UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 82-8196-CIV-PAINE

ANTHONY LAMARCA, MARTIN SAUNDERS and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON and BILLY JOE HARPER,

Plaintiffs,

vs.

R. V. TURNER, individually, and CHESTER LAMBDIN, as Superintendent of Glades Correctional Institution,

Defendants.
_____/

AMENDED
RESPONSE OF DEFENDANTS, INCLUDING OBJECTIONS, TO MAGISTRATE'S REPORT AND RECOMMENDATIONS

PREFACE

In Section I, the issues of the Magistrate's failure to grant a continuance, failure to grant a jury trial, and failure to enter a recusal are addressed. These issues were raised either pre-hearing, in respect to the first two, or during the course of the evidentiary hearing, in respect to the last. The failure to grant a jury trial was addressed in the Report and Recommendations; the other two issues were not addressed in that document.

In the Objections to the Findings of Fact, the Defendants note that a shockingly large number of factual findings by the Magistrate are predicated upon testimony or exhibits which not only fails to support the conclusions, but actually support the opposite

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conclusions.[1] In respect to a large number of his other findings, the Magistrate has asserted that there was an absence of evidence to establish certain facts favorable to the defense when the record was actually replete with such evidence -- much of it contained in exhibits offered by the Plaintiffs.[2] Finally, the Magistrate's Report assiduously avoids consideration of any of the positive evidence offered by the Defendants to establish that TURNER's conduct and policies fully reflected his concern with the welfare of the inmates and the proper operation of the institution.[3] Many of the Magistrate's findings place heavy reliance upon the direct testimony of Dr. Swanson, the Plaintiffs' expert witness, who based his opinions upon data which was narrow in its focus and who was often shown, on cross-examination, to have ignored, misread or overlooked much of the data which he did purport to rely upon.

The Defendants would contend that a fair review of the entire body of evidence, including not merely the testimony of Plaintiffs themselves and the direct testimony of Drs. Caddy and Swanson, but also the testimony of the defense witnesses including, among others, TURNER himself, Lt. Peters, and the the 9 inmate-witnesses who were not interested parties reveal a picture substantially at variance with that painted by the Magistrate which drew upon evidence that was selective, often substantially lacking in credibility and often misrepresented. A fair review of the evidence, the Defendants contend, would reveal that GCI was an institution which, while not ideal, was at least as acceptable from a

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1/ Examples include, but are not limited to: Peter's testimony as to the standard procedures at GCI involving rape investigations; the inclusion of Hispanics in figures for the white inmate population; Swanson's testimony as to whether GCI records revealed instances of sexual assaults; the alleged lack of training of correctional officers founded upon citation to weapon's incident reports; Peter's and Turner's testimony as to officers patrolling dormitories; Turner's testimony as to whether officers were disciplined for rules violations; testimony by Peters as to the number of prosecutions for sexual assaults; the Inspection Report relating to confinement cell conditions; testimony by Peters as to inmate prosecution for weapon's possession; Peter's testimony regarding post orders forbidding the hanging of sheets over beds.

2/ Examples include: testimony relating to contraband control measures; statistics and instances on prosecutions in State criminal proceedings and Department disciplinary proceedings of contraband cases; statistics and instances of prosecution of inmates in disciplinary proceedings for violating pass restrictions.

3/ Testimony by Turner and others revealed, in addition to the various measures aimed at enforcing restrictions, such positive actions as substantial improvements in facilities, institution of a wide range of activities to occupy inmates and thereby reduce the tensions in prison life, and personal involvement by Turner in inmate problems and affairs.

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constitutional standpoint as a majority of prisons in this country and better than many. What problems existed at GCI were primarily the result of limited funding, excessive population pressures and an older physical plant that may not have reflected the state of the art in penalogy. These root problems were not within the capacity of any superintendent to resolve. Yet the record revealed that TURNER acted with capability and ingenuity in his efforts at utilizing the limited resources available to him and in expanding those resources. He coupled this with vigorous enforcement of procedures aimed at reducing the threats posed by inmate violence and possession of contraband (threats which are universal and endemic in correctional institutions throughout this country).

In the Objections to the Conclusions of Law, the Defendants note that while the Report and Recommendations pays lip service to the legal standard -- now well-established by a series of Supreme Court decisions -- requiring a showing of intentional conduct or, at the least, reckless disregard or deliberate indifference by a prison official to support a claim alleging third party assaults under 42 USC Section 1983, a number of the cases relied upon by the Magistrate (particularly those where he attempted to draw a factual parallel to the allegations made in this case) are either expressly or impliedly founded upon a negligence standard now repudiated by the Supreme Court. As those cases adhering to the reckless disregard standard make clear, even if the Plaintiffs had been able to support a majority of their contentions in respect to procedures and conditions at GCI, they would not have succeeded in meeting their burden of proof that TURNER's conduct reached the degree of deliberate or reckless indifference necessary to support liability. Furthermore, not only was there a failure to establish deliberate or reckless indifference, but there was also a failure to meet the requirement of establishing a causative nexus between each claimed assault and the existence of allegedly unconstitutional conditions at GCI. Finally, the Defendants note that the Magistrate adjourned consideration of the class action issues, including that for injunctive relief, during the course of the proceedings before him. Under that circumstance,

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it was not proper for him to make recommendations in respect to the injunctive issues without allowing the Defendants the opportunity to provide evidence thereon.

In making reference to the Transcript, this Response gives the name of the witness preceding each page citation. This is necessitated by the fact that the Transcript numbering does not follow in uniform order. Thus, the Transcript of the case-in-chief of the Defendants begins anew at page 1 rather than picking up at the next page number following the Plaintiffs' case-in-chief.

Finally, this Amended Response and Objections is filed to correct the errors, primarily typographical, in the original Response. Due to problems with the printer used on this project, it was necessary to file an unedited draft of portions of the Response. That has now been corected herein.

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I. OBJECTIONS TO PARTICULAR LEGAL ISSUES

A. Failure to Grant a Trial by Jury

On November 25, 1985, the Magistrate issued an Order denying Defendants' jury demand. In the Report and Recommendation, the reasoning for the denial is set forth for the first time beginning at page 6. Citing *Cox v. C.H. Masland and Sons, Inc.*, 607 F.2d 138, 142 (5th Cir. 1979), and with a footnote reference to Rule 38(b), Fed. R. Civ. P., the Magistrate reasons that the right to jury trial may be waived if not demanded within ten days of the "last pleading directed to such issue." Where there has been such a waiver, it is reasoned that the right to trial by jury of all matters waived in the initial pleading may not be later reviewed by amending the prior pleadings. But, it is recognized (page 8) that a jury trial may be demanded for new issues raised in amended pleadings.4/

The Magistrate notes that an Answer to an Amended Complaint was filed November 2, 1983. As neither Plaintiffs nor Defendants demanded a jury trial, he concludes that the right was waived [page 9] -- forever. No attempt to analyze Plaintiff's Second Amended Complaint was made. Instead, the Magistrate, relying on *Parratt v. Wilson*, 707 F.2d 1262, tries to justify the denial by applying the provisions of Rule 39(b), Fed. R. Civ. P., which permits a discretionary granting of a jury trial after the time allowed to make the demand under Rule 38(b). This is not a Rule 39(b) case, and the factors outlined in *Parratt v. Wilson*, supra, do

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4/ Relied upon by the Magistrate are Walton v. Eaton Corp., 563 F.2d 66 (7th Cir. 1975) [new allegation that the plaintiff suffered mental and emotional injury to support claim for compensatory damages in equal employment opportunity case not considered a new issue as first complaint, in addition to request for punitive damages contained a request for general relief]; Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975) [adding a new count alleging a breach of contract right where prior pleading contained allegations of employment termination in violation of contract right did not present a "new" issue]; Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045 (9th Cir. 1974) [new sixth and seventh claims for relief elaborating on bad faith alleged in the fifth claim in a prior pleading did not raise a "new" issue]; Lanza v. Dressel and Co., 479 F.2d 1277 (2d Cir. 1973) ["new" issue not presented in new amendment relating to fraudulent inducement to exchange stock]; Williams v. Farmers and Merchants Ins. Co., 457 F.2d (8th Cir. 1972) [in suit on insurance policy, amended answer alleging new increase of hazard defense presented new issue on which request for jury trial should have been granted]; Connecticut General Life Ins. Co. v. Breslin, 332, F.2d 928 (5th Cir. 1964) [amended answer raising an affirmative allegation that death of insured was not effected through accidental means but by causes reasonably foreseeable did not present new issue where original answer contained a denial of plaintiff's allegations that insured died as a result of accidental means].

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not apply and are indeed irrelevant.[5/] At the time the demand for jury trial was made, there was pending before the court Defendants' Motion for More Definite Statement filed October 7, 1985, addressing the Second Amended Complaint. On October 23, 1985, Plaintiffs served a response in which they attempted [as noted in the Report and Recommendation] to supply a "factual overview" with respect to the request for more information. Before any ruling on the Motion for More Definite Statement, Defendants in an abundance of caution, served their demand for jury trial on November 6, 1985, to apprise the Magistrate and Plaintiffs that their answer would, when served, seek to have trial of the case before a jury.

On November 15, 1985, Plaintiffs filed a Motion for Leave to file a Third Amended Complaint. Ten days later, the Magistrate at a status conference approved the new complaint. With the filing of the Answer to Plaintiffs Third Amended Complaint on November 27, 1985, the action came to issue - four days before trial. A demand for jury trial was contained therein.

The Third Amended Complaint introduced seven new Plaintiffs claims for damages because of tortious conduct on the part of fellow inmates.[6/] The Magistrate concludes [page 11] that the only new issues raised in the Second and Third Amended Complaints would relate to the additional plaintiffs, saying,

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5/ The irrelevance of the Parratt factors are readily discernible. Taking them in order - (1) Whether the case involves issues best tried by a jury - damages from assault would be; (2) Whether granting of the motion (39b motions) would disrupt court's schedule or that of adverse party - the Magistrate permitted new complaints for damages of seven new plaintiffs at the original plaintiffs' behest. Any interruption would be created by plaintiffs. The paramount consideration should not be disruption but whether defendants are to be permitted the opportunity to face the new challenges; (3) The degree of prejudice to the adverse party - again the adverse party filed the new complaints; prejudice, therefore, should be evaluated from defendants perspective, i.e. opportunity to defend; (4) Length of delay - normally, a defending party is afforded an opportunity to prepare. A delay until January , 1986, as requested, would not have been an unduly long delay under the circumstances; (5) Reason for tardiness in requesting a jury trial - for two reasons, application of this factor is absurd. In no way should the defendants be required to foresee new claims two years in the future. Second, the waiver, on which the Magistrate seeks to preclude defendants, occurred with respect to damage claims of the three original plaintiffs. They should not be permitted to deny defendants their constitutional right as to seven new claimants.

6/ The Second Amended Complaint, dropped Secretary Wainwright as a party; seven new Plaintiffs were added; however, the Third Amended Complaint dropped Keith Harris as a plaintiff and added Billy Joe Harper causing Defendants to be concerned with eight new Plaintiffs.

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...However, since evidence pertaining to the injuries suffered by additional plaintiffs at GCI would be introduced irrespective of the pleading amendment as support for Plaintiffs' injunctive relief, no new issues are raised. [Page 12]

Such conclusion defies logics.[7] True the Third Amended Complaint seeks injunctive relief and the new plaintiffs could testify as to their experiences on separate dates while at Glades Correctional Institution. They were not added, however, solely for injunctive relief. The Third Amended Complaint is quite specific. In the first paragraph, it is stated that the initial three named Plaintiffs, Anthony LaMarca, Martin Saunders and Edwin Johnson, sue for declaratory and injunctive relief on their behalf and others similarly situated who have been, or will be incarcerated by GCI. Then it is stated:

They additionally, joined by the other named plaintiffs, sue for damages.

Of the seven new plaintiffs, four allege some form of injury in incidents occurring well after November 2, 1983, when the answer to the Amended Complaint was filed. For instance, it is alleged that David Aldred was assaulted (assailants not alleged) and raped on July 21, 1984; that Eddie Cobb was assaulted by inmate Pryor on January 27, 1984; that Ronald Durrance was sexually assaulted in March (day not alleged) 1984; and that Michael Gordon was assaulted and robbed during 1984 (no month or day alleged). While the other three allege tortious incidents occurred prior to November 2, 1983, their claims present new issues. They were strangers to the action prior to the new complaints. Each of the seven, to receive relief by way of damages, must establish: (a) that the incidents did occur; (b) if they did occur, who was liable; (c) causation between the occurrence and conduct on the part of TURNER; and (d) if liability is established, in what amount. All of these issues are typical jury decisions new to the action introduced through the Third Amended Complaint, and the introduction of

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[7] Guargando v. Estelle, 580 F.2d 748, 753 (5th Cir. 1978) holds that amendments presenting new issues will give rise to jury trial. The term new issues means new issues of fact and not new theories of recovery. See also Swofford v. B & W, Inc., 34 F.R.D. 15 (S.D. Tex., 1983); Munkocsy v. Warner Bros. Pictures, Inc., 2 F.R.D. 380 (E.D.N.Y. 1942), trial by jury granted in new issues raised in amended complaint to the same effect Warner and Swasey Company v. Held, 256 F. Supp. 303 (E.D. Wis. 1966); in Cataldo v. E.I. DuPont De Nemouss & Co., 39 F.R.D. 305 (S.D.N.Y. 1966) trial court recognized right of trial by jury on new count of breach of warranty and exercised its discretion to permit jury trial on original negligence cause of action; see also Curry v. Pyramid Life Ins. Co., 271 F.2d 1 (8th Cir. 1959).

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the new Plaintiffs' testimony as support for the class injunctive relief claim does not prove their individual claims.

In effect, the ruling of the Magistrate precluded the constitutional right to trial by jury on claims unknown to Defendants until the eve of trial. This it is respectfully submitted was error.

