93-5305

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN - 3 1994
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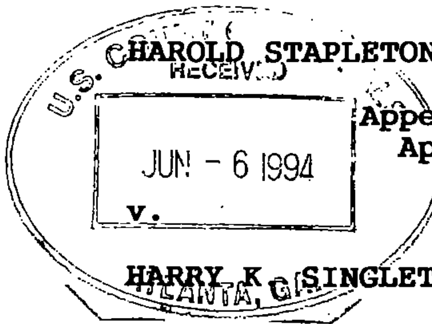

HAROLD STAPLETON, et al.,

Appellants/Cross-
Appellees,

v.

CASE NO. 93-5305

HARRY K. SINGLETARY, JR.,

Appellee/Cross-
Appellant.

ANSWER BRIEF/INITIAL BRIEF OF CROSS-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER 88-14178-CIV-PAINE

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Stapleton, et al. v. Singletary

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and Rules 26.1-2 and 28-2(b), Rules of Court for the Eleventh Circuit, counsel for Appellee/Cross-Appellant, Harry K. Singletary, Jr., certifies that the following individuals and corporations have or may have an interest in the outcome of this case:

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3. Kevin Baker

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    Senior United States District Court Judge

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STATEMENT REGARDING ORAL ARGUMENT

Secretary Singletary feels oral argument in this case would be helpful due to the extensive factual record and the inmates' characterizations and inferences from it.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES - INMATES' APPEAL

(1) Whether Secretary Singletary's cessation of illegal conduct of his predecessor and Singletary's implementation of overlapping internal compliance monitoring mechanisms was sufficient to warrant the District Court's determination that omnibus injunctive relief and Court imposed compliance mechanisms were not justified? Subsumed within this issue are two questions: (1) whether the District Court applied the correct burden of proof and (2) whether the District Court erred in declining to grant declaratory and injunctive relief designed to monitor Singletary's practices, policies and procedures to prevent him from implementing the practices, policies and procedures of his predecessor?

(2) Whether the District Court's finding that protective management inmates and general population inmates earn comparable amounts of gaintime is clearly erroneous?

STATEMENT OF THE ISSUES - THE SECRETARY'S CROSS-APPEAL

Whether the District Court erred, in class action suit challenging policy, pattern, practice and custom of Defendant, by entering injunction to remedy claims under the Eighth and Fourteenth Amendments to require removal of "bullet hole" window screening at the FSP and window shields at the Martin Correctional Institution and prohibiting use of animated videotapes as religious services at Marion, Polk and Union Correctional Institutions when:

(A) the bullet hole screening at FSP was on 10 of PM's 97 cells; was installed because it was the material available; allowed sight, light and ventilation; the windows could be opened or closed upon request; and inmates were freely assigned to other protective management cells;

(B) the window shields at Martin were previously installed in an existing new building before it was temporarily dedicated for use for PM inmates; PM inmates were to be removed from the building; inmates were removed prior to injunction; the building was newly constructed with forced air ventilation; and the shields were opaque and were approximately 13 inches from the face of the window; and

(C) the use of animation and videos as religious services was unknown to Singletary until trial; was not causally linked to him; and was condemned by him at trial.

STATEMENT OF THE CASE

1. Course of the Proceedings Below: By Complaint filed September 30, 1988, against the previous Secretary of the Florida Department of Corrections ("FDOC"), Richard Dugger, and previous Superintendents of three correctional institutions, Plaintiffs alleged those Defendants' policy, pattern, practice and custom violated Plaintiffs' rights under the Eighth and Fourteenth Amendments because punitive conditions were imposed in protective confinement ("PC").

Twenty-six months after the suit was filed, and after Harry Singletary was authorized to change the system by the Secretary, R-13-949, R-14-1118, the Department announced, in

response to this litigation, in November, 1990, that it was repealing PC and implementing protective management ("PM"). R-2-65. Following status conference in November, 1990, and commencement of implementation of the new PM rule, 33-3.0082, F.A.C., Dugger filed a Motion for Summary Judgment based on the PM rule and invited Plaintiffs' counsel and their expert on a two-day State sponsored tour, by airplane, of the PM designated facilities. R-11-571-7. The Motion was later withdrawn.

A 22 month informal monitoring interval followed the tour and the case was tried December, 1992. During that interval, a system of compliance mechanisms, including direct access of Plaintiffs' counsel to the Assistant Secretary was utilized to monitor PM. R-17-1698.

Trial was December, 1992, and January, 1993, by testimony of 14 inmates, 8 experts, 5 Department administrators, and (new) Secretary Harry Singletary. Several hundred documents, including statistic compilations, were presented.

The trial court's 72 page Findings of Fact and Conclusions of Law, R-6-212, discussed witness' testimony on gaintime, jobs, parole, religion, law library, academic and self-betterment programs, recreation and exercise, visitation, hobby craft, windows, canteen, cell restrictions and harassment. