a locked food storage area; improper temperature of coolers; etc. If representative of the sanitation maintained in the food services department, such conditions would clearly support plaintiffs' claims that they were exposed to an extreme health hazard sufficient to amount to the infliction of cruel and unusual punishment. See Hamilton v. Schiro, 338 F.Supp. 1016, 1017 (E.D. La. 1970); Heitman v. Gabriel, 524 F.Supp. 622, 627 (W.D. Mo. 1981). The Court is convinced that what the expert observed on her inspection was not typical, nor representative, of the true sanitary conditions. The testimony of persons who regularly visit the facilities paint a far different picture, one which the Court finds more

accurately reflects the conditions in the kitchen area.[13]/ While there have been violations reported in the three health inspection reports in evidence, there is insufficient evidence that the problems persisted continuously without corrective action. There is no credible evidence of vermin or rodent infestation in the food storage, preparation, or service areas.[14]/

In determining whether a constitutionally proscribed health hazard exists from the alleged unsanitary conditions, it is significant that there has never been a reported incident of food poisoning at the Virginia State Penitentiary. Some of the inmates testified that they had experienced "discomfort" after eating some of the meals, but never to such a degree as to cause them to seek medical assistance. Finally, there is no evidence of direct malnutrition[15]/, nor is there evidence of

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[13]/Ms. Dorothy Cook, Food Service Manager and Dietician for the Virginia Department of Corrections, who routinely visits the Virginia State Penitentiary, and who accompanied Ms. Judy Wilson on her tour, testified that she was "shocked" by what she saw that day. Mr. Alto Richardson, the Food Service Manager, indicated he was being "sabotaged" by inmate personnel on that day.

[14]/Apparently no one has taken a "body count" at the Virginia State Penitentiary, but it is clear from the evidence that the number of mice in attendance is far less than the 174 mice caught at the Southern Ohio Correctional Facility in April of 1976. There the Court found that the conditions during that month were probably temporary, and, therefore, did not constitute a health hazard. See Chapman v. Rhodes, 434 F.Supp 1007, 1014 (S.D. Ohio 1977), rev'd on other grounds sub nom. Rhodes v. Chapman, 452 U.S. 337 (1981). Additionally, Dr. Theodore J. Gordon, plaintiffs' expert, testified that, while he found some mouse droppings, he did not find any evidence of nesting.

[15]/As observed by another court, under similar circumstances:

> None of the inmates who testified or appeared during the trial of this case appeared in any way undernourished or malnourished. Chapman, 434 F.Supp. at 1014.

"sub-clinical manifestations" of malnutrition.[16]/ Plaintiffs have not proved their claims concerning the unsanitary conditions in the food service department.

On the issue of vocational and educational opportunities at the Virginia State Penitentiary, there is very little evidence in conflict. Testimony from the experts, both on behalf of the plaintiffs and on behalf of the defendants, fully borne out by the Court's own observations, leads to the classic question, "Who's in charge here?" Formal classes are ill-attended and illiteracy remains the norm. The vocational shops are operated in a haphazard manner. Supervision is singularly lacking and those purportedly in charge do not know who or where their charges are or what they are doing.[17]/ On the other hand, one senses no burning desire for education or rehabilitation among the inmate population. To the contra, it has been plaintiffs' position that defendants should offer inducements to exact more interest in the educational and rehabilitation programs. It was suggested, for example, that inmates might be paid to attend GED or vocational training.

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[16]/Ms. Judy Wilson, plaintiffs' expert on nutrition, testified that she would have expected the conditions at the Virginia State Penitentiary to result in sub-clinical manifestations of malnutrition. Such manifestations would appear as 1) increased dental problems; 2) reduced capacity to work; 3) reduced capacity to ward off disease; 4) reduced capacity to cope with stress; 5) reduced efficiency to work; 6) loss of appetite; 7) indigestion; and, 8) decreased ability to recover from trauma and illness.

[17]/There is ample testimony that instructors do not know or care who the inmates assigned to their sections are. On its tour of the Penitentiary, the Court observed one inmate in the furniture section happily using one of the sewing machines to produce a very colorful pocketbook; another inmate was seated on a window with his legs dangling on the outside, watching the traffic.

Plaintiffs have also complained of the lack of "meaningful" jobs available to inmates. The Virginia State Penitentiary does offer employment to inmates in the general population, although it normally takes six months after an inmate is assigned to the Penitentiary before he can obtain employment. Even then, he may not get a "meaningful" job. He may be assigned to any of several "make work" positions, which require only a minimum time per day to complete.

In this Circuit, at least, an inmate has no constitutional right to any prison job. **Altizer v. Paderick**, 569 F.2d 812 (4th Cir.), cert. denied, 435 U.S. 1009 (1978). Therefore, he has no right to a "meaningful job" nor does he have any "constitutional right" to vocational or educational training. **See Byrd v. Vitek**, 689 F.2d 770 (8th Cir. 1982). This is not to say that the failure to provide vocational and educational programs might not, under appropriate circumstances, amount to the infliction of cruel and unusual punishment. Here, however, where inmates have access to other programs, to recreational facilities, and to the free use of their own cells, the failure to provide a rehabilitative program does not violate the Eighth Amendment's proscription against cruel and unusual punishment. **Madyun v. Thompson**, 657 F.2d 868, 874 (7th Cir. 1981); see also, **Bowring v. Godwin**, 551 F.2d 44, 48 n.2 (4th Cir. 1977).