B. Failure to Grant Continuance

The record in this cause demonstrates that the case was not ready for trial (evidentiary hearing) and that the request for continuance should have been granted.

At a hearing before the Magistrate on October 7, 1985, counsel for Plaintiffs assured the Court that they were ready for trial. At that hearing, seven new Plaintiffs had been joined with each alleging separate claims for damages. A motion for more definite statement was filed by Defendants the same date. In November, 1985, leave to file a Third Amended Complaint was requested in which still another Plaintiff, Billy Joe Harper, was added. Keith Harris, a Plaintiff in the Second Amended Complaint, was dropped.

On November 25, 1985, the Third Amended Complaint was approved and trial set to begin one week later. The following day, counsel for the parties journeyed to GCI so that Plaintiffs could depose Randall Music, Superintendent, and Defendant, R. V. TURNER. About this time, it was learned that a new witness, Larry Brown, had been added to Plaintiffs' Petition for Habeas Corpus Ad Testificandum. The Order of November 21, 1985 will, if carefully examined, reveal that his name had been typed in after its preparation. Fortunately, while Defendants were not able to arrange for his deposition, a notarized statement was taken while all counsel were present at GCI.

On November 27, 1985, an answer was prepared and filed, bringing the action to issue on the Third Amended Complaint. On the 29th, counsel journeyed to Miami to depose Plaintiffs' expert, Dr. Richard Swanson, who was then preparing for trial but had not completed his review of the records in preparation for trial. A second expert, Dr. Glenn R. Caddy, who testified at length on his psychological evaluation of the seven complaints, had to

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be deposed during the evening of December 5, 1985, after commencement of the trial. Like Swanson, Caddy had not completed his evaluation until the weekend before trial.

During the period of Noember 13-15, 1985, Defendants were able to depose the seven new Plaintiffs, beginning at Union Correctional Institutional at Raiford and ending in Fort Lauderdale. Witnesses having knowledge of the new Plaintiffs' claims were revealed, but no opportunity to depose them was available because of the firm trial date set for December 2, 1985. These included Levi Fisher, Willie Dock and Greg Zatler. Discovery was also hampered by the burdensome requirement to produce more than 12,000 pages of documents from the Department of Corrections -- not a party to this action. In short, Defendants did not have a valid opportunity to prepare its case -- but more importantly, Plaintiffs were not ready either.

At the end of Plaintiffs' case, the Magistrate noted that all of their evidence pertained to individual damage claims. Since the Plaintiffs were unprepared to present evidence on the injunctive relief claims, the Magistrate "adjourned consideration" of the class action issues. Yet, until the announcement in the course of the trial that the Plaintiffs were unprepared to proceed on these issues (Swanson, p. 244-250), the Defendants had to proceed under the assumption that they must be prepared to defend not only the individual claims but the class action injunctive claims as well.

In short, the Defendants were compelled to go to trial on eight damage claims, newly asserted, for which adequate discovery was impossible, and Plaintiffs were not, in fact, prepared to try the whole case.

For these reasons, it is respectfully submitted that error was committed and a new trial de novo be granted.

C. Refusal of Magistrate to Recuse Himself

During the course of the examination of Dr. Swanson, it became obvious to defense counsel that the Magistrate -- who had visited GCI several years before during the pendency of the suit when LaMarca's was the sole claim -- was inclined to rely upon events that he

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stated had transpired sometime during the day of that visit as evidence tending to establish either knowledge of alleged conditions by TURNER or TURNER's failure to act on those conditions after a request that the Magistrate claimed to have given to his subordinate and counsel (see Swanson, p. 257-260).

Under Canon 3C of the Code of Judicial Conduct of the ABA, a judicial officer is required to disqualify himself in a proceeding where he has personal knowledge of evidentiary facts concerning the proceeding and where he is likely to be a material witness in the proceeding [Canon 3C(1)(a) and (d)(iv)]. See also 28 USC Section 455.

The Magistrate indicated that he had given instructions to TURNER's subordinate, Mr. Arline, and to his counsel to have TURNER investigate claims that he now says were made that day by LaMarca as to frequency of sexual assaults at GCI. What LaMarca said to the Magistrate that day and what the Magistrate allegedly told Arline and Belitsky were not testified to by any witness in the lawsuit. The sole source of information on this subject was the Magistrate's own statements -- the accuracy of which are not conceded by the Defendants.

When he was challenged on this issue and asked to recuse for having inserted himself and his claimed knowledge into the lawsuit, the Magistrate denied any intention of becoming a witness in the suit (p. 431-432). He thereafter denied the motion (p. 606).

Subsequently, despite the disavowal of the Magistrate, and despite the fact that no other witness ever testified to the "facts" he related, these matters were incorporated into the Report and made a basis for the Magistrate's recommendations (Report, paragraph 68-70). Although the Magistrate, in his Report, characterizes his visit to GCI as a "proceeding", there was no record of any "proceedings" and nothing other than the Magistrate's own relation of events sets the context for what allegedly transpired.

Under these circumstances, it is clear that the Magistrate's refusal to recuse himself was in contravention of the mandate of the ethical canon above-cited. It also contravened 28 USC Section 455. If the Magistrate was disqualified as a judicial officer from proceeding in this cause, then his entire Report and Recommendation must be rejected.

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II. OBJECTIONS TO FACTUAL STATEMENT

31. The statement that R. V. TURNER held the position of Superintendent through August 31, 1984 is incorrect. He held the position through July 31, 1984. (Turner, p. 557)

32. The inmate population on July 29-31, 1985 is irrelevant to the time period under TURNER since TURNER had retired a full year before. The statement of ethnic or racial breakdown, when coupled with the statements in paragraph 33, is misleading. On July 29-31, 1985, according to Plaintiff's Ex. 7, there were 550 Blacks, 322 Whites and 3 Indians, Japanese or Hispanics.

Of greater relevance to the issues in this proceeding, the inmate population figures for 9/19-21/83 -- the only date falling within the relevant time period of January 1, 1980 - July 31, 1984 for which a record of racial and ethnic background was put in evidence -- show 426 Blacks, 397 Whites and 10 "other" (Plaintiff's Ex. 6). There is no support in the records in evidence for the conclusion that the figures for Whites include people of Hispanic origin. The opposite is shown by a separate listing for "others" which specifically include Hispanics. The racial breakdown of 51.1% Black and 48% White is virtually identical to the statewide racial composite (Swanson, p. 288, 419). During TURNER's administration, the inmate population increased from just over 700 to a high point of 920 (Turner, p. 559). According to the Superintendent's monthly reports in evidence the population ranges for each year of TURNER's administration were as follows:

1980: 760-795
1981: 782-854
1982: 829-906
1983: 844-915
1984: 834-893

(Plaintiff's Ex.31)

33. The figure given by MUSIC for the current Hispanic population (December, 1985) was 7%, not 7-10% (Music, p. 133). The fact that the

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Superintendent's monthly report for 11/81 reported a large contingent of Latins does not establish any specific percentage -- either less, the same or greater than 7% -- and thus the conclusion that even on that date the Hispanic population was greater than 7% or any other percentage is not supported by facts or logic.

That the increase in Latin population on that date was apparently temporary is shown by the fact that there was no other reference to the problem, referenced in the monthly report of 11/81, in other reports (Defendant's Ex. 7).

The statement that 65-70% of the inmates at GCI were close custody during TURNER's administration is misleading. The testimony cited was that the percentage of close custody inmates increased during his administration to 65-70% in 1984. The close custody category began in the late 70's with approximately 50% (400 of 800) (Turner, p. 560) (Defendant's Ex. 14).

Close custody does not necessarily imply that the inmate is violent; it is a category for those inmates who because of past history or because they recently came into the system, are regarded as potential escape risks and who must be accompanied by armed guards when outside the defense perimeter (Turner, p. 562).

36. The sweeping statements in reference to a "wholesale manufacture of prison wine", "regular screenings of sexually explicit videotapes", "maintenance of an ill-assorted guard corps whose members the inmates perceived as regularly trafficking in contraband, extortion and neglect" are not supported by the record as will be addressed hereinafter. That instances of wine production, of viewing of films containing sexual subject matter and of improper conduct by correctional officers did occur appears in the record but far less frequently that these sweeping statements imply.

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38. The statement that "(c)onditions at GCI were known to Superintendent Turner" is false in the implication that it intends to convey: that TURNER was aware of all of the conditions which the Plaintiffs claim existed. The specific evidence used to support this statement in the Magistrate's Report consists of two letters TURNER wrote to Secretary Wainwright, describing the situation at GCI on March 15, 1979 and July 16, 1981. The "conditions" described in the first letter related solely to the shortage of staffing and the consequent problems of putting existing staff on overtime and spreading manpower thinly over the necessary posts. As will be shown, not only was TURNER not responsible for manpower shortages which occurred from the late 70's until 1982 (when the number of vacancies dropped considerably) but it was due to extraordinary efforts on his part that this problem was alleviated. These same problems were described in the letter of July 16, 1981 which further elaborated on the problems faced by GCI in recruiting a sufficient number of applicants who could meet minimum standards and the need for more experienced correctional officers. The statement that the security staff was tolerated by the inmates, in the context in which it was made, clearly referred to a potential rather than actual problem: that with an inadequate number of correctional officers there could be a danger that if the inmates chose to make trouble then control would be difficult. There was no reference to this potential problem actually occurring.

The Magistrate suggests that because of the shortage of staff during 1979-1981, the accreditation by the American Correctional Association was invalid. He also, in relying on Swanson's testimony, states that FSP was receiving accreditation at the time the Florida Circuit Court was finding it to be in violation of constitutional requirements and further states that the entire Florida Correctional system was accredited by the ACA when the Middle

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District found unconstitutional practices in the *Costello v. Wainwright* litigation. A reference to the reported decisions in both of these cases reveals quite clearly that Swanson's testimony was false. In view of the fact that he was personally involved in the FSP litigation, the falsity of his testimony raises serious questions as to his credibility as a witness.

In the opinion of *Graham v. Vann*, 394 So.2d 180 (Fla. 1st DCA 1981), the following facts are set forth: On Aug. 20, 1980 the Trial Court appointed an Advisory Commission (Swanson's commission) to explore, investigate, define, evaluate and recommend alternative approaches to alleviate the problems at FSP. This Commission filed a report to which the Governor and other defendants responded on October 3, 1980. At that time, the Trial Court then ordered that the Defendants submit a plan for implementation of the Advisory Commission Report and further ordered FSP to seek accreditation with the American Correctional Association. It is patently clear from this reported decision that it was not until well after the Advisory Commission undertook its study and issued its report that the Court even ordered the institution to begin seeking accreditation. It is further clear that the seeking of accreditation was a part of the remedial process aimed at improving conditions at the institution.

According to the uncontested testimony of Raymond Mulally, the accreditation coordinator for the Department of Corrections, Florida prisons first began seeking accreditation from the American Correctional Association in 1980 (Mulally, p. 498-499). A reference to the reported decisions in the Costello litigation reveals that the initial order of the District Court finding unconstitutional conditions in the system was on May 22, 1975, *Costello v. Wainwright*, 539 F.2d 547, 548 (5th Cir. 1976). On October 23, 1979, a settlement agreement was entered into between the parties covering all issues raised in the litigation. This agreement was approved by the Court and adopted in an order

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dated February 11, 1980 in which Judge Scott acknowledged that during the pendency of the litigation there had occurred real and substantial improvement in conditions in the Florida Penal System, *Costello v. Wainwright*, 489 F.Supp. 1100, 1102 (M.D. Fla. 1980). It is clear in respect to Costello that the findings relating to system wide problems in the penal system predated accreditation by the ACA of any Florida prison. Indeed the accreditation only followed upon the real and substantial improvements noted by the District Court in that case. Furthermore, there are still a number of prisons in Florida which are not accredited (Mulally, p. 507).

Swanson testified that the standards by which he judged the conditions at GCI were generically identical to those of the ACA (Swanson, p. 47). It is highly significant that on the only two occasions in which an in-depth contemporary evaluation of GCI under such standards was conducted, the result was a high approval rating by the ACA -- a group totally independent of either side in this litigation. It is further significant that both of these evaluations occurred during TURNER's administration. Each of these evaluations involved a three-man team which inspected the institution and its operation over a 2-3 day period (Mulally, p. 500-503). In contrast to this, Swanson did not observe the institution until more than a year after the end of TURNER's administration and almost 6 years after the time period in issue began. His request for documents to review included only those which were designed to disclose problems or negative aspects of the institution rather than giving a balanced historical view of the period (Swanson, p. 406). It is noteworthy that he never sought the accreditation reports for this study even though he knew that GCI was accredited (Swanson, p. 278).

40. In respect to the Grand Jury Report, which was admitted over objections of hearsay and relevancy, it is noteworthy that the Magistrate stated "... it

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carries very little weight." (p. 21). He further elaborated on the inherent unreliability of such reports (p. 22-23). Curiously, in his Report and Recommendation, he appears to have given it the weight he earlier questioned. Contrary to the statement in the Magistrate's Report, the Grand Jury Report stated nothing about a "free flow" of contraband. It indicated only that marijuana and drugs were available to inmates; it did not determine the degree of availability. (Plaintiff's Ex. 4, tab A, p. 6).[8/] The reference in the Magistrate's Report to the testimony from unnamed sources mentioned in the Grand Jury report is reliance upon the rankest hearsay. The reliability is especially questionable in view of the fact that the investigation was primarily concerned not with issues of security or contraband, but with shortages in meat supplies which had been discovered in 1978.[9/]

Finally, it is important to note that the Grand Jury investigation took place in 1979, from one to five years prior to any of the alleged incidents for which the Plaintiffs made claims.

