IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL A. AUSTIN, RICHARD ELLIOT, OGIE HAYES, CHARLES GUESS, WARREN LEATHERWOOD, and KERVIN GOODWIN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 95-T-637-N
FOB JAMES, JR., Governor of the State of Alabama, and JOE HOPPER, Commissioner of the Alabama Department of Corrections,	)	
Defendants.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

This is a class action lawsuit filed on 15 May 1995[1] by several Alabama inmates challenging the constitutionality of the maintenance by the Alabama Department of Corrections ["DOC"] of prison chain gangs, alternatively called the "Alternative Thinking Unit" ["ATU"]. Plaintiffs amended their complaint on 23 February 1996 by adding two named plaintiffs and by challenging three additional DOC practices as unconstitutional, to

[1]Plaintiff Michael Austin ["Austin"] originally filed his lawsuit individually in the Northern District of Alabama on 3 May 1995 (Civil Action No. 96-CV-1111). However, on 15 May 1996, the same day that the instant action was filed, Austin filed a Notice of Voluntary Dismissal pursuant to ***Fed. R.Civ.P. 41(a)(1).*** Over objections filed by the defendants, the case was dismissed on 26 May 1996.

wit, the use and maintenance of a device known as the hitching post,[2] failure to provide adequate toilet facilities, and denial of visitation. All of these additional claims pertained to inmates assigned to the chain gang.

Plaintiffs claim that the use of the chain gangs and the hitching post and the failure to provide adequate toilet facilities violate their rights secured by the Fifth, Eighth, and Fourteenth Amendments. They further claim that, by failing to permit their visitation with family and friends during their service on the chain gang, prison officials have violated their rights secured by the First and Fourteenth Amendments. The plaintiffs requested a declaratory judgment and a permanent injunction, but they did not sue for damages.

Plaintiffs name as defendants Joe Hopper ["Hopper"], Commissioner of the DOC and Fob James ["James"], the Governor of Alabama.[3] The defendants denied all of the plaintiffs' allegations and on 13 November 1995, they filed a motion for summary judgment seeking dismissal of all of the plaintiffs' claims. During the course of the litigation, the defendants discontinued the practice of chaining inmates together and modified their provision of toilet facilities to chain gang inmates. The parties subsequently proposed settlements on those issues to the court. The Magistrate Judge made preliminary determinations that the putative class should be certified and that the proposed settlements should be approved.

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[2]Plaintiffs claim that the practices constitute cruel and unusual punishment that is prohibited by the Eighth Amendment to the federal Constitution. This lawsuit is one of five lawsuits pending in this district which challenge the DOC's use of a chain gang.

[3]Plaintiffs initially named Ron Jones, the former Commissioner, but substituted Hopper when he replaced Jones during the litigation.

This case is now pending before the court on (1) defendants' motion for summary judgment on the chain gang claim, (2) defendant Hopper's motion for summary judgment on the claims regarding toilet facilities, visitation, and the hitching post, (3) defendant James' motion to dismiss. The Magistrate Judge conducted an evidentiary hearing on the issues before the court from 7 October 1996 through 15 October 1996.[4]

Upon consideration of the motions for summary judgment and the motion to dismiss, supporting and opposing evidentiary materials, the pleadings in this case, and the testimonial and documentary evidence received at the hearing, the Magistrate Judge RECOMMENDS (1) that the defendants' 13 November 1995 motion for summary judgment on the chain gang claim be DENIED as moot; (2) that the defendant's 17 May 1996 motion for summary judgment on the claims regarding the toilet facilities, visitation, and the hitching post be DENIED as moot in part, and DENIED in part; and (3) that defendant James' motion to dismiss be GRANTED.

The Magistrate Judge further RECOMMENDS that the court enter an order (1) granting the motions for class certification; (2) approving the parties' proposed settlements of the issues regarding the maintenance of chain gangs and the provision of toilet facilities

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[4]Pursuant to 28 U.S.C. §636 (b) (1) (A), a judge may "designate a magistrate judge to conduct hearings, including evidentiary hearings, and . . . submit to a judge of the court proposed findings of facts and recommendations for the disposition, by a judge of the court of" a motion for summary judgment or a motion to dismiss. On the authority of 28 U.S.C. §636 (b) (1) (B), a magistrate judge may also "conduct hearings, including evidentiary hearings, and . . . submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, . . . of prisoner petitions challenging conditions of confinement".

to chain gang inmates; (3) declaring that defendant Hopper's denial of visitation to chain gang inmates constitutes an unreasonable impingment upon their rights secured by the First Amendment, and (4) declaring that defendant Hopper's use of the hitching post violates the plaintiffs' Eighth Amendment rights, (5) enjoining the defendant from further violations of the plaintiffs' constitutional rights, and (6) ordering other appropriate relief.[5]

I. PROCEDURAL HISTORY

On 15 May 1995, plaintiff, Michael A. Austin, ["Austin"] an inmate at the Limestone Correctional Facility ["Limestone"][6] in Capshaw, Alabama, filed the complaint in this 42 U.S.C. § 1983 civil action. Austin alleged that Alabama's re-institution of the prison chain gang violated the Eighth and Fourteenth Amendments to the U.S. Constitution. Austin also requested that the court certify a class pursuant to Rule 23(a) of the ***Federal Rules of Civil Procedure.***

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[5]During this litigation, at least five inmates filed similar actions in the United States District Court for the Southern District of Alabama, and at least 43 other inmates filed similar actions in the Northern District of Alabama. Many of those lawsuits were dismissed by the courts before the evidentiary hearing in this case, on motions filed by the plaintiffs, presumably in anticipation of a ruling in the instant action.

[6]This Recommendation includes numerous references to the penal institutions operated by the DOC. All of them are officially known as "correctional facilities". They include Limestone, Fountain, Holman, Staton, Draper, Ventress, Easterling, Kilby, Donaldson, and St. Clair. Reference to them by name facilitates a more complete understanding of the breadth of the use of the hitching post in the Alabama prison system and the transience of Alabama inmates, factors which are germane to class certification, approval of the parties' settlement proposals, and the scope of the impact of the hitching post.

On 17 May 1995, Austin and three other individuals, Richard Elliot ["Elliot"], Ogie Hayes ["Hayes"] and Charles Guess ["Guess"], all of whom were inmates at Limestone at that time, filed an amended complaint (Doc. # 7) stating essentially the same allegations set forth in Austin's original complaint.[7] The amended complaint also alleged that "[i]nmates who refuse to go out on the chain gang are tied to a post with their hands handcuffed above their heads and are forced to stand on an uneven surface in an open-air cell all day in the hot sun." Amended Complaint at ¶ 20.

On 18 May 1995, Austin, Elliot, Hayes and Guess filed a motion to certify class (Doc. # 8), and on 21 July 1995, defendants filed their response to the plaintiffs' motion for class certification (Doc. # 33) in which they claimed that the plaintiffs had not shown the commonality and typicality requirements of Rule 23(a). Defendants also claimed that the requirements of Rule 23(b)(2) cannot be satisfied.

Defendant James, represented by private counsel, filed his Answer and Motion To Strike on 6 June 1995 (Doc. # 18). In his own defense, he asserted, ***inter alia,*** that the plaintiff may not rely upon the doctrine of respondeat superior. Defendant Hopper, represented by the legal counsel of the DOC, filed his Answer on 8 June 1995 (Doc. # 21). As affirmative defenses, Hopper asserted the defenses of (1) qualified immunity, as to all claims other than those for which plaintiffs request declaratory or injunctive relief, and (2)

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[7] Austin, Hayes, Guess and Elliot may hereinafter be collectively referred to as "the plaintiffs."

res judicata and/or collateral estoppel on the hitching post claim.[8]

On 19 September 1995, the plaintiffs filed a motion for leave to amend their amended complaint (Doc. # 37) by adding factual claims regarding denial of visitation privileges and adequate toilet facilities to chain gang inmates, and the placement of inmates on the hitching post.[9]

On 13 November 1995, defendants filed a motion for summary judgment on the plaintiff's chain gang claims (Doc. # 47), contending that judgment was appropriate because (1) it is constitutionally permissible to require inmates to work; (2) it is constitutionally

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[8]Under the heading of "Affirmative Defenses" in his 8 June 1995 Answer to the complaint, defendant Jones (now Hopper) stated: "To the extent that Plaintiffs assert claims for relief other than that of declaratory or injunctive nature, Defendant asserts the defense of qualified immunity." After a diligent search of the entire record, the Magistrate Judge finds that the only other references to the qualified immunity defense are found in defendant James' Answer to the plaintiff's Second Amended Complaint (Doc. # 77) and defendant Hopper's Answer to the Second Amended Complaint (Doc. # 81). In each document, the defendants asserted the defense against plaintiffs' request for "any award of damages or other monetary relief". The plaintiffs have never requested damages in this case.

Accordingly, the Magistrate Judge has concluded that the defendants did not intend to assert the defense of qualified immunity as a shield against the court's award of declaratory and injunctive relief to the plaintiffs. In any case, there is ample authority for a finding that the defendants are not entitled to assert the defense in this action. First, qualified immunity is an affirmative defense which must be pleaded by a defendant government official, and the defendants have specifically excluded the plaintiffs' claims for equitable relief from their pleadings. ***See L.S.T., Inc. v. Crow,*** 49 F.3d 679, 683, n. 7 (11th Cir. 1995); ***Barker v. Norman,*** 651 F.2d 1107, 1128 (5th Cir. 1981). Second, qualified immunity is not available in a lawsuit against a state official like Hopper who is sued in his official capacity. ***Moore v. Morgan***, 922 F.2d 1553, 1556 (11th Cir. 1991).

[9]The Magistrate Judge did not formally grant the plaintiffs' motion to file their second amended complaint, however, this case has been litigated - and evidence presented at the hearing - in support of and in opposition to the allegations of that pleading. Thus, the plaintiff's motion should be deemed to have been granted.

permissible to utilize shackles on inmates for security purposes when they are outside of the institution; (3) the operation of the chain gang is within the discretion of prison officials; (4) the chain gang program has several penological justifications; and (5) plaintiffs cannot satisfy the Eighth Amendment tests.

On 23 February 1996, plaintiffs filed yet another motion for leave to amend their complaint (Doc. # 59). The revised second amended complaint identified two new named plaintiffs, Warren Leatherwood ["Leatherwood"], an inmate who had been on the Limestone chain gang, and Kervin Goodwin ["Goodwin"], an inmate who was then assigned to the chain gang at Easterling Correctional facility ["Easterling" or "ECF"]. The revised second amended complaint was brought on behalf of all present and future Alabama inmates who have been or may be placed on the hitching post; thus the plaintiffs also filed an amended motion for class certification on 11 March 1996 (Doc. # 74). The motion was granted on 26 March 1996.

On 29 April 1996, plaintiffs filed a motion for leave to file amendment to complaint (Doc. # 103), seeking to add a claim that the chain gang procedures violate the Equal Protection Clause of the Fourteenth Amendment because it excludes women. The Magistrate Judge denied plaintiffs' motion on 2 May 1996 and disallowed the amendment.[10]

On 14 May 1996, the Magistrate Judge conducted a hearing on the plaintiffs' motion

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[10]By this date, another inmate, Jeffrey Pugh, had filed an individual action in this court which challenged the constitutionality of the chain gang on Equal Protection grounds. (***Pugh v. White***, Civil Action No. 95-T-1346-N). That action is still pending.

for class certification. On the same day, plaintiffs substituted current Department of Corrections Commissioner Joe Hopper ["Hopper"] for former Commissioner Jones as a defendant (Doc. # 115).

On 17 May 1996, defendants filed a motion for summary judgment (Doc. # 121) on the claims added by the plaintiff in their February, 1996 amended complaint. The defendants claimed that the hitching post had been found constitutionally permissible by the Eleventh Circuit Court of Appeals.

In June, 1996, the parties submitted a proposed settlement of the plaintiffs' chain gang claims. The DOC agreed to abandon the practice of chaining one inmate to another, adopting instead the practice of shackling inmates individually during their service on a work crew. At a pretrial conference held on 19 June 1996, the defendants orally moved to withdraw their objections to the plaintiffs' motions for class certification for the limited purpose of implementing the parties' proposed settlement, and the court granted the motion on 25 June 1996 (Doc. # 145). The parties followed their settlement by filing, on 28 June 1996, a joint motion for preliminary approval of proposed stipulation and notice to class members (Doc. # 155). Their motion was granted on 5 July 1996 (Doc. # 159).

In September, 1996, the parties resolved the issues concerning the plaintiffs' challenge to the toilet facilities provided to outside work squads. The proposed settlement required DOC to enact a standard operating procedure that improves the privacy and sanitary conditions of the outdoor work squads' toilet facilities. On 27 September 1996, the parties

filed a joint motion for preliminary approval of proposed stipulation and notice to class members (Doc. # 344).

The evidentiary hearing on the unsettled claims in this case was conducted from 7 October 1996 through 15 October 1996.[11]

II. FINDINGS OF FACT

A. The Visitation Policy For Inmates Assigned to the Chain Gang

1. Stipulated Facts

The visitation procedures for inmates assigned to the chain gang are not in dispute. The Magistrate Judge therefore adopts as her findings of facts the provisions of the parties' Joint Stipulation of Facts, filed on 23 September 1996:

> [1] At the time the visitation claim was filed [15 May 1995], visitation to ATU inmates was generally denied for 180 days.
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> [2] At the present time, visitation to ATU inmates is generally denied for 90 days.[12]

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[11]On 29 October 1996, the plaintiffs filed a motion to supplement the record (Doc. # 363), by inserting therein a newsletter from Donaldsonville Correctional Facility ["Donaldsonville" or "DCF"]. Following the court's 30 October 1996 order directing the defendants to show cause on or before 8 November 1996 why the plaintiffs' motion should not be granted (Doc.# 364), the defendants filed their response on 8 November 1996 (Doc. # 367). On 12 November 1996 (Doc. # 368), the Magistrate Judge granted the plaintiffs' motion.

[12]When Joe Hopper replaced Ron Jones as Commissioner, he reduced the restrictions upon visitation for chain gang inmates from 180 days to 90 days. [See Transcript of Pretrial Conference, 6/28/96, p. 24] Hopper believed that after 90 days without visitation, "it becomes

> [3] General population inmates [i.e., those who are not confined to special units such as segregation, infirmary, mental health, etc.] at Alabama prisons [are entitled] to receive visitation on weekends.

It is also undisputed that the denial of visitation challenged by plaintiffs is premised solely upon assignment to the chain gang, or ATU and that, notwithstanding the DOC's modified shackling procedures, there remains a restriction upon visitation with chain gang inmates for a period of 90 days.

2. Treatment of Specific Inmates: Visitation

a. Gary Montgomery

Montgomery is a former inmate who served on the Staton chain gang for 120 days pursuant to a specific sentence by a circuit judge in Fayette County in North Alabama (TR/574).[13] He is married, with two children, a daughter who is 18 and a son who is 17. His family also includes his mother, a sister, and brothers. Montgomery has a "very close" relationship with his family, with whom he lost contact during his service on the chain gang, because he was denied visitation. He admitted, however, that his relationship with his wife and children was not damaged by the denial of visitation (TR/588).

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counterproductive". See PX-25.

[13]In September, 1995, then-Commissioner Ron Jones "granted to circuit judges" the authority to order that convicted defendants be placed directly on an institutional chain gang "in conjunction with [the] split sentence act". The only diagnostic procedures to which they are subjected are generally physical examinations and the drawing of blood. These inmates are not classified or psychologically tested. Their status is "Judicially Directed Placement". See PX-18, p. 2.

In fact, during his time at Staton, Montgomery's mother, sister, and his sister's children visited his brother who was housed there. He did not see them, however, and his contact with his family was limited to telephone calls of six minutes each and letters (TR/576). He received a letter from his wife once per week and from his mother every other week. The letters "made [him] feel good", but he missed the personal visits. The rules required that he make collect calls, and his family accepted them (TR/579).

Before he was transferred to Staton, he was incarcerated in the Fayette County Jail. Visitation there was permitted each Sunday from 1:00 p.m. to 3:00 p.m. (TR/581).

b. Daniel Green

Green is currently incarcerated at the Staton facility and has previously been housed at the Draper and Limestone facilities (TR/350). From July, 1995, to November, 1995, Green was placed in the Limestone Alternative Thinking Unit (chain gang).

As an ATU inmate, Green was not allowed to receive visits. As a result of learning that he would not be allowed to see his family, Green, a first time offender, had to take medication to sleep (TR/353). The denial of visitation ultimately resulted in the termination of his relationship with his fiancee. Green, however, was allowed to call his family and fiancee while he was in the ATU, and he was able to write to them, although he found neither a substitute for visits (TR/356). Green found the time he spent in the ATU to be the single worst aspect of his incarceration because of the denial of visitation.

B. The Development, Maintenance, and Use of the Hitching Post[14]

1. Policies and Procedures Governing the Hitching Post

Witnesses, including inmates, prison officials, and expert witnesses presented very clear and detailed accounts of the physical characteristics and use of the hitching post. Although the collective witness testimony admits of minor discrepancies regarding, ***inter alia,*** the reasons for placement of inmates on the hitching post, the length of time they remained there, and the conduct of officers and inmates during placement on the hitching post, the facts presented to the court were substantially documented and largely undisputed.[15]

According to Sgt. Mark Pelzer ["Pelzer"], a supervisor of chain gang inmates at Limestone and an 11-year veteran with the DOC, chain gang inmates (whose refusal to work typically leads to placement on the hitching post) "cut trees, bushes, do cleanups in State parks, work on the Interstate, [and] work around the facility also". A supervisor monitors two to three work squads, consisting of 25-40 men each, along with three or four other

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[14]Throughout this litigation and during the evidentiary hearing, prison officials, inmates and other witnesses variously referred to the hitching post as a "restraining bar", "bar", "hitching rail", and "rail". All such references are to the same device, described with particularity ***infra.***

[15]Indeed, the parties submitted a Joint Stipulation of Facts on 23 September 1996 which reflects consensus in several key areas. The parties agree that: (1) The Department of Corrections' written policy, implemented in 1993, states that inmates may be put on the hitching post when a correctional officer decides that the inmate has refused to work or disrupted a work squad; (2) Inmates are not provided a due process hearing before they are placed on the hitching post; (3) The hitching post is located on the prison grounds; (4) Officers handcuff inmates' wrists to the hitching post and, at times, shackle their ankles together or to the hitching post itself; (5) Inmates remain handcuffed to the hitching post while they eat lunch; (6) Some inmates remain on the hitching post for up to ten hours during the day; and (7) Some inmates receive a medical exam, known as a "body chart", after having been released from the hitching post.

officers, all of whom are entry-level employees, or Correctional Officer I (TR/1034-1035).

The hitching post is maintained at "[e]ach facility" and is described in the DOC's Administrative Regulation 429 (PX-12) as a response to "an inmate [who] refuses to work or [who] is otherwise disruptive to the work squad". Disruption is defined as "fighting with the other inmates, trying to hit somebody with a tool or a piece of wood that [an inmate has] cut down, picking up a rock and trying to throw it . . . [or] . . . [t]rying to get the other inmates to shut down and stop working also" (TR/1042). It is also clear, however, that an inmate who simply refuses to exit his cell and report to the work squad, without disruptive behavior, is deemed to have refused to work (TR/1047). Even if the inmate were calm, DOC officers would use force to remove him from his cell (TR/986). When any of those actions occur, the inmate may be placed on a "permanently affixed restraining bar", further defined as follows:[16]

> The restraining bar should be made of sturdy, nonflexible material and should be located no more than 50 feet from an officer. Each facility should have two bars -- one mounted 57 inches from the ground for taller inmates and one at 45 inches for the shorter inmates.[17]
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> . . . . . .
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> Upon refusing to work, the inmate will be handcuffed to the restraining bar. . . . If force is used to handcuff the inmate to the

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[16]See PX-21, a photograph of an inmate placed on the hitching post at Limestone, and DX-2596, a photograph of two hitching posts, showing the different heights of the horizontal rails.

[17]At least one inmate testified that the bar at some institutions is "much higher" than 57 inches. (TR/23). If the bar is "about mid chest level" on the inmate, the officer has used the correct bar (TR/1041).

> restraining bar, a nurse will be contacted to check the inmate's condition. If medical attention is not warranted, at the end of the day the inmate will be carried to the health care unit for a body chart.[18]

The regulation also requires (1) that "fresh water" be made available to the inmate,[19] (2) that the inmate be allowed to use the bathroom "once each hour", (3) that he be "fed a sack lunch", (4) that the inmate be given any prescribed medication at the appropriate time, and (5) that an Activity Log be maintained to record the particulars of the inmate's placement on the hitching post.

If an inmate stops working, the duty officer makes an attempt to handle the problem, and if he is unable to do so, he summons his supervisor (TR/1036). The supervisor then speaks with the inmate to resolve the problem and makes a determination whether the inmate has a concern that can or should be addressed during work time or whether the inmate is refusing to work.

The supervisor or line officer also determines whether an inmate's report or complaint

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[18]An inmate who does not request to return to work remains on the hitching post for the remainder of the day and is not released until "the last squad" is checked into the institution. It is apparent from the regulation that if the inmate refuses to work on consecutive days, he may be returned to the hitching post for each day that he refuses to work to remain there until he agrees to return to work. The regulation does not provide a maximum period for placement on the hitching post, but the Activity Log does indicate that the hitching post is used "only during daylight hours".

In December, 1995, the DOC issued a change order to Administrative Regulation 429. It increased the permissible distance between the hitching post and the monitoring officer from a maximum of 50 feet to a maximum of 200 feet.

[19]See PX-20.

of illness is legitimate, i.e., one warranting his transfer to the facility's health care unit.[20] Although officers at some institutions call a nurse when an inmate complains of illness, at other institutions, whether medical assistance is requested "depends on the type of complaint the inmate makes" (TR/990). For example, in Warden Charlie Jones' opinion:

> "If he complained of a headache, that would probably not get him brought back [to the health care unit]. If he complained of *a bee sting, or if he twisted his ankle or something, or he's* bleeding, that would get him brought back." (TR/990)[21]

If a supervisory or line officer determines that the inmate has refused to work, he is transported to the facility and placed on the hitching post. The inmate may be released from the hitching post and returned to his work squad if he tells the back gate officer that he is ready to work.[22] After observing inmates on the hitching post for more than two years, one back gate officer stated that the average length of time that an inmate remains on the hitching post is "six or seven hours" (TR/1069).

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[20]There was no evidence presented that Pelzer or any other line officers or supervisory officers employed by the DOC had medical training or any other specialized knowledge enabling them to diagnose illness or confirm or refute an inmate's report of symptoms. The DOC has contractual employment relationships with physicians, nurses and other medical staff, but no medical personnel accompany inmates to their work sites away from the facilities. They are summoned to the work site only if an officer determines that it is necessary.

[21]Jones began his career with the DOC in 1969 and has a B.S. degree in criminal justice. During his career, he has worked at Holman, Staton, Fountain, St. Clair, and Draper and has served as warden of the first two institutions. Thus, the court assumes that the policies that he articulated regarding the response to an inmate who complained of illness were "in effect" at any institution where he was warden or on any work squad that he supervised.

[22]Pelzer, who had placed approximately 12 inmates on the hitching post, said that a "majority" of them" want to go back to work" after "thirty minutes to an hour" (TR/1048).

Although placement on the hitching post generally follows an accusation that an inmate has committed a rule infraction, prison officials insist that its use is not punishment (TR/831). No formal disciplinary action, including a due process hearing, is required before an inmate may be placed on the hitching post. Some inmates are formally charged however (Rule 54 prohibits refusal to work), and a warden or arresting officer (including a Correctional Officer I) has the discretion to use a behavior citation,[23] formal action, or no action (TR/839).[24]

Prison officials are required to document the inmate's placement on the hitching post by a "written disciplinary",[25] the most typical of which is a behavior citation, regarded as an "informal disciplinary action" governed by Administrative Regulation 414 [See PX-85]. Issued at the discretion of the "citing employee", the behavior citation carries sanctions

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[23]DOC Administrative Regulation 414 (PX-85) governs the issuance of behavior citations. They are used as "Informal Disciplinary Actions" . . . "[t]o reduce the number of lengthy hearings, requiring numerous man-hours, when sanctions imposed do not require a due process hearing". The regulation confirms the discretion given to officers at every level of the DOC.

[24]In Alabama's corrections system, the entry level security position is correctional officer trainee. An employee remains in that position for six months before becoming a correctional officer I. Thus, within the bounds of the DOC administrative regulations, an employee with six months or more experience has the discretion to impose informal or formal disciplinary action upon an inmate, or no action at all (TR/840). Based upon Thompson's testimony, it also appears that such officers ***actually*** exercised the discretion to impose disciplinary action ***regardless of its consistency with the regulations.***

[25]The hearing procedures are governed by DOC Administrative Regulation Number 403, which requires a "due process hearing" when an inmate is charged with a rule infraction which can result in "the loss of earned good time and/or confinement to segregation". [See PX-84] Included on the list of security violations (as a major violation) is Rule 54, "Refusing To Work/Failure To Check Out For Work/Encouraging Or Causing Others To Stop Work".

which may include "removal from good time earning status" and/or "assignment to institutional chain gang for up to 15 days", but not "forfeiture of earned good time". The type and number of sanctions are also determined in the discretion of the "citing employee". Plaintiffs' Exhibit 85 ostensibly applies to "Minor Rules Violations", which do not include "Refusal To Work". The list does include "Unsatisfactory work (No. 55)", "Failure to obey a direct order (No. 56)", "Feigning illness (No. 81)", and "Malingering (No. 87).