The Court is aware of the conclusions of Dr. Gordon, which if given credence, might bring the instant case within the purview of Byrd, 689 F.2d 770. However, Dr. Gordon's conclusion that the failure to provide meaningful jobs, or other mandatory training, to inmates is directly responsible for an unreasonable increase in violence is not

persuasive. His statistical analysis of the "deadheads"[18]/ is of no value to this Court.[19]/ The study may well indicate that deadheads, as a group, tend to be more violent than other inmates at the Virginia State Penitentiary, but that is all that it establishes. It may well be that the proper conclusion to draw from Dr. Gordon's study is simply that violent men, as a group, will either avoid or be unable to participate in vocational and educational programs and, thus, become deadheads. The evidence establishes that the idleness which exists among the deadheads, is neither the creation of the administration, nor is it fostered or promoted by them. It is the creation of the inmates themselves, who choose not to participate in the many programs which are available. Moreover, one would expect the violence attributable to the deadhead portion of the population would be reflected by a marked increase in violence in their living areas. The evidence does not show such to be the case. The Serious Incident Reports indicate almost as many violent acts occur outside the cellhouses as inside. It must be remembered that deadheads, by their very definition, remain inside the cellhouses. Such statistics cast some doubt on the validity on Dr. Gordon's conclusions. Byrd, 689 F.2d at 771. In any event, the failure to provide meaningful jobs, vocational programs, or educational training does not, under the circumstances of this case, amount to the willful and wanton

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[18]/The origin of the name "deadhead" is not clear. It refers to an inmate who has neither a job nor any educational program. Thus, all his time is "free" time, i.e., he may spend it as he wishes.

[19]/For example, the statistical analysis is flawed by Dr. Gordon's assumption that all persons listed in the heading of the Serious Incident Report as an assailant were, in fact, guilty of the attack. In truth, they are more properly termed "suspects." In some instances, a review of the Serious Incident Reports indicates they may not even be true suspects.

infliction of unnecessary pain. See Rhodes, 452 U.S. at 348; Hoptowit v. Ray, 682 F.2d 1237, 1254-1255 (9th Cir. 1982).

C-Building consists of three sections. All of the cells are similar except that those in the disciplinary isolation section have solid steel doors with a small viewing hole, in addition to the normal barred door. Inmates confined to disciplinary isolation are permitted limited reading materials; they receive three meals a day; and they exercise and shower twice a week. Adequate heat and ventilation are furnished. Inmates cannot control the lights which remain on 24 hours a day. The isolation section is designed for punishment and its use is limited to that purpose. Inmates may not be confined in excess of 15 days on any single offense and there is no evidence that any inmate spends a prolonged period of time in the isolation section. The conditions of confinement do not endanger the health of the inmates and the evidence simply does not establish cruel and unusual punishment. See Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975).

In the administrative segregation section, inmates are confined to their cells, except for showers two or three times a week (usually two). They are allowed three hours of exercise per week; they are permitted reading materials and a radio. They receive the same meals as the general population and have limited commissary privileges. The heating, ventilation and lighting in the entire C-Building is adequate.

The protective custody (PC) section of C-Building is similar to segregation. PC inmates, however, must wear white coveralls and are handcuffed whenever moved in the institution; they are allowed three hours of exercise per week and permitted to shower on Mondays and Thursdays;

they are allowed to have reading materials and a radio; and they receive three meals per day. The conditions in administrative segregation and protective custody are harsh, but not unconstitutional. See Rhodes, 452 U.S. 337; Breeden v. Jackson, 457 F.2d 578 (4th Cir. 1972).

The basement of B-Building contains a special area for inmates having emotional problems. The cells in that section are similar to other cells in B-Building; there is a "yard" available as a "dayroom;" a psychologist and a psychiatrist visit the inmates weekly; and group therapy sessions are available. There is nothing to suggest that the physical surroundings of this area constitute cruel and unusual punishment.

Plaintiffs have also claimed that the isolation units in the infirmary are improperly ventilated and lack illumination. Evidence to support these allegations is sorely lacking. In any event, confinement in such cells for emergency purposes and short periods of time does not amount to a constitutional deprivation. See Breeden, 457 F.2d 578; Sweet, 529 F.2d 854.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The proscription against "cruel and unusual punishment" applies not only to the type of punishment imposed, e.g., Wilkerson v. Utah, 99 U.S. 135-136 (1879); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), but to the manner in which it is administered. Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965); Bethea v. Crouse, 417 F.2d 504, 506-507 (10th Cir. 1979). Thus, once a state takes upon itself the authority of confining an individual for a violation of its laws, it must assume the responsibility of assuring that the conditions of

that confinement do not constitute cruel and unusual punishment. See Pugh v. Locke, 406 F.Supp 318 (M.D. Ala. 1976), aff'd as modified sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781 (1978). The state may not expose, therefore, a committed individual to living conditions which are barbaric; which shock the conscience; or which are inconsistent with contemporary standards of decency. Trop v. Dulles, 356 U. S. 86, 99-101 (1958). In some instances, a single condition of confinement may be so onerous as to amount to a constitutional violation. E.g. Estelle v. Gamble, 429 U.S. 97, 103-105 (1976)(lack of medical care). In others, where no single condition may alone violate constitutional standards, the totality of all of the conditions may. Rhodes, 452 U.S. at 363 (Brennan, J., concurring); Sweet, 529 F.2d at 861.

The facilities at the Penitentiary are not new, but age alone is far less important than the state of repair of a building in considering whether conditions of confinement offend the Eighth Amendment. In the instant case, among the items which are alleged to have been in need of repair, and which are alleged to constitute intolerable conditions, are the leaking roof in A-Building, the locking system in A-Building, and the showers in all buildings. That the roof presently leaks in A-Building is questionable, but, assuming that it does, the amount of water entering the cellhouse is negligible, and is confined to dripping along the outer walls of the building. There is no flooding or accumulation of water inside the cellhouse. While a leaky roof may rise

to constitutional significance under other circumstances, see Ramos, 639 F.2d at 569, it does not do so here.