42. Contrary to the Magistrate's finding, the Inspector General's Management Review of August 26-29, 1980 did not observe and corroborate "similar issues concerning a breakdown of security" as the Grand Jury. It did note a shortage of manpower, a fact about which TURNER was aware, but about which he could do little at that time. It found no "breakdown in security". The Magistrate overlooks the Review finding that all appropriate recommendations made by the Grand Jury in its 1980 Report had been put into effect by TURNER (Plaintiff's Ex. 4, tab B, p. 5). It is significant that the management review team catalogued the causes of the manpower shortage at GCI:

8/ Contraband is always a problem in any prison (Swanson, p. 333, 371; Music, p. 104-108).

6/ The Magistrate's Report overlooks the fact that the Grand Jury investigation was convened to follow up an internal investigation which had been instituted by Turner (Turner, p. 679,682).

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location of prison
socioeconomic conditions
availability of housing
quality of schools
competition from private employers
(Plaintiff's Ex. 4, tab B, p. 19).

To the extent that any of these causes could be alleviated, the appropriation of funding was essential -- a matter beyond the control of TURNER who, it was conceded, did all he could to make the budgetary needs known to his superiors and to the Legislature and who lobbied tirelessly (and, ultimately with some success) for the increased funding.

The Magistrate's Report also ignores the Review team finding that GCI had been through a massive effort at self review and improvement during the preceding months (Plaintiff's Ex. 4, tab B, p. 24). In short, the Management Review showed that GCI was run remarkedly well within the budgetary and fiscal constraints imposed upon it.

44. At no place in the Review team report was there a finding of low morale of the GCI staff. A feeling, reported in the survey that greater numbers of staff were needed does not necessarily equate with low morale and the conclusion that it does is not warranted.

Finally, it is important to note that the problems of staffing at GCI began to be substantially alleviated in 1982 when both turnover rate and the number of staff vacancies were reduced considerably (Plaintiff's Ex. 31; Plaintiff's Ex. 39; Swanson, p. 274-276).

45. The Magistrate, in referring to the mention of laxity in the Inspector General's Inspection Report of September 19-21, 1983, implies that this finding was in reference to security issues. In fact, the instances in which the Report noted laxity were the following: housekeeping; inmates' appearance; leaving of several garden implements near a gate; centerfolds posted to confinement cell

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walls and the use of inmate rather than officer translators. (Plaintiff's Ex. 6, p. 3). It is noteworthy that, as the Inspector General testified, the purpose of these inspections is to ferret out as many negative factors about each institution as possible (Brierton, p. 252).

It is instructive to refer to the specific findings of the Review Committee, the vast majority of which are positive. In respect to General Administration (a direct review of TURNER's activity), only 2 categories out of 20 resulted in negative findings and in one (existence of an organizational chart) the deficiency was already in the process of remedy at the time of the inspection. In respect to Personnel, only one category in 17 resulted in a negative finding (several recently employed officers had not yet been scheduled for training). Specifically, the team made positive findings in respect to morale and the professionalism of the staff.

The "security problem" referenced by the Magistrate from this Inspection Report involved single escape by a prisoner who threatened a guard with a homemade knife and scaled a fence to get out.

46. The Barrett incident has no relevance to the issues in the present case. It involved a single incident by a security lieutenant who overreacted to a prison fight after he had been summoned back to the compound from being off-duty where he had been drinking. TURNER was not present during the incident and none of the Plaintiffs were involved in the incident -- indeed with perhaps two exceptions most of the Plaintiffs had been transferred out of GCI at the time.

It is significant that this was the only incident involving improper use of force identified by Swanson as occurring in the time period 1980-1984. (Swanson, p. 387). it is further significant to note that during this period the Florida prison system had 250 complaints of excessive force at 28 institutions;

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only 2 were at GCI and only one (Barrett) resulted in a finding of excessive force after investigation (Turner, p. 664-666). It is clear why the Plaintiffs chose to rely heavily upon the Barrett incident: it was the only instance of improper use of force that they could find in a five year period. It is equally clear that it had no relevance to any of the issues in this suit.

The quotation referring to TURNER's not notifying the prison inspectors is taken out of context. It is clear in the Report that both Arline, the assistant superintendent who relieved Barrett immediately after the incident, and TURNER were asked about contacting the prison inspectors in regard to the initial incident that night. As Peters testified, TURNER had him investigate the incident (Peters, p. 401); the Inspector General's office was then summoned by TURNER and sent down a team three days after the incident (Swanson, p. 213-214).

The only infraction which the Report noted in respect to Lt. Peters was that he had returned to the compound, when summoned under an emergency call, after he had been drinking while off duty at the festival (Plaintiff's Ex. 9; Conclusion, p. 11). Again the Magistrate's Report is less than fully candid in its reference to his having been found guilty of "additional prison infractions".

There was absolutely no adverse report or finding in respect to TURNER in the Barrett report.

48. The Magistrate's finding that TURNER, in interviewing an inmate (Allen) in the course of the Barrett investigation, failed to register appropriate outrage on the Transcript in learning that some of the inmates had been drinking buck is patently absurd. First, it assumes that one can determine a person's emotional reactions from a transcript; second, it ignores the fact that TURNER was an interrogator whose object was to uncover facts not to express all of his opinions. What is clear in the interview is that TURNER was

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determined to uncover all of the facts of what happened even if they reflected adversely upon Lt. Barrett. It is also clear that he saw to it that Allen, who had been struck by Barrett, fully understood that he had an unrestricted right to pursue legal remedies for what happened to him (Plaintiff's Ex. 9; Allen interview, p. 7-8).

50. The Magistrate, in citing Swanson's criticism of TURNER for not immediately suspending Barrett, ignores the concession by Swanson on cross-examination that all he meant was that Barrett should have been removed from the compound that night and that this is precisely what TURNER did (Swanson, p. 330).

51. The Dixon investigation is equally irrelevant to the issues in this suit. Dixon was investigated several times at TURNER's instigation due to reports of inmates, made directly to TURNER, that they were subject to extortion. These investigations, involving use of lie detectors by prison inspectors and outside police, failed to substantiate the charges. In fact, the lie detector tests indicated the inmates were lying in several instances. (Plaintiff's Ex. 10, tab A). Despite this, TURNER ordered the investigation to continue. (Peters, p. 391; Turner, p. 660-663). Eventually concrete evidence was discovered during Music's administration of an incident which led to Dixon's resignation and prosecution.

53. The Magistrate's finding that the Barrett and Dixon reports revealed "wholesale staff corruption" is totally lacking in credibility. Each of these reports concerned the actions of single individuals out of a total staff of over 200 at any one time. The testimony of Larry Pryor, as acknowledged by the Magistrate, is of questionable credibility. In his testimony only Lt. Barrett is identified as having employed Pryor as an informant or enforcer. Even if true,

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this again involves only one individual and there was absolutely no evidence that TURNER had any knowledge of the matter.

56. The statement of Swanson that "little or no effort was taken to control illicit activity" resulting in readily available contraband" is clearly belied by the record. That contraband -- alcohol, drugs and homemade weapons -- existed at GCI is not contested. But Swanson himself conceded that contraband was unavoidable at a prison and was, indeed, a universal phenomenon (Swanson, p. 333, 371). At best, efforts can be made to reduce or limit the amount of contraband. Contraband includes a wide range of items forbidden to the inmates: homemade knives or shanks, drugs, homemade or manufactured alcohol being the most prevalent. The record is replete with evidence -- all of it uncontradicted -- showing a substantial effort at reducing and limiting contraband during the TURNER administration. That Swanson was not aware of these efforts is not surprising since he drew upon a limited source of information in giving his opinion: the inmate plaintiffs, the investigation showing that Dixon introduced contraband; TURNER's interview with inmate Allen in the Barrett case, in which Allen indicated that some of the inmates had been drinking buck, and the 1980 Grand Jury report of its investigation in 1979 (Swanson, p. 326). What is surprising is that Swanson, who purports to be an expert in these matters, should ignore a substantial body of information made available to him that indicated significant enforcement procedures at GCI aimed at limiting contraband -- some of which was contained in exhibits he prepared for the Plaintiff which were admitted into evidence. More than surprising -- even shocking -- is the fact that the Magistrate ignored this substantial body of evidence and also the further evidence presented, without refutation, by the Defense.

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As various witnesses testified, contraband could be introduced onto the compound by inmates returning from work crews, by visitors, by staff and by being thrown over the fence. Contraband could also be fashioned or made in the compound. (Peters, p. 363; Swanson, p. 332-333).

George Lawson, a shift lieutenant, testified at length to the procedures used for shakedowns of both individual inmates and entire dormitories during the period from 1980-1984 -- the latter requiring 8-12 officers and occupying 1-3 hours per search (Lawson, p. 543-545).

TURNER testified at great length to the wide ranging techniques he employed: marijuana sniffing dogs; dormitory shakedowns (each occupying 30 man-hours); use of informants; selective body searches of visitors; use of metal detectors; body searches of inmates returning from work crews and visitation; monitoring of prison implements and products such as brooms and glass cleaner from which ingenious inmates could devise weapons and alcoholic beverages; the assignment of two sergeants whose primary duty was to police the compound for contraband (Turner, p. 615-628).

Peters testified that GCI, during TURNER's administration, specifically employed two sergeants -- Bradley and Nappi -- who were highly skilled at uncovering contraband ranging from weapons to buck, or homemade wine; daily pat searches of the 400 inmates who worked outside the compound and selective strip searches of them; dormitory searches, locker searches, selective strip searches of inmates in the dormitories; inspection and searches of all belongings of visitors, and use of metal detectors (both hand held and walk-through). (Peters, p. 362-371). During the TURNER administration, thirteen criminal prosecutions were brought against visitors who attempted to introduce contraband that was illegal in society into the compound (Peters, p. 371). Visitors attempting to introduce contraband such as alcohol or money that was

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not illegal in society were not criminally prosecuted but the items would be confiscated (Peters, p. 369-371). In addition fourteen criminal prosecutions were brought against various staff members for introduction of contraband (Peters, p. 374). Inmates found in possession of contraband were prosecuted through the formalized disciplinary process, resulting in loss of gain time or disciplinary confinement or both. Plaintiff's own Ex. 4, tab B, Table V shows the following number of inmate prosecutions for the period of one year preceding June 1980: possession of weapons-12; possession of unauthorized drugs-83; trafficking in drugs or alcohol-3; manufacturing alcohol-2; possession of unauthorized beverage-13; possession of miscellaneous contraband-27. To say that the inmate records introduced into evidence (including portions introduced by Plaintiff) are replete with contraband prosecutions is an understatement. A few examples suffice: Willie Dock was found guilty of possession of a knife observed by Sgt. Bradley and sentenced to 30 days confinement and 30 days loss of gain time (Plaintiff's Ex. 16). Eddie Cobb (a plaintiff) was twice found guilty of possession of yeast (used in making buck) and sentenced to confinement and loss of gain time; he was also found guilty of possession of buck (Defendant's Ex. 16). Anthony LaMarca (another Plaintiff) was found in possession of two snakes and placed in confinement (Defendant's Ex. 20).

What this uncontradicted evidence shows is that the authorities at GCI during TURNER's administration utilized a number of methods aimed at preventing or limiting the introduction of contraband into, or its manufacture in, the compound; they pursued a wide range of methods aimed at discovering and limiting the existence of contraband in the institution, and they aggressively pursued prosecutions of inmates, visitors and even staff who introduced such contraband. Swanson's opinion, based on virtually no source that could fairly be said to be likely to reflect the actual procedures taken to

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combat contraband, was palpably worthless. That the Magistrate should adopt it in the face of clear documentary and specific testimonial evidence to the contrary is typical of a large number of his findings which reflect a failure to review the evidence.10/

57. The Magistrate's conclusion that the staff at GCI was poorly trained flies in the face of substantial contrary evidence. For his finding he relies upon what he alleges to be numerous incidents wherein staff members were unfamiliar with the use of weapons. In view of the fact that weapons are very seldom issued to staff, the reliance upon such an indicia for a sweeping conclusion would be remarkable even if the evidence showed what he claims it showed. In fact, the cited evidence fails to provide such support leading to a conclusion that, at best, the Magistrate failed to read the documents upon which he relies. Plaintiff's Ex. 33, which he cites, contains reports of four incidents involving weapons:

1) On 6/23/83, an officer discharged a shotgun while loading. The cause was found to be a defect in the weapon, not a mistake by the guard;

2) On 5/24/83, an officer fired a warning shot in the air to stop several inmates on a work crew who appeared to be attempting to an escape. The use of the weapon was approved on review;

3) On 7/18/83, an officer discharged a weapon he was loading due to failure to follow appropriate loading procedures. He was immediately ordered to undergo additional instruction;

7/ The Magistrate also cites -- in addition to Swanson as support for his finding -- the Grand Jury report whose value he had earlier deprecated and which did not apply to the time period in question; a report of an inmate being found in possession of a knife used in escape and a report that Peters once found 20 gallons of buck. This last is an erroneous report of Peters' testimony. The buck was found, not by Peters, but by Sgt. Bradley (Peters, p. 366). What this quite clearly shows is that the security officers were actively rooting out contraband. That the Magistrate should cite it as an example of neglect underscores the numerous factual errors and inverted logic used throughout the Report.

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4) Sgt. Wischer, while chasing an escapee for 2 hours through a field of sugar cane, lost a pistol out of his holster. The loss was found not to be his fault.

In summary, the Magistrate could point to one incident in nearly five years in which an officer manifested a need for further training on a particular weapon. This is pathetically weak support for his finding of widespread lack of familiarity with weapons.

In respect to the training of officers, the Magistrate quite conveniently ignores the uncontradicted testimony -- conceded even by Swanson -- that the correctional officers at GCI all received training through Palm Beach Correctional Institute of Palm Beach Junior College, and were required to undergo 320 hours of such training during their first six months (one of the highest requirements in the nation). (Swanson, p. 276; Turner, p. 613)

In particular respect to Swanson's testimony on firearm training, the Magistrate chose to consider only his testimony on direct and completely ignored the fact that Swanson was forced to concede on cross that the training requirement in firearms began under TURNER, not Music (Swanson, p. 379-380).