Notwithstanding the lack of authority in AR 429, many inmates at Holman were placed on the hitching post when they were accused of indecent exposure (TR/63). The evidence did not establish that the practice was in effect at any other institution (TR/844). Placement on the hitching post is not an "authorized punishment" for violating DOC Rule 37: Indecent exposure/exhibitionism. See PX-84.

For 10 months in 1995 and 1996, Leslie Thompson was the warden at Holman, a facility which housed 873 inmates, when this practice was in effect (TR/825). Pursuant to the policy, an inmate who exposed himself could be placed on the hitching post immediately without a due process hearing and kept there "until the shift change" (TR/831). Thompson has worked for the DOC for 18 years, six of which were spent as a warden of an institution (TR/846). He stated that the policy was used to deter male inmates from exposing themselves to female officers (TR/827).[26]

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[26]Thompson said that they "were having a very great problem. At times there would be anywhere from fifteen to twenty inmates lining the hall publicly masturbating" (TR/827).

Thompson understood that AR 429 did not authorize placement of inmates on the hitching post for any reason other than refusal to work (TR/833), but he gave instructions to his subordinates at Holman that inmates who exposed themselves could be placed there. When asked how such an inmate could be released from the hitching post, Thompson said that it was the "shift change" or the departure of the female officer from her post. He added that the inmate himself could take no action that controlled how long he remained on the hitching post.[27] Thompson had never observed an inmate remain on the hitching post all day (TR/835), but acknowledged that "[I]t's possible it happened . . . without [his] knowledge" and that indeed an inmate could be placed on the hitching post without his knowing about it at all (TR/835).

Disciplinary action could be taken against the offending inmate, but it did not work;[28] because he was concerned about potential legal action against him by female officers, Thompson permitted the use of the hitching post to address offenses related to indecent exposure (TR/829). He would have placed such offenders in segregation cells at Holman had there been a sufficient number of them.

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[27]AR 429 provides that an inmate who announces his willingness to work may be removed and returned to the work squad. PX-12.

[28]Thompson admitted, however, that placement on the hitching post was not necessarily a more effective remedy and that it "really didn't have that great of an effect on" indecent exposure violations (TR/829). He realized two months into his 10-month tenure at Holman that the hitching post was not an effective remedy, and, although he began assigning inmates to the disciplinary chain gang, inmates continued to be placed on the hitching post for indecent exposure throughout Thompson's tenure at Holman (TR/836-338).

2. Treatment of Specific Inmates: Hitching Post

a. John Spellman

John Spellman, a 12-year Alabama inmate, is serving a life term for murder. Spellman, who has been the subject of many disciplinary actions, is quite familiar with DOC regulations and allowable sanctions for rule violations.

Spellman has been placed on the hitching post 5-10 times at three different institutions (TR/22), and in his experience, officers' compliance with the rules governing an inmate's placement on the hitching post "varies from institution to institution", including the description of the post; the provision of food, water, and bathroom breaks; the circumstances of release from the hitching post; medical attention; the provision of head cover in hot or inclement weather; and disciplinary action against the inmate (TR/22-26, 87). In fact, Spellman has never received a formal or informal disciplinary action after his placement on the hitching post (TR/25).

On 23 August 1995, before he had any contact with plaintiffs' counsel (TR/35), he was given a 15-day assignment to the alternative thinking unit for inmates in administrative segregation at the Easterling Facility (TR/27; PX-58). Spellman had been issued a behavior citation charging him with indecent exposure (TR/93). That morning, Spellman told prison officials that he did not have any work boots and could not check out with his work squad.[29]

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[29]Spellman, who was in segregation pending investigation of other, unrelated disciplinary charges, was assigned to the chain gang by verbal order on the same morning.

Shortly thereafter, a captain and another officer returned to his cell and placed him in handcuffs and leg shackles (forcing him to his knees in spite of his complaints about a back injury), and placed him on the hitching post just before 11:00 a.m. Spellman, who is 5' 8" (or 68 inches) tall, was handcuffed to a post with a horizontal rail that was approximately one inch above his head.[30] Spellman remembered the day as "very hot", and he was not wearing a hat. He also described his placement on the hitching post, from 11:15 a.m. to 5:30 p.m. (PX-58), as painful, frustrating, demeaning, and humiliating (TR/33).

Spellman was returned to the hitching post on 22 September 1995 (TR/38). On 31 August 1995, several inmates had physically attacked Spellman and another inmate with a leg iron (DX-562), requiring them to be treated at the health care unit.[31] He was not returned to the chain gang until 22 September 1995, but when he checked out to go with his work

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[30]Two days before, Spellman had been treated in the facility's health care unit after being placed on the hitching post. He had complained of pain when he raised his arms, shortness of breath, and an abrasion on his elbow. The nurse placed him on a work stop for one day and prescribed medication for pain. (TR/ 33; PX-60).

Most of the witnesses referred to medical examinations and treatment of inmates before, during, and after their placement on the hitching post, and the great majority of the defendant's trial exhibits included "body charts" and other documents from institutional health care units. The defendant called only one health care professional, however, and she did not testify about a specific inmate or health record. The court is left with scores of such records which, though admitted without objection as official (authentic) records under Rule 901 (a), Fed.R.Evd., are difficult if not impossible to decipher. The nurses' and physicians' handwriting is often illegible, and the language is replete with medical jargon, symbols, and abbreviations that no witness explained. Findings based upon those records would necessarily rest substantially upon speculation and are therefore scarce.

[31]The attacking inmates were charged with a rule violation for assault on an inmate (DX-562).

squad, Spellman protested because his chain gang included some of the same inmates who had attacked him three weeks before. Prison officials interpreted Spellman's protest and his request to speak with a supervisor as a refusal to work, and he was again placed on the high hitching post where he remained from approximately 6:30 a.m. to 10:00 a.m. (TR/40). Apparently, Spellman was placed on the hitching post for several consecutive days thereafter, but the evidence does not firmly establish the period. Each day, he was placed on the post until 10:00 a.m. During this time, however, Spellman never agreed to go to work and continued to insist - unsuccessfully - upon speaking with a supervisor (TR/42).

During his multiple placements on the Easterling hitching post, Spellman was given hourly water and bathroom breaks, in accordance with AR 429 (TR/86). The defendants did not call any witnesses to refute Spellman's testimony as reported in these findings,[32] and, in fact, defendants acknowledged that they did not have any documentary evidence of Spellman's placement on the hitching post (TR/1097).

The defendants did not present any witnesses who refuted Spellman's claims, and defendants' counsel acknowledged that there may be no documentation of Spellman's placement on the hitching post on the occasion about which he testified (TR/1097).

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[32]During this litigation, John Spellman claimed that the defendant retaliated against him by placing him on the hitching post because he spoke with class counsel and with a paralegal employed by class counsel. The Magistrate Judge conducted a hearing on the claim on 24 May 1996 and directed the defendants to remove Spellman from the hitching post for his alleged infraction until the court determined his claim. Spellman's allegations in support of the retaliation claim involved different dates and a different rule infraction. That matter is still pending and will be decided separately.

b. Tony Fountain

Fountain suffers from a painful back injury - a "curve" and a "bulging disk" in his back - which has caused his left leg and toes to become partially paralyzed (TR/113). He reinjured his back in 1994 and in March of that year, he was treated by private and prison physicians who prescribed several pain medications. See PX-40A. He was subsequently assigned to a farm squad at the Staton facility.

Fountain's pain medication helped to relieve his symptoms but made him constipated, for which he was prescribed a laxative. On 2 May 1994, at the regular 6:00 a.m. check-out time, he was in "tremendous pain", having remained awake on the previous evening from 10:30 p.m. to 4:00 - 5:00 a.m. Because the pain was concentrated in his left leg, he walked slowly and could not keep up with the other inmates.[33] Before they reached the work site (TR/144), the squad officer responded by telephoning his supervisor to report that Fountain should be placed on the hitching post. Fountain, who was willing to work, did not refuse to do so (See TR/114-118).

Nevertheless, Fountain cooperated with the officers and walked to the institution's back gate where the hitching post was located. In the absence of an opportunity to explain his problem in a discussion with supervisory officers or a disciplinary hearing, Fountain was

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[33]There was much discussion at the evidentiary hearing about whether Fountain had a work stop order when he was placed on the hitching post (See TR/140-142). The Magistrate Judge has assigned little weight to this testimony, however, because it is not deemed probative of whether placement of the plaintiff on the hitching post violates his constitutional rights.

shackled to Staton's lower hitching post at 7:00 a.m for a period of nine hours (TR/120, 123).[34] Another inmate was also placed on the hitching post with him (TR/143).

Fountain - a lean, wiry man who is 6' tall - had to bend forward while attached to the lower bar and after his release from the hitching post, he "walked around in the camp in a bent position" . . . "for two weeks" (TR/122). During his placement on the hitching post, the laxative that Fountain had taken the previous evening began to work; officers ignored his complaints and his repeated requests to use the bathroom, and he defecated in his clothes around noon of that day. For the next 4½ hours that he remained on the hitching post, officers and other inmates laughed and made fun of him (TR/123-125, 128).

At the end of the day a farm squad - approximately 100 men - returned to the facility and upon seeing Fountain, they laughed at Fountain and called him derogatory names. (TR/129).[35] During that time, Fountain's cuffs were "very tight", his back hurt, and he was never given food or water, even after he requested some. Given the temperature of ninety degrees, the fact that he wore a coat (from the morning chill), his physical condition, and his bent posture, Fountain described the experience as "unexplainable . . . terrifying. . . [and] . . . horrible" (TR/130).

After he was released from the hitching post, Fountain went, on his own, to the health

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[34]Fountain's placement on the hitching post was uninterrupted (TR/123).

[35]Inmates still tease Fountain about the incident.

care unit and requested an examination. His work schedule was stopped for 30 days because he was dehydrated and could not stand up straight (TR/125-132). Fountain was also charged with disobeying a direct order, and after a disciplinary hearing, he was found guilty and punished by (1) 15 days of extra duty, (2) 30 days suspension of his store, visitation, telephone, and mail privileges (TR/136).[36]

After questioning by the court, Fountain explained that his placement on the hitching post and the disciplinary charge and punishment arose from the same incident: his alleged refusal to work (TR/136-137). Before this incident, Fountain had never been accused of refusing to work, and he has not again been so charged (TR/133). The defendants did not call any witnesses to refute Fountain's testimony,[37] but at least one veteran DOC employee who has served as warden at two institutions admitted that the circumstances of his case constitute a violation of DOC policy (TR/993).

c. Warren Leatherwood

Leatherwood, who suffers from seizures, was placed on the hitching post during his assignment to the chain gang at the Limestone facility (TR/165). He was administered his

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[36]"Store privileges" include the privilege of purchasing goods, including stamps, at the institution's commissary.

[37]Staton's back gate officer, Leroy Fountain, recalled the occasion on which Fountain was placed on the hitching post, though he did not specify a date. He did not personally observe Fountain defecate in his pants (TR/1083), and he did not refute Fountain's testimony.

medication while on the chain gang, and, apparently because of his seizures, prison doctors had assigned him a "bottom bed profile", which he described as a restriction to the bottom bunk of his two-tiered bed. He explained that, if he occupied the top bunk and had a seizure, he could "roll off and hit the floor". Leatherwood takes dilantin twice a day to control his seizures and stated that they are triggered if he gets sinus attacks or gets "too hot" (TR/166).

Before he was placed on the hitching post, Leatherwood had two seizures during his work assignment, once when he had taken his medication and once when he had not[38]. On 12 May 1995, he missed an early morning sick call and did not take his medication. As a result, he was "light-headed" when he boarded the bus to go to the chain gang work site. When they observed his condition, other inmates reported his illness to the bus driver, and Leatherwood also tried to tell the driver that he was ill. When the bus arrived at the work site, Leatherwood tried to stand, but he collapsed into a seizure.[39] See PX-55.

Leatherwood told Sgt. Pelzer, the supervisory officer at Limestone, that he was having a seizure, and he summoned a nurse who boarded the bus and examined Leatherwood (TR/1043).[40] There is a factual dispute between Leatherwood's and Pelzer's testimony (See

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[38]Leatherwood explained that his seizures are under control as long as he takes his medication (TR/198).

[39]He doesn't remember whether he lost consciousness, but he started "shaking" and his eyes "rolled in the back of [his] head". He could hear what was being said around him, but he could not see anyone (TR/172-173).

[40]At that time, the chain gang procedures required a "nurse on-site". That practice had ceased when Pelzer testified at the evidentiary hearing (TR/1044).

also PX-55) regarding the nurse's conclusions and advice, but both stated that Leatherwood told Pelzer that he was having a seizure. Leatherwood stated that Pelzer told him to "stand up", concluding aloud that if he could stand and talk, he should "go on to work" (TR/173-174). The officer shackled Leatherwood's legs while he was still on the floor.[41] Pelzer stated that Leatherwood became "agitated and hostile" and began cursing (TR/1044-1045), ultimately refusing to go to work.

Pelzer ordered two farm officers to take Leatherwood to the hitching post (TR/176, 1046). At no time during the period from his awakening in his cell to his placement on the hitching post did Leatherwood threaten any other inmates or officers, use physical force in resistance of any officer's order, or create a security emergency. Nor did he precipitate or participate in a riot or otherwise encourage any other inmates not to work.

When Leatherwood arrived at the hitching post, he complained to one Capt. Wise that he needed to see a doctor. The captain permitted an officer to take Leatherwood to the health care unit where he received his medication, but he was immediately returned to the hitching post and handcuffed to a horizontal bar just above his head, requiring him to stand "on [his] tiptoes" (TR/181).[42] It was his first time (TR/177). Leatherwood is pictured in PX-20 as he

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[41]This incident occurred before the parties reached their settlement; thus inmates were still being shackled to each other in groups of five (TR/172). The shackling of Leatherwood's legs together was in preparation for shackling him to four other inmates once he departed the bus.

[42]This witness is 5' 6" tall. He stated that he needed to stand on his tiptoes because standing flat-footed would put "pressure on [his] hand", thereby creating more pain.

appeared on the hitching post on this occasion and where he remained from 8:30 a.m. to 6:30 p.m. (TR/184).

During his placement on the hitching post, Leatherwood was given water, although he had to drink it from his hand (TR/185), and instead of eating lunch at the regular time of 11:00 a.m., he didn't get lunch until 3:30 p.m., seven hours after he was placed on the post. Still, he reported feeling "more pain than hungry" (TR/187). He was allowed to relieve himself, but only at the fence beside the hitching post.[43]

Just before Leatherwood was released, a nurse returned and examined him again. He complained about the pain in his wrists. He was subjected to a subsequent disciplinary hearing and was found not guilty of refusing to work (TR/192). Leatherwood did not present any evidence at a hearing.[44] Thereafter, he was assigned to "a job in the camp", as opposed to returning to the chain gang work squad.

d. Gerald Ware

During the period June through August, 1995, Ware, an inmate with 16

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[43]According to Leatherwood, he was allowed to urinate outdoors. The officers "took the handcuffs off and let us get away from the bar and stood over there by the fence" (TR/189). He did not need to defecate during the 10 hours. Leatherwood was on the hitching post with one other inmate.

[44]The documentary evidence does not include a record of the disciplinary hearing, but PX-55 includes an "Incident Report Control Sheet" on which Capt. Wallace made the following comment: "This incident report took entirely too long to get to me and be distributed. Procrastination and lack of follow-up. Inmate was found not guilty on disciplinary."

disciplinaries,[45] was assigned to the Draper Segregation Unit and the facility's chain gang. On 26 June, he injured his shoulder on the chain gang and was scheduled to go for x-rays at the Kilby institution on 6 July (TR/229-230). Just before his work squad checked out on 5 July, Ware told the back gate officer, Allen Stroud, that he had been injured, that his shoulder was swollen, that he was scheduled to have x-rays done and that he needed to see a nurse. PX-62. The officer replied that Ware would have to go to work nevertheless.

Ware's persistence led Stroud to conclude that he was refusing to work. Stroud summoned a supervisor, Lt. Jessie Smith, who came to the work site, unshackled Ware from the others on his chain gang, and, without taking him to the health care unit, placed him on the hitching post at approximately 8:30 a.m. until approximately 1:00 p.m.(TR/232, 235-237).[46] Ware, who is 5' 9", was handcuffed to the "highest rail," which ran along the level of his chest.

Being placed on the highest post caused Ware's arms to be positioned slightly above his shoulders, but as time passed, he became "tired and dehydrated" and began "hanging for a period of time" (TR/256). Just before Ware was removed from the hitching post, Officer Stroud asked him if he could "just stand up" and "fake it for awhile", adding that if Ware remained on the hitching post, he "could have a heat stroke" (TR/240). Ware reiterated that

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[45]See TR/243.

[46]Draper has three hitching posts, instead of the two described in AR 429. The horizontal bars of each are at different heights, and the posts stand independently of each other. Ware said that the temperature was 95° that day.

he never refused to work and agreed to go to the work site and stand. After he returned to his squad, Ware did not perform any work; he merely stood around.

Although PX-62, the documentation of his placement on the hitching post, indicates that he received water and a restroom break at 9:45, Ware stated that he did not have either and that the first time that he ate and drank was upon his release from the hitching post (TR/239). The evidence indicates that prior to his placement on the hitching post, Ware did not threaten anyone or resist officers; nor did he cause a disruption or encourage other inmates to refuse to work (TR/248).

Ware was charged with violating Rule 54: Refusing to Work, and on 14 July 1995, after a disciplinary hearing, he was found not guilty. The hearing officer found that:

> "Inmate Gerald Ware was scheduled for X-Rays and did in fact go to Kilby on July 6, 1995. Inmate Ware should have been stopped up until the x-rays [sic] were done".

PX-61. Based upon the disciplinary report, no testimony was taken at the hearing. The defendants did not present any witnesses who refuted Ware's claims.

e. Michael Askew

In July, 1995, Askew injured himself while lifting weights at Draper. The facility's doctor determined that Askew had strained his testicles and advised that Askew should not lift more than 10 pounds for seven days, from 31 July to 6 August.

On the morning of 1 August, Askew checked out for work on the chain gang although

he was in pain (TR/366). While at the prison's back gate, Askew was told by Officer Marks to get a hoe. He informed the officer that he could not work with a hoe,[47] and he showed him the medical document or "stop-up" from the prison doctor. See PX-30. Askew also told Marks that he would work but that he could not work with the hoe. The officer replied, "[A]in't no stopup on the chain gang" (TR/367). Officer Marks then called the tower, and another officer, Jones, arrived and placed Askew on the hitching post.

Askew, who is approximately 5' 9" tall, was placed on the higher of the two hitching posts at Draper for approximately 5 hours. Despite the heat and several requests by him, Askew says he was not given any water or anything to eat (TR/372). The officers did not allow Askew a bathroom break, thus requiring him to hold his urine and aggravate his injury.[48] The sun also caused the handcuffs on Askew to become hot, causing additional discomfort.

Askew was released from the hitching post when he asked to return to work, but he explained that it was the pain and frustration that caused him to consent to return to work, adding, "I was willing to do anything just to get off the hitching post" (TR/376). This time he was allowed to spread out grass and was not required to lift any tools (TR/376). At a subsequent disciplinary hearing on his alleged refusal to work, Askew was found not guilty.

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[47]In fact, Askew told Marks that he would work as long as he didn't have to use a hoe, adding that he would "go out there and pick up hay, or whatever" (TR/368).

[48]A prison activity log indicates that Askew was given water and food and allowed to use the restroom on three occasions (TR/385-386).

PX-31. The hearing officer, Sgt. Roberts, found:

> It seems reasonable to this hearing officer that the defendant was justified in the matter. I find the defendant not guilty.

The defendants did not present any witnesses who refuted Askew's claims.

f. Jerry Johnston

Johnston suffers from a back injury which he sustained as the result of a car accident in 1994. (TR/421). He re-injured his back on 3 April 1995 while incarcerated at Limestone when he fell as he cleaned the prison shower. He was examined by a nurse who gave him some aspirin and told him that he could report to work on the chain gang. Johnston was in such pain, however, that he asked his cell mate if he could sleep on the lower bunk because he could not crawl onto the top bunk (TR/426).

At 7:00 a.m. that morning, Johnston reported to work. At that time, he informed the back gate officer that he had fallen earlier that morning and that he was hurt. The officer responded that Johnston would still have to go to work and that his injury would be addressed that afternoon (TR/428). Johnston began walking, but en route just sat down on the ground, unable to walk the remaining 2 ½ miles to the work site. Deriding Johnston and telling him that he "would never amount to anything", the back gate officer summoned another officer to place Johnston on the hitching post (TR/428).

Of the three hitching posts at the Limestone facility, Johnston was handcuffed to the

highest. As such, his hands were cuffed over his head, causing his back to hurt. Johnston's legs were also shackled. Johnston believes that he remained on the hitching post for about five hours, although documentation produced by the defendant indicates that he stayed on the hitching post for two hours (TR/431).

Johnston was given water, but there is a dispute about how often. Johnston was allowed a bathroom break but was taken to a nearby shed and given a bucket in which he urinated and defecated. He was not provided with any toilet paper (TR/435). That was his only bathroom break, and approximately one hour after he returned to the hitching post, he urinated on himself (TR/462). Johnston advised the officers but they took no action.

In a subsequent disciplinary hearing, Johnston was found guilty of refusing to work. See PX-52. The warden, however, refused to approve the finding (TR/439). The defendants did not present any witnesses concerning Johnston's claims.

g. Calvin Nix

Nix was placed on the hitching post at Holman on 17 March 1996, following a charge of indecent exposure by a female correctional officer (TR/524). Nix was shackled on the high post in a cross position, *i.e.*, his arms were independently shackled "spread completely apart" (TR/526). The weather was "[d]rizzling, rain and cold" (TR/527), and he remained

on the hitching post from approximately 3:15 p.m. to 6:30 p.m. (TR/540).[49]

While on the hitching post, Nix had a seizure which rendered him unconscious. He was taken off the post only to begin having another seizure again (TR/528). It took five officers to take him to the infirmary and to restrain him[50] so that he could be examined by the nurse. For reasons not set forth in the record, the prison doctor was not there. Prior to this incident, Nix had not had a seizure for almost a year. Since the nurse was unable to give him any medication without the doctor's approval, once he calmed down, Nix was released and taken back to the hitching post (TR/530). While there, he was not given any water nor was he given an opportunity to use the bathroom.

As a result of the female officer's claim, Nix was given a citation recommending the loss of all privileges for 45 days. The citation also recommended that Nix be moved to cell three, where other inmates also charged with indecent exposure were housed. On 25 March 1996, Nix was verbally advised that he would be working on the chain gang. When officers came to his cell to shackle him, Nix verbally refused to go (TR/531). A sergeant ordered that the officers use force to shackle Nix, and they did. During this incident, Nix's back was injured. Because the rain prevented the chain gang from working outside, Nix and other

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[49]On 4 November 1994, Warden Leslie Thompson issued an SOP regarding Refusal to Work. It provided in part: "In case of inclement weather, the inmate will be removed from the bar and returned to it once the inclement weather is over." DX-2533

[50]When Nix arrived at the infirmary, he was "jerking and snatching" from his seizure (TR/528).

inmates, in chains, were paraded through the prison's halls in front of their fellow inmates, creating a "freak show" (TR/532).

On 26 March 1996, Nix was in his segregation cell when he was again ordered to work on the chain gang. He was unable to walk because of the injury he had received the day before. Following a sergeant's order that Nix be dragged out of bed, Nix was handcuffed, shackled and dragged on the floor to the infirmary by the chains of his handcuffs, with his "feet and [his] back and [his] shoulders dragging on the concrete" (TR/533). He was left on the floor of the infirmary for the nurse to examine, and by the time he arrived, he had no feeling in his legs. PX-56.

Again, because the doctor was not in, the nurse released Nix. He was dragged from the infirmary into the hall where they encountered a captain, who, although advised that Nix was to see a doctor, ordered that Nix be placed on the hitching post (TR/536). After Nix begged not to be dragged, two of the officers carried him to the post by picking him up by his shoulders and letting his legs and feet, clad only in socks, drag on the concrete. Nix said that "the skin of my feet was rubbing on bare concrete and it eat the skin off the tops of my feet and my toes."

At approximately 6:30 a.m. on 26 March 1996, Nix, wearing only a shirt, pants and socks, was placed in a chair (because he couldn't stand or walk) and handcuffed to the lowest post in the rain. Again he was placed in the cross position, with his arms stretched "outward

and up" (TR/536). The weather was still rainy and cold,[51] and Nix was not provided water during the 4 ½ hours he remained on the post (TR/538). When the officers returned, they asked Nix if he wanted to see the doctor and told him that he would have to walk. Nix was unable to do so and told them that they were refusing to assist him. He was ultimately taken to the hospital ward in a wheelchair at approximately 11:00 a.m. (TR/540).

The doctor told the officers that Nix had to be hospitalized for x-rays. One of the officers became so angered that Nix could not be returned to the hitching post that he pushed the wheelchair down the hall into another officer, who, uncertain of what had happened, drew his stick (TR/542).

Nix remained hospitalized for five days after his release from the hitching post (TR/541). When he left the hospital with the assistance of a walker, he was instructed to return to his cell and rest for a few more days. However, the very next day, 1 April, officers told him that he was going to work on the chain gang again. Although Nix informed the officers that he was still having problems with his back and legs, he was handcuffed and escorted to the highest hitching post at 6:30 a.m. Again he was placed on the post in a cross position, with his "arms up even with [his] shoulders" (TR/543).