There has also been an allegation that the noise level in the cellhouses may be unreasonable. While such conditions might amount to cruel and unusual punishment, see Burks v. Walsh, 461 F.Supp. 454, 469-471, 486 (W.D. Mo. 1978), the Court found no evidence in support of the inference on any of its three separate visits to the cellhouses.

One would seriously doubt, however, that the facilities of the cellhouses meet the criteria for accreditation under the ACA standards. For example, the cells provide only 48.75 square feet of living space per inmate in A-Building and slightly more space in B-Building.20/ (The ACA requires a minimum of 60 square feet.) There is no warm water in the cells, the lighting falls short of their recommendations, and other violations of the standards could be cited. The experts also agree that the physical layout of the building is not conducive to the best management and security of the inmates.

The buildings cannot be described as cheerful - hardly.21/ At first glance, the scene inside is reminiscent of an Edward G. Robinson film, except for the predominance of television sets and antennas. However, it is not by the standards of the ACA, nor by the opinion of the

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20/All cells at the Virginia State Penitentiary are "single" cells. There is no double bunking.

21/The Court specifically finds that, while it is depressing, the atmosphere in the cells has not caused serious emotional harm to the confined inmates.

experts, nor even by the personal opinion of the Court, that the conditions of confinement are to be judged; rather, it is by the Constitution. Rhodes, 452 U.S. at 337; Rummell v. Estelle, 445 U.S. 263, 275 (1980). It is now settled that conditions which are unpleasant, even harsh, will withstand constitutional muster so long as they do not offend evolving standards of decency. Rhodes, 452 U.S. at 347.

Inmates confined in the Virginia State Penitentiary are furnished a clean cell for single occupancy, with adequate heat and ventilation. Each inmate has his own toilet and sink. Although an inmate may only have immediate access to cold water inside his cell, he can readily obtain hot water for cleaning and personal hygiene. Adequate showers are available on each tier and freedom of movement in each section is relatively unhampered. Inmates may spend their free time either in the "yard," (dayroom) or in their cells, when not outside. They may watch television in their cells if they have a set, or may watch one of the two state-furnished sets in the dayroom. Cards and other games are also available.

The living areas are clean and sanitary and the general population inmates may participate in various social activities. A recreational building and a ball field is available for exercise. Wholesome and nutritious food is served three times a day, and contact visits are permitted frequently. Other amenities are available but need not be detailed. Under the circumstances of this case, the physical conditions surrounding the plaintiffs' confinement in the Virginia State Penitentiary, either separately or in combination, do not amount to the infliction of cruel and unusual punishment. See Rhodes, 452 U.S. at 337.

In addition to their complaints concerning the physical conditions of their confinement, the plaintiffs have asserted a constitutional claim that they have been denied adequate protection from assaults by other inmates at the Virginia State Penitentiary. Official reports establish that 7 inmates have been murdered while confined in the Penitentiary within the last 5 years.[22] Additionally, there have been 54 stabbings and 24 other serious assaults on inmates by inmates since 1979.[23] Assaults undoubtedly occur which do not appear in the records, because: (1) they do not result in an injury requiring medical treatment[24]; (2) they are not witnessed by staff members; or, (3) they are not reported to staff members by the victims or by the witnesses for fear of reprisals.[25] The extent of such undetected assaults cannot accurately be determined from the evidence. Some inmates testified that

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[22]/No inmates were fatally stabbed in 1979; two inmates were fatally stabbed in the years 1980 and 1981; and, one inmate was fatally stabbed in the years 1982 and 1983. In one particularly brutal incident, an inmate was killed when another inmate set his cell on fire, after placing a padlock on the door to prevent his escape.

[23]/An actual tabulation of the number of stabbings, the number of beatings, and the number of other incidents for each year and the location of the incidents compiled from the Serious Incident Reports is attached as Appendix #3.

[24]/It is clear that a Serious Incident Report, the main source of records of serious assaults, is completed on every incident involving an inmate receiving medical attention, even where the inmate refuses to cooperate in any manner with the authorities.

[25]/There is ample evidence, and the Court finds, that there exists among prisoners an almost universal code of "see no evil, do no evil, and under no circumstances, report any evil." Breach of the code can bring with it an enormously increased risk of personal harm, except in rare circumstances.

unreported assaults were almost an every day occurrence, although they, themselves, were never involved. Other inmates testified that such assaults occurred only occasionally. Correctional officials indicated that the number of undetected assaults would be insignificant. Intuitively, from the many prison cases filed in this Court, the feeling persists that innumerable minor assaults, those which did not involve a weapon, must occur at the Virginia State Penititentiary. In terms of the evidence presented in this case, however, there is little to justify that conclusion. Official records, which might have assisted the Court in this aspect of the case, were offered by neither party. Records concerning Institutional Classification Committee or Institutional Adjustment Committee decisions involving assaults, threats, extortion, etc., also would have been helpful.[26]/

For whatever reason, they were never introduced. The Court has before it only the barest conflicting generalities from which it is asked to make a decision bearing on a fundamental constitutional right - the Eighth Amendment right of an inmate to be reasonably protected from assaults by other prisoners. There is ample evidence of a number of serious injuries which have resulted from armed inmate assaults on other inmates. There were 19 such injuries in 1979; 19 in 1980; 18 in 1981; and, 23 in 1982.[27]/ Most inmates

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[26]/Institutional Adjustment Committees sit to hear institutional disciplinary charges placed against an inmate. Where guilt is found, the written findings of the Committee are made a part of the inmate's file. Institutional Classification Committees, unlike Adjustment Committees, do not impose punishments. However, they may recommend an increase in custody classification, where a particular inmate presents a threat to other inmates or to the institution. Institutional Classification Committee decisions are also placed in an inmate's file.