59. The Magistrate's sweeping conclusions in regard to staff morale is not only not supported by the cited exhibit -- which does not reflect upon the issue of morale -- but is completely contrary to the specific finding in Plaintiff's Ex. 6, which, on September 19-21, 1983, found employee morale and performance to be positive (the only such record in evidence relating to a specific analysis of employee morale during the TURNER administration period under question (1980-84).

The Magistrate's reference to staffing shortages, turnover and high overtime are, perhaps, more disturbing as reflecting two fundamental errors in his analysis. First, consistently throughout the Report the Magistrate cites the

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least favorable statistics, in respect to each issue, which can be found over the five year period and then represents them as applying to the entire period. Second, the Magistrate assumes with no cited basis in the evidence that the staffing problems are due to TURNER.

In respect to the first point, already referenced above, Plaintiff's own Ex. 39 reveals that the high number of staff vacancies existing in 1980 and 1981, dropped dramatically in 1982 and continued to drop generally through to 1984. Concomitantly, the turnover rate also declined dramatically as did the staff overtime -- which was at 1/2 of the level in 1983 that it was in 1980. As even Swanson conceded -- but again, a point curiously ignored by the Magistrate -- the manpower and staffing situations improved considerably under TURNER and resulted in improved conditions at GCI. (Swanson, p. 274-276). The Magistrate's Report also ignores the reason for the high overtime -- the shortage of staff -- and the alternative facing TURNER if he did not resort to staff overtime -- even fewer guards on duty at any one time (Swanson, p. 404).

In respect to the second point, the Magistrate completely disregards the finding of the Inspector General's Report of August 26-29, 1980, which he relies upon elsewhere and where the causes of the high turnover and staff vacancy rate are examined (Plaintiff's Ex. 4; tab B p. 19). Not a single cause was or could be attributed to TURNER. He also ignores the substantial evidence as to various methods employed by TURNER to improve the situation: lobbying in both the Department and the Legislature for increased salaries; cooperative agreements for medical services; use of transportation to bring employees from the coast; increasing the size of the bachelor quarters and expanding the trailer park facilities; personally recruiting in the high schools and from other penal institutions. (Turner, p. 609-613; 635-638). Significantly,

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Swanson was forced to concede on cross that he was unaware of most of TURNER's efforts at recruitment and that the records he had relied upon were not calculated to show what efforts were made by TURNER. (Swanson, p. 364-366). Many of these efforts were dependent upon funding and it was only with the funding that the situation was finally relieved. But, as shown above, it is not accurate to characterize TURNER as only approaching this problem from a legislative lobbying standpoint.

Finally, it is important to note that not all new staff were inexperienced. Many had come from other prisons or were employees who left GCI and then returned on a seasonal basis due to outside agricultural employment. (Turner, supra; Music, p. 95-96; Swanson p. 370).

61. The conclusion that the individual plaintiff's claims arose out of the failure of TURNER to station officers properly is not supported by citation to the record. There was not an iota of support for this conclusion.

62. The entire issue of upper bunk sheets obscuring the view of the showers is a false one. As Swanson was finally forced to concede, and as the Defendant's composite photographic Ex. 1 and 2 clearly show, even if there were no bunks at all in the dorms, a guard in the wicket could not see into the showers; indeed even if a guard is midway between the wicket and the showers with no obstruction between him and the showers, he cannot see into the shower room. (Swanson, p. 318-323). This being so, the entire issue as to sheets blocking a view of the showers is totally without substance.

63. The Magistrate's characterization of Peter's testimony as being that the officers did not patrol the dorm is another of the frequent clear misrepresentations of the evidence. What Peters said was that the officers were supposed to patrol the dorm. He did not say that they did not patrol. (Peters, p. 452-456). The Magistrate points to not a single item of evidence showing

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that the officers did not, as the general rule, patrol as they were supposed to do. In fact, there was dramatic testimony by an inmate that patrolling did take place (Taylor, p. 187). In respect to TURNER's testimony, the Magistrate mischaracterizes the evidence once again. TURNER actually testified that there certainly may have been disciplinary action taken against an officer for failure to patrol as he was supposed to do; he could not, by memory, recite specific instances (Turner, p. 732).

64. A more serious instance of misrepresenting the evidence occurs in this paragraph where the Magistrate's Report states that Peters testified that there was no standard operating procedure for investigation of rapes. No page citation is given. A reference to the following, however, will clearly demonstrate not only that it was false to state that Peters made such a statement, but also that Peters made exactly the opposite statement and described such procedures in such detail that it is difficult to understand how the misrepresentation in the Magistrate's Report could have been made:

1) On page 444, Peters stated that there was no procedure for line officers to report rapes directly to him;

2) On page 445, he testified, in direct response to the Magistrate's own questions, that the proper procedure at GCI was for line officers to report to their superiors and those superiors to the next level up;

3) On page 461, Peters explained that he received his investigative assignments directly from TURNER not from the line officers;

4) Then, in great detail, on pages 464 and 485, Peters described the standard procedure for investigation of rapes at GCI:

-insure that victim is taken to medical department for a rape examination;

-interview victim to determine if he can identify assailant;

-pick up and interview alleged assailants;

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-contact sheriff's office;

-contact state attorney's office;

-isolate both victim and assailant;

5) Peters further described the technique for the rape examination as involving the Johnson rape kit used for rectal examination (Peters, p. 490).

6) This procedure was established by TURNER himself (Peters, p. 484).

It is significant that the Magistrate did not acknowledge this testimony and reject it; instead he misrepresented it in each and every particular and ascribed the misrepresented testimony to Peters and TURNER.

65. The Defendants agree that these procedures were not followed in respect to Saunders, Aldred or Harper. As appears later, they question whether these and the other alleged assaults ever occurred and, if they did, whether they were reported to any officer. Even if it is conceded, arguendo, that these inmates were assaulted and that they reported the assaults to an officer, there was a total absence of evidence that TURNER or Peters were ever advised of these rapes. In fact they both denied any such report. At most, the evidence could show only that a line officer or his immediate superior failed to report the assault or to make out an incident report as required by the written regulations. In view of Swanson's observation that the line officers documented every occurrence out of the routine -- no matter how minor -- there is serious doubt that any report of an incident by these Plaintiffs was ever made to the officer (see Swanson, p. 384, 412).

66. The statement that there was only one prosecution for rape during the entire TURNER period is manifestly inaccurate. It is also a clear misrepresentation to state, as does the Magistrate's Report, that no rapes were ever reported in any of the massive documentation received by Dr. Swanson. First, the reference to rape prosecution is apparently derived from Peters'

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testimony. What Peters actually said was that he recalled only one case successfully prosecuted in 1984; he could not remember, without reference to records, what prosecution, if any, occurred in 1983 or prior years. Against Plaintiff's counsel's misrepresentation of his testimony, he reiterated this (Peters, p. 465-468; 487). It is manifestly improper to characterize a witness' statement that he does not know by memory as to whether something was done into a conclusion that nothing was done. Peters clearly said that his memory only went back to 1984.

In regard to the reporting of rapes in the documents received by Swanson, the Court is directed to Plaintiff's Ex. 31 and 39 -- the latter a summary by Swanson, himself, from data in the former! The Superintendent's reports listed 5 reported sexual assaults from 1980-84 under TURNER. Nor does the citation given by the Magistrate to Swanson's testimony support his conclusion. What Swanson stated was that he found no reports of the rapes claimed by the Plaintiffs in their inmate files (Swanson, p. 150).

71. The Magistrate's finding that rapes occurred at GCI during TURNER's administration establishes nothing. The question is one of frequency and the frequency known to TURNER. As Swanson candidly admitted, rapes are a fact of life in virtually all prisons and are very difficult to eliminate (Swanson, p. 309). The records reveal five reports of rape to the administration during the relevant time period of 1980-84 (Plaintiff's Ex. 31). These are not necessarily 5 rapes, but 5 reports of rape. Some reports turned out to be false -- see report of two rapes to Lt. Lawson later retracted by the complainants after being given medical examinations (Lawson, p. 546). While it would be a fair assumption that not all rapes are reported to the staff, and while it is possible that a staff member might under some circumstances improperly fail to report to the administration (the latter an unlikely occurrence in an institution where

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thorough and detailed documentation of all exceptional events exists, as Swanson found to be the case at GCI, supra), the administration, and TURNER in particular, can be held to have knowledge only of those incidents reported to it -- a fact so basic as to form almost a tautology.

The suggestion that rapes can be inferred from a free flow of contraband is in error on two counts: first, while there was contraband at GCI -- as at all prisons -- it was by no means free-flowing; second, there was no opinion evidence that drew a conclusion that the existence of contraband implied prevalence of rape; it is perhaps unnecessary to note that there is no logical connection between contraband and rape.

73. The suggestion that Plaintiff's Ex. 6 reveals that a disproportionate number of young white inmates checked into confinement in September, 1983 is in error; there is nothing in the Report reflecting on the age of the inmates in PC.

Since the inmates in PC were required to give a reason for their request for protection, and since those requests often listed debts or money problems, it is not accurate to suggest that raw data as to the number of protective custody inmates necessarily reflects fears of sexual assaults (see e.g. Defendant's Ex. 15, 22; Harper; Durrance; also Brierton, p. 270-271). It was also common for inmates who had been in PC at other institutions to request it automatically on arrival at a new institution (see e.g. Plaintiff's Ex. 5, letter of 11/30/81 re: Zatler; see also incident where 9 inmates from Florida State Hospital applied for PC on arrival at one time, Plaintiff's Ex. 33). Indeed, as the Superintendent's report for February, 1981 indicates, a number of spaces in protective confinement were occupied by mental patients transferred from RMC (Defendant's Ex. 7).

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The footnote contention that the population figure for whites (48%) includes Hispanics is not supported by the record and, as noted above, is contrary to the listing in the reports themselves.

75. The reliance upon Plaintiff's Ex. 5 to support the contention of poor ventilation and lighting in protective confinement constitutes an unwarranted and selective choice of evidence out of context. It ignores the memorandum of October 6, 1982 which responded to the memorandum of September 22, 1982 (not 1985 as given in the Magistrate's Report). In it, the State Design & Construction Administrator advised that the cells measured two weeks earlier by the investigator were still under construction, with one block being 65% complete and the other nearly 100% complete; that the lighting and ventilation were not yet completely hooked up; and that when they were finished, they would meet State standards (see Swanson's concession of this point, p. 362-363). It is not accurate to imply that a temporary condition due to construction efforts undertaken to expand the confinement quarters reflected the permanent condition of the cells.

In respect to the claims of crowded conditions, the Superintendent's reports (Plaintiff's Ex. 31) do not reflect a greater number of inmates in confinement than the number of permanent beds (23) until the latter part of 1981 (Turner, p. 592). In late 1982, with the completion of the new wings, the capacity was substantially increased. While overcrowding did occur for a short period of time, it is not proper to ascribe that to TURNER who had no authority to incur construction expense on his own and who, indeed, went to extraordinary lengths to develop special funding to permit the construction of additional cells (Turner, p. 608).

76. The shortages in cell space were due to a number of factors: increase of 30% in inmate population, supra, the development of the protective

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confinement concept in the 1970's leading to tremendous increase in the number of inmates in PC throughout the country (Brierton, p. 263-264); the fact that confinement facilities are divided between three classifications -- disciplinary, administrative and protective. In view of the fact that in some states as many as 20% of the inmate population is in protective confinement, the 2-3% figure at GCI was actually extraordinarily low (see Brierton, p. 320).

77. The Magistrate's reliance upon Swanson's testimony as confirming that certain specific incidents occurred in ill-founded. Swanson specifically disclaimed any intention of confirming the inmate Plaintiffs' specific complaints (Swanson, p. 311-312).

78. The suggestion that the hanging of sheets or towels is a definite sign of sexual activities ignores the many non-sexually related reasons that an inmate might have for screening his bunk -- such as minimal privacy and as a barrier to light shining on his face (Brierton, p. 337; Deposition of Greenwood, p. 6-8). Moaning by an inmate in his bunk might be indicative of a number of things besides homosexual activity -- from indigestion to self abuse. Most importantly, there was no evidence that TURNER ever heard or had occasion to hear such moaning. Nor did he see sheets or towels hung on beds. The movies were selected not by TURNER but by the Athletic Director (Johnson, p. 235; see also Brierton, p. 338-339: a superintendent with all of his other responsibilities cannot screen each movie shown in prison).

79. The Plaintiffs adduced no evidence that any of their alleged assaults were reported to TURNER except for the case of Harper. The unreliability of Harper's testimony will be addressed later.

81. The complete falsity of this finding has been addressed, supra.

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82. While neither Peters nor TURNER interviewed Aldred and Saunders, there was no evidence that the allegations of the latter with respect to their claimed assaults were reported to either Peters or TURNER.

Footnote 21 again repeats the assertion addressed above. Peters specifically testified that rectal exams were used; medical exams -- and, since the medical staff included both a psychologist and a psychiatrist, one can legitimately conclude that psychiatric exams were included -- were given; and interviews of both alleged victims and assailants were standard procedures. There is no citation given by the Magistrate for his reliance on TURNER's testimony, but a careful review of the entire Transcript fails to reveal any statement by TURNER that these procedures did not occur. While lie detector tests were not part of the standard procedure, considering the poor results shown in the investigations where they were used, it is not surprising that little reliance was placed on them (see Plaintiff's Ex. 10, tabs A & F). In any event, it is patently absurd to suggest that the constitutional rights of inmates require that lie detector tests be given -- indeed a more cogent argument could be made for the opposite proposition.

83. This mischaracterization of the evidence cited by the Magistrate has previously been addressed. Peters testified that he could recall only one successful prosecution in 1984 and was unable to say whether there were prosecutions in prior years or not. Even if there was only one successful prosecution from 1980-84, this would not establish anything adverse to TURNER since only 5 alleged incidents in total were reported to the administration during that time period (supra). Nothing in respect to these 5 reports was put into evidence. Thus, it is unknown as to whether any of the complainants retracted their stories (see Lawson, supra); whether they were able to identify their assailants (several of the Plaintiffs even today claim they

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cannot identify their assailants) and, thus, establish a prosecutable defendant; whether the State Attorney's office refused to prosecute, or whether he failed to prosecute successfully.