By then, the weather had become hot and humid. In spite of repeated requests, Nix received no water; nor did he have sun screen or a hat to protect him from the sun. His face, the tops of his wrists and his forehead were sunburned (PX 56). During his almost 11

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[51]Nix was wearing a shirt, a pair of pants and a pair of socks (TR/538).

consecutive hours on the post, Nix also was not allowed to use the bathroom. As a result, he urinated on himself and remained on the hitching post for approximately 2 ½ hours before he was removed. (TR/545).

On 2 April 1996, Nix, still unwilling to go to work with the chain gang, was returned to the hitching post in the same position at 6:30 a.m. This time Nix was prepared and brought a towel to cover his face from the sun. When the supervisor, Capt. Bullard, saw Nix with the towel, he ordered the officers to take it, saying "You damn red niggers don't need nothing like that" (TR/547-548).[52]

Nix spent another 11 hours in the sun unprotected. His face blistered and began to swell. His eyes were almost swollen shut. On this third day on the hitching post, Officers brought Nix lunch and a cup of juice. However, instead of handing it to him or releasing him from the hitching post so that he could eat, the sergeant placed the lunch three feet in front of Nix on the ground, telling him to "[d]o it the best damn way you can" (TR/550). Nix did not eat that day until he was returned to his cell at approximately 7:00 p.m.[53] Nix also was not allowed to use the bathroom that day. As a result, he defecated on himself and was forced to remain on the hitching post for an additional hour or more "with that stuff running

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[52]Nix said that Bullard's reference was to his "Indian bloodline, because [his] mother is Seminole Indian" (TR/548).

[53]Nix continued to ask the nearby officer for food and water that day. Nix saw the officer "pick up the phone" and call, but when Nix asked him what was happening, the officer replied, "They ain't coming" (TR/551).

down [his] legs" (TR/551; PX 56).

The next two days, on April 3rd and 4th, Nix requested that he be allowed to work on the chain gain in order to avoid further placement on the post. Nix, however, did not have work boots and when the officers were unable to locate any for him, he was returned to the hitching post (TR/554). Again, he was given no water, no food, no bathroom break (TR/555). In fact, after he defecated on himself on 1 April, officers refused to permit Nix to take a shower until he agreed to work.[54]

On April 3rd and 4th, Nix remained on the post for approximately 11 hours and urinated - but did not defecate - on himself each day (TR/547). During Nix's several conversations with prison doctors from 26 March through 4 April 1996, Dr. Crumb and Dr. Clay told him that they could not intervene on his behalf and that their "hands [were] tied" (TR/558).

He also spoke with Leonard Goltry,[55] a psychological associate who was assigned to Holman from July, 1994 to September, 1996 (TR/712). Goltry, who personally observed 15-20 inmates on the hitching post while he was at Holman, remembered speaking with Nix "several times", and he specifically recalled that Nix had requested his "intervention" at

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[54]Nix said that he bathed in his cell, presumably using a sink.

[55]During his testimony, Nix said that he had spoken with someone whose name sounded like "gold tree". He described the person's position in a manner sufficient to permit defendant's counsel to locate him. No such person had been listed by the parties as a witness, but because of the gravity of Nix' allegations, the court directed defendant's counsel to produce the person for testimony as the court's witness. The court conducted the initial examination.

approximately 11:00 a.m. on one of the days that he was placed on the hitching post (TR/713-717).

Nix appeared "sunburned" and "uncomfortable", and Goltry also observed "some sign of abrasions on his wrists and some blood" (TR/723). He knew that Nix was placed on the hitching post for "several days", and, although he did not observe Nix sitting while attached to the post, his sole conversation with Nix occurred "the first time he was on the hitching post" (TR/718). Goltry described the weather on that day as "warm [and] sunny" (TR/721).

The most frequently-occurring emotion that Goltry has observed among inmates on the hitching post is anger. He doesn't believe that mere placement on the post is degrading, but acknowledged that it is degrading for an inmate to urinate or defecate on himself (TR/721).

There was no evidence that, during the time that Nix was placed on the hitching post, he engaged in threatening or disruptive behavior, or physical resistance. Apparently, Warden Leslie Thompson, who was assigned to Holman during this time, was unaware of the entire Nix affair (TR/834-836).

Warden Charlie Jones was assigned to Holman in August, 1996, and the practice of placing inmates on the hitching post for indecent exposure ended soon after his arrival because it "was inconsistent with regulations" (TR/980). The defendants did not present any evidence refuting Nix' testimony, and in fact, they acknowledged that they "were unable to find" any documentary evidence of Calvin Nix' placement on the hitching post (TR/1097).

h. Anthony Giles

At the time of the evidentiary hearing, Anthony Giles had served six years on his current prison term, and he had been in prison five times (TR/609). Giles was placed on the hitching post on two occasions while he was incarcerated at Staton (TR/594). On 22 January 1996, Giles was placed on the hitching post for four hours for refusing to work (TR/600). The circumstances of his placement are in dispute, but neither side in this case offered any evidence that Giles resisted or threatened officers. See PX-44. The parties also agree that Giles reported that he had a cold or the flu to Officer Yelder, the back gate officer. Giles received a behavior citation approximately one month later (TR/601).

Giles was again placed on the hitching post exactly one month later, on 22 February 1996 (TR/602). That day, Giles asked his chain gang officer, Carter, for a shovel instead of a sledgehammer. Carter interpreted Giles' question as a "refusal of a tool" and ordered that he be taken to the back gate for placement on the hitching post. Giles did not refuse to work (TR/602). Since they had not yet left for the work site and he was only 10 feet from the back gate at the time, Giles walked - unescorted - toward the hitching post, and when Yelder observed him, he and other officers approached him and began using physical force to get him on the post. Giles grabbed the fence and closed his eyes as the officers dragged him to the post (TR/606). He remained on the hitching post for approximately eight hours. On both occasions, Giles received behavior citations (TR/629).

The defendants did not present any witnesses who refuted Giles' claims.

i. Hadji Hicks

Hicks, currently incarcerated at the Ventress facility, was placed on the hitching post approximately six times in February and March, 1996, while housed at the Staton facility. On each of the occasions in February, he remained on the post approximately nine hours (TR/636-637). Hicks recalled that on several occasions while he was on the hitching post, Sgt. Leo Allard said "If you little niggers didn't keep coming back to prison, you wouldn't have to be put up or go through this" (TR/638).

Hicks was placed on the hitching post each time for refusal to work. On February 7th and 8th, Hicks failed to report to work on time (TR/656, 660). After being released from the post, he was taken to the health care unit on each day. On February 8th, he complained of pain in his back and hips (TR/664). Hicks concedes that he refused to work on February 9th when he was again placed on the hitching post. He failed to check out for work with his squad because he did not wish to be shackled to other inmates (TR/665). On February 22nd, although Hicks left with his work squad, he hurt his back while working with a shovel and refused to continue working (TR/667).

Hicks thought that his 120-day chain gang sentence was to end on 11 March 1996[56],

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[56]The department suggested that Hicks' sentence had been extended as the result of his having received a behavior citation (TR/653).

but on that day, he was ordered to report for work on the chain gang. Hicks unsuccessfully attempted to persuade Allard that his chain gang sentence had ended. When Hicks showed Allard his plea agreement, Allard stated that "he didn't give a damn about the Court order and [Hicks] was checking out anyway" (TR/641). Hicks refused to check out for work and backed into the corner of his cell, at which time Allard ordered officers to escort Hicks to the backgate. A scuffle ensued during which Hicks was choked, slammed to the ground and kneed in the back by the officers. He was shackled by the officers and forcibly placed on the post at approximately 9:00 a.m. (TR/640-642; PX 48). Hicks' legs were shackled together around one of the bars on the hitching post and his arms, extended to the side, were handcuffed to the post (TR/644; PX 45-48).

As a result of the earlier altercation with the officers, Hicks was in pain while handcuffed to the post. He repeatedly asked the officers if he could use the bathroom. One of the officers responded, "I can't do nothing for you," and Hicks was forced to defecate and urinate in his clothing (TR/645). Allard and another officer saw Hicks' condition and laughed at him. Two other inmates who had been placed on the hitching post along with Hicks, Toby Davis and Tony Montgomery, also made fun of Hicks' condition. Approximately 15 minutes passed before Allard told another officer to take Hicks to the showers. After showering, Hicks agreed to work on the chain gang.

The defendants did not present any testimony which refuted Hicks' testimony. Staton back gate officer Leroy Yelder remembered that Hicks "refused to work on a lot of

occasions" (TR/1082); he had also "heard" that Hicks defecated on himself during his placement on the hitching post (TR/1101).

j. Larry Hope

Hope, a 40-year-old in prison for the first time, is housed at Donaldson. In March, 1995, when the use of hitching post was in its incipient stage, he was assigned to the chain gang at Limestone (TR/681-682). On 11 May 1995, while working with his squad near an interstate highway, Hope had a verbal disagreement with another inmate, Tony Perkins, and the inmates were ordered to stop arguing by a correctional officer. See PX-50. The officer determined that Hope was at fault and sent him back to the facility, where Sgt. Pelzer placed him on the hitching post for arguing with Perkins. Hope had not refused to work or encouraged other inmates not to work (TR/683).

Hope's wrists were shackled to the hitching post just above his face. He remained there for approximately two hours before a captain ordered that he be removed because "it was Perkins' case". Hope did not receive a disciplinary for the incident (TR/685). Before the captain ordered his release, Hope had no reason to believe that he would be released if he promised to go back to work. The captain described his argument with Perkins as "a silly disagreement", that there was "no fight", and that the inmates "should have not [sic] been removed from the squad". See PX-50.

On 7 June 1995, Hope was involved in a fight with an officer while he was on his

work site. Other officers became involved, and they ultimately took Hope to the hitching post. Again, he did not refuse to work nor disrupt the work of other inmates (TR/687-688).[57] Before he was placed on the hitching post, Hope went to the infirmary for examination. He had "bruises [in] quite a few places."

After he left the infirmary, Hope was placed on the hitching post from 11:00 a.m. to 6:00 p.m. in "very hot" weather (TR/691). Hope is pictured in PX-20. He remembered the occasion and described it as "painful", because in "trying to give [his] feet some relaxation", he had to "give in some . . . therefore put[ting] a lot of pain on [his] wrist". His wrists swelled and remained swollen for a day after his removal from the post. (TR/692).

Officers gave Hope water perhaps as many as two times during the day. He remembered the incident because of the officers' behavior on one of the occasions that he asked for water. Nearby were two officers who were assigned to the "dog truck", the vehicle used to search for escapees. Hope asked them for water, but they teased him about being on the hitching post. He then asked another officer, one Odium, for water. In response, Odium went to the guard house and filled a cooler with ice and water, ostensibly to return it to Hope. Then one of the officers from the dog truck told him not to give Hope water. Odium obeyed and set the cooler on the ground near Hope; the dog truck officer removed pans from his

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[57]On the day before, however, Hope had encouraged other inmates not to go to work on the chain gang. See DX-1046. In a subsequent disciplinary hearing on the charge of intentionally creating a security hazard, Hope pleaded guilty. His punishment: 30 days' extended time on the chain gang, loss of 17 days of good time, increase in custody level for 90 days.

truck, filled them with water from the cooler and "watered the dogs" (TR/693-694). When he finished watering the dogs, the officer approached Hope with the cooler as if to give him water. Before he did so, however, he set the cooler on the ground perhaps three feet from Hope, "took the top off" and "kicked it over" so that the water ran onto the ground (TR/694, 703). At that point, Hope had not been given water for two hours. Another hour passed before he was given any more (TR/704).

Hope described his response as "frustrated" and "angry" and admitted that the officers made him "feel as though . . . the dogs deserved water better than [he] did" as though he "wasn't even a human being". Hope did not receive a behavior citation or disciplinary charge as a result of his placement on the hitching post on 7 June.

III. DISCUSSION

A. Standard For Summary Judgment

The movant for summary judgment "bears the initial responsibility of informing the district court of the basis for the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact". ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting ***Fed.R. Civ.P. 56(c)***). The burden of production then shifts to the nonmoving party

- in this case the plaintiffs - to "set forth specific facts showing that there is a genuine issue for trial". ***Fed.R.Civ.P. 56(e).***

In order to survive the defendants' properly supported motion for summary judgment, the plaintiff is required to produce some evidence to support his constitutional claim. ***See Celotex Corp. v. Catrett, supra; see also Fitzpatrick v. City of Atlanta,*** 2 F.3d 1112, 1115-17 (11th Cir. 1993) (discussing how the responsibilities on the movant and the nonmovant vary depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or nonmovant bears the burden of proof at trial). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp,*** 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Where all of the materials before the court indicate that there is no genuine issue of material fact and that the party moving for summary judgment is entitled to it as a matter of law, summary judgment is proper. ***Everett v. Napper***, 833 F.2d 1507, 1510 (11th Cir. 1987); ***Delancy v. St. Paul Fire & Marine Ins. Co.***, 947 F.2d 1536, 1544 (11th Cir. 1991).

The record before the court indicates that there exists a genuine issue as to material facts on the visitation and hitching post issues, and because the Magistrate Judge concludes that the defendants are not otherwise entitled to judgment as a matter of law on those issues, their motions for summary judgment should be denied.

B. Certification of the Class

1. Definition of the Classes

In their complaint, the plaintiffs requested certification of a class of "all present and future Alabama inmates who have been or may be assigned to work in chain gangs". Their definition of the putative class did not change with the filing of their Motion For Class Certification on 18 May 1995. After the plaintiffs added new claims to their complaint, they filed an Amended Motion For Class Certification on 11 March 1996, requesting certification of a second class defined as follows: "all present and future Alabama inmates who have been or may be placed on the hitching post". These proposed definitions appear to exclude former inmates [TR-pretrial conference, 6/28/96, p. 41], but probation, parole, and recidivism are factors indicating a transitory class membership.

Plaintiffs contend that the putative class meets the requirements of Rule 23(a) and that their request for declaratory and injunctive relief only renders this class certifiable under Rule 23 (b) (2) (See Docs. # 28 and 74). While acknowledging that the decision to certify a class must be made without an inquiry into plaintiffs' chances of success on the merits, defendants nevertheless argue that (1) the plaintiffs cannot meet the prerequisites set forth in Rule 23 (a), (2) certification is unnecessary since any relief granted would inure to the benefit of all class members, and (3) the named plaintiffs can litigate the claims properly without class certification.

Although the parties have agreed to treat the plaintiffs as a class of "all present and

future Alabama inmates who have been or may be assigned to work in chain gangs" for purposes of implementing their settlement of the chain gang and toilet claims (see discussion, ***infra***), that agreement does not obviate the court's consideration of certifying such a class. The plaintiffs' visitation claim pertains only to inmates assigned to the chain gang or ATU, because those are the only inmates in the system whose visitation rights are suspended for a period of 90 or more days merely by virtue of their assignment to a unit. Visitation is denied to other Alabama inmates only when they have committed rule infractions or when they have violated rules governing visitation.

Certification of a class of inmates assigned to the chain gang does not overlap completely with a class of inmates placed on the hitching post, however, because the two populations are not necessarily the same. During his deposition, Holman Warden Leslie Thompson stated that the hitching post was used primarily for non-chain gang inmates.[58] Indeed, reference to the Administrative Regulation which addresses assignment to the hitching post (PX-12) reveals that the only restriction applicable to the hitching post is that its use is limited to inmates who refuse to work. An inmate's work assignment, location within the institution, and classification are not factors which affect his or her eligibility for placement on the hitching post once an officer determines that he or she has refused to work.

For the reasons stated below, the Magistrate Judge concludes that two classes of

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[58]See Deposition of Leslie Thompson, 5/8/96, p. 61, PX-5, Corrected Exhibits In Support of Plaintiffs' Opposition To Defendants' Motion For Summary Judgment.

inmates should be certified for the purpose of considering the award of appropriate relief to the plaintiffs:

> 1. A class defined as all present and future Alabama inmates who have been or may be assigned to work in chain gangs; and
>
> 2. A class defined as all present and future Alabama inmates who have been or may be placed on the hitching post.[59]

2. Requirements For Maintenance of a Class Action

Pursuant to Rule 23(a) of the ***Fed.R.Civ.P.***:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The plaintiffs seek maintenance of the classes under Rule 23 (b) (2) class and thus seek to show that the defendant has "acted or refused to act on grounds generally applicable

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[59]There are arguable bases for further subdivision of the classes. For example, assignments to the chain gang may be disciplinary or non-disciplinary; and the evidence establishes that, in spite of the governing policy, inmates are placed on the hitching post for reasons other than refusal to work. However, plaintiffs' contention that the defendant's policies affect all inmates exposed to them in a similar manner is supported by the evidence. The scope of the class is determined by the effects of the defendant's alleged violations. ***Califano v. Yamasak***i, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979).

to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole". The action or inaction of the defendant does not have to be effective or completed with reference to each member of the class, so long as it is based on grounds which have general application to the class. ***3B Moore's Federal Practice*** § 23.40(2), at 23-290; ***Jones v. Diamond***, 519 F.2d 1090, 1100 (5th Cir. 1975). Moreover, Rule 23(b) (2) was intended primarily to facilitate civil rights class actions, where the class representatives typically sought broad injunctive or declaratory relief against discriminatory practices. ***Penson v. Terminal Transport Co., Inc.***, 634 F.2d 989, 993 (5th Cir. 1981). The plaintiffs in this case seek only injunctive and declaratory relief, which would inure to the benefit of the entire class. ***See also Holland v. Steele***, 92 F.R.D. 58, 62-64 (N.D. Ga. 1981).

The defendant's actions are based on published policies and procedures generally applicable to all Alabama inmates.[60] That is usually the case when the constitutionality of prison conditions is questioned. As a result, Rule 23 (b) (2) class certifications are not uncommon in prisoners' rights cases where only injunctive and declaratory relief are sought. ***Geraghty v. United States Parole Comm'n***, 579 F.2d 238 (3rd Cir. 1987); ***Pugh v. Locke***, 406 F.Supp. 318 (M.D. Ala. 1976), ***aff'd sub nom, Newman v. Alabama***, 559 F.2d 283 (5th Cir. 1977), ***cert. denied***, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978).

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[60]Any inmate could refuse to work and be placed on the hitching post. Similarly, since an inmate's custody classification can be changed during his incarceration, any Alabama inmate is a potential member of a chain gang.

3. Numerosity, Commonality, Typicality, and Adequacy of Representation

The plaintiffs' complaint and the evidence submitted in support of other pleadings, including particularly the plaintiff's response to the defendant's motion for summary judgment, establish their compliance with the requirements of Rule 23 (a) (1). The plaintiffs seek to represent classes of inmates that potentially include most of Alabama's 20,000 inmates. The court has received evidence to support a reasonable estimate of the number of purported class members. ***See Zeidman v. J. Ray McDermott & Co., Inc.*** 651 F.2d 1030, 1036 (5th Cir. 1981).

Chain gang squads of 25-40 inmates are maintained at six penal institutions in the state for a period of 90 or more days each. PX-14 through 17. In the approximately three years since the chain gangs were established, well over 2000 inmates have been assigned to the chain gang and have had their visitation rights suspended for the time that they served on it. Neither the plaintiffs nor the defendants presented evidence reflecting the number of inmates who had been placed on the hitching post since 1993. However, mere reference to defendants' trial exhibits - which do not purport to reflect the totality of those inmates - indicates that over 200 inmates have been so placed. In addition, the number of inmates assigned to the chain gang and placed on the hitching post increases constantly.

That is one reason why 23 (b) (2) classes are not uncommon in prisoners' rights cases. ***See McCray v. Bennett***, 467 F.Supp. 187, 190 (M.D. Ala. 1978); ***Bradley v. Harrelson***, 151

F.R.D. 422, 423 (M.D. Ala. 1993). The numbers of inmates actually and potentially involved also establishes the difficulty - if not the impossibility - of joinder of class members in one lawsuit. "Any class consisting of inmates at an institution is likely to include individuals who were unidentifiable at the time the class was certified." ***Holland v. Steele***, 92 F.R.D. 58 (N.D. Ga. 1981).

Analysis of the visitation and the hitching post issues is characterized by common questions of law and fact. First, each of the issues is governed by a system-wide policy that purportedly governs the acts and omissions of the defendant and his subordinate employees. Second, the provisions of the policies are equally applicable to all inmates assigned to the chain gang and all inmates placed on the hitching post. For example, all inmates assigned to the chain gang are denied visitation for 90 or more days, regardless of their classification or the institution where they are housed; all inmates who refuse to work are subject to placement on the hitching post.[61]

The law does not require that class representatives have precisely the same claims as other class members. ***Walker v. Jim Dandy Co.***, 638 F.2d 1330, 1336 (5th Cir. 1981). When this action was filed, plaintiffs Austin, Elliott, Hayes, and Guess were then assigned to chain gangs and were being denied visitation. When the plaintiffs amended their complaint to add the hitching post claim, they also added two additional class representatives, Warren

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[61]As the evidence at the hearing established, many inmates who were charged with other rule infractions were placed on the hitching post. And some inmates were placed on the hitching post because they were too ill to work.

Leatherwood and Kervin Goodwin, both of whom had been placed on the hitching post. In fact, in their affidavits filed to support their motion for class certification, Austin, Elliott, and Hayes represented their intent to represent the interests of the class without expectation of special benefit.

Although defendants oppose class certification, they have not challenged the adequacy of the named plaintiffs' representation.[62] The fact that plaintiffs are represented by an institutional public interest advocate that is experienced and skilled in handling class actions affirms - and in many ways assures - the adequacy of their representation of their fellow class members.

The Magistrate Judge rejects the defendant's argument that class certification is unnecessary in this case. "There is no language in Rule 23 (b) (2), as there is in Rule 23 (b) (3), that requires the court to consider the necessity for a class action. Rule 23 (b) (2) was specifically designed to allow for the class action mechanism in civil rights cases." ***Reproductive Health Services v. Webster***, 655 F.Supp. 1300 (W.D. Mo. 1987). Injunctive and declaratory relief are well-suited for addressing the claims of system-based violations of constitutional rights such as those asserted by the plaintiffs.

The instant case is not this court's first encounter with claims of constitutional violations by Alabama's Department of Corrections, and the circumstances of

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[62]The named plaintiffs have appeared in court on several occasions, and the Magistrate Judge has been impressed with their discipline and the obvious cooperative spirit that they have displayed toward their attorneys.

implementation of departmental policies render this case ripe for class certification to facilitate the binding effect of the court's ultimate ruling upon the defendant and upon prisoners all over the state. ***See Pugh v. Locke, supra.***

C. Dismissal of Defendant Fob James

The plaintiffs do not oppose defendant James' motion to dismiss. The Magistrate Judge recommends that the motion be granted because the parties have stipulated to his dismissal [see discussion ***infra***] and, moreover, James was not personally involved in the alleged actions which support the plaintiffs' unresolved claims.

The language of 42 U.S.C. § 1983 requires proof of an affirmative causal connection between actions taken by the defendants and the constitutional deprivation. ***Jones v. Preuit & Mauldin,*** 851 F.2d 1321 (11th Cir. 1988), ***cert. granted, judgment vacated by***, 489 U.S. 1002, 109 S.Ct. 1105, 103 L.Ed.2d 170 (1989). The requisite causal connection may be shown by the personal participation of the defendant, a policy or custom established by the defendant which results in deliberate indifference to a prisoner's constitutional rights or breach of a duty imposed by state or local law which results in constitutional injury. ***Zatler v. Wainwright,*** 802 F.2d 397 (11th Cir. 1986).

The law of this circuit requires that plaintiffs show that the defendants "were personally involved in acts or omissions that resulted in the constitutional deprivation". ***Hale v. Tallapoosa County***, 50 F.3d 1579 (11th Cir. 1995). To that extent, defendant James'

Carolina Governor James B. Hunt, Jr. of liability in §1983 actions).

D. Proposed Settlement of Chain Gang and Toilet Claims

When this case was initially filed, the plaintiff class challenged the constitutionality of four DOC practices: establishment and maintenance of chain gangs, use of the hitching post, denial of toilet facilities to inmates on the chain gang, and denial of visitation to inmates on the chain gang. At a pretrial conference on 19 June 1996, the parties filed a Stipulation setting forth their settlement of the chain gang dispute, and on 24 September 1996, the parties filed a similar Stipulation regarding the provision of toilet facilities.

The stipulations are not proposed consent decrees, and the plaintiffs and defendants have not requested the court to enter a decree or order which renders the parties obligated to the court - as opposed to each other - to abide by the terms of their agreement. Arguably the stipulations or agreements amount to little more than private agreements between the two sides of this litigation, not unlike settlement agreements which often lead to voluntary dismissals in other civil cases in this court.

Nevertheless, because of the significance of this action, the number of plaintiffs involved,[63] the fact that the plaintiffs are inmates who are typically in greater need of the court's guardianship over their rights than non-imprisoned litigants, and the permanence of

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[63]The class of plaintiffs in this case certainly meets the numerosity requirements of Rule 23. In addition, however, the population of state inmates is ever-changing, and the function of the institutions involved suggest a perpetual life. Thus, the class in this case is potentially infinite.

contention that the doctrine of respondeat superior does not apply is meritorious.