[27]/It is highly unlikely that there is any significant difference between the number of actual injuries from armed assaults and the number reported. See also footnote 24, supra.

and correctional officals attribute these violent acts to extortion, homosexuality, or narcotics. Very little actual evidence exists that extortion or homosexuality play a major role in the number of violent incidents occurring at the Penitentiary. It is true that several inmates testified that they knew of numerous cases where younger, weaker inmates were subjected to homosexual abuse by stronger, more violent men. One inmate testified that the purchase and sale of such younger inmates was a fairly common practice at prices ranging from $5.00 to $350.00; and that at one time he offered his services to protect those prisoners. He stated he finally stopped when it proved to be a thankless job. Observing the witness testify, it became obvious that he was enjoying himself immensely at the expense of his veracity. In short, his testimony was not credible. Another inmate's testimony was extremely vague, except in the conclusion that younger, smaller inmates might be subjected to homosexual attacks. The official records at the Virginia State Penitentiary indicate that, since 1979, there has only been one forcible homosexual attack. The Court recognizes that the embarrassment and mental anguish involved in such crimes would tend to suppress official reports of such assaults, but the Court must acknowledge the evidence, or lack thereof, in the determination of the presence of a constitutional violation.

While the testimony of the inmates was intended to lead to the conclusion that there are numerous "young, new" inmates confined in the Penitentiary, the conclusion would not be justified. According to the evidence, youthful offenders, with few exceptions, are assigned to the Southampton Correctional Center, not to the Penitentiary. The Court is not convinced that homosexuality or homosexual attacks are significantly involved

in any acts of violence at the Penitentiary. There is also a lack of credible evidence to indicate extortion plays a major role in the violence occurring at the institution.

There is substantial evidence to establish the existence of a drug problem among the inmates confined in the Penitentiary. Even though the evidence does not establish a problem of the magnitude asserted by plaintiffs, there is indisputably a significant problem. The evidence indicates that the administration has recognized this difficulty and has taken some reasonable, albeit unsuccessful, measures to halt the introduction of drugs into the institution. For example, all incoming packages and their contents are searched in the mailroom before delivery to inmates.

The most commonly abused substance at the Virginia State Penitentiary is Talwin, a Class IV controlled substance, whose only medical use appears to be that of an analgesic. Talwin is neither stored at, nor available through, the Penitentiary pharmacy. No prescription for the drug is honored, nor may the drug be dispensed by any physician associated with the Department of Corrections. Another analgesic is always substituted. Additionally, hypodermic syringes, through which Talwin is introduced into the body, are strictly controlled. Inmates are strip-searched upon leaving the visiting areas and unannounced searches and shakedowns are performed. Yet, the problem persists. It does not follow that cruel and unusual punishment has been inflicted by the Commonwealth of Virginia on anyone by virtue of the existence of drug trafficking among the inmates. The evidence of both parties establishes conclusively that inmates, who do not become involved in drugs, do not fear violence from those that do. Any risk of assaults from drug users or dealers is limited to the persons who are either using or dealing in drugs.

Exposure to the risk of violence associated with the drug business results not from incarceration at the Virginia State Penitentiary, but from the voluntary association with an illicit activity. Somewhat surprisingly, there is no evidence that the use of Talwin or other drugs has significantly increased the incidents of larceny, robbery, etc. Because the evidence fails to establish that inmates have been exposed to the willful and wanton infliction of unnecessary pain by reason of the purported drug problem, further comment is neither necessary nor warranted.[28]/ See Rhodes, 452 U.S. at 349-350; cf. Smith v. Fairman, 690 F.2d 122, 125 (7th Cir. 1982)(desire to remedy harsh conditions must not influence interpretation of evidence).

The Court is unwilling to accept the further proposition that all violent injuries arising from assaults are the result of drug-related transactions.[29]/ At least one inmate was stabbed for no apparent reason and others have claimed similar incidents. Furthermore, there is some evidence to establish additional acts of violence resulting in injuries, less dramatic than those described in the Serious Incident Reports perhaps, but violent nonetheless. Precisely when the number of acts of violence may approach the impermissible infliction of cruel and unusual punishment is not, in any event,

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[28]/This is not to say that a drug-related stabbing or violent assault may not have an adverse impact on the general population. But, since the evidence establishes that it is commonly known to the general population that they will not be exposed to such violence themselves, their fear of such attacks is greatly diminished and fails to establish an independent constitutional claim. See discussion, infra.

[29]/Another proposition advanced by plaintiffs is the risk of danger from assaults by psychotic or mentally ill patients. The evidence does not substantiate the claim. It is not contested that there are some severely disturbed patients in the general population; but, those patients are closely monitored, non-violent, and generally in good remission. They simply do not pose any significant risk to the other inmates.

capable of simplistic statistical analysis.[30]/ See Ruiz, 679 F.2d at 1142. A "reign of terror" is clearly sufficient. See Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973). An isolated incident ordinarily is not. Withers v. Levine, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980).