The statement attributed to Peters that there was no State prosecution initiated for weapons possession by an inmate is another that is belied by the record. Peters actually testified that he would have to review his files -- which had not been brought with him -- on such prosecutions to give an answer, but he recalled at least one specific incident from memory (Peters, p. 458-460). This also ignores the fact, alluded to above, that the inmates were frequently prosecuted through the disciplinary process resulting in confinement and loss of gain time -- thus, effectively lengthening their sentences (supra).

84. The statement that inmates roamed GCI bent on rape and violence might constitute interesting dramatics for the calculated benefit of the press, but it was not substantiated in the testimony even if the Plaintiffs' stories are accepted as true. That incidents will occur, particularly during periods when manpower shortages prevent guards from being everywhere on an 11-acre compound, is not surprising, but to inflate a few incidents -- many of which are questionable at best -- into a common occurrence is simply symptomatic on the basic invalidity of the entire Magistrate's Report. The statement that TURNER did not seek State investigators to investigate armed robbery and assaults is totally without support in the record. Not only did Peters produce more than 25 instances of prosecution for contraband, but even the Plaintiffs' own carefully culled evidence shows the report by TURNER to the FDLE (Florida Department of Law Enforcement) for just such an investigation and use of a lie detector involving an incident arising out of an assault incident (Plaintiff's Ex. 10, tab F).

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The citation of 18 USC Section 1241 is equally unsupported -- this time by the United States Code which fails to list any such section of Chapter 18.

86. The reason that TURNER never ordered an investigation of the claims of Harper, Aldred and Saunders is that these claims were never reported to him -- if they were reported to anyone.

87. The Magistrate's listing of supposed sources of outside investigation is totally without one iota of support in the record that any of these agencies even had jurisdiction to investigate inmate on inmate assaults: the reference to the Attorney General's office is only the most incredible of the group, for this office has no function and no such capacity. No generalized jurisdiction on behalf of the Department Inspector General was established: that the IG's office might investigate alleged improprieties by staff does not mean that it has jurisdiction to review every instance of inmate on inmate violence. Peters testified that he did bring prosecutions for inmate assaults to the State Attorney's office, but that it was the policy of that office to require corroborative evidence beyond one inmate's word against another -- a policy which made many prosecutions difficult or impossible, but one which undoubtedly mirrored prosecutional experience with juries and, in any event, a matter of absolute discretion by the State Attorney (see Peters, p. 380).

What may be lost in this entire issue and, thus, what must be specially emphasized is that there was no evidence that the GCI's own inspectors were not able to adequately investigate any matter brought to their attention. This critically important fact is overlooked by the Magistrate. But the Plaintiffs made no showing whatsoever that Peters and his staff failed to investigate such incidents adequately -- so long as the inmates were willing to report the incident and the assailant could be discovered.

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87. The statement that the FBI was never consulted in respect to violation of Federal criminal civil rights statutes is simply gratuitous. There was no showing that any such violations occurred beyond the Barnett incident in which the FBI was involved.

89. The statement that inmates had free access over the compound is absolutely contrary to the Plaintiff's own documentary evidence. Against one instance cited in this paragraph by the Magistrate of an inmate who was able to leave his assigned area (Plaintiff's Ex. 6, p. 8), the Court is directed to the following among the many examples in the record:

1) In the Management Review Report of 8/26-29/80, it was noted that during the year preceding June, 1980, 67 inmates received disciplinary action for being absent from their assigned area and 43 for being in unauthorized areas (Plaintiff's Ex. 4; tab B, p. 21);

2) Anthony Lamarca, a Plaintiff, was found guilty by being in an unauthorized area on 9/25/81 (Plaintiff's Ex. 24);

3) Andrew Jackson was found guilty of being in an unauthorized area and given 15 days loss of gain time (Plaintiff's Ex. 21);

4) Eddie Cobb, another Plaintiff, was twice found to have entered dormitories to which he was not assigned. He lost 30 days gain time on October 25, 1983 and 15 days again on November 8, 1983 (Plaintiff's Ex. 15).

These 114 incidents of prosecution of inmates who were in areas off limits to them are far from all encompassing since totals are available in the record for only one year. There is no doubt from these instances, however, that (1) the administration did limit free access about the compound to the inmates; and (2) the administration actively and severely punished violators -- including two of the Plaintiffs who have raised this palpably unsupportable claim in the first place.

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92. The errors in this paragraph have been previously addressed. It ignores two basic points made above: (1) the post orders required the officers to patrol the dorm and not to just remain in the wicket; and (2) even without a single bunk bed in the dorm, the view of the showers would be blocked from the wicket by the shower room wall (supra). In addition, it should be noted that the trade off in eliminating a middle row of double bunks is that beds must be placed closer together (Turner, p. 640-641).

93. As discussed above, TURNER specifically testified that the post orders required officers to patrol (Turner, p. 643). TURNER stated that he may well have disciplined guards for failure to patrol, but was not then able to mention specific instances (Turner, p. 732).

It should be noted that while an officer might in the ordinary course make his rounds in 10 minutes, if he were delayed by a diversion or other incident he might take considerably longer to patrol his dorm.

94. It should be noted that Music was only able to eliminate the middle row of double bunking in one dorm -- D; contrary to the testimony of Swanson and implication in the Magistrate's Report, this modification required the allocation of substantial funding -- $7,000 in D dorm alone (Music, p. 141-142).

96. The Magistrate's finding that aggressive "wolves" were retained at GCI and not transported to other institutions was based on Swanson's testimony on direct examination only. It ignores his testimony on cross where he substantially modified or changed his opinion. It also ignores substantial documentary evidence to the contrary. TURNER testified, and Swanson concurred, that during most of the time period at issue, the Florida prison system was at capacity; this limited severely the ability of superintendents to have transfers of inmates approved (Turner, p. 650-651; Swanson, p. 196, 373-375). Despite these limitations, TURNER still undertook to transfer out a

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number of problem inmates by agreed swaps with other institutions; however, when effecting a swap, one institution with problem inmates did not have the luxury of sending out problem inmates and receiving in return model prisoners; as TURNER phrased it, you did not send out the big bad wolf and get back Little Red Riding Hood in return -- an institution that swapped merely exchanged one problem case for another (Turner, p. 651; see also Swanson, p. 373-375). Although the Department did not maintain a single document listing swaps and transfers, the documentary evidence admitted is replete with instances of swaps used to get rid of particular problems and transfers of others when those could be arranged; a few instances suffice: in July of 1984, TURNER swapped 7 problem inmates, including three who had been determined to be "wolves" (Plaintiff's Ex. 13, swap sheet for 7/19/84; Swanson, p. 298); on June 24, 1982 in another swap, 12 problem inmates were transferred (Swanson, p. 302); specific "wolves" or problem inmates identified in the present case were transferred out as well: Levi Fisher, Andrew Jackson, Michael Lane and Eddie Cobb were all transferred out as management problems (Peters, p. 396; Plaintiff's Ex. 21, 25; Defendant's Ex. 16). On cross-examination, Swanson admitted that his opinion as to the transfer of inmates was derived from the files of two inmates, one of whom was Pryor, where a transfer had been rescinded. When pressed on the issue, Swanson admitted that a great deal of effort would have been required for him to search the thousands of pages of documents for swaps and transfers -- an effort he was not prepared to make. As a consequence, he depended on a sample of two inmates out of thousands who were at GCI during this time period -- a sample which he conceded had no validity (Swanson, p. 301-304). He admitted that before he could actually render a proper opinion, he would need to know how many transfers per month occurred under TURNER (Swanson, p. 300-301). When further presented with

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the documents he had overlooked, he was forced to retract his prior testimony and admit that swaps of problem inmates and transfers of wolves clearly did occur during TURNER's administration (Swanson, p. 303).[11/]

97. The six busloads of problem inmates shipped out by Jones actually totaled about 40-45 altogether (Swanson, p. 134). "Problem inmates" include both wolves and those seeking protective confinement or "sheep" (Swanson, p. 374). The statement that a negative transfer is a rejection of an inmate assigned to GCI is false. The superintendent of a prison has no discretion in accepting a prisoner; he can only subsequently seek a transfer with the approval of Tallahassee (Music, p. 82-88). As Music testified, he too had problems transferring problem inmates out of GCI. While he found transfer somewhat easier in his first few months, he now has the same problems as TURNER experienced and has inmates whom he has been waiting for months to have their transfers approved due to lack of space in other institutions (Music, p. 162-164). The 5-6 inmates he transferred each month during his first few months involved both "wolves" and inmates in PC (Music, p. 162). This figure is actually less than those for the two months for which documents are in evidence in TURNER's administration (7 and 12 inmates, supra).

Finally, the reference to the "unrebutted opinion" of Peters should be clarified. Peters never expressed such an opinion throughout his testimony. Indeed, he indicated several instances where problem inmates had been transferred under TURNER (Peters, p. 396, 467). This "opinion" was the second-hand relation of Swanson of his recollection of a conversation with Peters.

11/ What the Magistrate's report ignores is that the transfer or swap of a problem inmate merely moves him from one prison to another. Since he is already in prison, there is no more restrictive repository for these inmates.

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98. The statement (ftn. 24) that TURNER did not adhere to the classification team decision on Pryor is absolutely contrary to the evidence. As the computer sheet in evidence reveals, authorization to keep Pryor was given by Raymond Snell, not TURNER (Plaintiff's Ex. 26, tab B). Snell was the classification specialist (Plaintiff's Ex., tab C). As TURNER testified, the team would occasionally agree due to extenuating circumstanes, to give an inmate another chance after a proposed transfer. When they did so, he usually agreed (Turner, p. 651-652). TURNER's testimony on this point is the only indication of what may have been his involvement.

Despite the implication in this paragraph, Music did not transfer Pryor because he regarded him as a "wolf". Pryor was transferred for having allegedly assaulted a staff member while in confinement (Plaintiff's Ex. 26, tab C).

In respect to Willie Dock, whom Durrance claims to have been raped by on March 17, 1984, the Plaintiff's own exhibit reveals that Dock was in administrative confinement from March 14, 1984 until March 20, 1984. He could hardly have raped Durrance in a dorm shower while locked in confinement (Plaintiff's Ex. 16, tab C).12/

In respect to Fisher, Peters actually testified that Fisher assaulted one inmate -- not several as implied in the Magistrate's Report -- and as a result of the investigation of that assault by Peters, TURNER had Fisher transferred to FSP (Peters, p. 395-396). There was absolutely no evidence that Fisher was left in D dorm after this assault to further allegedly rape Harper. Since he was transferred as a result of the assault on the other inmate, it is more probable that Fisher committed the assault well after the date that Harper now claims

12/ Administrative confinement was used as a lockup pending investigation of charges. In the event of conviction, an inmate might receive disciplinary confinement. In this case, Dock received 30 days of disciplinary confinement and 30 days loss of gain time for possession of contraband--a knife.

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that he was attacked. Again, the Magistrate's Report claims as fact that which is absolutely unsupported by, and contrary to, the clear evidence.

Contrary to the statement in footnote 25, Peters did not describe Dock as a wolf (Peters, p. 413) -- indeed, Dock's record shows him not to have been a serious problem inmate during the TURNER administration (for instance, he received only one disciplinary report during that period compared to nearly a dozen by Plaintiff, Cobb) (Plaintiff's Ex. 16; Defendant's Ex. 16).

One final note on this topic is critical: the fact that the administration may have learned that a particular inmate was a "wolf" does not mean that this fact was known throughout the period of his incarceration at GCI. The Report does not attempt to determine when "Bone" and "Fisher" were determined to be "wolves".[13/]

101. Swanson, while he initially refered to the movies as x-rated (he later admitted he had no expertise in movie ratings) never described them as "hard-core" and he most certainly never stated that they depicted anal penetration (Swanson, p. 375-376). This latter attribution is a transparent effort at trying to connect the movies to the lawsuit. It is noteworthy that none of the inmate Plaintiffs was sexually assaulted in the movies. The only connection to this case is that Bronson, an admitted homosexual prostitute, claims that a black inmate compelled by by threats to masturbate him (the black inmate). To suggest that this was caused by the content of the movies is sheer speculation.

The reference in footnote 26 to Brierton's testimony is incomplete. While Brierton did state that he had no clear opinion on the subject, he acknowledged that there were two respectible schools of thought in respect to

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13/ It should be noted that a wolf is a term used to describe an inmate who simply assaults other inmates. It describes oe who preys upon weaker inmates or sheep. Plaintiff Johnson, for instance, was involved in a number of fights as an aggressor. While he might have been termed assaultive, he was not a "wolf" (Defendants' Ex. 21).

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the screening of movies with sexual content. One school regards such screening negatively; the other regards them as harmless when viewed by adults (Brierton, p. 338). As he further testified, it is difficult to get films without a sexual content.

103. The suggestion that *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982) or any other case makes an administrator liable under Sectio 1983 for not doing everything within the limits of his authority sets the law on its head and is absolutely contrary to the holdings in *Estelle v. Gamble*, infra, and *Davidson v. Cannon*, infra. The law requires that the superintendent not, by intentional act or by reckless indifference to the rights of inmates, deprive those inmates of their rights.

105. (i) As addressed above, there was no evidence that TURNER did fail to discipline staff for failure to patrol the dorms, and there was no proof either that guards on a regular basis failed to patrol or that TURNER was made aware of any such failure.