> "[T]he general doctrine of respondeat superior does not suffice and a showing of some personal responsibility of the defendant is required." ***Johnson v. Glick,*** 481 F.2d 1028, 1034 (2d Cir. 1973), ***cert. denied***, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

Moreover, that James was the Governor - the person who appointed Jones - does not render him liable for all of Jones' or Hopper's decisions. In other words, "[t]he fact that he was in a high position of authority is an insufficient basis for the imposition of personal liability." ***McKinnon v. Patterson***, 568 F.2d 930, 934 (2nd Cir.1977), ***cert. denied,*** 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); ***see Turpin v. Mailet***, 579 F.2d 152, 167 (2nd Cir. 1978) (***en banc***) ("notions of respondeat superior have not been incorporated into § 1983 to permit the imposition of liability in damages upon supervisory personnel for the wrongs of their subordinates"), ***cert. denied***, 439 U.S. 988, 99 S.Ct. 586, 58 L.Ed.2d 662 (1978).

The plaintiffs have acknowledged that Governor James was not personally involved in the implementation of the chain gang and toilet policies and procedures and have agreed to his dismissal. Pursuant to the foregoing analysis, the Magistrate Judge can discern no evidence that James was personally responsible for - or personally participated in - the policies which led to the challenged visitation policy for ATU inmates or the procedures for placing inmates on the hitching post.

Dismissal of the Governor is therefore appropriate. ***Hardin v. Hayes***, 957 F.2d 845 (11th Cir. 1992); ***see also West v. Atkins***, 799 F.2d 923 (4th Cir. 1986) (clearing North

the promises and covenants made by the parties, the court has applied greater scrutiny to these stipulations than it imposes upon routine civil settlements.

1. Settlement of Chain Gang Claim

The Department of Corrections established [64] "chain gang security squads" in early 1993. Then-Commissioner Ron Jones advised the wardens of the several penal facilities to develop institution-specific procedures. Some, but not all, of them are reflected in PX-14 through PX-18. Inmates may be assigned to a chain gang for disciplinary and non-disciplinary reasons. [See Transcript of Pretrial Conference, 6/28/96, pp. 25-26]

Pursuant to those policies, inmates were assigned to work on chain gang squads consisting of 25-40 inmates under the supervision of 1-2 correctional officers. Usually, the chain gangs were placed on farm squads or road squads and were transported at approximately 6:30 a.m. from their facilities to the work sites by bus or van. Upon arrival at the work site, the inmates were chained or shackled together in groups of five, and they remained so connected until they boarded the bus for return to the facility at approximately 5:00 p.m.

Thus, inmates on the chain gang were shackled to at least four other persons for a period of up to 10 hours and remained shackled through meals and use by any single inmate

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[64]The evidence suggests that the chain gang practice was actually "re-established". Chain gangs were last used in Alabama in the 1930's.

of the toilet (one portable toilet for the entire squad). The inmates were not separated if one of them became ill unless an officer determined that the inmate should be transported to the facility for treatment;[65] nor did the use of force upon an inmate require his separation from the other four.[66]

Plaintiffs did not challenge the criteria used for assigning inmates to chain gangs or the DOC's maintenance of farm squads or road squads. Instead, they contended that the aforestated practices and circumstances of shackling five men together on work squads constituted cruel and unusual punishment and were thus violative of the Eighth Amendment.[67] The DOC has shackled inmates individually "for various purposes for years". [See TR- Pretrial Conference, 6/28/96, p. 26]

Pursuant to their agreement, the defendants agreed to cease the practice of shackling inmates to each other, adopting instead the practice of "individual chains for inmates" in the belief that it "allows more productive and efficient management of inmates, with increased

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[65]Chain gang officers were required to be "first aid knowledgeable and trained to identify the symptoms of heat exhaustion and heat stroke to include first aid for each." PX-16.

[66]"If force must be used on an inmate who is put on a chain, the remaining four inmates will be ordered to get down on their hands and knees to prevent injuries." Officers will "physically place the inmate face down on the ground. The inmates' hands will be cuffed behind his back. A pair of regular leg irons will be placed on the inmate. ***The inmate will then be removed from the chain."*** PX-16. [Emphasis supplied]

[67]Indeed, in their Notice to Class Members of Proposed Settlement (Doc. # 160), the plaintiffs acknowledged that: "The practice of shackling inmates individually has never been a part of this lawsuit, and this proposed settlement agreement does not have any effect on that practice one way or the other."

safety and security" (Doc. # 140). During the pretrial conference on 19 June 1996 plaintiffs' and defendant's counsel explained their agreement and respective positions to the court, and on 25 June 1996, the Magistrate Judge entered an order setting forth the parties' following agreements and positions:

1. The Commissioner agrees, "on behalf of himself and his agents and successors, . . . not to resume the practice of chaining inmates together in the future."

2. Governor Fob James should be dismissed as a party to the lawsuit.

3. The defendants withdraw their objections to class certification and agree to treat the plaintiffs and a plaintiff class for purposes of implementing the settlement of the chain gang issue.

4. The plaintiffs agree to waive their right to seek fees and costs incurred in pursuing their claim against the practice of chaining inmates together.

5. Plaintiffs' challenge to the practice [of chaining inmates together] should be dismissed with prejudice.

6. If defendant Hopper breaches the stipulation, the plaintiffs may reinstate their challenge to the practice of chaining inmates together and/or enforce the stipulation as a contract between the parties in state court.

The Stipulation was signed by counsel for the plaintiff class and both individual defendants, but defendant James contends, without objection, that "the agreement is Commissioner Hopper's agreement". [TR-Pretrial Conference, 6/28/96, p. 26]. In the order entered on 25 June 1996, the Magistrate Judge granted the defendants' motion to withdraw their objections

to class certification, established a schedule for distribution of notice to class members, and set a date for a fairness hearing.

The parties filed their Joint Motion For Preliminary Approval of Proposed Stipulation and Notice To Class Members on 28 June 1996 (See Docs. # 155, 160). The motion was granted on 5 July 1996, and thereafter court-approved notice was "conspicuously posted on community bulletin boards in every dormitory in every prison, . . . in the law library and dining area of each facility," and served upon each inmate in segregation individually. To facilitate notice to state inmates housed in county jails, the notice was also forwarded to each county jail in the state with requests that the notice be "prominently displayed in common areas of the jail facility".

The notice was adequate to inform all interested parties about the provisions of the settlement proposal. The notice advised class members and non-class members of the status of the lawsuit and explained the terms of the proposed settlement. It further explained the advantages and disadvantages of the proposed settlement in detail, with specific reference to the limitations placed upon a court decree [upon a finding against the defendants] by the Prison Litigation Reform Act The notice also advised inmates of their right to object, the mailing address for filing objections and procedures for using the forms prepared by plaintiffs' counsel. Finally, it advised inmates of the date of the Fairness Hearing and included a copy of the form for completion and mailing.

On 2 August 1996, the Magistrate Judge conducted a fairness hearing after

distribution of court-approved notice to each inmate at all of the DOC's facilities in Alabama. Of the 4,000 inmates who had served on chain gangs in August, 1996, 154 or 3.8% filed objection forms.[68] The number of inmates who articulated opposition to the settlement was 126; thus 3.1% of inmates opposed the settlement. An analysis of the objection forms reveals the following:

1. 28 inmates really had no objections;[69]

2. 50 objected on the basis that they were still being chained individually and the lawsuit should have covered that circumstance;[70]

3. 3 wanted a declaration that chain gangs were unconstitutional;[71]

4. 14 wanted money damages;[72]

5. 11 wanted other relief not included in the complaint and beyond the court's power, such as early release, parole, etc.;[73]

6. 17 thought the settlement should have included other claims such as the hitching post and toilet claims;[74] and

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[68]See Docs. # 162-190, 192-202, 204-297, 299-302, 304-316, 320 and 323-324.

[69]See, e.g., Docs. # 181, 292, 300, 309, 311, and 315.

[70]See, e. g., Docs. # 187, 206, 211, 290, 291, 293, and 307.

[71]See, e. g., Doc. # 166.

[72]See, e. g., Docs. # 294, 297, 306, 312, and 313.

[73]See, e.g., Docs. # 170, 214, and 308.

[74]See, e.g., Docs. # 167, 232, and 301.

7. 3 discussed gender and other classification issues.[75]

Because the inmates characterized in item 1 and items 3 through 7 did not address the fairness of the settlement to the class in the context of the court's authority to grant relief, the court focused its attention on the inmates characterized in item 2, i.e., those who objected to the settlement because it did not end the practice of shackling inmates individually.

The fairness hearing and opportunity for written objections were adequate to solicit and determine the views of class members and non-class member inmates. Both the notice and fairness hearing were sufficient under Rule 23(e). Named plaintiffs Michael Austin and Ogie Hayes and class members Douglas Crouch, Domineke Taylor, Terrance Roberts, Curtis Buggs, and Lorenzo Johnson testified for plaintiffs at the fairness hearing on 2 August 1996. Austin and Hayes testified that they had not been rewarded or benefitted by serving as class representatives in the case. Each approved of the stipulation and articulated his understanding of its terms and its impact. Crouch, who acknowledged his understanding that the plaintiffs had not requested damages, stated his desire for damages nonetheless. Taylor, who served on the Draper chain gang, testified that he did not object to the settlement, but Roberts stated his objection to any chains whatsoever "because of what it does to you mentally". Taylor also stated his belief that the settlement should have included monetary relief but understood that the settlement does not prevent him from filing an action for money damages. Finally, Johnson stated that he believed that class members should receive money

[75]See, e.g., Docs. # 218 and 302.

damages or other additional relief from the settlement and that the chain gang was safer than individual chaining. The defendants did not call witnesses.

2. Settlement of Toilet Facilities Claim

On 24 September 1996, the parties filed their Stipulation of settlement of the claim regarding provision of toilet facilities to inmates on the chain gang (Doc. # 339). Provision of toilet facilities is covered in the institutional SOPs which govern the chain gangs. Under the heading "Latrine Facilities", they typically provide as follows:

1. One portable toilet is provided for each squad of inmates to be placed in portable screens and covered on the front by blanket material attached to a wooden stake or pipe. Front cover "will only be used if public visibility is possible".

2. Other inmates on the chain are required to "stretch the chain to allow the inmate limited privacy".

3. Inmates use the toilet while remaining chained to other inmates on the gang.

See PX-14, 16, and 17.

Acknowledging that their claim was not asserted against Governor James, the plaintiffs objected to the practices on the grounds that (1) forcing inmates to defecate while chained together is humiliating and demeaning, and (2) failure to provide adequate toilet facilities, toilet paper, soap, and water exposes inmates to unsanitary conditions. The first concern was alleviated when the DOC ceased the practice of chaining inmates together, and

the parties have proposed the following terms to settlement of their remaining concerns:

1. DOC will provide soap and water for handwashing to all inmates.

2. DOC will provide toilet paper to all inmates.

3. Portable toilet facilities will "contain a heavyweight canvas screen for increased privacy". At least one portable toilet shall be available for each squad of forty inmates, and the facilities shall be kept in good repair.

4. No toilet facilities are provided to medium custody work squads working on prison grounds. The DOC shall make reasonable efforts to allow privacy to medium custody inmates who must relieve themselves. The DOC shall further provide medium custody inmates with a "shovel or other implement suitable for digging a hole" so that the inmate can defecate into the hole without the use of a toilet facility on the prison grounds. The waste shall be adequately covered thereafter.

5. Within 8 months after the Stipulation is finally approved by the court, the Commissioner of the DOC or his designee will conduct an unannounced inspection of all outdoor worksites at all facilities, take the corrective action necessary to ensure compliance with the SOP, and notify plaintiffs' counsel of the inspection and the corrective action, if any.

6. Plaintiffs agree to waive their right to seek attorney fees and costs incurred in pursuing the toilet facilities claim.

7. The plaintiffs' toilet facilities claim will be dismissed without prejudice. In the event of breach by the Commissioner, the plaintiffs may reinstate their claim and/or enforce the Stipulation as a contract between the parties in state court.

Doc. # 339.

3. Standards For Review of Settlements

Rule 23(e) of the ***Fed.R.Civ.P.*** provides that:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In addition to these requirements, Congress passed in 1996 the Prison Litigation Reform Act ["PLRA"], 18 U.S.C. §3626, which includes provisions governing the court's treatment of settlements of "prison condition cases". Pursuant to those provisions, there are well-defined limits on the remedies which a federal court may order in prison conditions cases. First, a court may not enter or approve a consent decree "that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law unless (1) Federal law permits such relief to be ordered in violation of State or local law; (2) the relief is necessary to correct the violation of a Federal right; and (3) no other relief will correct the violation of the Federal right." 18 U.S.C. §3626 (c) (1).

Under the PLRA, however, the parties may enter into private settlement agreements without observing the aforestated restrictions "if the terms of the agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement" settled. 18 U.S.C. §3626 (c) (2). The PLRA does not preclude a party claiming breach of a private agreement from seeking any state law remedy in state court, and the restrictions set forth in the act do not apply to relief entered by a state court upon claims arising solely under

state law.

In the instant case, the parties have not asked this court to enforce their agreement by judicial action in case of breach. In both Stipulations, the parties provided that in the event of breach by the Commissioner of Corrections, plaintiffs may reinstate their challenge to the practice in question or enforce their agreement as a contract in state court. Therefore, the agreements between the parties satisfy the statutory requirements for private agreements in settlement of prison conditions cases. The structure of the parties' agreements also pretermit the court's making specific findings prerequisite to approval of a consent decree. Therefore, the stipulations of settlement of the plaintiffs' chain gang and toilet claims comply with the criteria set forth in the PLRA.

Judicial prudence dictates, however, that this court nevertheless subject the parties' agreements to some additional scrutiny. Although voluntary settlement is the preferred means of resolving class actions, the settlement process is susceptible to certain types of abuse and, as a result, a court has a heavy, independent duty to ensure that the settlement is fair, adequate, and reasonable. ***See Piambino v. Bailey***, 757 F.2d 1112, 1139 (11th Cir. 1985), ***cert. denied***, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 976 (1986); ***Pettway v. American Cast Iron Pipe Co.***, 576 F.2d 1157, 1214 (5th Cir. 1978), ***cert. denied***, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). For the purpose of making such a determination, this court draws no distinction between settlement of all of the claims asserted on behalf of a class and settlement of some of the issues, as is the case here.

This court recently set forth factors that it may examine in deciding whether a settlement is fair, adequate, and reasonable. ***White v. State of Alabama***, 867 F.Supp. 1519, 1533 (M.D. Ala. 1994), ***vacated by***, 74 F.3d 1058 (11th Cir. 1996). These factors include: (1) the views of the class members; (2) the views of class counsel; (3) the substance and amount of opposition to the settlement; (4) the possible existence of collusion behind the settlement; (5) the stage of the proceedings; (6) the likelihood of success at trial; (7) the complexity, expense, and likely duration of the lawsuit; and (8) the range of possible recovery. ***See also Bennett v. Behring Corp.***, 737 F.2d 982, 986 (11th Cir. 1984)***; Reynolds v. King***, 790 F.Supp. 1101 (M.D. Ala. 1990). Because the parties have not requested the court to enter a consent decree, the court has applied less stringent standards to the analysis of the reasonableness of their settlement. As a result, the court will focus upon the views of class members, the substance and amount of opposition to the settlement, and the complexity, expense, and likely duration of the lawsuit.

a. The Views of Class Members

Unlike plaintiff class members in ***White, supra***, where there were no objections filed, at least 126 of the 2000 putative class members opposed the terms of the settlement proposal. It is significant, however, that the individual plaintiffs' opposition was based on the ***inadequacy*** of the proposal, not its unfairness. None of the class members expressed the point of view that cessation of the practice of chaining inmates together was unfair, illegal,

or otherwise wrongful. The class members who opposed the settlement thought that the proposal did not go far enough: that it should have enjoined all chaining and shackling of inmates, that it should have included monetary damages, that it should have covered all of the issues in this case, or that it should have requested or required other forms of relief for the class members.

b. The Substance of and Amount of Opposition to the Settlement

Close analysis of the objections indicates that the plaintiffs have not challenged the fairness of the settlement terms; nor have they refuted the benefit to class members of the DOC's modification of the chain gang. Moreover, there appears to be no overt conflict within the class. For example, although the proposed settlement does not provide monetary relief to any class members (and the plaintiffs have not requested damages), it does not preclude or otherwise limit suits by individuals for damages against the defendants. The comprehensive impact of the proposed settlement - on both the chain gang and toilet issues - will be systemic relief in each of the Alternative Thinking Units at each of the institutions.

When a "settlement provides for structural changes with each class member's interest in the adequacy of the change being substantially the same, and where there are no conflicts of interests among class members or among definable groups within the class, then the decision to approve the settlement 'may appropriately be described as an intrinsically "class" decision in which majority sentiments should be given great weight'." ***Paradise v. Wells***, 686

F.Supp. 1442, 1445 (M.D. Ala. 1988) (***quoting Pettway***, 576 F.2d at 1217).

The Magistrate Judge has accorded great weight to the opinion of the majority of the classes, the opinions of the class representatives and the defendant, and the opinions of their respective counsel. Those factors favor approval of the proposed agreements, with one exception. In the Stipulation of settlement of the chain gang claim, the parties agreed that the plaintiffs' Eighth Amendment challenge should be "dismissed with prejudice". Yet, they also agreed that, in the event of defendant's breach of the settlement, plaintiffs could "reinstate their challenge" or "enforce the stipulation as a contract between the parties in state court".

While the former action would arguably be permissible after dismissal with prejudice in this court[76], a subsequent Eighth Amendment challenge to the practice of chaining inmates together could be strongly contested in federal or state court since dismissal with prejudice could be construed as an adjudication on the merits.[77] Rule 41(b), Fed.R.Civ.P. Thus, if this court approved an agreement to dismiss the chain gang claim ***with prejudice***, individual

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[76]The parties acknowledge that their agreement constitutes a private contract among them. Enforcement of their contractual obligations would therefore be governed by Alabama law and could be pursued in state court even if this court (or any other court) made a later determination that the defendant's 1993 chain gang policies ***did not*** violate the plaintiffs' constitutional rights. As counsel for the parties have indicated, their willingness to settle these issues is due in part to their respective assessments of the risk of loss on the merits.

[77]In this connection, the comparison of the settlements in this case with private settlements of routine civil cases in this court is apt. When the parties in such cases file motions pursuant to Rule 41, they typically request that the court enter an order dismissing the case (or the plaintiffs' claims) "with prejudice", a designation which generally reflects their agreement that the matter or the issues therein cannot be re-litigated.

plaintiffs might be deprived of legal bases for bringing subsequent actions for damages or actions to enforce the agreements. ***See generally, McCants v. Ford Motor Company, Inc.***, 781 F.2d 855 (11th Cir. 1986); ***Durham v. Florida East Coast Railway Company***, 385 F.2d 366 (5th Cir. 1967). [78] This is especially true since the parties' agreements will not be reflected in a consent decree. The only obligations which flow from those agreements are among the parties, not between the parties and this court.

It is therefore incumbent upon this court, before dismissal of any claims, to safeguard the rights of the class members while it still has uncontested jurisdiction over all of the parties and the subject matter (from a class perspective). The Magistrate Judge concludes that, should the court approve the parties' settlement of the chain gang claims, dismissal should be without prejudice. The parties have already stipulated that the plaintiffs' claims regarding toilet facilities should be dismissed without prejudice.

c. The Complexity, Expense, and Likely Duration of the Lawsuit

Given the presentation of evidence during six days of trial on the two remaining issues, it is likely that trial of the original four issues in this case would have consumed perhaps twice as long, at considerable expense to the parties, the witnesses, and the judicial

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[78]Accordingly, implicit in the Magistrate Judge's Recommendation that the settlement proposals be approved by this court is the concomitant finding that dismissal without prejudice does not portend "clear legal prejudice" to the defendant. Simple litigation costs, inconvenience to the defendants, and the prospect of a second or subsequent lawsuit do not constitute clear legal prejudice. ***McCants, supra.***

system. Trial of the settled claims would also have significantly increased the complexity of the lawsuit, required several additional witnesses and numerous other documents, thus complicating presentation of the evidence and management of the record.

In the absence of settlement of two of the claims, it is probable that final resolution of the issues and relief for the plaintiffs would have been delayed for as much as several additional weeks or months. Since this litigation has been pending almost two years, and as many as 50 other challenges to the chain gang have been filed in Alabama's federal courts, expedited resolution of the issues is critical to protection of all of the parties' interests. Finally, the waivers by plaintiffs' counsel of all attorney fees and expenses associated with their pursuit of the chain gang and toilet issues is an important consideration, especially since payments of those amounts would almost certainly be made from the public treasury.[79]

The Magistrate Judge has independently evaluated the fairness, adequacy, and reasonableness of the proposed settlements. Except for the proposed mode of dismissal of the chain gang claims, discussed ***supra***, the court finds that the settlements "[do] not unfairly impinge on the rights and interests of dissenters", ***Pettway, supra***, 576 F.2d at 1214, and that the agreements were entered into without fraud or collusion. ***Bennett, supra***. "A settlement is in large measure a reasoned choice of a certainty over a gamble, the certainty being the settlement and the gamble being the risk that comes with going to trial." ***Paradise,*** 686

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[79]"There can be doubt that plaintiffs who obtain relief through settlement are nevertheless prevailing parties within the meaning of 42 U.S.C. §1988." ***Dowdell v. City of Apopka, Florida***, 521 F.Supp 297, 300 (M.D. Fla. 1981), ***aff'd. in part, rev'd in part***, 698 F.2d 1181 (11th Cir. 1983).

F.Supp. at 1446. As a result, the question is not "whether the proposed [settlement] is the best deal possible," but whether it is "at a minimum, fair, adequate, and reasonable." *Id.* at 1448.

E. Denial Of Visitation to Inmates on the Chain Gang

The plaintiffs have challenged the defendant's denial of visitation to inmates assigned to the chain gang as violative of their First Amendment right to freedom of association.[80] They rely on universally recognized standards in the corrections industry and upon case authority which requires that, at a minimum, prison officials set forth a "legitimate penological objective" before imposing restrictions upon visitation.

1. Status of Visitation As A Prison Condition

Over 20 years ago, this court found that inmate visits were "essential to the maintenance of community ties" and that policies which discourage visitation "decrease an inmate's chances of successful reintegration upon release". ***Pugh v. Locke, supra.*** The defendant does not disagree with that proposition. Hopper acknowledged that the general consensus among correctional commissioners is that visitation should not be prohibited

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[80]Typically, inmate challenges to restrictions upon visitation are premised upon the Eighth Amendment as a deficiency in the "conditions of confinement". Although the plaintiffs allege that they have suffered detrimental effects as the result of defendant's denial of visitation, because they have limited their challenge by reference to the First Amendment only, the court will not consider their claims within the analytical framework of the Eighth Amendment.

unless an inmate has violated prison rules, but he also said that visitation would detract from the goal of the chain gang program to instill in inmates self-discipline and respect for authority (TR/879).

Experts in penology, several of whom testified for the plaintiffs at the evidentiary hearing, also agree that visitation is beneficial to inmates and to the prison system. One of them, George Sullivan,[81] testified that the denial of visitation to inmates on the chain was "outrageous" and that he saw no reason to deny the plaintiffs visitation with their families. Another, Allen Breed, denounced the penological objective urged by the defendant. He advised the court that denial of visitation for no justification creates "bitterness, unhappiness, resentment, and very often .... retaliation" within an institution (TR/312). Plaintiffs' experts also agreed with plaintiffs Daniel Green and Gary Montgomery that letters and telephone calls were no substitutes for in-person visits.[82]

Federal courts have not viewed visitation, however, through quite the same lens as

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[81]Sullivan is a corrections consultant who has worked in corrections for over 41 years. See PX-79.

[82]Green believes that visitation "keeps you from getting in trouble, because that's about the only thing you really have to look forward to in the penitentiary" (TR/354).

they have viewed adequate food,[83] reasonable safety,[84] medical care,[85] and access to court.[86] ***See Caraballo-Sandoval v. Honsted***, 35 F.2d 521, 525 (11th Cir. 1994). Rather, visitation has more commonly been linked with other kaleidoscopic privileges accorded to prisoners, including adequate exercise,[87] parole,[88] and other rehabilitative programs. [89] Judges have been reluctant to cloak visitation with broad constitutional protection even as they have consistently recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution". ***Turner v. Safley***, 482 U.S. 78, 83, 107 S.Ct. 2224, 2259, 96 L.Ed.2d 64 (1987);

In fact, prison life is necessarily characterized by a diminution in an inmate's freedom to enjoy the rights and privileges that law-abiding citizens enjoy. An inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system". ***Pell v. Procunier,*** 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974); ***Newman, supra***, 559 F.2d at 286.

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[83]***Hamm v. DeKalb County***, 774 F.2d 1567, 1575 (11th Cir. 1985).

[84]***Farmer v. Brennan***, 511 U.S. 811, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

[85]***Brown v. Hughes,*** 894 F.2d 1533, 1537 (11th Cir. 1990) ***(per curiam), cert. denied,*** 496 U.S. 928, 110 S.Ct. 2624, 110 L.Ed.2d 645 (1990).

[86]***Johnson v. Avery***, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969).

[87]***Fullman v. Graddick,*** 739 F.2d 553, 556-557 (11th Cir. 1984).

[88]***Ellard v. Alabama Board of Pardons & Paroles***, 824 F.2d 937, 942 (11th Cir. 1987).

[89]***Francis v. Fox,*** 838 F.2d 1147 (11th Cir. 1988).