One key to understanding when the risk of violence reaches constitutional dimensions is its effect on the inmate population. See Rhodes, 452 U.S. at 364 (Brennan, J. concurring); Johnson v. Levine, 588 F.2d 1378, 1380-1381 (4th Cir. 1978). In this context, it is not necessary that an inmate establish that he has been the subject of an actual attack, but he must establish that he lives in reasonable fear of assaults from other inmates, Withers, 615 F.2d 158; and that the fear results in significant mental pain. See Leonardo v. Moran, 611 F.2d 397 (1st Cir. 1979). To establish fear

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[30]/Mr. David Fogel, one of plaintiffs' experts, testified at some length concerning his statistical studies of violence in the Virginia State Penitentiary. There is a serious question of the validity of his works. He testified that he obtained his raw data from the summaries of Serious Incident Reports as shown on plaintiffs' exhibit #23. Rarely, however, do the figures reported in those documents coincide with those used by Mr. Fogel. For example, for the year 1982, he testified that there were 41 "inmate on inmate" assaults, and 29 "inmate on staff" assaults. Using simple addition, plaintiffs' exhibit #23 actually shows 32 "inmate on inmate" assaults (an error by Mr. Fogel of 28%). Likewise, in his statistical analysis of the "inmate on inmate involving the use of a weapon," Mr. Fogel employed erroneous raw data to conclude that the Virginia State Penitentiary is more violent than the San Quentin Prison. Additionally, Mr. Fogel failed to consider the larger base populations (3,200 inmates) in San Quentin, (900 inmates) in Virginia State Penitentiary, or that San Quentin is a "lock-down" institution - i.e., inmates remain constantly locked in their cells - where the Virginia State Penitentiary is quite the opposite. Obviously the opportunity for violence in a tightly controlled environment, such as San Quentin, is far less than that in the Virginia State Penitentiary, where movement and contact is relatively unimpaired.

of constitutional dimensions, an inmate must show more than simple anxiety. He must demonstrate anxiety on a level such as would interfere to some degree with his everyday functions. Cf. Estelle, 429 U.S. 97 (plaintiff must demonstrate "serious medical need" to establish constitutional claim); see West v. Keve, 571 F.2d 158 (3rd Cir. 1978). An inmate does not need to establish that he is totally incapacitated by any means. But, before pain of a constitutional magnitude can be said to exist, there must be evidence of serious mental and emotional deterioration attributable to the fear of constant danger from assaults. See Sweet, 529 F.2d at 866 n.30 (physical or mental deterioration necessary to establish Eighth Amendment claim based on solitary confinement); accord Darrough v. Hogan, 563 F.2d 1259, 1263 (5th Cir.), cert. denied, 439 U.S. 850 (1978).

This is not to say that failure to provide protection from unreasonable risks of assault will always require a showing of preexisting fear. Once an inmate suffers an actual assault, he has suffered "pain." All that is left to establish the constitutional tort is evidence that the pain resulted from the willful or wanton acts of the administration. See Smith v. Wade, __U.S.__, 51 U.S.L.W. 4407 (April 20, 1983). Where there is no actual infliction of pain, be it physical or mental, there is no constitutional deprivation; accord Leonardo, 611 F.2d at 399; see Estelle, 429 U.S. 97; Rhodes, 452 U.S. 337.31/ The requirement that the fear engendered be of sufficient magnitude to create significant mental distress is in keeping with

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31/Under some circumstances, the evidence of pain is obviated by the nature of the punishment itself, where the punishment is "grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. 153, 173 (1975).

the Court's recent discussions of cruel and unusual punishment in terms of the "wanton and unnecessary infliction of pain." Rhodes, 452 U.S. at 347; Estelle, 429 U.S. 97.

Nevertheless, assuming that an inmate establishes that his fear of assaults has produced significant mental distress and psychological impairment to produce "pain," it does not automatically follow that he has been subjected to cruel and unusual punishment. He must also show that the pain was inflicted recklessly or wantonly. This latter requirement was recognized long before the Rhodes decision. E.g. Estelle, 429 U.S. 97 (deliberate indifference to serious medical needs); Little v. Walker, 552 F.2d 193, 197-198 (7th Cir.), cert. denied, 435 U.S. 932 (1977)(deliberate indifference to violent attacks and sexual assaults); see Withers, 615 F.2d 158 (evidence must establish "pervasive risk of harm"). Moreover, the pain must, itself, be "totally without penological justification." Gregg v. Georgia, 428 U.S. 153, 183 (1976); see Estelle, 429 U.S. at 103.

In considering the significance of violence in this case, it must not be forgotten that the Virginia State Penitentiary is a maximum security institution. The inmates confined therein have lengthy sentences to serve, because of their convictions of extremely serious offenses, most involving robbery, rape, murder, abduction, and assault. It is only natural to expect violent men to do violent deeds. No special expertise is necessary to realize that, when such men are confined together, the chance that violence will occur increases dramatically. The high risk of assaults in a maximum security institution must be recognized as a necessary adjunct to any sentence of confinement therein. It follows, therefore, that a high risk of assaults in a maximum security institution is not totally without penological justification. Nor can it be said that confinement in a maximum security

institution offends "evolving standards of decency that mark the progress of a maturing society." Trop, 356 U.S. at 101. Recognizing these axioms, Judge Merhige of this Court had occasion to remark:

> . . . [T]he Court takes notice of the violent nature of the men who inhabit the Virginia prisons. It would be fantasy to believe that even the most enlightened prison officials operating with unlimited resources could prevent all acts of violence within the prison. Moreover, even if a prison official fails through his negligence to prevent an act of violence, a violation of constitutional right is not of necessity stated. To the contrary, there must be a showing either of a pattern of indisputed and unchecked violence or, on a different level, of an egregious failure to provide security to a particular inmate, before a deprivation of constitutional right is stated.

Penn v. Oliver, 351 F.Supp. 1292, 1294 (E.D. Va. 1972).

Thus, the generally high risk that is associated with penitentiary life cannot, in and of itself, amount to the infliction of cruel and unusual punishment, because even if it results in constitutionally significant pain, it is neither unnecessary, nor wanton.