(ii) As addressed above, there was no evidence of wholesale extortions committed by correctional officers, and no evidence that TURNER was aware of any such extortions which he failed to investigate. The only evidence of extortion by a guard was in regard to Dixon; TURNER, as previously discussed, ordered the original investigations of Dixo and when they failed to confirm wrongdoing, he still ordered the investigation to continue. Far from a dereliction of duty, his conduct in this regard was aggressive -- in the relevant 5 years, he had criminal charges brought against 14 officers for introducing contraband (supra), and against 12 visitors for the same offense; Swanson specifically found that when staff violated the rules, they were reprimanded (Swanson, p. 386).

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(iii) As discussed above, TURNER did direct his staff through post orders to forbid the draping of sheets in the dorm; there was no evidence that TURNER was ever made aware on any occasion that the orders were not being carried out, and there is no evidence that he failed to discipline any officer for not carrying out the order. As testimony of one inmate revealed, the occasions when any inmates draped sheets at the side of their bunk were actually rare -- once or twice a week and then for only a half hour at a time (Deposition of Greenwood, p. 7). In respect to two of these points, it is clear that the Magistrate has converted an absence of evidence into evidence that certain things did not occur. This violates the burden of proof placed upon the Plaintiffs to come forward with proof.

(iv) As addressed above, the assertions in this paragraph are a shocking distortion of the evidence which actually showed that there was an established procedure for reporting and investigation of sexual assault cases. Rectal exams and medical exams were a part of that procedure. There is no showing that a lie detector test would have been of any additional benefit in any particular investigation and no showing that the failure to give lie detector tests ever encouraged a single sexual assault. There was not an iota of evidence that a single rape was uninvestigated or not prosecuted due to any failure by TURNER to establish procedures. Any failure to investigate was due to a failure by inmates to report assaults, and any lack of prosecution of reported assaults was due to retraction by the alleged victims or their failure to identify assailants.

(v) As previously discussed, the Magistrate's findings in this paragraph are another gross distortion of facts. There was no evidence that the State Attorney was not consulted on rapes; there was positive evidence that his office was consulted; there was no evidence that the Inspector General had

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jurisdiction to investigate such assaults and no evidence that he had the staffing to do so; finally, there was no evidence that any of the five sexual assaults reported to the administration involved any facts which would warrant possible prosecution under 18 USC Section 241: a critical element in any violation of this statute is the existence of a conspiracy. Interestingly, the annotations fails to reveal a single case in which this statute has been used to prosecute an inmate assault on another inmate, 18 USCA Section 241. It must also be noted that there was no showing that the institutional investigator was unable to investigate adequately any inmate assaults.

(vi) As shown above, this conclusion also flies in the face of the evidence showing dozens of prosecutions of inmates through disciplinary proceedings for violating the limitations on movements in the compound.

(vii) As shown above, this conclusion also flies in the face of the uncontradicted evidence of a number of transfers and swaps which took place during TURNER's administration and which involved problem prisoners. Since there was no separate recording of swaps, they had to be culled from inmate files; just in the small number of inmate files in evidence, evidence of swaps and transfers of a number of problem inmates appear. Further, as shown above, Willie Dock was in administrative confinement during the time that Durrance claimed to be raped. Pryor was given a second chance by the Classification Board; there is no specific evidence that TURNER participated in the decision to give him this second chance.

108. Contrary to the statement by the Magistrate, Swanson did not utilize his "multi-variate" approach to corroborate the inmate's individual claims of their assaults with the possible exception of Gordon and Johnson, where he found that their files contained incident reports on non-sexual assaults.

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109. In respect to Dr. Caddy's testimoy and in subsequently reviewing the testimony of the Plaintiffs, it is significant to note first that he only had occasion to interview the Plaintiffs briefly the weekend before trial (Caddy, p. 1141). Several tests, including MMPI, were administered at the same time by an associate (Caddy, p. 1132).

Upon cross-examination, Caddy admitted that his opinion in respect to the inmates' claims was dependent upon the honesty of those inmates in responding to the questions he asked in the course of his brief interview with each (Caddy, p. 1282). He had no independent source to confirm the truth or accuracy of the statements given by each inmate (Caddy, p. 1293). In respect to a number of these inmates, it became clear that they had been less than candid in supplying their history to him (see e.g. Caddy, p. 1282-1292 re: Harper). He further acknowledged that virtually all of these inmates had an underlying conduct disorder and, consequently, possessed a manipulative personality associated with conduct disorders (Caddy, p. 1284).[14/] As Caddy noted, the more intelligent the person with such a disorder, the greater the potential for success in their manipulation.

In respect to Harper, he finally conceded that he was not prepared to speak to that Plaintiff's veracity (Caddy, p. 1292). It is also noteworthy that Harper's MMPI results revealed a significant finding of psychopathic deviancy.

In respect to Saunders, Caddy conceded that this inmate was one of the brightest and most manipulative of the group. He further admitted that he was in some doubt as to Saunders' credibility (Caddy, p. 1312).

111. The Magistrate properly notes that both Durrance and Bronson failed to report a rape to any prison official. His conclusion that the other three --

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14/ Conduct disorders generally derive from childhood development (Caddy, p. 1284).

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Harper, Aldred and Saunders -- reported that they were assaulted is based only on their testimony.

118. The sweeping and unwarranted conclusions set forth in this paragraph have previously been addressed in detail. One exception, however, is the allegation that inmate assaults "by and upon correctional officers" led to the creation of a climate where rapes would occur. In respect to the assaults upon inmates by officers, it has previously been noted that there was only one improper use of force over the relevant 5-year period (while 248 excess force complaints were filed against the other 27 institutions -- an average of 9 per institution). It has also been noted that the officer responsible for that use of force was removed from his position following a full investigation initiated by TURNER. In respect to inmate assaults on officers, the Plaintiffs offered no comparative evaluation which might indicate that the number of such incidents at GCI was unusually high.

121. This paragraph reasserts the now refuted contention that rectal exams were not used at GCI (it is noteworthy in this respect that the two allegations of rapes reported to Lt. Lawson were retracted by the complainants after a medical exam, supra).

122-129. It is significant that although Aldred claimed to have told two dorm officers and a lieutenant that he had been raped, he could not remember the names of any of them, thus making it impossible for the Defendants to produce the anonymous officers in rebuttal (Aldred, p. 811, 817-818). Aldred also claimed not to know or be able to recognize his assailants (Caddy, p. 1170).

Aldred did claim that he told the psychologist at Lake Butler a few weeks later "exactly what had happened" at GCI -- meaning, that he had been raped (Aldred, p. 827-828). Significantly, his medical records, while containing a report from the psychologist at Lake Butler, make no mention of a report of

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rape. There is only a mention that Aldred had a vague fear of returning to GCI and wanted a transfer (Plaintiff's Ex. 13, tab C).

If a rape had occurred and if Aldred's comments to the officers at GCI did occur, there is no reason to suppose that he was any more clear in his report to them than he was to the psychologist -- in both instances, Aldred claims he clearly reported a rape and yet his medical records do not reveal this. At most, he may have made claims of vague fears.

Aldred had a long history of confinement in mental hospitals in his youth (Caddy, p. 1167). Far from fitting the Magistrate's category of a weak, young white male, Aldred was a weight lifter who could easily handle 250-275 pounds (Aldred, p. 826). He was serving a sentence for first degree murder and perjury -- the latter crime having been committed against a police officer (Aldred, p. 823-824).

130-143. As noted above, Durrance claimed that he was raped by several inmates on March 17, 1984, including Willie Dock (Durrance, p. 455, 465). Durrance claimed to be positive about both the date and identity of his attackers. A review of Plaintiff's Ex. 16, tab B, however, reveals that Dock had been placed in administrative confinement on March 14, 1984 and released from administrative confinement on March 20, 1984. Clearly, he could not have assaulted Durrance as Durrance claimed.

In view of the fact that Durrance made no report of any assault at GCI until he joined this lawsuit, and in view of the improbability in his story as to his assailant, the alleged assault is at best a highly questionable occurrence.

It should also be noted that Durrance, like Aldred, did not fit the Magistrate's profile of the victim group at GCI -- Durrance was physically strong and, in his nine years in the prison system, had collected 25 disciplinary

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reports; in addition, he had belonged to an inmate gang at another prison (Durrance, p. 516-518; Caddy, p. 1221).

Durrance's excuses for not reporting the alleged assault do not wash. In respect to his claim that he was fearful of blacks learning that he had been raped and thereby viewing him as vulnerable, it might be noted that if he were gang raped by a large group of blacks in a dormitory, he would certainly have expected that that fact would become known among the other prisoners. In respect to his claim that he was too embarrassed to report to the medical department for fear of being publicly viewed as a homosexual, it is perhaps sufficient to note that he has not been reluctant to broadcast his claim through the vehicle of this lawsuit to a substantial portion of the population of this State -- including its prison population. If he felt any real embarrassment over a sexual assault, it is highly unlikely that he would have joined this suit.

It is apparent that Durrance, who apparently had financial problems with Dock and others, and who sought protective confinement on that basis, has after-the-fact attempted to convert that situation into an alleged sexual assault for the benefits accruing in this suit.

144-149. Bronson, an admitted homosexual prostitute who voluntarily sold his favors at other institutions, claimed that he was compelled to do so at GCI only by force (Bronson, p. 717-718). Like Durrance, he admitted that he never made any report of sexual assaults or harassment while he was at GCI or for three years thereafter. During the intervening period, however, he was no stranger to litigation against the State, the DOC and its employees (Bronson, p. 720-721; 724-725). It is, therefore, remarkable at the least that, if he had suffered the incidents of which he complains in this suit, that he remained silent for so many years.

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150-160. In footnote 48, the Magistrate noted Peters' testimony that the bathroom in the classification building where Saunders claimed that both Pryor and Roper raped him was so narrow that a person sitting on the toilet would hit his head against the wall if he leaned forward. The Magistrate went on to find that despite the narrowness of the room, the alleged assault could have occurred in it. This ignores the detailed description given by Music who measured the room and found it to be just over 4 feet square (51" x 54") -- barely more than a broom closet -- containing both a standard sink and toilet and having an inward opening door (Music, p. 113). In a room of that character, three people could not physically fit in; much less could two people force their way into such a confined space, close the door and undertake the alleged sexual assault as described by Saunders. It is noteworthy that Saunders' own estimate of the size of the room was more than double its actual size (Saunders, p. 598).

161-168. Harper's credibility has been addressed above. It is particularly significant in respect to his claim that he informed TURNER that he had been raped by Levi Fisher to note that both Harper and the former inmate-witness, Zatler, claimed to be present at the time. Zatler, however, does not concur with Harper in what was told to TURNER. Zatler states only that when he, Harper and the others were asked by TURNER why they were in confinement, "...we told him, because of Fisher."[15/] (Zatler, p. 794-795).

Nor is this the only inconsistency in Harper's testimony in the record. As even the Magistrate's Report concedes, Harper's story that he was raped two weeks after arrival at GCI, and went into confinement the next day, is not supported by his inmate record which shows that he did not seek confinement until almost two months after the time he claims to have been raped. Harper told Dr. Caddy that he went to TURNER to tell him he had been raped; his

15/ Zatler and perhaps several of the other inmates were consensual sexual partners of Fisher (Zatler, p. 790-792).

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testimony at trial, noted in the Report, was that TURNER came to him while he was in PC (Caddy, p. 1295). Harper's record contains several documents -- noted in the Report -- indicating that Harper on several occasions made reports that he was raped at other institutions; he now denies the reports (Harper, p. 750-752). The reasons given by Harper for seeking PC following transfer from GCI is also inconsistent (Defendant's Ex. 15; Swanson, p. 70).

Finally, contrary to the testimony of Swanson and finding of the Magistrate that inmates had difficulty gaining protective custody at GCI, Harper had no such difficulty (Harper, p. 760).

169-172. Johnson was one of the Plaintiffs who did not claim to have been sexually assaulted. The Magistrate's Report (paragraph 172) states that the Defendants never produced to Plaintiff any report of the one physical assault in which Johnson claimed to have sustained an injury -- the fight with Michael Lane. In fact, not only was the report provided by the Defendants, it was part of a Plaintiff's exhibit which was apparently ignored by the Magistrate (Plaintiff's Ex. 25). What the report reveals is that Johnson had provoked the fight by spitting in Lane's face and that Lane was punished with 90 days in disciplinary confinement for fighting (Plaintiff's Ex. 25, tab C). It is abundantly clear that the fight upon which Johnson based his claim was one arising not out of any "climate of fear", but out of a personal dispute between two inmates. It is also clear that the administration responded with severe penalties against Lane.

173-177. In respect to the Epprecht claim, it must be noted that this Plaintiff admitted that he never reported the alleged assault and, despite inquiries from officers at GCI who were skeptical of the story he gave of being accidentally injured, he refused to reveal any details of the assault to the authorities. TURNER had no reason to make any inquiry of Epprecht because no assault

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had been reported. The quote from Defendant's Ex. 7 from the Superintendent's Report of 2/81 omits the passage which explains the severe financial plight at GCI caused by budgetary limitation which made it necessary to hold open the staff vacancies that month. Immediate assistance in solving this problem was requested.

178-180. The Report ignores the cause of the fight between Cobb and Pryor. Cobb -- whose assaultive conduct far exceeded that of Pryor (Defendant's Ex. 16) -- was actively harassing Pryor's prison mate, apparently asking him for sexual favors (Pryor's deposition).

181-183. Gordon was another inmate who did not claim a sexual assault. It is noteworthy that while he reported all three incidents -- and each was documented in the records of GCI -- he could not or would not reveal the assailants, making any resolution by the administration impossible. It is also noteworthy that while Gordon denied watching the movies which he claimed were pornographic, another inmate testified that Gordon often attended the movies with his sex partner (Deposition of Greenwood, p. 12). Finally, Gordon's weight loss must be seen in context of his weight -- he weighed 355 pounds prior to incarceration (Gordon, p. 316).

184-188. In respect to LaMarca, it must be emphasized that he never claimed to have been assaulted or injured at GCI.

189-195. In respect to Brown, it must be noted that the incident he alleged occurred well after TURNER retired from GCI and, thus, has no relevancy with respect to the time period. It is noteworthy that Brown's claim that he was raped and reported it to Lt. Minor was refuted both by the inmate records and the testimony of Music which established that Brown did not seek PC but was given it as a result of Music's learning from an informant that Brown was selling sexual favors to a large group of inmates (Music, p. 114). The claim of

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rape came only after Brown -- who has a long history as a molester and rapist of young boys -- was confronted with his conduct by the administration. At that point, Brown apparently concocted his claim of rape as a cover to his activities (see Caddy, p. 1313; Martinez Deposition, p. 4-7).

196. The Magistrate's finding that the Plaintiffs' credibility is enhanced because most of them did not initiate individual legal claims until they read notices of the class action has no support in logic or common sense. A prisoner is no less likely to fabricate a story -- indeed, he is more likely to do so -- if he thinks that in doing so he can "hitch his wagon" to an already alleged claim by others who have set the scene for him.

Nor would concurrence by several of the inmates upon several general topics be surprising since they were advised in advance of the then existing claims made by LaMarca in the original action and were interviewed by Plaintiffs' counsels' investigator to determine if they had any experiences in these areas.

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III. OBJECTIONS TO CONCLUSIONS OF LAW

The Report and Recommendation now before the Court represents a clear departure from established principles of law enunciated by the Federal courts. The case authorities urged by Plaintiffs, and adopted in toto by the U.S. Magistrate, do not, it is respectfully submitted, support an award in compensatory damages against Defendant, R. V. TURNER.

The Conclusions of Law, beginning on page 102 of the Report and Recommendation, state that conditions in GCI were viewed by the U.S. Magistrate as being cruel and unusual and, hence, in contravention of the Eighth Amendment. From this observation, the Magistrate springboards to a conclusion that because TURNER knew or should have known of these conditions, he must, through "callous indifference", be held liable to ten Plaintiffs, proceeding together, in monetary damages.

The danger in such an approach is two-fold. First, by this rationale, the door is open to any inmate who might have been incarcerated in GCI during TURNER's administration to bring an action seeking damages against this Defendant for any assault by a fellow inmate. In effect, TURNER has been made an insurer. This may be highlighted by paragraph 226, wherein it is stated:

> *Turner's failure to properly and prudently manage GCI matters within his administration and financial control is a direct cause of Plaintiffs' injuries. The exacting causation link required Williams v. Bennett, has been amply proven and documented.*
>
> (Emphasis by Magistrate)[16/]

The second danger, should the Report and Recommendation stand, is just as far reaching. Where any group of plaintiffs get together and combine their allegations of assaults or other tortious conduct, involving several alleged, separate incidents in respect to time and identity of participants over a period of years, then any superintendent of any correctional institution in this or any other state would find himself in the impossible situation of defending against an action such as the one in the case before this Court. It

16/ Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), as will be distinguished later on, does not provide for this broad application of Eighth Amendment principles. The "affirmative link" has not been identified in the Report and Recommendation.

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would be extremely difficult, if not impossible, to demonstrate proper and prudent management to the satisfaction of a U.S. Magistrate. In finality, recruiting any person to serve as a prison administrator in a setting that is complex and intractable would also be impossible.

After initial citations to the effect that while the Federal judiciary is reluctant to interfere with prison administration, *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), but will scrutinize claims involving constitutional infringements, *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), the Report and Recommendation then proceeds to Eighth Amendment considerations.

Great emphasis is placed on *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982), and *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971). Both require careful perusal.

Williams v. Bennett, supra, involved a factual situation pertaining to a prison in Alabama which by comparison is substantially different from that at GCI. Prior litigation in *Pugh v. Locke*, 406 F.Supp. 318 (M.D. Ala. 1976), aff'd with modifications sub nom, *Alabama v. Pugh*, 438 U.S. 81, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978), had determined that living conditions in the Alabama prison, including constant exposure to the constant threat of violence from other inmates, constituted cruel and unusual punishment in violation of the Eighth Amendment. (In the case before the Court, no such prior determination had been made.) Williams, in 1978, after the findings of the *Pugh* court, brought an action under 42 USC Section 1983, alleging that he had been stabbed by a fellow inmate. While recognizing that the prior litigation in the form of a class action had determined the cruel and unusual conditions in the Alabama prison, the appellate court found that it had no preclusive effect on the issue of individual consitutitional wrongdoing on the part of the defendants. Thus, the appellate court reasoned that for the plaintiff to prevail against any one defendant, he had to prove three things:

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1) That being confined in a dormitory with inmates other than minimum security inmates without guards being present deprived him of his Eighth Amendment right to be free from cruel and unusual punishment because of the danger of violence.

2) That the individual defendant intentionally, or by callous indifference, was a cause of the constitutional deprivation.

3) That this deprivation was a legal cause of his injuries.

Williams v. Bennett, supra, at 1381. From this we learn that the existence of pervasive conditions is not enough to support a damage award. As an example, the Court said:

> *...it would be unfair to penalize with personal monetary liability an individual Board of Corrections member whose vigorous efforts to hire sufficient prison guards, or to assign available so as adequately to staff the dormitories, were overruled by the contrary views of a majority of the Board. On the other hand, it would be highly relevant to the establishing of personal liability to introduce evidence that an individual defendant, having jurisdiction over an adequate number of guards and over Williams' dormitory at the time of the stabbing announced: "I'm not going to station a guard in that dorm. Those prisoners deserve what they can do to one another".*

Williams v. Bennett, at 1383. The appellate court also noted:

> *There can be no duty, the breach of which is actionable, to do that which is beyond the power, authority, or means of the charged party. One may be callously indifferent to the fate of prisoners and yet not be liable for their injuries. Those whose callous indifference results in liaiblity are those under a duty -- possessed of authority and means -- to prevent the injury.*
>
> (Emphasis added)

Williams v. Bennett, supra, at 1384. This then is the affirmative link which is missing and overlooked in the Report and Recommendation. It has not been proven that the conditions at GCI, whatever they might have been, caused the injuries to the particular Plaintiffs at the particular times of each occurrence.

Callous indifference, as the *Williams v. Bennett* decision indicates, will not, standing alone, justify imposition of liability and this is particularly true where, as noted above, the means available are limited. In fact, callous indifference of an individual, if it exists, may not be actionable at all.

> *In contrast, however, we are called upon to consider the liability of individual state employees for injuries suffered as a result of the unconstitutional conditions. Unlike the state, an individual defendant generally has neither the power to operate*

> *nor close down a prison. Moreover, we refuse to adopt the position that an employee who attempts to accommodate the constitutional rights of prisoners in his charge, within the financial limitations imposed, should, instead, resign from his position because of the realization that full compliance is impossible in the absence of adequate funding. Indeed, the corrections official who walks away could be said to act with greater indifference than those who remain and attempt to work within the system.*

Williams v. Bennett, at 1388. The U.S. Magistrate recognized Defendant, TURNER's, limitations and stated:

> *Defendant Turner has presented evidence which focuses upon the inherent limitations within which he performed his duties as Superintendent at GCI. These limitations relate to fiscal realities in attempting to comply with various constitutional norms. Turner articulated these limitations in describing two overriding problems during his administration. (1) the lack of staff, and (2) the physical plant. The Court is sensitive to the inherent financial problems incurred by Turner, or for that matter, any higher level correctional official occupying the position of Superintendent at GCI. Limited financial resources however is not dispositive of Turner's potential liability in this case. Rather, the issue to be considered is whether "full compliance [of constitutional norms] is beyond the control of a particular individual and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority". Williams v. Bennett, 689 F.2d 1370, 1387-88 (11th Cir. 1982).*
>
> (Emphasis added)

Report and Recommendation, p. 45-46. The reference to *Williams v. Bennett*, to which emphasis has been added is incomplete and misleading. The full passage reads:

> *...One such limitation may have been the funding available to comply with the constitutional norms. Because the element of callous indifference focuses on a defendant's intent, see Fielder v. Bosshard, 590 F.2d 105, 109 (5th Cir. 1979), if full compliance is beyond the control of a particular individual and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority, then he cannot be said to have acted with callous indifference.*

Bennett v. Williams, at 1387-88. See also *Hamm v. Dekalb County*, ___ F.2d 132 (11th Cir. 1985); *Fielder v. Bosshard*, 590 F.2d 105, 109 (5th Cir. 1979), states that malicious intent refers to acts which are "substantially certain" to result in the consequences of which the plaintiff is complaining.

The seven items which are thereafter listed on pages 46 and 47 of the Report which the Magistrate believes would have minimized or eliminated the likelihood of rape and assaults of the various Plaintiffs at GCI do not demonstrate any malicious intention. Briefly: (i) failure to discipline officers not regularly patrolling the dorms; (ii) overall laxity in

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disciplining officers; (iii) failure to cause staff to have inmates remove sheets draped from bunks; (iv) failure to promulgate rules to investigate rapes; (v) failure to use outside investigative and prosecutorial assistance of other branches; (vi) failure to institute inmate movement controls; and (vii) Failure to transfer troublesome inmates through requests to DOC, are all at best, matters of omission, not deliberate or malicious intention to harm or injure Plaintiffs. They, at best, represent the thoughts of the author as to measures, reviewing the situation retrospectively, that he might have taken. But most of all, as shown in the response to factual findings, they are not supported by the record.

Many of the cases cited in the Report and Recommendation are based on negligence and it now appears certain that negligence will not give rise to a claim under 42 U.S.C. Section 1983. One such case, *Davidson v. O'Lone*, 752 F.2d 817, sub nom *Davidson v. Cannon, et al.*, _____ U.S. _____, Case No. 84-6470, January 21, 1986, which holds that protections of the Due Process Clause are not triggered by lack of due care by prison officials, and this is true even where a state remedy is unavailable. See also, *Daniels v. Williams*, _____ U.S. _____, Case No. 84-5872, decided the same date. See also *Owens v. City of Atlanta*, _____ F.2d 1898 (11th Cir. Jan. 30, 1986).17/

The second case upon which Plaintiffs heavily rely, *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972), is of dubious precedential value. Again, the Report and Recommendation (page 106) contains an incomplete citation, viz, "(Section 1983 liability premised upon a 'callous indifference to [inmate suffering] at the management level, in the sustained knowing maintenance of bad practices and customs'". The full sentence reads:

> *...Thus in an Eighth Amendment case, if there were, as here, no conscious purpose to inflict suffering, we would look next for a callous indifference to it at the management level, in the sustained knowing maintenance of bad practices and customs.*

17/ Cases which predicate their holding on a negligence standard include: Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972); Withers v. Levine, 615 F.2d 158 (4th Cir. 1980); Doe v. District of Columbia, 701 F.2d 948, 961 (Dist. of Columbia, 1983); Woodhous v. Commonwealth of Virginia, 487 F.2d 889 (4th Cir. 1973); Matzker v. Herr, 748 F.2d 1142, 1146 (7th Cir., 1984.

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Roberts v. Williams, at 827. But, ignored by Plaintiffs and the Magistrate is the concurring opinion of Judge Simpson rejecting Eighth Amendment application (page 834) and the Addendum of Judge Nichols which reads:

> *The panel directed that publication of the foregoing opinions be withheld, at the request of a Fifth Circuit judge not a member of the panel. The reason his anticipation that the deliberations of the judges of the Circuit, sitting en banc, in Anderson v. Nosser, 456 F.2d 835, might produce conclusions inconsistent with our majority opinion, respecting the application of the Eighth Amendment to instances of mistreatment of prisoners in custody. No one had requested rehearing in Roberts v. Williams, and it would have been a needless imposition on the parties for the court to order sua sponte. The anticipation mentioned has been so far realized that on March 3, 1972, a majority of the active judges of the Circuit decided forthrightly that no violation of Eighth Amendment rights warranting the direction of a verdict as to liability was made out below. Meanwhile, in Roberts v. Williams, the plainitff, Roberts, petitioned for certiorari and it was denied, 404 U.S. 866, 92 S.Ct. 83, 30 L.Ed.2d 110 (1971). In view of the foregoing, the panel has decided to add what follows before publication. We modify our opinion so as to declare that the liability of the defendant, Arterbury, rests upon Mississippi law applied under the doctrine of pendent jurisdiction. The discussion of the meaning of the Eighth Amendment as applicable to the plaintiff, Roberts, remains relevant primarily in answering defendant, Arterbury's, contention that the complaint should have been dismissed for failure to state a federal claim. It is to be taken also as reflecting the impact of the decision below and the briefs and arguments of counsel in Roberts v. Williams, upon the minds of a majority of the panel, as of April, 1971. If we had to decide the same issues again, we would of course be guided by Anderson v. Nosser and by other recent authorities.*
>
> *Our slip opinion included two references to the panel opinion in Anderson v. Nosser. The first we are asking the publisher to delete. The second at p. 830, should stand as it deals with personal immunities of state officials, a matter not discussed in the en banc opinion as it was in the panel opinion; therefore, what is said in the panel opinion remains properly citable.*
>
> *The individual views of Circuit Judge RIVES and Judge NICHOLS on the subject of Eighth Amendment rights remain unchanged.*

Roberts v. Williams, at 834-35. The opinion seems to have been withdrawn or at best limited as an expression of the individual Eighth Amendment views of Judges Rives and Nichols as they existed in 1971.

Other cases relied upon for imposing liability are readily distinguishable. *Miller v. Solem*, 728 F.2d 1020 (8th Cir. 1984), an appeal from a summary judgment in favor of prison officials, was affirmed with the court holding:

> *...To sustain this claim [Eighth Amendment], Miller "must show something more than mere inadvertence or negligence. He must show the defendants were deliberately, indifferent to his constitutional rights, either because they actually*

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intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates" ... Hence, "deliberate indifference" denotes both recklessness and actual intent.