In that connection, the Department of Corrections has established a visitation policy that restricts ***every*** Alabama inmate's access to his or her family members, friends, and others on the outside. Pursuant to the DOC's Administrative Regulation 303, visitation is a privilege which may be suspended or revoked if "there is a clear and present danger to institutional security". See DX-2554. An inmate's visitation is limited by regulation of the following factors:

1. The number, age, and identity of visitors;

2. The location, time, and duration of visitation;

3. The circumstances of visitation, including the behavior of the inmate and visitors, items that visitors may bring or take away; and

4. Denial of entry to persons whose conduct offends order and security within prison.

Moreover, visitation may be denied to the inmate for several reasons, including rule infractions, failure to list a person as an approved visitor, providing false information about visitors, misbehavior during visitation, or assignment to special units such as segregation. In fact, suspension or denial of visitation is a common disciplinary tool in the Alabama prison system DX-2554. (See also PX-24 for an example of an institution's Standard Operating Procedure regarding visitation. The SOPs are consistent with the AR but are usually more particularized.)

The Standards for Adult Correctional Institutions, promulgated by the American

Corrections Association, advises prison officials as follows:

> Written policy, procedure, and practice provide that the number of visitors an inmate may receive and the length of visits may be limited only by the institution's schedule, space, and personnel constraints, or when there are substantial reasons to justify such limitations.[90] See PX-1 and PX-87.

Pursuant to the prison industry's and the DOC's general regulatory approach to visitation, the defendant has established a policy that suspends or denies visitation to inmates on the chain gang for 90 days.

2. Constitutionality of Denial of Visitation

In ***Turner v. Safley, supra***, the Supreme Court set forth the appropriate standard of review for challenges to prison regulations, including those that allegedly impinge upon First Amendment rights, and concluded that a regulation should be left intact "if it is reasonably related to legitimate penological interests". ***Turner, supra***, 482 U.S. at 89, 107 S.Ct. at 2254. Writing for the majority, Justice O'Connor declared that "such a standard is necessary if 'prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations'." (***quoting Jones v. North Carolina Prisoners' Union,***

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[90]In its comment to the standard, ACA stated: "Inmates should not be denied access to visits with persons of their choice except when the warden/superintendent or designee can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors."

433 U.S. 119, 128, 97 S.Ct. 2532, 2539, 53 L.Ed.2d 629 (1977)).[91]

In an exhaustive review of decisions which considered prisoners' challenges to regulations which impinged First and Fourteenth Amendment interests, the court determined that the development of the jurisprudence had yielded the following four considerations, each of which is an axis for assessing the reasonableness of the restriction: (1) Is there a "valid, rational connection" between the regulation and the justification offered by prison officials? ***Block v. Rutherford***, 468 U.S. 576, 586, 104 S.Ct. 3227, 3232, 82 L.Ed.2d 438 (1984); (2) Are there alternative means of exercising the right that remain open to prison inmates? ***Jones v. North Carolina Prisoners' Union, supra***; (3) What is the impact of accommodation of the asserted constitutional right upon guards and other inmates, and upon the allocation of prison resources generally? [and] (4) Are there easy, alternative means of achieving the penological objective in question? ***See Block v. Rutherford, supra.***

In applying the four-pronged analysis set forth in ***Turner***, however, courts are guided

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[91]The jurisprudence in this area is somewhat unwieldy. On the one hand, the Courts of Appeals in several circuits, including this one, have ruled that "inmates do not have an absolute right to visitation" under the First Amendment. ***Caraballo-Sandoval v. Honsted***, 35 F.3d 521, 525 (11th Cir. 1994). The ***Caraballo-Sandoval*** panel, however, like the Supreme Court in ***Turner***, and countless other appellate panels which have produced ***Turner's*** progeny, have decided First Amendment claims using one or more of the four tests. These rulings typically omit traditional First Amendment analysis and seldom include a specific finding that the challenged regulation does or does not violate the First Amendment. Instead, they determine whether the First Amendment is "implicated" or "burdened". By perpetuating the now-axiomatic principle that there is no absolute right to inmate visitation, and leaving it there, the courts have delayed closure on the important questions of whether inmate visitation is a protected right or an unprotected privilege and whether it - like marriage and news reporting - is subsumed under any of the First Amendment's facial guarantees.

by an over-arching consideration that affects judicial consideration of ***any*** challenge by prisoners to ***any*** aspect of prison life: Prison officials require "broad discretion . . . to maintain orderly and secure institutions". ***Pugh v. Locke, supra***, 406 F.Supp at 328 (***quoting Procunier v. Martinez***, 416 U.S. 396, 404-405, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). "Wide ranging deference must be accorded the decisions of prison administrators. They, and not the courts, must be permitted to make difficult judgments concerning prison operations." ***Newman v. Alabama, supra***, 559 F.2d at 286. While these considerations are more germane in evaluating the appropriateness of the relief accorded to successful prisoners, they collectively act as a fulcrum for directing the course of judicial influence over prison administration.

a. Valid, Rational Connection

The record does not indicate whether Jones, as head of the state's penal system and the originator of the contemporary chain gang in Alabama, established the Alternative Thinking Unit as tools of rehabilitation or as means of insuring security and order. The responses that he gave to plaintiffs' counsel at his deposition indicate that his only objective was to deny a privilege. When asked directly the first time to state the purpose of the restriction, Jones replied, "Because it's a privilege". When asked again, he said merely: "All privileges for the same reason". On counsel's third attempt, Jones said:

> To send a very clear message that as a repeat offender or a

> judicial entry, the prison system is not going to be, for you, an entitlement system, at least for a while . . . No benefits, no privileges. (PX-2, Plaintiff's Corrected Exhibits to their Opposition to Defendants' Motion For Summary Judgment, November, 1995]

The only rationale for the restriction on visitation articulated by Joe Hopper, the current Commissioner, was that denial of visitation eliminates "outside distractions" that impede the process of "instilling self-discipline" among prisoners (TR/867-868).

It is clear that visitation with family and friends distracts an inmate from prison life, but the testimony from two plaintiffs and the expert testimony before this court strongly support the conclusion that such distractions should be welcomed and encouraged. For example, Daniel Green testified that visitation "keeps you from getting in trouble, because that's about the only thing you really have to look forward to in the penitentiary")TR/354). One of plaintiffs' experts, Allen Breed, advised the court that "from the standpoint of mental health and adapting to the program and hoping for good discipline, the last thing in the world you'd do is take away the visitation privilege" (TR/313).[92]

Even if Hopper's belated justification for the restriction were applied solely to the minority of inmates assigned to the chain gang for disciplinary reasons, the integrity of the facially valid rationale is compromised by the fact that the group includes those inmates already housed in disciplinary segregation or administrative segregation units. Their

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[92]This view is supported in the American Correctional Association's standards for visitation. See PX-2.

visitation rights have already been curtailed.[93] Other inmates assigned to the chain gang for a sole rule infraction are most likely to have had a suspension of visitation separately imposed upon them as punishment, in addition to assignment to the chain gang.

The other broad category of chain gang inmates consists of those who are assigned for non-disciplinary reasons, including inmates who are returning to prison as parole violators and inmates who are entering prison for the first time as probation violators. Since inmates on the chain gang do not include high security prisoners or prisoners considered very dangerous (because of the heightened risk of escape), the Alternative Thinking Units are populated mostly by medium custody inmates who are not being punished for violating any DOC rule.

In the absence of a clear statement of the objective for the denial of visitation to inmates on the chain gang in particular, the court looks to the Administrative Regulation promulgated by the DOC which governs visitation in general. (AR 303, DX-2554).

> Visitation . . . may be suspended or revoked because institutional rules governing visitation or correspondence are violated or there is a clear and present danger to institutional security.
>
> If it appears that the institution cannot accommodate the number

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[93]According to Charlie Jones, a warden, prisoners in disciplinary and administrative segregation are locked in their cells for 23 hours a day, 7 days a week (TR/993). They are entitled to one visit a month, and disciplinary segregation inmates cannot receive telephone calls. They have no televisions in their cells and they are allowed only certain magazines in administrative segregation. None of these inmates may participate in institutional programs, such as the GED programs (TR/994).

> of visitors entering the institution the institutional Head may modify or limit visits/visitors.

Three reasons thus appear for denial of visitation: (1) violation of institutional rules governing visitation, (2) clear and present danger to institutional security, and (3) excess visitors entering the institution.

The denial of visitation to chain gang inmates does not appear to have been precipitated by any of the foregoing circumstances. Nor has it been shown to further any of the objectives implied in the regulation. Chain gang inmates are not screened to determine whether they have violated institutional rules governing visitation; they are denied visitation regardless of their previous use of the privilege, and some, as brand new prisoners, have had no opportunity to violate rules. There is no evidence that visitation for chain gang inmates would pose any greater risk to institutional security than visitation for inmates who are not assigned to the unit.[94]

The record admits of no further reasons advanced for denying visitation to inmates on the chain gang. In ***Lynott v. Henderson,*** 610 F.2d 340, 343 (5th Cir. 1980), the Bureau of Prisons policy statement clearly set forth the rationale for restricting visitation to family members by making clear that nonrelatives may visit inmates "if it can be ascertained that

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[94]The DOC is "not punishing the real serious offenders, because the real serious offenders who are maximum security people don't go to this program. So they get visitation. But somebody who is medium or minimum security and violates his parole for some reason, comes back into this particular program and he has his visitation taken away from him." [Testimony of Allen Breed, TR/314]

the association of friendship is a genuinely constructive one and that the offender would profit from such continued contact". ***Id.*** While other cases have considered other rationales or bases for restrictions upon visitation, unless it is obvious,[95] the statement of objectives has always been provided by prison officials themselves. Courts cannot presuppose the legitimacy of an impingement without some affirmation in the record, especially when that same record includes evidence of the incontrovertible benefit of the inmate's activity. ***See Smith v. Coughlin***, 748 F.2d 783, 787 (2nd Cir. 1984); ***Smith v. Beatty***, 82 F.3d 420 (7th Cir. 1996); ***Bellamy v. Bradley***, 729 F.2d 416, 420 (6th Cir. 1984), ***cert. denied***, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984).

A legitimate justification for denying visitation to those defendants can only be strained. Accordingly, the Magistrate Judge finds that the defendant has failed to establish a legitimate penological objective, as required by ***Turner***.

b. Alternative Means of Exercising the Right

Limits on visitation rights "cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison." ***Pell v. Procunier, supra***, 417 U.S. at 823, 94 S.Ct. at 2804. Defendants contend that their provision of stamps and telephone privileges to inmates on the

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[95]Among the most obvious rationales for restrictions on visitations are punishment for rule infractions and bans on contact visitation. ***See Smith v. Beatty, supra; Block v. Rutherford, supra.***

chain gang is an acceptable substitute for in-person visitation during the 90-day period. A review of the evidence, including the opinions articulated by the experts, supports a conclusion that the defendants are also unable to satisfy this prong of the ***Turner*** analysis.

Inmates assigned to the chain gang retain some entitlement to send and receive mail and to communicate with family and friends by telephone. ***Turner*** requires, however, that the alternative means "remain open to prison inmates". ***Turner, supra***, 482 U.S. at 90. The gateways to those alternative means - corresponding by writing and economic means to afford long-distance calls - have not remained open to chain gang inmates, and have never been open to most of them. Two DOC statistical reports concluded that, although 31% of Alabama's inmates have finished high school (or attained an equivalent credential), only 447 of the 20,320 inmates in the prison system read at their education level. Moreover, 17,291 inmates read below their education level, and the average reading level is fifth grade. (See PX-19 and 71).

> [F]rom my review of the cases and knowledge of prisons in general, probably twenty-five or thirty percent of the prisoners are illiterate, so that the ability to write a meaningful letter, if I could use that term, just isn't within them. . . . As far as the telephone is concerned, there are exorbitant charges through collect charges. Collect calls from prisons, a surcharge is put on which brings a sizable profit to the Department of Corrections. Most of these families just can't afford that kind of telephone call. [Testimony of Allen Breed, TR-314]

This Magistrate Judge, assigned to a quarter of the hundreds of prisoner petitions filed in this District each year, is familiar with the laborious, often incomprehensible petitions

submitted by inmates to this court. Moreover, because all such petitions proceed ***in forma pauperis***, the conclusion is inescapable that for Alabama inmates, alternatives to visitation which are fueled by literacy and ability to pay are counterfeit means of maintaining ties to family and deterring recidivism.[96]

c. Impact of Asserted Constitutional Right on Guards, Other Inmates, and on Allocation of Prison Resources Generally

"In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." ***Turner, supra***, 482 U.S. at 90. The accommodation that the plaintiffs seek, however, cannot be viewed as costly to the defendant or as an undue infringement upon the due deference to which prison officials are entitled in administering their institutions.

In challenging the blanket denial of visitation for the seemingly arbitrary period of 90 days,[97] the plaintiffs are requesting the same privileges that other inmates are accorded. In

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[96]The end of this analysis is not the imposition of an obligation upon the DOC to subsidize long-distance calls between inmates and their families or to modify or eliminate the system by which it permits such calls. Payment for long-distance calls is part of the burden imposed upon families by the criminal activity that triggered their loved ones' incarceration. Accordingly, the Magistrate Judge intimates no opinion regarding the validity or appropriateness of the prison system's Inmate Phone System, governed by Administrative Regulation 431 (DX-2553). This Recommendation concludes merely - and narrowly - that as a substitute for in-person visitation for inmates assigned to the chain gang, the procedure falls short.

[97]Every inmate on the chain gang is denied visitation for 90 days, regardless of his security classification, previous disciplinary record, length of time in prison, recidivist status, or the reason

fact, they are requesting (1) the same privileges that they enjoyed ***themselves*** before their assignment to the chain gang, and (2) the same privileges that they will again enjoy when their assignment ends. Moreover, the DOC has developed a rather elaborate and detailed scheme for regulating visitation with inmates, and accommodation of the plaintiffs' asserted constitutional right would not burden the prison system's administration or its personnel.[98]

The defendants have not even contended that the accommodation of the plaintiffs' insistence upon visitation during their service on the chain gang would compromise their resources. The court finds that according visitation to inmates on the chain gang would have no detrimental effect on their fellow inmates or on prison staff and that, under the ***Turner*** analysis, the blanket denial is constitutionally infirm.

d. Ready Alternatives to Denial of Visitation

"[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." ***Turner, supra***, 482 U.S. at 91. In this case, inmates on the chain gang are subject to

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for his placement on the chain gang.

[98]If any burden results from allowing inmates on the chain gang to visit with their families, it will fall upon the families. Inmates are routinely transferred to other institutions for assignment to the chain gang, and they return to their "home institution" when their service ends. Therefore, family members who wanted to visit them during their months-long service on the chain gang would have to alter their visitation patterns, and in many cases travel greater distances.

additional and substantial restrictions on their freedom in several areas. For example, at Limestone, where most of the chain gangs have been housed, an inmate:

- is shackled for periods of up to 10 hours per day while working;
- works outside several miles from the prison;
- is exposed to weather conditions, insects, snakes, and other hazards;
- eats a sack lunch at mid-day, rather than a hot meal (whether or not the inmate is actually working);
- has no toilet facilities for defecating ;
- is strip-searched each day;
- may not purchase items at the prison commissary;
- may not watch television;
- must report to the infirmary for treatment at 3:00 a.m. or not at all;
- is at considerably greater risk of placement on the hitching post; and
- is subject to serving extended time on the chain gang for rule violations.[99]

PX-16.

Given the plethora of restrictions attendant to chain gang status, alternatives to denial of visitation are bountiful. Presumably, all of them are designed to instill the "self-discipline" that the defendant has established as the objective of the Alternative Thinking Unit. In any case, for the purpose of assessing its influence upon inmates, it is difficult to

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[99]As Ralph Hooks, the Limestone warden who wrote that institution's SOP, warns inmates in the Orientation sheet: "If you don't behave you could stay here indefinitely."

see how denial of visitation makes anything other than a cumulative contribution to the restrictive mix. The court therefore concludes that denial of visitation constitutes an exaggerated response to prison concerns.

F. The Due Process Implications of the Hitching Post

The plaintiffs have vigorously contended that defendant's placement of inmates on the hitching post violates their rights to procedural and substantive due process secured by the Fourteenth Amendment and their right to be free from cruel and unusual punishment, secured by the Eighth Amendment to the Constitution.

The hitching post, according to the plaintiffs, is a punishment that is summarily imposed upon inmates who allegedly refuse to work or who commit other rule violations. Because it reflects a substantial departure from ordinary prison life, and because it is a cruel and unusual method of punishing prisoners for misconduct, its imposition without a disciplinary hearing - and its imposition under any circumstance - violates, in plaintiffs' opinion, the Fourteenth Amendment's procedural and substantive due process guarantees.

The defendant abhors summary punishments,[100] but contends that inmates who are placed on the hitching post are not being punished. Rather, the hitching post is used to

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[100]Concerning inmates being placed on the hitching post for indecent exposure, defendant Hopper testified that "We won't be putting anybody on here for masturbating, or for any other reason. Those instances shall be dealt with through a due process hearing. We're not going to have any summary punishment by correctional officers or supervisors" (TR/866).

coerce inmates into returning to work, and its use is at most "an immediately necessary coercive response undertaken to restore or maintain order and discipline". Moreover, the defendant argues, that while the hitching post may be uncomfortable, it does not cause pain, and its use has been upheld by this court and other courts.

1. Procedural Due Process

"[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." ***Jones v. North Carolina Prisoners Labor Union, supra***, 433 U.S. at 125, 97 S.Ct. at 2537 (***quoting Price v. Johnston***, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948)). When those withdrawals of rights or privileges alter the very essence of incarceration, however, it is incumbent upon prison officials to preface the retributive action with the procedural protections set forth in ***Wolff v. McDonnell***, 418 U.S. 539, 94 S.Ct. 963, 41 L.Ed.2d 935 (1974).

Sandin v. Conner, ___ U.S. ___, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), is the Supreme Court's most recent pronouncement on inmates' entitlement to the due process protections articulated in ***Wolff***. The Court in ***Sandin*** departed from traditional analysis of such entitlements and focused due process analysis in the context of prison conditions. Thus, the nature of the deprivation is more determinative than whether the language of a particular statute or regulation is mandatory or permissive. ***See Wolff, supra***; ***Meachum v. Fano,*** 427

U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

The decision in ***Sandin*** makes clear that the Due Process Clause is implicated only when the actions taken against an inmate represent a "dramatic departure" from the ordinary conditions of incarceration. Where the loss suffered by the plaintiff amounts to a grievous loss of a "substantive interest", the protection of the Due Process Clause is invoked.

The threshold inquiry, however, is whether the state has created a liberty interest which is protected by the Due Process Clause. ***Sandin*** recognized that "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an expected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." ***Sandin, supra,*** 115 S.Ct. at 2300 [citations omitted].

By establishing an administrative regulation which requires due process hearings and sets authorized punishment for inmates charged with refusing to work, the state has created a liberty interest for the offending inmate - i.e., to be free from restraint by arbitrary and capricious to the hitching post as further punishment. The DOC's Administrative Regulation 403 (PX-84) identifies "Rule 58: Refusal to work" as a "major rule violation". It further provides that (1) a hearing officer will hear evidence in cases of major violations of departmental administrative regulations for which punishments or sanctions may be imposed; and (2) an inmate charged with a violation of departmental administrative regulations ***must be given*** a due process hearing if the violation can result in the loss of earned good time

and/or confinement to segregation. Finally, it provides that "authorized punishments" for major rule violations are loss of a portion of or all good time, confinement to segregation, and placement on the chain gang. Although inmates other than those on the chain gang are placed on the hitching post, assignment to the chain gang substantially increases the likelihood that an inmate will be placed on the hitching post.[101]

The liberty interest having thus been identified, the remaining inquiry under ***Sandin*** is whether placement on the hitching post "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or is a "dramatic departure" from ordinary prison conditions. ***Sandin***, ***supra***, 115 S.Ct. at 2300, 2306. The petitioner in ***Sandin*** had been placed in disciplinary segregation on one charge of misconduct for 30 days, and four hours in segregation on each of two other charges, to be served concurrent with the 30 days. His punishment was served in a single cell which was similar to those occupied by other inmates, and his punishment did not extend the length of his sentence. The court concluded that due process protections were not implicated by his confinement.

In ***Williams v. Fountain***, 77 F.3d 372, 374 (11th Cir. 1996), the Eleventh Circuit Court of Appeals, citing ***Sandin***, recently found that the sanctions imposed upon a prisoner

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[101]This is true not just because chain gangs work outside where the hitching post is located or that the hitching post is more "convenient" to work squads. Notwithstanding the parties' settlement of the chain gang issue, the inmate testimony and the testimony of DOC officials contained repeated reference to inmate disdain of the practice of chaining inmates together. Increased prisoner disenchantment with the chaingang naturally led to a higher incidence of inmates being shackled to the hitching post.

reflected an atypical and significant hardship "in relation to the ordinary incidents of prison life", thus entitling him to the due process that he had received. His sanctions included 12 months of disciplinary confinement, 45 days of store restriction, and 45 days of incentive privilege restriction. Other courts have also found that actions by prison officials reflected substantial departures from the ordinary incidents of prison life. ***See Washington v. Harper***, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (l990) (prisoner had liberty interest in avoiding administration of psychotropic drugs); ***Vitek v. Jones***, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (a prisoner has a liberty interest in avoiding transfer from his institution to a mental hospital).

The Magistrate Judge has no hesitation in concluding that restraining an inmate to the hitching post so substantially alters an inmate's conditions of confinement and reflects such a substantial departure from ordinary prison life that it must trigger procedural due process guarantees. First, there is no limit to the length of time an inmate may remain on the hitching post. Second, regardless of the defendant's claims to the contrary, the court deems placement on the hitching post as punishment. Third, an inmate's extremely limited range of mobility, exposure to the elements, and exposure to unsanitary conditions for eating and using the toilet are more confining than segregation or solitary. Fourth, although it is not traditional corporal punishment, use of the hitching post results in the knowing and predictable infliction of physical and mental pain, a penalty which is unlike any other prison condition known to this court. Under the DOC's own rules and the holding in ***Sandin***, shackling an inmate to the

hitching post must therefore be preceded by a disciplinary hearing before it can be imposed.

The experience of Alabama inmates shackled to the hitching post departs far more substantially from ordinary prison life than the experiences of the prisoner in ***Ort v. White,*** 813 F.2d 318 (11th Cir. 1987), and in the cases identified above. For that reason, the Magistrate Judge deems any reliance upon ***Ort*** as mistaken.

In ***Ort,*** an Alabama inmate filed suit in this district challenging, as violative of his due process rights, an officer's denial of water to him for his refusal to work on a work squad. The inmate, Anthony Ort, was deprived of water on the work squad until he agreed to resume his duties. He argued that he had a right to be punished only after a disciplinary hearing.

The Eleventh Circuit found that the denial of water to Ort was not violative of his substantive and procedural due process rights, even though the officer did not follow the usual procedures of filing a disciplinary report and conducting a disciplinary hearing before taking the action.[102] The officer was alone in the field supervising the inmate work squad when he was confronted with Ort's conduct. Ort's squad officer testified at an evidentiary hearing that Ort's refusal to carry the water keg and to perform his duties caused problems among other inmates on the squad, some of whom told the officer that if Ort could refuse to work and still drink the water, they would do the same. The court stated that, "[a]lthough the due process clause generally applies to prison disciplinary actions, its protections are not

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[102]The court also found that the Eighth Amendment's proscription against cruel and unusual punishment rights had not been violated.

absolute, and they must be evaluated in the context of the needs and exigencies of the institutional environment." ***Id.*** at 326 (citations omitted). The court noted that the lone officer had to take action to maintain discipline and control until the squad returned to prison.

In contrast to the circumstances in ***Ort***, inmates on the hitching post are most often non-violent and non-disruptive when the decision is made to place them on the hitching post; thus, they pose no immediate physical danger to officers and no threat of violence to their work squads. While it certainly may be necessary to remove them from the squad, the evidence establishes that there are always other officers present or nearby to transport the inmate back to the facility. To be sure, by the time the inmate arrives at the facility, any semblance of exigent circumstances has fully dissipated.[103]

Under ***Sandin,*** the defendant's placement of inmates on the hitching post without a hearing, thus exposing them to a summary and peculiar panorama of deprivations, violates procedural due process.

2. Substantive Due Process

"Prison inmates clearly may claim the protections of the Fourteenth Amendment, and they may not be deprived of life, liberty, or property without due process of law. ***Ort, supra,***

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[103]Many inmates, including Calvin Nix, were in their cells when they were extracted and placed on the hitching post. Warren Leatherwood became ill on the bus, and in spite of his disabled condition, he was placed on the hitching post. Countless other inmates have been placed on the hitching post for the most extreme forms of passivity, including being absent when the work detail departs the facility. See Appendix 1 and 2.

813 F.2d at 326 (***quoting Wolff, supra***, 418 U.S. at 556, 94 S.Ct. at 2974). Even due consideration of the lawful restrictions upon those rights that may be imposed by prison officials leaves intact the court's finding that the challenged practice of placing Alabama inmates on the hitching post for refusal to work and for other rule infractions violates the Eighth Amendment's proscription on cruel and unusual punishment. See discussion, ***infra***. Accordingly, the Magistrate Judge finds that, in the absence of disciplinary hearings, placement of Alabama inmates on the hitching post as punishment for refusal to work or other rule violations, violates the inmates' Fourteenth Amendment's substantive due process protection.