However, if it can be shown that there is a "great risk" of harm flowing, not from the general nature of the inmates confined in an institution, but from a specific obvious and unnecessary danger, the wanton infliction of unnecessary pain is established and a constitutional claim exists. See Withers, 615 F.2d 158; Woodhous, 487 F.2d 889. Thus, confinement of a slightly-built, younger inmate in the same cell as a large, violent, aggressive inmate may amount to cruel and unusual punishment because the risk is specific (the risk of homosexual assault); it is obvious (a pervasive risk of that type of assault exists); and, it is unnecessary (other cell assignments might easily be made). Cf. Wade, 51 U.S.L.W. 4407 (reckless failure to protect inmate from obvious danger of assault may justify punitive

damages in § 1983 actions).[32]/ Given these principles, the plaintiffs have not proved their claim that they have been denied constitutionally adequate protection.

First, the evidence of any real fear of assaults at the Virginia State Penitentiary is virtually non-existent. Almost universally, the inmate witnesses testified that they were not frightened.[33]/ True, some testified that they took certain precautions when eating to avoid a possible attack[34]/;

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[32]/Plaintiffs have stressed the prevalence of weapons in the Virginia State Penitentiary by claiming that the state has failed to protect them from a pervasive risk of harm, relying on the language of Withers, 615 F.2d 158. At first glance, the argument is attractive, for weapons do exist. There is evidence that the material from which they were made, i.e., scrap metal, was not sufficiently safeguarded and there is evidence that the method employed to restrict the making and conveyance of such weapons was inadequate. The facts may well establish that a danger exists which is specific (the weapons), obvious (from the number of stabbings and shakedown reports), and "unnecessary." The fallacy in the argument is the use of the term "unnecessary." The danger does not come from the weapons themselves. It comes from the use of those weapons, and as has already been discussed, that risk, in terms of an Eighth Amendment violation, is not unnecessary. The weapons may increase the risk of violence, but their existence is only one facet to be considered in the overall question of whether or not prison officials have acted in a willful and wanton manner in inflicting unnecessary pain. The fact that inmates have been able to make and possess some knives out of scrap metal may be impressive. It may even seem shocking. But, the stark reality of prison life is that virtually anything can be employed as a weapon, e.g., a pencil can become a dagger; an electric cord a garrote; a lock inside a sock a bludgeon; human excretion a poison. Pool cues, brooms, and chairs have all been used as weapons at one time or another. The pervasive risk of harm from which inmates are entitled to be protected is not the knife, but the act of assault. Courts have been unwilling to establish constitutional liability solely on the basis of the existence of weapons within an institution. See Bogard v. Cook, 586 F.2d 399, 418 (5th Cir.), cert. denied, 444 U.S. 883 (1979); cf. Puckett v. Cox, 456 F.2d 233, 235 (6th Cir. 1972)(negligence in permitting insane prisoner to roam within prison, and in allowing him access to dangerous instruments does not state equal protection claim).

[33]/The overall impression from the inmates who testified may best be summed up as, "I don't need to worry. I can take care of myself."

[34]/There was testimony that, when dining, many inmates sit with their friends in such a manner that each inmate is able to view the area behind the men opposite him, thus, "covering" each other from surprise attacks.

but the general sense of their testimony was that the best way to avoid assaults was to avoid drugs; and, that if one did so, he would be relatively safe. Additionally, there was a sparsity of evidence to indicate that the inmates exhibited any significant psychological symptoms as a result of their exposure to violence at the Penitentiary. Dr. Stanton Samenow, a clinical psychologist, after touring the Penitentiary and talking with officials and interviewing inmates, concluded that inmates at the Penitentiary were surprisingly unconcerned about the acts of violence inside the institution - that none of them seemed worried. Interestingly, on each occasion that the Court visited the Penitentiary, there was a striking lack of tension. On the unannounced tour, it appeared that the inmates were relaxed and totally unconcerned that they might be subjected to any violence. Both Mr. Terrell Don Hutto and Mr. Maurice Sigler, defendants' experts, found similar conditions to exist on their tours. The Court concludes that any fear of assaults by inmates from other inmates is transient, momentary, and does not cause any mental pain to the general population.

Secondly, there is no evidence that either the fear of assaults, or the assaults themselves, result from the willful and wanton failure of the state to take reasonable steps to protect the inmates. The evidence is overwhelming that the state has recognized the dangers, which result from the close confinement of prisoners in the Virginia State Penitentiary, and it has done much to reduce the risk of violence posed by the inherent nature of those prisoners. Inmates are not confined together in the same cell, thereby eliminating the possibility of an occurrence such as described in Withers, 615 F.2d 158. See also Wade, 51 U.S.L.W. 4407. Inmates are not permitted to discipline other prisoners, compare Jones v. Diamond, 636 F.2d 1364, 1373 (5th Cir.), cert. dismissed sub nom. Ledbetter v. Jones, 453 U.S. 950 (1981), nor

is there evidence that inmates were permitted to act as guards. Ruiz, 679 F.2d 1115. In fact, the Virginia State Penitentiary has one of the best guard/inmate ratios in the nation. Compare ibid.

A classification system exists to alert the administration to any known enemies of each inmate, and such enemies are not only housed in different buildings but, when possible, they are housed in different institutions. When more violent inmates can be identified, they are segregated from the population and may be transferred to the Mecklenburg Correctional Center, a maximum security institution designed to house inmates with particularly severe behavioral problems. Inmate movement is controlled and monitored. There are institutional shakedowns and routine, unannounced cell searches in attempts to reduce contraband. All known or suspected serious incidents are investigated, and, where state criminal violations occur, the cases are referred to the Commonwealth Attorney's Office for prosecution.35/ Lighting throughout the institution is adequate to deter criminal acts and the stationing of correctional officers makes them highly visible to the inmates. There are also facilities for providing protective custody, where required. Cf. Breeden, 457 F.2d 578 (inmate may be required to live under harsher conditions than those in the general population where it is necessary to protect him).