Miller v. Solem, at 1024. In *Wade v. Haynes*, 663 F.2d 778, 781 (8th Cir. 1981), after a trial by jury, the court directed a verdict in favor of a prison superintendent, but awarded compensation and punitive damages against one correctional officer who placed plaintiff in a cell with two other inmates who beat and sexually assaulted him. Applying the test that deliberate deprivation may result from actual intent to deprive him of his rights or from recklessness in ignoring known threats, only the correction officer was found liable. The directed verdict in favor of the warden was upheld. Finally, in *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983), a jury verdict against a sheriff who had been held liable for injuries inflicted on an inmate was upheld. The distinguishing feature of this case was that the Sheriff was under a federal order to separate the inmates according to nature and type of crime -- which he did not obey -- the jail was manned by only one jailer and he provided no rules whatsoever for running the jail -- this was a matter left to the jailers. At trial, when asked, if under the same circumstances would he do the same things, he replied, "Yes, I would do the same thing again". *Stokes v. Delcambre*, at 1127. From the evidence, the appellate court concluded that the evidence was sufficient to support a jury verdict that the sheriff's actions were "maliciously, wantonly, and opppressively done". (at 1127).

No case has been cited in the Report and Recommendation that supports the conclusion that, even if a pervasive risk of harm exists in a prison setting, any assault or other tortious conduct among inmates will subject the superintendent to absolute liability. Something more is needed. *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981), a case most familiar to plaintiffs' counsel, involved a county jail in Mississippi, where inmates were permitted to run the jail and even maintained a prisoner-run kangaroo court that inflicted physical and sexual abuse on other prisoners. Even so, plaintiff Jones was unable to prove any injury to which he would be entitled to compensatory damages and the trial court's finding as to other plaintiffs -- that there was insufficient, corroborating evidence that the

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incidents occurred or that the facts did not support a finding of negligence on the part of prison officials -- was left undisturbed. *Jones v. Diamond*, at 1380-81.

In *Williams v. Field*, 416 F.2d 483 (9th Cir. 1969), cert. den., 397 U.S. 1016, 90 S.Ct. 1252, 25 L.Ed.2d 431 (1970), an inmate lodged a complaint that his life had been threatened by a fellow inmate. The authorities refused him protective custody ("lock up"). The inmate was subsequently assaulted. In dismissing the Section 1983 action, the court concluded:

> *...that the complaint did not allege intentional conduct by the defendants, and second, that the conduct complained of did not violate any federally secured rights. The court held that at most the allegations made out an "unintentional common law tort".*

Williams v. Field, at 485. This reasoning appears to be in line with *Davidson v. Cannon*, _____ U.S. _____, Case No. 84-6470, January 21, 1986.

The appellate court, in approving the dismissal, said:

> *...In the factual surroundings of a prison it is thus necessary to show a bad faith oppressive motive in order to make out a violation of the equal protection clause out of an isolated instance of failure to protect a prisoner from attack by a fellow inmate. No such bad faith motive appears in the instant case.*

Williams v. Field, at 486.

In a recent case, *Wheeler v. Sullivan*, 599 F.Supp. 630 (D. Del. 1984), a prison warden was held not to be liable in a case factually almost identical to the individual claims asserted before this Court. It was there alleged by plaintiff Wheeler, an 18 year old white male, that he was sexually assaulted by a black inmate a day or two after his entry into a state prison. One year before the incident, a governor's task force had made an investigation of the prison and reported, among other things: (1) that the institution was overcrowded; (2) that the correctional staff required professionalization (many correctional officers were found to have conviction records and placement of officers on duty without training was a regular occurrence); and (3) that homosexual rapes were frequent with correctional officers in some instances having become callous and having accepted the act as a part of prison life. (*Wheeler v. Sullivan*, at 636). In dealing with Wheeler's complaint that the policies and conditions of the prison resulted in his being assaulted and sodomized, the district court said, at 640-41:

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Personal security, like medical care, is one of life's necessities to which inmates are entitled in "minimal civilized measure". Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). If the need for personal security is not met by prison authorities, it will not be met. If there is a failure to meet that need, pain and suffering may result which no one suggests would serve any penological purpose. At the same time, a negligent failure to provide personal security, like a negligent failure to provide medical care, "cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind'".

For these reasons, I conclude that Wheeler is entitled to recover if he has shown that one or more of the defendants were deliberately indifferent to a substantial risk that he would incur serious personal injury. He cannot recover, however, if he has failed to establish his degree of culpability on the part of any of the defendants.

The second relevant legal principle is that one may not be held vicariously liable under Section 1983 for the misconduct of another. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir 1976); King v. Cuyler, 541 F.Supp. 1230 (E.D. Pa. 1982). Thus, the relevant question is not whether subordinates of these defendants were deliberately indifferent to a substantial risk of serious injury to the plaintiff, but whether any of the defendants exhibited such indifference.

Finally, plaintiff must show a causal connection between a defendant's deliberate indifference and the injury for which compensation is sought. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); McKenna v. County of Nassau, 538 F.Supp. 737 (E.D.N.Y. 1982), aff'd 714 F.2d 115 (2d Cir. 1982); Redmond v. Baxley, 475 F.Supp. 111 (E.D. Mich. 1979). Thus, even if Wheeler can show some deficiency in a defendant's performance rising to the level of deliberate indifference, that deficiency must be one of the proximate causes of the June 7th assault.

Each claim made by Wheeler was examined in depth and the district court, after a careful and closely reasoned analysis in respect to each claim, entered judgment for all defendants, concluding:

The plaintiff in this action was a victim of a homosexual rape on June 7, 1980 while an inmate at the Delaware Correctional Center. Tragically, his misfortune was not an isolated occurrence at that time and place. I have concluded, however, that the assault upon plaintiff occurred, and the problem of homosexual violence existed at DCC, in spite of the efforts of Commissioner Sullivan and Warden Redman rather than because of any indifference on their part. Since Bureau Chief Jones, the only other defendant, was not employed by the Department of Corrections in June of 1980, judgment must be entered against plaintiff on his assault claim.

I also conclude that the conditions of Wheeler's confinement at DCC did not at any time constitute cruel and unusual punishment and that any violation of his right to due process of law is not the responsibility of any of these defendants.

Finally, I find no violation of plaintiff's rights under the Constitution and laws of the State of Delaware. Judgment will be entered for the defendants.

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Wheeler v. Sullivan, at 652. This case, it is respectfully submitted, represents the better view in light of recent Supreme Court decisions in an Eighth Amendment application. There must be more than a negligent failure; a high degree of culpability must be established, vicarious liability cannot be applied for the misconduct of another under Section 1983, and above all, there must be a causal connection established between any alleged unconstitutional condition and the actual occurrence of the assault. Footnote 6 of the *Wheeler* opinion is worthy of examination. It reads:

> *See also* Patzig v. O'Neil, *577 F.2d 842, 847-48 (3d Cir. 1978):*
>
> > *In order to establish a constitutional violation under the Eighth Amendment, it is necessary that there be a deliberate indifference to the prisoner's needs. See* Estelle v. Gamble, *429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976);* Hampton v. Holmesburg Prison Officials, *supra [546 F.2d 1077] at 1081 [3d Cir. 1976]. A reading of the evidence before the district court reveals that police personnel may have acted negligently, perhaps even callously; but such actions do not amount to the "intentional conduct characterizing a constitutional infringement".* Id. *at 1078. "More is needed than a naked averment that a tort was committed under color of state law..."* Gittlemacker v. Prasse, *428 F.2d 1, 6 (3d Cir. 1970). On the record before us, we find that no such intentional conduct was shown. Consequently, the district court did not err in entering a directed verdict in defendants' favor with respect to the "cruel and unusual punishment" claim.* Dennenv v. Siegel, *[407 F.2d 433 (3d Cir. 1969)], supra.*
>
> *The same result is reached under a due process analysis under the Fourteenth Amendment. Some courts have refused to treat as punishment conduct that is not ostensibly intended to serve some legitimate penal objective, but have nonetheless found a proscription of wanton and unnecessary infliction of pain under a due process theory. See* Rhodes v. Robinson, *612 F.2d 766, 771-72 (3d Cir. 1979);* Curtis v. Everette, *489 F.2d 516 (3d Cir. 1973);* Johnson v. Glick, *481 F.2d 1028 (2d Cir. 1973); cert. den. 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973). The test under this theory is whether the conduct "shocks the conscience".* Rochin v. California, *342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952);* Rhodes v. Robinson, *supra. The crucial question is the manner of infliction of the injury; an improper state of mind by those causing the injury is required.* Rhodes v. Robinson, *supra;* Holmes v. Goldin, *615 F.2d 83, 85 (2d Cir. 1980).*

Thus far, the examination of the Report and Recommendation has emphasized the error in holding Defendant, TURNER, liable in damages to the 10 individual claims of the Plaintiffs. Other points, however, must be addressed, at least in brief.

A. Turner's Knowledge of Pervasive Risk of Harm

LAW OFFICES OF DAVIS CRITTON HOY & DIAMOND
SUITE 1010 FORUM III, 1655 PALM BEACH LAKES BOULEVARD, WEST PALM BEACH, FLORIDA 33401 • TEL. (305) 478-2400

It is concluded that TURNER knew of security problems through official documentation (the grand jury report of 1980, his letter to Wainwright, the 1980 Inspector General's Report, the 1983 Inspector Report, and the Barrett and Dixon incidents. Taken in true perspective, these do not support the proposition that TURNER knew of pervasive risk of harm of sexual assaults upon inmates. None of the documents suggest inmate abuse. The staff shortages were recognized by TURNER and he tried in good faith and through the most vigorous means to correct the matter. That was the very purpose of the letter to Wainwright -- I need more staff. The "out of control" statement has been taken completely out of context and the record shows that as a result of TURNER's letter and other efforts, the situation did improve. As shown in *Williams v. Bennett*, supra, a prison superintendent would be deliberately indifferent if he walked away from a problem institution. Furthermore, a superintendent may not be held liable where prison conditions such as overcrowding or understaffing are beyond his control. *Pento v. Nettleship*, 737 F.2d 130 (1st Cir. 1984). As to the grand jury and Inspector General reports, it must be noted that no reference was made to any inmate injury -- nor was there any indication that any direct action was required of TURNER.[18/] Finally, the two correctional officer incidents finally ended in their removal from GCI. Next, it is reasoned that TURNER should have known of a pervasive risk of harm because of an alleged free flow of contraband and frequency of assaults. The fallacy of the factual basis for this conclusion has been addressed. The Magistrate's finding was drawn from testimony of Dr. Richard Swanson and was based upon his subjective conclusion. Not once did Dr. Swanson confer with TURNER before or during the trial as to procedures that TURNER actually followed or implemented at GCI. Corroboration of Dr. Swanson's testimony was non-existent at best.

B. Series of Isolated Incidents

18/ Although, as noted above, the Inspector General's report found that Turner had implemented all relevant recommendations set forth in the Grand Jury report.

LAW OFFICES OF DAVIS CRITTON HOY & DIAMOND
SUITE 1010 FORUM III, 1655 PALM BEACH LAKES BOULEVARD, WEST PALM BEACH, FLORIDA 33401 • TEL. (305) 478-2400

As discussed before, the incidents which Plaintiffs alleged occurred, if at all, at different times, dates, places and with different participants. The one thing bringing them together is this action. The Magistrate's Report fails to analyze the alleged conditions at GCI individually in respect to each claim. As shown above, certain conditions, such as the understaffing, changed during the entire period. Certain of the alleged inmate assailants present at certain times were not present at other times. Thus, even if the factual basis for the allegedly unconstitutional conditions were established (and, as shown above, they were not), it would still be necessary to establish that these conditions were in existence at the time of each alleged assault.

C. Injunctive Relief

The appointment of the committees to run GCI was not appropriate. During the trial, the U.S. Magistrate found that Plaintiffs' proof was directed to the imdividual damage claims and that the Plaintiffs were not prepared to present a case for injunctive relief. He thereupon "adjourned" the class action aspect of the case seeking injunctive relief (see p. 250-252, Swanson's testimony). At that point, it would have been improper for the Defendants to present evidence countering the Plaintiffs' claims in respect to current conditions and they did not do so, acting in reliance upon the Magistrate's rulings. Now, after the conclusion of the evidentiary presentation, and predicated upon supposition rather than evidence, the Magistrate has undertaken to recommend the establishment of a commission upon a determination by him that the Plaintiffs' claims as to the current conditions at GCI were well-founded. This was but another action by the Magistrate that quite simply prevents the Defendants from having a proper day in Court. It was improper to advise counsel that he would not undertake consideration of a claim and then -- after the defense, in proper reliance upon the representation, had withheld its evidentiary presentation upon the subject -- proceed to recommend findings that the conditions alleged by the Plaintiffs continue to exist.

D. Breach of Duty Imposed by State Law

LAW OFFICES OF DAVIS CRITTON HOY & DIAMOND
SUITE 1010 FORUM III 1655 PALM BEACH LAKES BOULEVARD, WEST PALM BEACH, FLORIDA 33401 • TEL. (305) 478-2400

It is important to note that the duty that the Magistrate draws from Section 20.315, *Florida Statutes*, and attempts to impose upon TURNER, is expressly applied by the statutory language only to the Department of Corrections and not to the individual superintendents.

LAW OFFICES OF DAVIS CRITTON HOY & DIAMOND
SUITE 1010 FORUM III, 1655 PALM BEACH LAKES BOULEVARD, WEST PALM BEACH, FLORIDA 33401 • TEL. (305) 478-2400

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. mail, this 18th day of March, 1986, to DAVID M. LIPMAN, ESQUIRE, 5901 S.W. 74 Street, Miami, FL 33143-5186, and WILLIAM AMLONG, ESQUIRE, 524 South Andrews Avenue, Fourth Floor, Fort Lauderdale, FL 33301.

Walter M. Meginniss
Assistant Attorney General
DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, FL 32301
(904) 488-1573

and

DAVIS, CRITTON, HOY & DIAMOND
Attorneys for
Post Office Box 3797
West Palm Beach, FL 33402
(305) 478-2400

Attorneys for Defendants

By _____
MICHAEL B. DAVIS