G. The Hitching Post As Cruel And Unusual Punishment

> That's the worst thing I had experienced since I been in prison. . . . they had me chained, hitched up to the hitching rail like I was a dog. And it's just real unsanitary, that they shouldn't have no individual hooked up to the hitching rail like that, not to no ten hours". [Michael Askew, TR/378-379]
>
> [I] felt like a slave at some point. I felt degraded . . . Several times an officer . . . had said that 'If you little niggers didn't keep coming back to prison, you wouldn't have to be put up or go through this' . . . and that made me feel real bad." [Hadji Hicks, TR/638]
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> [T]he irritation from the sun, it caused my face - across my face under my eyes and nose to blister and swell. And the tops of my hands were burnt. . . . . My eyes was burnt so bad, my eyes was almost shut, they were swelled and puffed up and draining, blisters was draining. And it was rough. [Calvin Nix,

It is well-established that conditions of confinement constitute cruel and unusual punishment when the conditions involve or result in "wanton and unnecessary infliction of pain, [or] . . . [are] grossly disproportionate to the severity of the crime warranting imprisonment." ***Rhodes v. Chapman***, 452 U.S. 337, 347, 101 S.Ct. 2393, 69 L. Ed. 2d 59 (1981). ***See also Pugh v. Locke, supra; Whitley v. Albers,*** 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986); ***Hudson v. McMillian***, 503 U.S. 1, 112 S.Ct. 998, 117 L.Ed.2d 156 (1992); and ***Chandler v. Baird***, 926 F.2d 1057 (11th Cir. 1991).

The pertinent inquiry that should be made by any court when faced with challenges to prison practices on Eighth Amendment grounds is this: Does the requested judicial action "supersede the duly constituted state authorities in the performance of vital state functions rather than compelling those authorities to perform those functions in a constitutional manner?" ***Newman v. State of Alabama***, 559 F.2d at 288. Although the court's inquiry was focused on the relief fashioned by this court in ***Pugh v. Locke, supra,***[104] its interrogatory mandate is similarly applicable to a determination of liability.

Judicial review of prison practices has become commonplace since the days when it was "a comparatively new field of the law", ***Newman***, 559 F.2d at 287, but encouragement of judicial restraint in assessing the constitutionality of challenged prison regulations or

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[104]The Pugh court had already acknowledged its duty to accord deference to prison officials in the operation of penal institutions. ***Pugh***, 406 F.Supp. at 318.

operations has persisted as a staple in the now-evolved case law. The Supreme Court has reiterated the requirement of judicial restraint. ***Turner v. Safley***, 482 U.S. at 84-85; ***Hudson v. McMillian***, 503 U.S. at 6,112 S.Ct. at 998. The Magistrate Judge is mindful of these principles and, in recommending that the defendant's use of the hitching post be declared unconstitutional, has sought to take the least-intrusive course toward protection of the plaintiffs' constitutional rights.

1. Standards for Evaluating the Hitching Post

a. Turner v. Safley

A policy is "valid if it is reasonably related to legitimate penological interests." ***Turner v. Safley,*** 482 U.S. at 89. ***See Thornburgh v. Abbott***, 490 U.S. 401, 409-410 (1989). "[S]uch a standard is necessary if prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." ***Jones v. North Carolina Prisoners' Union,*** 433 U.S. at 128.

The court has already articulated the four elements of the ***Turner*** analysis in its evaluation of the plaintiffs' visitation claim. They are equally applicable here:

> First, there must be a "valid rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it.
>
> . . . . . .
>
> Second, the court must consider "whether there are alternative means of exercising the rights that remain open to prison inmates.

> . . . . . .
> A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.
> . . . . . .
> Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

Turner v. Safley, 482 U.S. at 89-91 (citations omitted). Applying these factors to the defendant's use of the hitching post, as reflected in the DOC's Administrative Regulation 429 (PX-12), the Magistrate Judge concludes, initially, that the policy is not reasonably related to a legitimate penological objective.

b. Wilson v. Seiter

Wilson is a "pure" Eighth Amendment case, which does not analyze conditions of confinement in the context of other guarantees arising from the Bill of Rights. The ***Wilson*** court's finding was categorical: The Eighth Amendment, which applies to state action through the Due Process Clause of the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishment" on those convicted of crimes. ***Wilson v. Seiter***, 111 S.Ct. 2321, 2323 (1991). The ***Wilson*** standards are more difficult to satisfy than the ***Turner*** standards:

> First, the prisoner must satisfy the objective component of the test and show that he suffered "unnecessary and wanton infliction of pain" ;[105]

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[105]***Rhodes v. Chapman, supra.***

> Second, under the subjective component of the test, prison officials must be shown to have acted with "the requisite culpable state of mind", which the court has further defined as "deliberate indifference" to the prisoner's needs[106] and or "wantonness".[107]

The defendant's practice is no less egregious under the ***Wilson*** analysis. The plaintiffs' testimony and other evidence in this case, including the valuable assistance rendered the court by the expert witnesses, leave little doubt that the defendant's use of the hitching post deprives the plaintiffs of the "minimal civilized measure of life's necessities", that the plaintiffs have suffered and will continue to suffer "unnecessary and wanton infliction of pain" and that the officials who are responsible for their placement on the hitching post do so with an intent to cause pain and suffering. The hitching post practices in use in Alabama's prisons are thus cruel and unusual punishment by any other name.

2. Turner Analysis: Legitimate Penological Objective

a. Valid, Rational Connection

Borrowing from the Eleventh Circuit's description of the practice challenged in ***Ort v. White, supra***, the defendants have defined the hitching post as "a means by which to

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[106]***See Estelle v. Gamble***, 429 U.S. 97, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). "It is only such indifference" that can violate the Eighth Amendment; allegations of inadvertent failure or negligence fail to establish the requisite culbable state of mind. Estelle did not require an "express intent to inflict unnecessary pain". 429 U.S. at 97. Wilson made clear that the deliberate indifference standard applies regardless of whether the challenged treatment of the prison is medical, dietary, religious, or otherwise. ***Wilson***, 501 U.S. at 303.

[107]***See Whitley v. Albers, supra.***

coerce a recalcitrant inmate into compliance with institutional rules, specifically the requirement that the inmate work". [See Defendant's Post-Trial Brief, Doc. # 365] The defendant is disingenuous in his attempt to mask as an incentive a practice so obviously punitive. The Magistrate Judge finds that the practice is a punishment which follows an officer's determination that an inmate has already violated Rule 54 (refusal to work) or other prison regulations, it is used only after offending behavior has occurred and only by reference to offending behavior.

As the court has already stated, Commissioner Hopper was not very helpful to the court in identifying a valid rational connection between placement on the hitching post and the stated objective of instilling self-discipline. The reasons for his and the court's struggle to infuse the practice with fundamental reason is simple: The use of the hitching post is arbitrary and capricious, loyal to no governing principles, and fraught with abuse. Even the defendant himself said that "[s]ome of the things listed [on the regulation] are not even refusals to work, [such as] refusal to walk in a prescribed manner, refusal to carry a tool, these are not refusals to work" (TR/866).

The best evidence of the caprice with which inmates were restrained and kept on the hitching post is the documentation provided by of the numerous incident reports, activity logs, and behavior citations admitted into evidence. They are summarized on charts in Appendix 1: Behavioral Citations And Incident Reports/Hitching Post, and Appendix 2: Summary of Events Which Trigger Placement On Hitching Post. A review of the summaries

reveals the following:

1. Inmates were not always placed on the hitching post when they were accused of refusing to work;[108]

2. Inmates were placed on the hitching post for reasons other than refusal to work, including fighting, indecent exposure, and failing to check out;[109]

3. Officers sometimes infer that inmates are refusing to work, including those occasions when the inmate reports an illness;

4. Inmates who were late for work were placed on the hitching post, regardless of whether they expressed an unwillingness to work;

5. Some inmates placed on the hitching post received formal disciplinary action (pursuant to AR 403), some received informal action, some received a behavioral citation, and some received no disciplinary action at all;[110]

6. There were no rules and there is no pattern governing the issuance of any of the actions in

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[108][I]t's incumbent upon the supervisors to ensure that when they observe a regulation being violated, to correct the situation immediately and keep it on track. And in some cases that does not appear to have been done in the state of Alabama." (Testimony of Joe Hopper, TR/865)

[109]The Activity log which is used for monitoring inmates on the hitching post permits the officer completing it to indicate why the inmate is on the hitching post. That it has a category labeled "Other" is the first sign that its use is inconsistent with AR 429 (which purportedly limits the use of the hitching post persons who refuse to work). A more serious problem is presented, however, by the Commissioner's admission that he did not know what "other" meant.

[110]Hopper admitted that it was a violation of AR 429 if an inmate placed on the hitching post was not given a written disciplinary (TR/885).

item 5;

7. Some inmates were placed on the hitching post because of illness or accidents; and

8. Supervisors, line officers, and back gate officers made decisions to place inmates on the hitching post.[111]

Not even an attempt to isolate the defendant's justification by reference to the policy underlying the establishment of the chain gang is instructive. Inasmuch as the hitching post is used so often for inmates assigned to the chain gang, its justification should logically be hoisted upon the justification for the Alternative Thinking Unit itself. The difficulty is that there was none - or none that was articulated by the defendants when the program was initiated. The Magistrate Judge has combed the entire record and can find no rationale upon which Commissioner Jones relied to create a nexus between the contemporary creation of Alabama's chain gang and "the legitimate policies and goals of the corrections system". ***Pell v. Procunier***, 417 U.S. at 822, 94 S.Ct. at 2804.

Any connection between use of the hitching post and the DOC's goal of having inmates perform work in and around the institutions has been made irrational by the arbitrary manner in which the practice has been employed. The court must therefore find that there

[111]The procedure dictated that a supervisor or sergeant make the final decision on whether to place an inmate on the hitching post. (TR/877).

is no valid, rational connection.[112]

b. Alternative Means of Exercising the Right

Inmates have no alternative means of exercising their right to be free of the restraints, pain, and inhumane treatment they experience on the hitching post. The system admits of alternatives, but they do not "remain open to prison inmates", as ***Turner*** requires. An inmate has no choice in whether he is assigned to hitching post; nor does he have a choice whether he receives a hearing before placement on the post.

c. Impact of Asserted Constitutional Right on Guards, Other Inmates, and on Allocation of Prison Resources Generally

The removal of the hitching post from the landscape of the Alabama prison system can only have a beneficent impact on every inmate and most of the corrections officers who work in the system, and it should have a benign impact on the system itself. The court is not unmindful of the defendant's need to use scarce resources in the most efficient manner possible and to protect prison security, a purpose which is "central to all other corrections

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[112]The Magistrate Judge does not suggest that the regulation's stated purpose for use of the hitching post, to encourage inmates to work, is non-legitimate. The Commissioner and all of the experts who testified at the evidentiary hearing believe that any type of work within a correctional setting is very important. "Work provides an outlet and an activity for individuals to go outside and participate in the nice fresh air and not be locked up in a dormitory or a cell all day long" (TR/861). The finding that there is not a rational connection between the hitching post and the single, stated goal of "self-discipline" is based primarily on the arbitrariness with which it is used and the excessiveness of its impact.

goals." ***Pell v. Procunier,*** 417 U.S. at 823. However, the defendant has not persuaded the court that elimination of the hitching post and resort to some other tool of discipline would be costly.

Even if there are measurable costs, the benefits far outweigh the disadvantages. For correctional officers the benefits would include: (1) freedom from the risk of physical injury and retaliation inherent in the use of force to place inmates on the hitching post, (2) freedom from the extra duty and responsibility associated with placing inmates on the post and monitoring them as they remain there, (3) predictable improvement in the "quality of life" in their work environment arising from the elimination of the unpleasant, often unsanitary milieu that is the hitching post, and (4) disassociation from a penal system that creates a perception of inhumanity.[113]

For the prison system, the negative impact would be de minimus. Alabama, according to the experts, is the ***only*** state with a hitching post. Commissioner Hopper agrees, but he countered that the alternative of placing the non-working inmate in single cells would be more expensive (TR/859). Hooks, the warden at Limestone, also testified that there were

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[113]Six months ago, the Sixth Circuit ruled that the governor of the state of Michigan has no power to refuse to extradite a fugitive from the Alabama prison system. In a concurring opinion, one of judges on the panel wrote: "[The fugitive] will be tossed into a prison system that has adopted the barbaric 'discipline' of the chain gang. This perpetuation of injustice cloaked in the tattered cloth of the Alabama justice system is deplorable. . . . In this current climate, . . . already difficult decisions are made more so for sensitive state officials forced to render prisoners, particularly African-American prisoners, back to jurisdictions like Alabama, which appear determined to resurrect harsh and inhumane treatment." ***State of Alabama v. Engler***, 85 F.3d 1205, 1210 (6th Cir. 1996).

not many beds in segregation and that they were "needed for dangerous type inmates" and "not for somebody who is not willing to work" (TR/1014).[114] Assignment of inmates to segregation beds, however, is but one option, and based on the evidence it would not be the option likely applied for most of the inmates who are placed on the hitching post.[115] Moreover, "compliance with constitutional standards may not be frustrated by . . . . failure to provide the necessary funds". ***Newman,*** 559 F.2d at 286.

Hooks also believes that although inmates' privileges could be taken away, that would not work as well as the hitching post. This testimony is not credible - or persuasive, if credible - for several reasons: First, withdrawal of privileges is the most commonly - used punishment in the prison system. Second, the entitlements that the DOC permits prisoners to enjoy, including visitation, are valued by inmates. Third, in defiance of Hooks' hypothesis, reference to the Appendices reveals that the hitching post has many "repeat offenders". Fourth, Alabama's cannot be the only one of America's 50 state prison systems whose inmates are so ornery and difficult to manage that they ***require*** the hitching post to enforce order.

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[114]This statement suggests that Hooks does not regard inmates typically placed on the hitching post as "dangerous", buttressing the notion that the punishment is grossly excessive.

[115]Inmates placed in segregation are generally considered to be dangerous, violent, or found guilty of repeated violations or serious violations directly involving the safety of other inmates or correctional officers. The testimony (and documentation regarding) the plaintiff witnesses and the summaries in Appendices 1 and 2 reflect that most of the inmates assigned to the hitching post are not typical of the inmates assigned to segregation.

d. Ready Alternatives to Placement on the Hitching Post

Mere reference to the DOC's Behavior Citation (See Appendix 2) evinces the almost myriad alternatives available to DOC officials to punish inmates who refuse to work. These alternatives are "ready" in that they are easily accessible, and easy to implement. Prison officers use them every day, and inmates are familiar with them. ***See McCorkle v. Johnson, 881 F.2d 993 (11th Cir. 1988).***

Again, the defendant has provided his own answer. Hopper testified that the Georgia prison system (where he worked for 11 years) handled refusals to work by having due process hearings, placement in segregation or loss of privileges or good time (TR/882). There was no suggestion that these alternatives were not effective.

There is no doubt that the plaintiffs have satisfied this prong of the test, and in so doing, have established a basis for this court's finding that AR 429 does not pass constitutional muster.

3. Wilson Analysis: Minimal Civilized Measure of Life's Necessities

The use of the hitching post is apparently rejected in every state in the United States except Alabama. That fact alone suggests that contemporary standards of decency do not countenance - and certainly do not favor - its use. Further evidence that society is intolerant of the device is found in a letter written to Governor James on 27 March 1995 by Deval L. Patrick, Assistant Attorney General in charge of the Civil Rights Division of the

Justice Department. (See PX-25).

Patrick advised the Governor that, pursuant to an investigation done by his division at the Easterling Correctional Facility, he "found significant constitutional violations in two major areas", one of which was that inmates were being subjected to inappropriate disciplinary practices. Patrick roundly criticized the prison's use of the hitching post, calling it "inappropriate" because it "requires improper use of restraints and corporal punishment":

> While shackled to a security bar, inmates are in an extremely uncomfortable, stationary position, which allows very little movement for extended periods of time. Legal and professional standards mandate that restraints should only be used for medical, emergency or other special conditions. They should never be used as punishment. Practices of this sort cannot be justified no matter how many superficial safeguards.

Patrick recommended the the DOC "[c]ease use of the 'security bar' or any other form of corporal punishment or improper restraint including, but not limited to: shackling inmates to fences, posts, rails, cell bars, or other stationary objects".

The minutes of a DOC wardens' meeting held in November, 1995 addressed the matter as follows:

> In the Justice Department investigation last year, one of the things they complained about was the restraining bar. They suggested that we have some kind of protocol for its use but we feel the Adm Reg we have in place right now covers that need. Just emphasize to your employees that they follow our regulation specifically, and make sure they keep any and all logs they are supposed to and that it is properly applied.

a. Objective Test: Unnecessary and Wanton Infliction of Pain

To be cruel and unusual punishment, "conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety". ***Whitley v. Albers***, 475 U.S. at 319. Defendants have insisted that the hitching post is not a punishment device. Yet, short of death by electrocution, the hitching post may be the most painful and tortuous punishment administered by the Alabama prison system.[116] Almost all of the testimony regarding the infliction of pain inherent in placement on the hitching post, the fact that it was unnecessary, and the fact that it was wanton was undisputed, and the Magistrate Judge has credited all of it.

The attributions at the beginning of this analysis are but an evidentiary pittance of the accounts of the extreme pain, anguish, humiliation, mental suffering, and resulting physical soreness and mental depression that the plaintiffs associate with placement on the hitching post. None of the suffering disclosed by the plaintiffs in their testimony can be remotely justified by their actions which precipitated their placement on the hitching post. The defendants did not produce a single witness who sought to justify the use of the hitching post by reference to the need to protect inmates in danger of physical attack by others, or need to restrain inmates engaged in violent distubances or disruptions of the prison environment. In the absence of physically violent behavior which threatens the safety of officers or other

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[116]Some would argue that it is even more so, given an inmate's average duration of exposure to it (5-6 hours) and the likelihood that the exposure will be repeated.

inmates, it is excessive to shackle a man by his arms and legs to a post for several hours to a hitching post in the heat of the Alabama sun because he announces his refusal to work, sits down at work, or disobeys an officer's direct order to work.

The Magistrate Judge is aware of other decisions which have held that painful punishments do not constitute cruel and unusual punishment. ***See Williams v. Burton***, 943 F.2d 1572 (11th Cir. 1991) (Eighth Amendment was not violated by the gagging and shackling of an inmate to a bunk for 28 hours where the inmate was threatening and attempting to incite violence to others.); ***Ort v. White, supra; Fulford v. King***, 692 F.2d 11 (5th Cir. 1982) (requirement that prisoners wear a "black box" over their handcuffs on trips outside the prison to prevent the handcuffs from being picked did not constitute cruel and unusual punishment); ***Sims v. Mashburn,*** 25 F.3d 980 (11th Cir. 1994) (prisoner kept in cell which had been stripped of his belongings was not subjected to cruel and unusual punishment).

There are factual indicators in this case, however, which compel a finding that the hitching post offends the Eighth Amendment. For example, in ***Rhodes v. Chapman,*** the Supreme Court recognized that some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise. ***Wilson v. Seiter***, 501 U.S. at 304. The immobility assured by the hitching post, when combined with burning, chafing heat is one

such combination of factors. So are the protracted standing and denial of access to toilet facilities. And of course the act of urinating or defecating on oneself, in combination with immobility (and the resulting inability to clean oneself), has the "mutually enforcing effect" about which ***Wilson*** speaks. It is clear that "all prison conditions are [not] a seamless web for Eighth Amendment purposes", ***Wilson, supra***, but the hitching post spews forth a seemingly infinite array of the kinds of deprivations that are proscribed by the Eighth Amendment.[117]

That the punishment inflicted by the hitching post is unnecessary has been amply shown. That it is also routinely wanton is also evident. It is unreasonable to expect that an inmate who stands, unprotected, in temperatures soaring above 90 (as they do for many days at a time in Alabama) to leave the hitching post unscathed by the heat. Thus it is not only possible, it is foreseeable, that inmates on the hitching post will urinate or defecate on themselves (or in an unprotected manner in the immediate vicinity of the hitching post) thereby creating a potentially serious health hazard for everyone in the area. Alabama's correctional officers have become almost immune to the suffering that inmates endure on the hitching post, and, as Calvin Nix' and Hadji Hicks' experiences indicate, these inmates have evolved from objects of derision to objects of sport. The infliction of pain is surely wanton,

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[117]Most of the continuing deprivations found throughout Alabama's statewide prison system in ***Pugh v. Locke, supra***, are now reproduced almost in their entirety in one device. Inmates on the hitching post are deprived of food, water, adequate clothing, shelter, adequate medical treatment, adequate toilet facilities, exercise, shelter, and adequate personal hygiene. Surely the Eighth Amendment proscribes this insidious brand of compact cruelty.

and arguably malicious and sadistic.

Even in the absence of the health hazard created by enforced incontinence and the medical jeopardy implicit in protracted, involuntary exposure to the hot sun or chilling rain, a practice that compels a person to endure those experiences - for whatever reason - is anathema to "minimal civilized measures of life's necessities".

b. Deliberate Indifference

Analysis of the circumstances like those surrounding the placement of Tony Fountain, Warren Leatherwood, Calvin Nix, and John Spellman on the hitching post leaves little doubt that the prison officials involved were deliberately indifferent to their suffering - and perhaps even determined to cause it. In many instances, inmates, like Leatherwood and Fountain, were placed on the hitching post following their report of illness. [See Appendix 2]. "[F]or prison officials knowingly to compel convicts to perform physical labor which is beyond their strength, or which constitutes a danger to their lives or health, or which is unduly painful constitutes an infliction of cruel and unusual punishment . . ". ***Jackson v. Bishop***, 268 F.Supp 804, 815 (E.D. Ark. 1967).

The evidence is equally persuasive that the hitching post itself, used in the manner intended by AR 429, practically ***enforces*** deliberate indifference to an inmate's needs. Realistically, for example, it is not logical to expect a person to use the bathroom on a schedule, and it is not reasonable to expect a lone back gate officer to remove inmates from

the hitching post (especially when there are several men on the post at once) as their legitimate needs arise. Nor is it reasonable to expect that an inmate who stands, unprotected, in temperatures soaring above 90 (as they do for many days at a time in Alabama) to leave the hitching post unscathed by the heat. Thus it is not only possible, it is foreseeable, that inmates on the hitching post will urinate or defecate on themselves (or in an unprotected manner in the immediate vicinity of the hitching post) thereby creating a potentially serious health hazard for everyone in the area.

The court will not impose the higher burden upon the plaintiffs of demonstrating that Alabama prison officials have acted "maliciously and sadistically for the very purpose of causing harm", the state-of-mind standard enunciated in ***Whitley v. Albers***, 475 U.S. at 320-321. That test is reserved for those occasions when actions are taken "in haste [and] under pressure", and is not applicable here. There is a paucity of evidence in the record that placement of inmates on the hitching post routinely or even frequently occurs in an atmosphere of violence or under circumstances that can be characterized as emergency situations. [See Appendices 1 and 2]. In fact, Hopper readily admitted that it was not an emergency "when an inmate refuses to report to work" (TR/886), although it could be an emergency when an inmate on the work site stops working. He added, however:

> If they're in a Segregation cell, I can't fathom removing an individual from a secure Segregation cell to take them outside and put them on a restraining bar. I just can't fathom that

happening, and I don't see the reason for it." (TR/887)[118]

The court shares the Commissioner's quandary, but regrettably for the plaintiffs, the explanation must follow the evidence: That with deliberate indifference for the health, safety, and indeed the lives of inmates, prison officials have knowingly subjected them to all of the hazards of the hitching posts, then observed as they suffered pain, humiliation, and injuries as a result. Their indifference is offensive to the Eighth Amendment, and their use of the hitching post - called barbaric by several of the plaintiffs' experts - should end.

[118]On numerous occasions, inmates who has passively announced their refusal to work were forcibly extracted from their cells on the inside of the prison and taken to the hitching post on the outside, i.e., removed from an ultra-secure environment to a far less secure one. Such actions defy defendant's implied that the policy underlying the DOC's use of the hitching post advances the goals of institutional security and safety.

IV. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that:

a. the defendants' 13 November 1995 motion for summary judgment - addressing solely the chain gang claims - be DENIED as moot;

b. the defendant's 17 May 1996 motion for summary judgment - addressing the chain gang, toilet facilities, visitation, and hitching post claims - be DENIED as moot on the claims of maintainance of a chain gang and provision of toilet facilities to inmate work squads, and DENIED on the visitation and hitching post claims; and

c. defendant James' motion to dismiss be GRANTED.

It is the further RECOMMENDATION of the Magistrate Judge that the court enter a final order finding and ordering that:

a. this action is certified as a class action consisting of the two classes of inmates defined herein;

b. the parties' proposed settlements of the following claims are approved: the plaintiffs' challenge to the defendant's practice of chaining inmates together and the denial of adequate toilet facilities to inmates on the chain gang work squads;

c. judgment is entered for the plaintiffs and against the defendants on the use by the Alabama Department of Corrections of a hitching post and the processes related thereto and declaring that the practices violate the plaintiffs' rights secured by the Due Process

Clauses of the Fifth and Fourteenth Amendments, and that they constitute cruel and unusual punishment, prohibited by the Eighth Amendment;

d. judgment is entered for the plaintiffs and against defendants on the denial of visitation rights to Alabama inmates assigned to the chain gang, and declaring that the said denial constitutes an unreasonable impingement upon the plaintiff's rights secured by the First Amendment to the Constitution;

e. the defendant is permanently enjoined from denying visitation to inmates assigned to the chain gang solely because of their assignment;

f. the defendant is permanently enjoined from maintaining and using the hitching post as a restraining device for inmates;

g. as prevailing parties, the plaintiffs are entitled to reasonable attorney fees and costs pursuant to 42 U.S.C. §1988, and should be granted a reasonable time within which to file their petition for fees, together with evidentiary support thereof;[119] and

h. the costs of this proceeding are taxed against the defendants.