35/There is evidence that the Commonwealth Attorney's Office does not prosecute all cases referred to it, but there is no evidence that the prison officials failed to present such cases. The Court is not blind to the realities of prosecutorial problems. Crimes occurring at the Virginia State Penitentiary are prosecuted by the Richmond City Commonwealth Attorney's Office, which, like other prosecuting offices, has more than its share of work to do. The Court can sympathize with the feeling that an additional sentence on top of a life sentence may not warrant prosecution.

The totality of the conditions of confinement, including the risk of violence, reveals life in the Virginia State Penitentiary to be less than pleasant, but hardly comparable to those condemned by other courts. See e.g. Ramos, 639 F.2d 559; Gates v. Collins, 501 F.2d 1291 (5th Cir. 1974); Pugh, 406 F.Supp. 318. Inmates at the Virginia State Penitentiary are provided private cells, each with its own sink and toilet. While it surprised the Court, inmates are permitted to have their own television sets, fans, and other electrical items in their cells.[36]. Each inmate may spend as much or as little time inside his cell as he desires, except when sleeping, or when in segregated confinement. There is no "hard labor." In fact, if he does not choose to do so, an inmate does not have to work at all. There is no evidence that any inmate has suffered any serious mental, physical or emotional deterioration solely on account of his confinement in the Virginia State Penitentiary. While there is a risk of violence at the Penitentiary, it is neither unreasonable, nor is it the product of wanton or reckless actions by the defendants.

On the other hand, the evidence concerning the illegal usage and dealing of drugs at the Virginia State Penitentiary is a matter of grave concern. The evidence fairly well eliminates the inmates and their visitors as a source of the controlled substances entering the institution. The conclusion is not attractive. The facts may indicate violations of federal

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[36]/There is evidence that the only electrical outlet in the cells in A-Building is for the light bulb. An adapter is available to permit the outlet to be used as a source for two additional appliances. There is also evidence that some inmates wire their appliances directly to the wiring behind the light fixtures. While unauthorized, the practice does not appear to have presented any serious hazards other than the possible "fire hazard." As previously noted, that hazard is minimal at best.

criminal laws[37], but they fall short of establishing constitutional violations. Similarly, criticism of the vocational and educational opportunities at the Virginia State Penitentiary, while justified, does not establish a deprivation of constitutional magnitude.

When all of the claims which have been proved are considered together, they do not involve the willful or wanton infliction of unnecessary pain, Rhodes, 452 U.S. at 347; nor, do the conditions at the Virginia State Penitentiary threaten the physical, mental, or emotional health of the inmates, id. at 364 (Brennan, J. concurring); nor, do they offend the evolving standards of decency of a maturing society. Trop, 356 U.S. at 101. In short, the Virginia State Penitentiary is not a nice place, the conditions of confinement may even be harsh, but that is simply part of the price that those who choose not to abide by the rules of society must pay for their actions. Society, too, has its rights.

Accordingly, this action will be dismissed and an appropriate order shall issue.

UNITED STATES MAGISTRATE

Dated 29 JUN 1983

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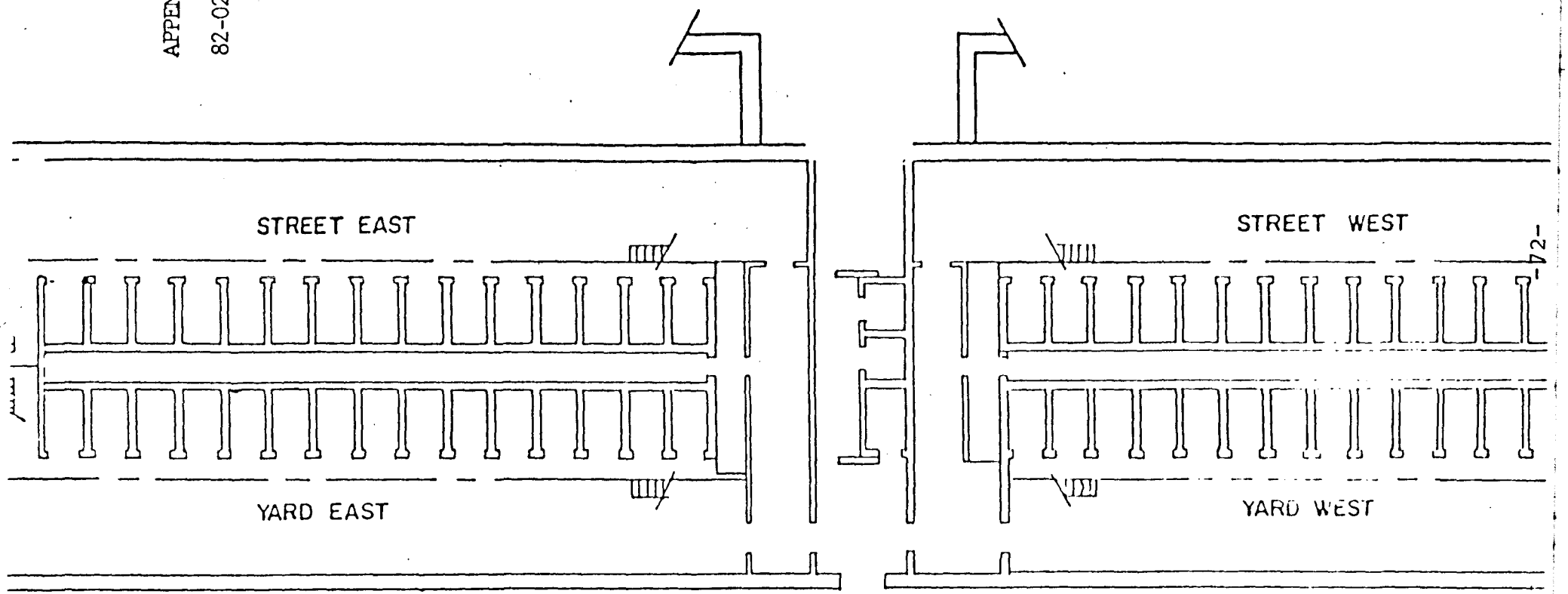
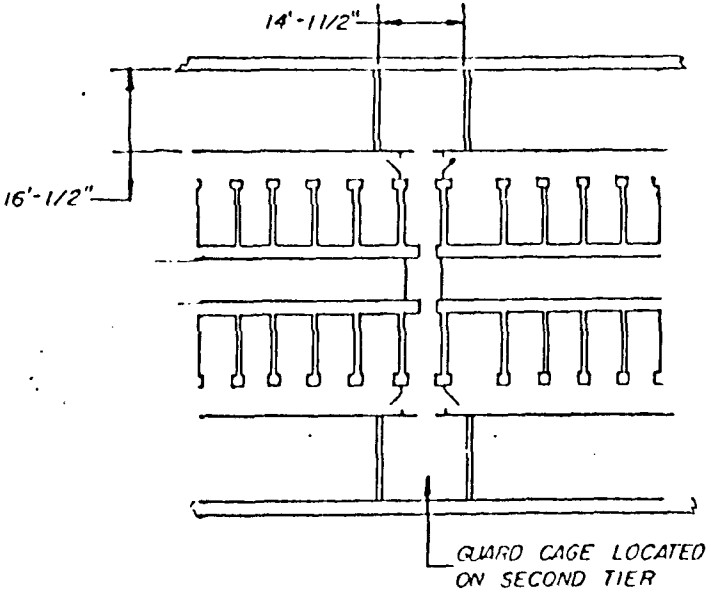
[37]/See, e.g., 21 U.S.C. §§ 841, et seq; 18 U.S.C. §§ 371, 1962, et seq.

APPENDIX #1

82-0247-R

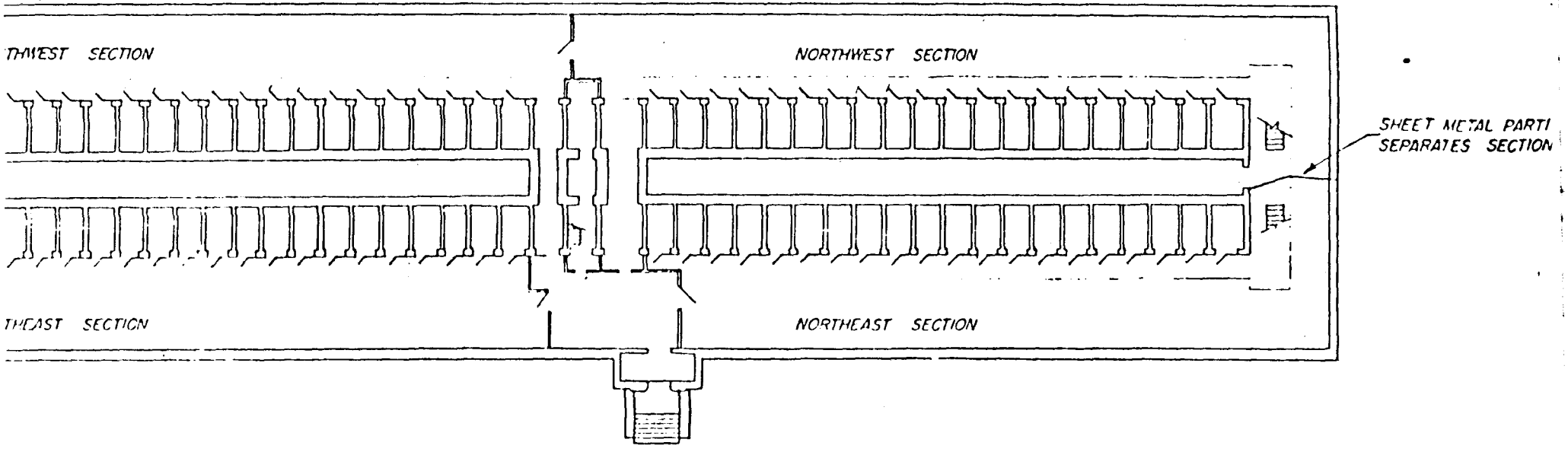


A CELL HOUSE
FIRST FLOOR PLAN
SCALE: 1" = 20'-0"



FLOOR PLAN - B-BUILDING

Virginia State Penitentiary



APPENDIX #3

1979	A	B	Other	Undisclosed
Stab	8	2	4	4
Beat	0	0	0	0
Other	1	0	0	0

1980	A	B	Other	Undisclosed
Stab	2	3	6	0
Beat	2	0	2	0
Other	0	1	3	0

1981	A	B	Other	Undisclosed
Stab	5	1	6	1
Beat	0	0	1	2
Other	1	0	1	0

1982	A	B	Other	Undisclosed
Stab	2	1	7	2
Beat	0	4	0	0
Other	3	3	1	0

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1) Beatings include: All assaults with blunt instruments, except common items, i.e., chairs, etc.

2) Others include: Acid and arson.