Done this 28th day of January, 1997.

VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE JUDGE

[119]In their Joint Stipulation, filed on 19 June 1996, the plaintiffs waived their right to seek attorney fees and costs associated with their challenge to the practice of chaining inmates together. They did not waive attorney fees and costs related to their pursuit of other claims.

CIVIL ACTION NO. 95-T-637-N

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 30 days from the date of mailing. Any objections filed must specifically identify the objectionable findings in the Magistrate Judge's Recommendation. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a ***de novo*** determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. ***Nettles v. Wainwright***, 677 F.2d 404 (5th Cir. 1982). ***See Stein v. Reynolds Securities, Inc.***, 667 F.2d 33 (11th Cir. 1982). ***See also Bonner v. City of Prichard***. 661 F.2d 1206 (11th cir. 1981, ***en banc***), adopting as binding precedent all of the decisions of the former Fifth Circuit promulgated prior to the close of business on 30 September 1981.

DONE this 28th day of January, 1997.

VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX 1

SUMMARY OF BEHAVIORAL CITATIONS AND INCIDENT REPORTS/ HITCHING POST

Michael A. Austin v. Fob James, Jr., 95-T-637-N

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 9	Warren Leatherwood & Albert Moore	CO1	Argument/Cell	Limestone	6-1-95	N/A	Peace agreement
DX 31	Toby Davis & Frederick Gooden	Lt.	Refusing to work; failure to check out for work/ Does not indicate where inmates were-- they failed to report to Gate #3	Limestone	6-6-95	12 hrs. ea.	Rule violation #54
DX 33	Larry Hope	Captain	Insubordination, creating security, safety or health hazard/ Day room	Limestone	6-6-95	N/A	Rule violation #62 & #57
DX 60	Bentley Jones	Sgt.	Failure to obey (use of force)/ I-65	Limestone	6-16-95	N/A	Rule violation #56
DX 91	Jared Brasch	Sgt.	Refusal to work/ Gate #3	Limestone	8-11-95	1 hr.	Rule violation #54
DX 93	Orlando Watkins	Lt.	Inmate illness/ I-65	Limestone	8-15-95	N/A	N/A
DX 94	Phillip McClendon	COI	Inmate illness/ I-65	Limestone	8-15-95	N/A	N/A
DX 168	George Griffin	COI	Refusal to work/ Road behind security-4	Limestone	10-26-95	3 hrs. 45 min.	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 185	George Griffin	COII	Refusal to work/ Stump filed behind Warden's house	Limestone	11-14-95	4 hrs. 15 min.	N/A
DX 238	Malcolm Lanier	COII	Alleged inmate injury/ chain gang rock pile	Limestone	1-10-96	N/A	N/A
DX 289	Malcolm Lanier, Roderick Craig, Bobby Wallace & Kevin Nolan	COI	Fighting without a weapon; failure to obey a direct order/ Farm road beside tool shed	Limestone	3-13-96	Craig & Wallace placed on the hitching post for 1 hr.	Craig & Lanier received disciplinaries for rule violation #34; Nolan & Wallace received disciplinaries for rule violation #56
DX 357	Adam Brown	COI	Refusal to work/ I-65	Staton	8-30-95	No indication of length of time	Rule violation #54
DX 365	Marvin Hudson	Sgt.	Refusal to work/ I-65	Staton	9-15-95	2 hrs. 45 min.	Rule violation #54
DX 428	Hadji Hicks, Houston Blackwood, Christopher Kelly, John Bethune & Maurice Patterson	COI	Informational/ Accident/ I-65	Staton	1-12-96	N/A	N/A

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 431	Alex Green, Daniel Burns, Maurice Patterson, Edward Dotson, Hadji Hicks, Tony Montgomery & Marcus Lee	COI	Failure to check out/ Does not indicate where inmates were-- they failed to report to Staton backgate	Staton	1-22-96	N/A	Rule violation #54
DX 432	Anthony Giles	Sgt.	Refusal to work/ I-65	Staton	1-22-96	No indication of length of time	Rule violation # 54
DX 448	Hadji Hicks	COI	Refusal to work/ creating a security hazard/ I-65	Staton	2-6-96	No indication of length of time	Rule violation #54 & #62
DX 453	Tony Montgomery, Edward Dotson & Hadji Hicks	Sgt.	Refusal to work/ Backgate sallyport	Staton	2-7-96	8 hrs. 20 min.	Rule violation #54
DX 454	Michael Martin	Sgt.	Informational/ Alleged Injury/ Cement slab	Staton	2-7-96	No indication of length of time	Rule violation #54
DX 455	Tony Montgomery, Edward Dotson & Hadji Hicks	Sgt.	Refusal to work/ Backgate sallyport	Staton	2-8-96	No indication of length of time	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 458	Gregory Moody, Edward Dotson, Hadji Hicks & Bodie Swan	COI	Failure to check out for work/ Backgate	Staton	2-9-96	N/A	Rule violation #54
DX 476	Michael Hicks, Hadji Hicks & Edward Dotson	COI	Accidental injury/Cement slab	Staton	2-22-96	Does not indicate time	Rule violation #54
DX 477	Anthony Giles	Lt.	Refusal to work/ failure to obey/ use of force/ Backgate	Staton	2-22-96	4 hrs. 50 min.	Rule violation #54
DX 479	Gregory Moody	Lt.	Refusal to work/ Cement slab	Staton	2-22-96	1 hr. 20 min.	Rule violation #54
DX 483	Rodney Hinton	Lt.	Accidental Injury/ Cement slab	Staton	2-27-96	N/A	N/A
DX 485	Christopher Childs	Lt.	Accidental Injury/ Cement slab	Staton	2-27-96	N/A	N/A
DX 489	Geronimo Hill	Sgt.	Accidental Injury/ Cement slab	Staton	2-29-96	N/A	N/A
DX 499	Hadji Hicks	COI	Failure to report to assigned work detail/ Bed #18	Staton	3-6-96	N/A	Rule violation #56

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 500	Hadji Hicks, Toby Davis & Tony Montgomery	Lt.	Refusal to work/ failure to obey a direct order/ use of force/ Backgate sallyport holding pen	Staton	3-11-96	Hicks placed on the post for 30 min.; does not indicate length of time other two were placed on the post	Disciplinary action was taken against all inmates for rule violation #54; disciplinary action was taken against Hicks for rule violation #56
DX 501	Willie Perry	COI	Accidental Injury/ Cement slab	Staton	3-13-96	N/A	N/A
DX 506	Edward Dotson	Sgt.	Refusal to work/ E-Dormitory	Staton	3-21-96	7 hrs. 45 min.	N/A
DX 509	Michael Winborn	Lt.	Refusal to work/ Cement slab	Staton	3-26-96	5 hrs. 15 min.	Disciplinary action was taken for rule violation #54
DX 519	Joshua Oulotta	Lt.	Accidental injury/ Rock pile	Staton	4-11-96	N/A	N/A
DX 520	49 inmates	COII	Failure to obey a direct order/ E-Dormitory	Staton	4-12-96	N/A	Disciplinary action wa taken for rule violation #56
DX 528	Edward Dotson	Sgt.	Refusal to work/ Backgate sallyport holding pen	Staton	4-25-96	5 hrs. 45 min.	Disciplinary action was taken for rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 535	Rodney Hinton & Edward Dotson	Lt.	Refusal to work/ Rock pile	Staton	5-7-96	8 hrs.	N/A
DX 537	Henry Lane	COI	Refusal to work/ I-65	Staton	5-8-96	2 hrs. 10 min.	Disciplinary action was taken for rule violation #54
DX 542	Micheal Thomas	COI	Refusal to work/ Segregation, B-Side, Cell #5	Easterling	7-7-95	Incident report indicates 4 hrs. 15 min.; activity log indicates 8 hrs.	Disciplinary action was taken for rule violation #54
DX 547	Anthony Lane	Sgt.	Refusal to work/ insubordination/ Construction site of the city hall bldg. in Clio, AL	Easterling	8-1-95	7 hrs. 15 min.	Disciplinary action was taken for rule violation #54 & #57
DX 551	Tommy May, Jimmy Hardin, Rex Lemon & Michael Roberson	COI	Being in an unauthorized area/ refusal to work/ Does not indicate where inmates were-- failed to report to backgate	Easterling	8-17-95	1 hr. 15 min.	Disciplinary action was taken for rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 554	Stanley Robinson & Corey Hughes	COI	Being in an unauthorized area/ refusal to work/ Does not indicate where inmates were-- failed to report to backgate	Easterling	8-22-95	Robinson placed on the post for 7 hrs. 30 min.; Hughes placed on the post for 2 hrs. 30 min.	Disciplinary action was taken for refusing to work and being in an unauthorized area
DX 556	John Spellman & Tony Evans	COI	Refusal to work/ Does not indicate where inmates were-- failed to report to backgate	Easterling	8-23-95	Evans placed on the post for 4 hrs. 15 min.; Spellman placed on the post for 5 hrs.	N/A
DX 557	Christopher Robertson & Michael Carter	COI	Refusal to work/ Does not indicate where inmates were	Easterling	8-25-95	45 min.	Disciplinary action was taken for refusing to work and being in an unauthorized area

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 559	Tommy May, Kikkomon Shaw, Arthur Jackson, Woodrow Dillard, Alphonso Walker, Tony Evans, Samuel Moore, Jameel Shadee & Jantzen Christopher	COI	Refusal to work/ Assault on another inmate/ Outside the perimeter fence at the rear of the institution	Easterling	8-28-95	8 hrs.	Disciplinary action was taken for rule violation #54; Jackson also received a disciplinary for rule violation # 31
DX 561	Franklin McCormick	Lt.	Work stoppage/ Segregation unit A-side yard	Easterling	8-30-95	5 hrs. 30 min.	Disciplinary action was taken for rule violation #54
DX 562	Samuel Moore, Alfonzo Walker & Tony Evans	COI	Assault on an inmate/ Gate 39 Segregation	Easterling	8-31-95	N/A	Rule violation #31
DX 566	Ronald Humphrey, James Beachem & Alexander Andrews	COI	Being in an unauthorized area/refusal to work/ Does not indicate where inmates were	Easterling	9-6-95	3 hrs.	Inmates to receive a warning citation b/c first time incident
DX 567	Lester Brown	Lt.	Refusal to work/ Outside backgate	Easterling	9-6-95	4 hrs.	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 569	Eddie Engram, Jr. & Lamar Winston	COI	Fighting/Outside the perimeter fence behind industries bldg.	Easterling	9-11-95	N/A	Rule violation #35 & #62
DX 570	Franklin McCormick	Sgt.	Refusal to work & Failure to obey/ Segregation unit cell #5B18	Easterling	9-12-95	13 hrs.	Rule violation #54 & #56
DX 572	Chad Griffith & Andy Franklin	COI	Refusal to work/ Does not indicate where inmates were-- failed to report to backgate	Easterling	9-12-95	3 hrs.	Rule violation #54
DX 577	Robert Goodwin, Anthony Collins & Dwight Davis	COI	Refusal to work/ Being in an unauthorized area/ Does not indicate where inmates were-- failed to report to backgate	Easterling	9-13-95	25 min.	Rule violation #54 & for being in unauthorized area
DX 578	Jimmy Dixon	COI	Illness/ Work detail south of institution	Easterling	9-14-95	N/A	N/A
DX 579	Charles McIntosh	COI	Refusal to work/ kitchen	Easterling	9-14-95	2 hrs.	Rule violation #54
DX 582	Charles Jackson, Gregory Law & Horace Jackson	COI	Refusal to work/ Does not indicate where inmates were-- failed to report to backgate	Easterling	9-15-95	2 hrs. 45 min.	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 583	Allen Brazzie, Herbert Lane, Morris Welch, Bobby Monogan & Bruce Wilson	COI	Refusal to work/ being in an unauthorized area/ Does not indicate where inmates were-- failed to report to backgate	Easterling	9-18-95	2 hrs. 45 min.	Rule violation #54 & # 50
DX 587	John Spellman	Sgt.	Refusal to work/ Backgate	Easterling	9-22-95	3 hrs. 40 min.	Rule violation #54
DX 589	Harold Scott	Sgt.	Refusal to work/ Dining Hall	Easterling	9-22-95	45 min.	Rule violation #54
DX 590	Claude Harris	COI	Illness/ Perimeter road	Easterling	9-25-95	N/A	N/A
DX 591	Jim McDonald	COI	Illness/ Perimeter road	Easterling	9-25-95	N/A	N/A
DX 594	Jeremy Logel & Harold Kizziah	COI	Refusal to work/ Does not indicate where inmates were-- failed to report to backgate	Easterling	9-27-95	4 hrs. 15 min.	Rule violation #54 & for being in an unauthorized area
DX 595	John Spellman	COI	Hunger strike/ Segregation unit cell A-5	Easterling	9-27-95	N/A	N/A
DX 596	Hubert Davis, James Henderson, Tony Evans, Samuel Moore, Daron Fayson, James Browder, Billy Pittman & Ralph Farmer	COI	Possession of Contraband/ Threats/ Insubordination/ Assault on a person associated with DOC/ Failure to obey a direct order/ Backgate sallyport	Easterling	9-28-95	Moore & Evans were placed on the post for 10 hrs.	Davis & Henderson received disciplinaries for rule violation #64; Evans for rule violation #44; Moore for rule violation ##57, 29 & 56

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 603	Christopher Carlton	COI	Being in an unauthorized area/ Refusal to work/ Yard in front of Dormitory 8	Easterling	10-13-95	5 hrs.	Rule violation #54 and #50
DX 604	Devis Lamar Coleman	COI	Being in an unauthorized area/ Refusal to work/ Yard in front of Dormitory 8	Easterling	10-13-95	5 hrs.	Rule violation #54 and #50
DX 605	Ralph Rice	COI	Being in an unauthorized area/ Refusal to work/ Cell	Easterling	10-16-95	28 min.	Rule violation #54 and #50
DX 616	Eddie Player & Timmie Minniefield	Lt.	Threats/Refusal to work/Being in an unauthorized area/Use of force/ Dormitory 7 B side	Easterling	11-9-95	45 min.	Rule violation #50, #54 & #44; Player was placed in admin. segregation
DX 617	Samuel Moore	Lt.	Illness/ Radio tower	Easterling	11-9-95	N/A	N/A
DX 619	Kervin Goodwin	Lt.	Refusal to work/ Radio tower	Easterling	11-9-95	N/A	Rule violation #54
DX 620	Kenneth Weaver	Lt.	Insubordination/Refusal to work/ East side of institution by radio tower	Easterling	11-14-95	9 hrs. 30 min.	Rule violation #54
DX 621	Steven Simon	COI	Refusal to work/ East side of institution by radio tower	Easterling	11-14-95	8 hrs. 30 min.	Rule violation #54
DX 623	Larry Powe, Alonzo Robinson & Timmie Minniefield	COI	Refusal to work/Does not indicate where inmates were--failed to report to the backgate	Easterling	11-20-95	2 hrs. 30 min.	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 625	Kervin Goodwin	COI	Refusal to work/ Segregation B	Easterling	11-29-95	6 hrs. 15 min.	Rule violation #54 & #56
DX 627	Kervin Goodwin	Sgt.	Refusal to work/failure to obey a direct order/ Outside fence behind Dormitory 10	Easterling	11-30-95	2 hrs. 15 min.	Rule violation #54 & #56
DX 628	Michael Austin	COI	Refusal to work/Insubordination/ Kitchen	Easterling	12-4-95	N/A b/c of inclement weather	Rule violation #54 & #57
DX 632	Kervin Goodwin	COI	Refusal to work/ Outside perimeter fence, rear of institution	Easterling	12-13-95	4 hrs. 30 min.	Rule violation #54
DX 635	Michael Austin	COI	Refusal to work/ Kitchen	Easterling	12-24-95	N/A	Escorted to segregation lobby; Rule violation #54
DX 637	Christopher Edward, Sylvester Law, John Loyd, James Christian & Willie Carthon	COI	Refusal to work/ Dormitories	Easterling	1-26-96	2 hrs. 45 min.	N/A
DX 644	Alfred Wiley	COI	Refusal to work/ Backgate	Easterling	2-27-96	11 hrs.	Rule violation #54
DX 651	Rodrell Mobley	COI	Refusal to work/ Kitchen	Easterling	3-4-96	1 hr. 45 min.	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 659	Vonnell Lewis	Sgt.	Refusal to work/Disobeying a direct order/Use of force/ Segregation Dormitory 5B-25	Easterling	3-12-96	9 hrs. 10 min.	Rule violation #54 & 56
DX 662	Benson Smith & Christopher Smith	COI	Refusal to work/Does not indicate where inmates were--failed to report to backgate	Easterling	3-13-96	4 hrs.	Rule violation #54
DX 664	Vonnell Lewis	COI	Refusal to work/Use of force/ Segregation unit A-side Cell #2	Easterling	3-14-96	8 hrs. 45 min.	Rule violation #54
DX 674	William Kevin Turrentine	Lt.	Refusal to work/ Dormitory 9 B-side	Easterling	3-27-96	1 hr. 15 min. b/c of rain	Rule violation #54
DX 682	Benson Smith, Christopher Smith & Tony Kelly	COI	Refusal to work/ Does not indicate where inmates where-failed to report to backgate	Easterling	4-1-96	Smith & Kelly, 5 hrs. 25 min.; Christopher Smith, 7 hrs. 25 min.	Rule violation #54
DX 684	Leon Collins & Charles Phillips	COI	Refusal to work/ Dormitory 9 A-side	Easterling	4-3-96	5 hrs. 45 min.	Rule violation #54
DX 685	Labarron Hill	COI	Refusal to work/Use of force/ Does not indicate where inmate was--he was escorted to backgate for not reporting	Easterling	4-3-96	6 hrs.	Rule violation #54
DX 686	Vonnell Lewis	COI	Refusal to work/ Backgate	Easterling	4-3-96	6 hrs. 15 min.	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 698	Reginald White	COI	Refusal to work/ Perimeter road	Easterling	4-17-96	4hrs.	Rule violation #54
DX 705	Vonnell Lewis	COI	Refusal to work/ Does not indicate where inmate was--he was escorted to backgate for not reporting	Easterling	4-26-96	4 hrs. 45 min. b/c inclement weather	N/A
DX 706	Vonnell Lewis	COI	Refusal to work/ Backgate	Easterling	4-29-96	8 hrs. 23 min.	N/A
DX 710	Reginald White	Lt.	Refusal to work/Outside fence by tool shed	Easterling	5-2-96	9 hrs. 15 min.	Rule violation #54
DX 723	Jimmy Hardin & Jeffery Lynn	COI	Refusal to work/ Perimeter road behind Dormitory 7	Easterling	5-15-96	3 hrs. 45 min.	N/A
DX 728	David Bowles	COI	Refusal to work/ Circle road	Draper	5-2-95	6 hrs. 15 min.	Rule violation #54
DX 733	Richard Vanderslice	COI	Refusal to work/ Backgate	Draper	5-18-95	3 hrs. 15 min.	Found guilty of violation of rule #54/H.O. recommended loss of visiting & store privileges for 14 days & 14 days extra duty
DX 734	Sonja Underwood	COI	Refusal to work/ Backgate	Draper	5-25-95	8 hrs. 15 min.	Found guilty of violation of rule #54/H.O. recommended 45 days disciplinary segregation

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 737	Gerald Ware	Lt.	Refusal to work/Behind milk plant	Draper	7-5-95	2 hrs. 15 min.	H.O. recommended that Ware be found not guilty b/c he should have been stopped up until X-rays were done
DX 744	Brian Smith	Lt.	Refusal to work/Ditch behind cemetery	Draper	7-27-95	4 hrs. 30 min.	H.O. recommended 21 days segregation & loss of all privileges, store, phone & visitation
DX 746	Anthony Moss	Sgt.	Refusal to work/Ditch behind cemetery	Draper	7-31-95	7 hrs.	H.O. recommended 21 days segregation & loss of all privileges (store, phone & visitation)
DX 748	Michael Askew	COI	Refusal to work/Tool wagon at the backgate	Draper	8-1-95	5 hrs. 15 min.	H.O. recommended Askew be found not guilty b/c he had a medical stop up not to lift in excess of 10 lbs.
DX 751	Albert Albritton	COI	Refusal to work/Backgate	Draper	8-15-95	3 hrs. 30 min.	Rule violation #54
DX 753	Robert Little & Stacey Baker	Sgt.	Refusal to work/Backgate	Draper	8-16-95	4 hrs. 15 min.	Rule violation #54
DX 756	Byron Cooks	Lt.	Refusal to work/Tool area outside backgate	Draper	8-25-95	8 hrs. 20 min.	Rule violation #54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 760	Marvin Dupree	Sgt.	Accidental injury/Ditch behind cemetery	Draper	9-5-95	N/A	N/A
DX 764	Mark Doster	Sgt.	Injury/Ditch on Peachtree Rd.	Draper	9-13-95	N/A	N/A
DX 766	Mark Lee	COI	Refusal to work/Ditch on Peachtree Rd.	Draper	9-14-95	2 hrs. 26 min.	Rule violation #54
DX 772	Brian Smith & Mark Doster	COI	Refusal to work/Ditch on Peachtree Rd.	Draper	9-20-95	2 hrs. 45 min.	Rule violation #54
DX 779	Mark Doster & Brian Smith	COI	Threats/Backgate	Draper	9-25-95	12 hrs.	Rule violation #44
DX 782	Duntay Caldwell	COI	Refusal to work/Pivot Rd.	Draper	10-11-95	6 hrs. 30 min.	Rule violation #54
DX 784	Miguel Wright, Antonio Jackson, Steven Williams & Alton Surles	COI	Refusal to work/Rd. to Elmore Correctional Center, pass Staton's canning plant	Draper	10-13-95	Williams & Surles, 7 hrs.; Wright & Jackson, 7 hrs. 15 min.	Rule violation #54
DX 797	Benjamin Snell	COI	Refusal to work/Tool area outside backgate	Draper	12-1-95	7 hrs. 15 min.	Rule violation #54
DX 798	Samuel Lanier	COI	Refusal to work/Ditch on Pivot Rd.	Draper	12-14-95	6 hrs. 30 min.	Rule violation #54
DX 806	John Hines	Sgt.	Refusal to work/Circle Rd.	Draper	2-29-96	2 hrs. 15 min.	Rule violation #54
DX 810	Lorenzo Nunley	COI	Inmate illness/Peachtree Rd.	Draper	4-2-96	N/A	N/A
DX 812	Alfonso Gibson	COI	Refusal to work/Peachtree Rd.	Draper	4-4-96	7 hrs. 10 min.	Rule violation # 54

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 813	Daniel Burns	COI	Refusal to work/Backgate	Draper	4-9-96	4 hrs.	Rule violation ## 54 & 56
DX 830	Nevis Jennings, Calvin Nix, James Nicholson & Daniel Carter	COI	Use of Force/Hallway at receiving door	Holman	3-25-96	N/A	N/A
DX 1046	Larry Hope	COII	Intentionally creating a security, safety or health hazard	Limestone	6-6-95	N/A	H.O. rec. additonal 30 days on chain gang, loss of 17 days of good time, removal from class II & placement in class IV for not less than 90 days
DX 1081	Carl Acklin	COII	Late for work detail (1st offense)/Dorm 16 Gate 3	Limestone	8-16-95	N/A	Counseling/warning
DX 1082	Daron Ambus	Sgt.	Missing work detail (1st offense)/ Dorm 16 Gate 3	Limestone	8-23-95	N/A	Counseling/warning
DX 1084	Michael Anderson	Sgt.	Failure to check out for work (1st offense)/ Dorm 16 Gate 3	Limestone	11-15-95	N/A	Counseling/warning
DX 1085	Austin Nicholas	Sgt.	Missing work detail (1st offense)/Dorm16 Gate 3	Limestone	8-11-95	N/A	Counseling/warning
DX 1088	Cedric Averhart	Sgt.	Late for work detail (1st offense)/Dorm 16 Gate 3	Limestone	8-15-95	N/A	Counseling/warning
DX 1089	Henry Bailey	Sgt.	Late for work detail (1st offense)/Dorm 16 Gate 3	Limestone	8-24-95	N/A	Counseling/warning

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1092	James Bailey	Sgt.	Late for check out (1st offense)/ Dorm 16 Gate 3	Limestone	9-19-95	N/A	Counseling/warning
DX 1093	Orlando Beasley	Sgt.	Late for work detail (1st offense)	Limestone	8-14-95	N/A	Counseling/warning
DX 1094	Darryle Bettis	Sgt.	Missing work detail (1st offense)/Dorm 16 Gate 3	Limestone	8-14-95	N/A	Counseling/warning
DX 1095	Cameron Bonner	COII	Late for assigned duties (1st offense)/?	Limestone	7-28-95	N/A	Warning
DX 1152	Americain Felder	COII	Failure to report for checkout/ Dorm 16 Gate 3	Limestone	4-4-96	N/A	H.O. recommended extra duty for 30 days, 3 hrs./day, 2nd shift
DX 1153	Bernard Finley	Sgt.	Late for checkout (1st offense)/ Dorm 16 Gate 3	Limestone	8-29-95	N/A	Counseling/warning
DX 1154	Steve Foreman	Sgt.	Failure to check out for work (1st offense)/ Dorm 16 Gate 3	Limestone	8-30-95	N/A	Counseling/warning
DX 1155	James Foster	Sgt.	Failure to report for check out (1st offense)/Dorm 16 Gate 3	Limestone	9-26-95	N/A	Loss of telephone for . days
DX 1156	Lateef Friend	Sgt.	Late for check out (1st offense)/ Dorm 16 Gate 3	Limestone	10-17-95	N/A	Counseling/warning
DX 1157	Randall Holloway	Sgt.	Failure to report for check out (1st offense)/ Dorm 16 Gate 3	Limestone	10-31-95	N/A	Counseling/warning
DX 1158	Larry Gardner	Sgt.	Failure to report for check out (1st offense)/Dorm 16 Gate 3	Limestone	10-31-95	N/A	Counseling/warning

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1159	Randy Gibson	Sgt.	Late for check out (1st offense)/ Dorm 16 Gate 3	Limestone	9-19-95	N/A	Counseling/warning
DX 1160	Tommy Gilbert	COI	Failure to report for check out (second offense)/Dorm 16 Gate 3	Limestone	9-1-95	N/A	Extra duty for 14 days at 1 hr./day under 2nd shift
DX 1161	Tommy Gilbert	COI	Late for work detail (1st offense)/Dorm16 Gate 3	Limestone	8-31-95	N/A	Counseling/warning
DX 1162	Tommy Gilbert	Sgt.	Late for check out (3rd offense)/Dorm 16 Gate 3	Limestone	9-19-95	N/A	Remain on chain gang for an additional 10 days
DX 1163	Christopher Givins	Sgt.	Refusal to work/Failure to check out/ Encouraging others to stop work/Gate 3	Limestone	9-5-95	N/A	15 days loss of canteen, telephone, extra duty and 10 additional days on the chain gang
DX 1164	Fredrick Gooden	COI	Refusal to work/Failure to check out/ Gate 3	Limestone	6-6-95	?	H.O. rec. 21 days admin. seg., 30 days loss of store & visitation, 30 days extra duty 1st shift 2 hrs./day, classif. review for custody increase from medium to closed & remain Class IV for not less than 6 mos.
DX 1165	James Greenwood	Sgt.	Missed work detail (1st offense)/Dorm 16 Gate # 3	Limestone	8-23-95	N/A	Counseling/warning

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1166	Michael Gregory	Sgt.	Failure to check out (1st offense)/Dorm 16 Gate # 3	Limestone	11-16-95	N/A	Counseling/warning
DX 1167	Enoch Griffin	Sgt.	Missed work detail (1st offense)/ Dorm 16 Gate # 3	Limestone	8-11-95	N/A	Counseling/warning
DX 1168	George Griffin	COI	Refusal to work/Road behind Security 4	Limestone	10-26-95	?	H.O. rec. 30 days disc seg., 30 days extra on chain gang & remain current CIT status
DX 1169	James Griffin	Sgt.	Failure to check out (1st offense)/ Dorm 16 Gate # 3	Limestone	11-16-95	N/A	?
DX 1170	Steven Gulledge	Sgt.	Missed work detail (2nd offense)/Dorm 16 Gate # 3	Limestone	8-28-95	N/A	Loss of telephone for 15 days & 15 days extra duty at 2 hrs./day of 2nd shift
DX 1171	Steven Gulledge	COII	Late for assigned duties	Limestone	7-11-95	N/A	Warning
DX 1172	Michael Hanson	Sgt.	Refusal to work/Failure to check out/Encouraging or causing others to stop work/ Dorm 16 Gate # 3	Limestone	9-5-95	?	H.O. rec. 90 additiona' days on chain gang, 3u days loss of telephone, loss of 8 mos. of good time & placement in class IV for 3 mos.
DX 1173	Johnny Harpe	COI	Failure to show up for check out/ Dorm 16 Gate # 3	Limestone	9-1-95	N/A	Counseling/warning

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1174	Orlondray Hasberry	Sgt.	Failure to check out (1st offense)/Dorm 16 Gate # 3	Limestone	11-16-95	N/A	Counseling/warning
DX 1175	Dantrell Haynes	Sgt.	Missed work detail (1st offense)/Dorm 16 Gate # 3	Limestone	8-3-95	N/A	Counseling/warning
DX 1176	Dantrell Haynes	Sgt.	Late for check out (1st offense)/Dorm 16 Gate # 3	Limestone	9-19-95	N/A	Counseling/warning
DX 1177	Scott Henkins	COII	Refusal to work/Failure to check out/Encouraging or causing others to stop work/ Dorm 16 Gate # 3	Limestone	9-5-95	?	H.O. rec. 90 additional days on chain gang, 30 days loss of telephone & placement in class IV for 3 mos.
DX 1178	Jeffery Hensley	COI	Failure to report to check out (1st offense)/ Dorm 16 Gate 3	Limestone	9-1-95	N/A	Counseling/warning
DX 1179	Marco Hill	COI	Late for work detail (1st offense)/Dorm 16 Gate 3	Limestone	8-16-95	N/A	Counseling/warning
DX 1180	Marco Hill	Sgt.	Late for check out (2nd offense)/Dorm 16 Gate # 3	Limestone	10-17-95	N/A	Loss of telephone for 1[illegible] days, extra duty for 15 days at 1 hr./day of 2nd shift, removal from incentive program & no packages
DX 1181	Raymond Hill	Sgt.	Failure to check out (1st offense)/Dorm 16 Gate # 3	Limestone	8-30-95	N/A	Counseling/warning

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1182	Gary Hines	COI	Refusal to work/Dorm 16 Cubicle	Limestone	1-10-96	N/A	Loss of telephone & canteen for 15 days
DX 1183	Gary Hines	COI	Refusal to work/Failure to check out/Encouraging or causing others to stop work (1st offense)/Gate # 3	Limestone	12-1-95	N/A	Counseling/warning
DX 1184	Daniel Hoggle	Sgt.	Failure to report for check out (1st offense)/Dorm 16 Gate # 3	Limestone	9-19-95	N/A	Counseling/warning
DX 1185	Daniel Hoggle	Sgt.	Failure to report for work detail (1st offense)/Dorm 16 Gate # 3	Limestone	10-2-95	N/A	Counseling/warning
DX 1186	Harold Hollis	Sgt.	Failure to check out (1st offense)/Dorm 16 Gate # 3	Limestone	8-29-95	N/A	Counseling/warning
DX 1187	Charles Hubbard	Sgt.	Late for check out (1st offense)/ Dorm 16 Gate # 3	Limestone	10-17-95	N/A	Counseling/warning
DX 1188	Ronald Hudgins	COII	Refusal to work/Failure to check out/Encouraging or causing others to stop work	Limestone	9-5-95	?	H.O. rec. 90 additional days on chain gang, 30 days loss of telephone & placement in class IV for 3 mos.

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1189	Harold Ivey	COI	Late for check out (3rd offense)/Dorm 16 Gate # 3	Limestone	8-25-95	N/A	Loss of telephone for 15 days, extra dut for 15 days at 2 hrs./day on 2nd shift & remain on chain gang for additional 30 days
DX 1190	Harold Ivey	COI	Failure to report for check out/Dorm 16 Gate 3	Limestone	8-16-95	N/A	Loss of telephone for 15 days & extra duty for 15 days at 2 hrs./day on 2nd shift
DX 1191	Harold Ivey	Sgt.	Missed work detail/Dorm 16 Gate # 3	Limestone	8-7-95	N/A	Extra duty for 10 days at 2 hrs./day on 2nd shift
DX 1587	Hadji Hicks	COI	Failure to obey a direct order/ E Dorm Bay #1 Bed # 18	Staton	3-6-96	N/A	Counseling/warning, loss of telephone, canteen & visitation for 30 days, extra duty for 30 days at 2 hrs./day on 2nd shift & assignment to chain g[illegible] for up to 15 days
DX 1588	Hadji Hicks	COII	Failure to obey a direct order/ Backgate Sallyport holding pen	Staton	3-11-96	?	Loss of telephone, canteen & visitation for 30 days

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1655	Hadji Hicks	COI	Would not keep up with the squad/ I-65	Staton	2-6-96	N/A	Loss of telephone for 15 days, extra duty for 15 days at 2 hrs./day under 2nd shift, removal from incentive program & assignment to chain gang for up to 15 days
DX 1702	Anthony Giles	COI	Refusal to work/ I-65	Staton	1-22-96	N/A	Counseling/warning, loss of telephone for 30 days, extra duty for 15 days at 2 hrs./day under 2nd shift & assignment to chain gang for up to 15 days
DX 1703	Anthony Giles	Lt.	Refused to accept a tool/Force used to place him on the post/backgate	Staton	2-22-96	?	Assignment to chain gang for up to 15 days
DX 1705	Hadji Hicks	COII	Refusal to work/backgate	Staton	3-11-96	?	H.O. rec. 45 days disc. seg., loss of telphone, store & visitation for 30 days, referal to classification for custody review & institutional transfer

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1706	Hadji Hicks	COI	Refusal to work/ I-65	Staton	2-6-96	N/A	Loss of canteen for 15 days & assignment to chain gang for up to 15 days
DX 1707	Hadji Hicks	COI	Failure to check out/backgate	Staton	1-22-96	N/A	Assignment to chain gang for up to 15 days
DX 1708	Hadji Hicks	COI	Refusal to work/backgate sallyport	Staton	2-7-96	?	Loss of telephone for 30 days, referral to classification for custody review & assignment to chain gang for up to 15 days
DX 1709	Hadji Hicks	COI	Refusal to work/backgate sallyport	Staton	2-8-96	?	Loss of canteen for 30 days, referral to classification for custody review & assignment to chain gang for up to 15 days
DX 1710	Hadji Hicks	COI	Failure to check out/backgate	Staton	2-9-96	N/A	Loss of telephone & canteen for 30 days & assignment to chain gang for up to 15 days
DX 1711 is a copy of DX 1710							

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1712 is a copy of DX 1706							
DX 1813	Alfonzo Walker	COI	Assault on inmate John Spellman/ Gate 39 seg.	Easterling	8-31-95	N/A	Not processed b/c arresting officer could not identify inmate
DX 1816	Kervin Goodwin	COI	Assault on person associated w/ DOC/backgate sallyport	Easterling	2-8-96	N/A	H.O. rec. 6 mos. chain gang & 60 days seg.
DX 1822	Kervin Goodwin	COI	Failure to obey direct order/ Seg. Unit, Dorm # 5, Cell B-14	Easterling	11-15-95	N/A	H.O. rec. 45 days seg. & 45 days chain gang
DX 1823	Kervin Goodwin	COI	Failure to obey direct order/ Seg., B side	Easterling	11-29-95	N/A	H.O. rec. 21 days seg. & 21 days chain gang
DX 1824	Kervin Goodwin	COI	Failure to obey direct order/ outside fence behind 10 dorm	Easterling	11-30-95	N/A	H.O. rec. 21 days seg. & 21 days chain gang/ warden disapproved
DX 1848	Kervin Goodwin	COI	Insubordination/ Backgate sallyport	Easterling	2-8-96	N/A	H.O. rec. 6 mos. chain gang & 60 days seg.
DX 1872	Tony Evans	COI	Refusal to work/outside perimeter fence, rear of facility	Easterling	8-28-95	N/A	H.O. rec. 21 days disc. seg.

Doc. #	Inmates Involved	Officer Level	Reason/Location	Facility	Date	Approx. Time On Hitching Post	Subsequent Discipline
DX 1873	Kervin Goodwin	COI	Refusal to work	Easterling	11-30-95	N/A	H.O. rec. 21 days disc. seg. & 21 days chain gang
DX 1874	Kervin Goodwin	COI	Refusal to work	Easterling	12-13-95	N/A	H.O. rec. 45 days chain gang
DX 1875	Kervin Goodwin	COI	Refusal to work/North side of institution by radio tower	Easterling	11-9-95	N/A	H.O. rec. 45 days dis. seg. & chain gang
DX 1876	Kervin Goodwin	COI	Refusal to work/Seg. B side	Easterling	11-29-95	N/A	H.O. rec. 45 days disc. seg. & 45 days chain gang

?= Document does not indicate

H.O.= Hearing Officer

dis.= Disciplinary

seg.=Segregation

Rule violation #29=Disciplinary action pending for assault on a person associated with DOC

Rule violation #34=Disciplinary action pending for fighting without a weapon

Rule violation #44=Disciplinary action pending for making threats

Rule violation #50=Disciplinary action pending for being in an unauthorized area

Rule violation #54 = Disciplinary action pending for refusal to work

Rule violation #56 = Disciplinary action pending for disobeying a direct order

Rule violation #57=Disciplinary action pending for insubordination

Rule violation #62=Disciplinary action pending for intentionally creating a security, safety or health hazard

Rule violation #64=Disciplinary action pending for possession of contraband

APPENDIX 2

SUMMARY OF EVENTS WHICH TRIGGER PLACEMENT ON HITCHING POST

Michael A. Austin v. Fob James, Jr., 95-T-637-N

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 9	No					√ (inmate fight)
DX 31	Yes		√ (failed to report for check out)		√	
DX 33	No					√ (insubordinate)
DX 60	No		√ (wanted water & became loud)		√ (but refused to get on knees so leg chains could be removed)	
DX 91	Yes		√ (said he had signed up for sick call)		√	
DX 93	No					√ (illness)
DX 94	No					√ (illness)
DX 168			√ (said he had a stop up)		√	
DX 185	Yes	√ (said he refused to work & to place him on the bar)			√	
DX 238	No					√ (illness)
DX 289	Yes		√ (inmates fighting)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 357	Yes	√ (said he had a headache due to surgery, then said he was finished & would not work anymore)			√	
DX 365	Yes	√ (said he was not going to do any work)			√	
DX 431	Yes		√ (failed to check out)		√	
DX 432	Yes	√ (said he was not going to work & he was not moving)		√ (refused to move & threw blade down)		
DX 448	Yes	√ (said he was not going to work)		√ (threw his tool down & refused to move w/ squad)		
DX 453	Yes	√ (refused to check out)			√	
DX 454	Yes		√ (said he hurt his groin)		√	
DX 455	Yes		√ (failed to check out)		√	
DX 458	No		√ (failed to check out)		√	
DX 476	Yes	√ (said they were not working any more)			√	
DX 477	Yes		√ (refused tool)	√ (refused tool)		
DX 479	Yes	√ (refused to go to work)			√	
DX 483	No					√ (injury)

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 484	No					√ (injury)
DX 485	No					√ (injury)
DX 489	No					√ (injury)
DX 499	No		√ (asleep;failed to report to work)		√	
DX 500	Yes	√ (refused to work)			√	
DX 501	No					√ (injury)
DX 506	Yes	√ (failed to check out but then said he was not going to work)			√	
DX 509	Yes		√(refused to get a shovel)	√ (refused to get a shovel)		
DX 519	No					√ (injury)
DX 528	Yes	√ (failed to check out but then said he was not going to work)			√	
DX 535	Yes	√ (quit work & refused to go back)			√	
DX 537	Yes	√ (said he was finished for the day)			√	
DX 542	Yes		√ (refused to exit his cell)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 547	Yes	√ (said he would not go back to work)		√ (pulled off his nail sack & laid his hammer down)		
DX 551	Yes		√ (not present for check out)		√	
DX 554	Yes		√ (not present for role call)		√	
DX 556	Yes	√ (refused to check out)			√	
DX 557	Yes		√ (in an unauthorized area)		√	
DX 559	Yes	√ (demanded a water break & refused to continue working)		√ (demanded a water break & refused to continue working)		
DX 561	Yes	√ (said he was not going to work)		√ (refused to have leg irons placed on him)		
DX 562	No					√ (inmate assault)
DX 566	Yes		√ (not present at roll call)		√	
DX 567	Yes		√ (refused to pick up bush ax)	√ (refused to pick up bush ax)		
DX 569	No					√ (fight)

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 570	Yes	√ (refused to check out of their cells)		√ (physically resisted leaving cells)		
DX 572	Yes		√ (not present at roll call)		√	
DX 577	Yes		√ (not present at roll call)		√	
DX 578	No					√ (illness)
DX 579	Yes	√ (refused to work in kitchen)			√	
DX 582	Yes		√ (not present for roll call)		√	
DX 583	Yes		√ (not present for roll call)		√	
DX 587	Yes	√ (stated he refused to check out & work)			√	
DX 589	Yes		√ (stated he did not know how to make biscuits)		√	
DX 590	No					√ (illness)
DX 594	Yes		√ (not present for roll call)		√	
DX 595	No					√ (inmate had not eaten for 4 days)
DX 596	Yes		√ (assault on DOC officer)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 603	Yes		√ (not present for roll call)		√	
DX 604	Yes		√ (not present for roll call)		√	
DX 605	Yes		√ (not present for roll call b/c he overslept)		√	
DX 616	Yes	√ (said they were not going to the backgate for roll call & check out)			√	
DX 617	No					√ (accident)
DX 619	No	√ (said he was not going to work)		√ (refused to pick up his hoe)		
DX 620	Yes	√ (said he was not going to work)			√	
DX 621	Yes	√ (said he was not going to work)			√	
DX 623	Yes		√ (not present at roll call)		√	
DX 625	Yes	√ (said he did not want to be in the middle of chain, then said put me on the rail, I refuse to work)			√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 627	Yes	√ (said if he could not use the restroom, he was not going to work anymore)		√ (threw his hoe down & sat down)		
DX 628	No	√ (said he was not going to clean pots & pans)			√	
DX 632	Yes	√ (said he was not working & put him on rail)		√ (threw down his hoe)		
DX 635	No	√ (said he was not going to clean pots & pans)			√	
DX 637	Yes		√ (not present for check out)		√	
DX 644	Yes	√ (refused to check out)			√	
DX 651	Yes	√ (refused to clean pots & pan)			√	
DX 659	Yes		√ (refused to back toward cell door for handcuffing)		√	
DX 662	Yes		√ (not present for roll call)		√	
DX 664	Yes		√ (refused to back toward cell door for handcuffing)	√ (refused to back toward cell door for handcuffing)		

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 674	Yes	√ (said he was not going to work & take him to the bar)			√	
DX 682	Yes		√ (missed check out)		√	
DX 684	Yes	√ (found sitting on their beds & refused to work when given direct order)			√	
DX 685	Yes		√ (did not report to work)		√	
DX 686	Yes	√ (refused to check out)			√	
DX 698	Yes	√ (said he was shutting down & not going any further)			√	
DX 706	Yes	√ (refused to check out)			√	
DX 710	Yes	√ (said he was not going to work)		√ (refused to pick up hoe & said place him on the bar)		
DX 723	Yes	√ (said "I refuse to work....")			√	
DX 728	Yes	√ (said "Call the truck I'm not going to do any more work")			√	
DX 733	Yes		√ (refused to go out of the backgate)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 734	Yes	√ (refused to work)			√	
DX 737	Yes	√ (refused to work b/c of shoulder pain)			√	
DX 744	Yes		√ (refused to work)	√ (sat down)		
DX 746	Yes	√ (said "I'm not moving, call the truck")		√ (sat down)		
DX 748	Yes	√ (said he had a stop up & was not doing any work)		√ (refused to get a hoe)		
DX 751	Yes		√ (refused to check out b/c he had a medical problem)		√	
DX 753	Yes		√ (sat down)		√	
DX 756	Yes	√ (said "I'm not going to work")		√ (refused to get a tool)		
DX 760	No					√ (injury)
DX 764	No					√ (injury)
DX 766	Yes		√ (sat down & refused to work)	√ (sat down)		
DX 772	Yes		√ (sat down & refused to work)	√ (sat down)		

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 779	Already on the post					√ (threatened an officer while on the post)
DX 782	Yes		√ (sat down & refused to work)	√ (sat down & threw his hoe)		
DX 784	Yes		√ (sat down, said leg irons were too tight and was not walking anymore)	√ (sat down)		
DX 797	Yes		√ (refused to get a tool)	√ (refused to get a tool)		
DX 798	Yes	√ (said "I'm not going to work")		√ (threw down his tool & cursed)		
DX 806	Yes		√ (said "If I can't get a light, I'm not moving)	√ (refused to move)		
DX 810	No					√ (illness)
DX 812	Yes		√ (sat down & refused to move)	√ (sat down & refused to move)		
DX 813	Yes	√ (said he was not doing any work)		√ (refused to come out of inside holding unit; resisted being pulled out)		

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 830	No					√ (refused to have leg irons placed on them)
DX 1046	DR	√ (shouted to others to buck & not go to work on chain gang)		*	*	
DX 1081	BC		√ (late for work detail)		√	
DX 1082	BC		√ (missed work detail)		√	
DX 1084	BC		√ (failed to check out)		√	
DX 1085	BC		√ (missed work detail)		√	
DX 1088	BC		√ (late for work detail)		√	
DX 1089	BC		√ (late for work detail)		√	
DX 1092	BC		√ (late for check out)		√	
DX 1093	BC		√ (late for work detail)		√	
DX 1094	BC		√ (missed work detail)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 1095	IC		√ (late for assigned duties)		√	
DX 1152	DR		√ (failed to check out)		√	
DX 1153	BC		√ (late for check out)		√	
DX 1154	BC		√ (failed to check out)		√	
DX 1155	BC		√ (failed to check out)		√	
DX 1156	BC		√ (late for check out)		√	
DX 1157	BC		√ (failed to check out)		√	
DX 1158	BC		√ (failed to check out)		√	
DX 1159	BC		√ (late for check out)		√	
DX 1160	BC		√ (failed to check out)		√	
DX 1161	BC		√ (late for check out)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 1162	BC		√ (late for check out)		√	
DX 1163	BC		√ (refused to check out)	*	*	
DX 1164	DR/ Yes		√ (failed to check out; said "I've got too much time to mess w/ this chain gang. I will not get down on my knees for any man to put chains on me.")		√	
DX 1165	BC		√ (missed work detail)		√	
DX 1166	BC		√ (failed to check out)		√	
DX 1167	BC		√ (missed work detail)		√	
DX 1168	DR/ Yes	√ (said "Put me on the rail, I am not going to work")		√ (sat on a bucket)		
DX 1169	BC		√ (failed to check out)		√	
DX 1170	BC		√ (missed work detail)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 1171	IC		√ (late for assigned duties)		√	
DX 1172	DR/ Yes	√ (said he was refusing to work)			√	
DX 1173	BC		√ (failed to check out)		√	
DX 1174	BC		√ (failed to check out)		√	
DX 1175	BC		√ (missed work detail)		√	
DX 1176	BC		√ (late for check out)		√	
DX 1177	DR/ Yes	√ (said he was refusing to work)			√	
DX 1178	BC		√ (failed to check out)		√	
DX 1179	BC		√ (late for work detail)		√	
DX 1180	BC		√ (late for check out)		√	
DX 1181	BC		√ (failed to check out)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 1182	BC	*	*	*	*	
DX 1183	BC	*	*	*	*	
DX 1184	BC		√ (failed to check out)		√	
DX 1185	BC		√ (failed to report for work detail)		√	
DX 1186	BC		√ (failed to check out)		√	
DX 1187	BC		√ (late for check out)		√	
DX 1188	DR/ Yes	√ (stated he was refusing to work)			√	
DX 1189	BC		√ (late for check out)		√	
DX 1190	BC		√ (failed to check out)		√	
DX 1191	BC		√ (missed work detail)		√	
DX 1587	BC		√ (failed to report to assigned extra duty)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 1588	BC/ Yes					√ (failed to exit holding pen to be placed on post)
DX 1655	BC		√ (would not keep up with the squad)		√	
DX 1702	BC	√ (said he was not going to work)		√ (refused to move to job site)		
DX 1703	BC/ Yes		√ (refused to accept a tool & go to his assigned area)	√ (refused to accept a tool & go to his assigned area)		
DX 1705	DR/ Yes	√ (said he was not going to work)			√	
DX 1706	BC	√ (said he was not going to work & put him on the post)			√	
DX 1707	BC		√ (failed to check out)		√	
DX 1708	BC	√ (said he was not going to work)			√	
DX 1709	BC/ Yes	√ (said he was not going to work)			√	
DX 1710	BC		√ (failed to check out)		√	

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 1711	BC		√ (failed to check out)		√	
DX 1712	BC	√ (said he was not going to work)			√	
DX 1813	DR					√ (assault)
DX 1816	DR					√ (assault on an officer)
DX 1822	DR					√ (refused to give officer razor blade when requested)
DX 1823	DR					√ (refused to come up so leg chains could be placed on him)
DX 1824	DR					√ (refused to pick up hoe & resume work)
DX 1848	DR					√ (called officer a name)
DX 1872	DR	*	*	*	*	
DX 1873	DR		√ (threw down his hoe & sat down)	√ (threw down his hoe & sat down)		

Doc. #	Placement On The Hitching Post	Explicit Refusal To Work	Implicit Refusal To Work	Active Refusal To Work	Passive Refusal To Work	Not A Work Situation
DX 1874	DR	√ (threw his hoe down & said "I am not working, send me to the rail")		√ (threw down his hoe)		
DX 1875	DR	*	*	*	*	
DX 1876	DR		√ (said "I'm not going on the chain, put me on the rail")		√	

DR= disciplinary report, which, unless specified otherwise, does not typically provide this information

BC= behavioral citation, which, unless specified otherwise, does not typically provide this information

IC=institutional citation which, unless specified otherwise, does not typically provide this information

*=document does not indicate the nature of the work refusal but merely states "refusal to work"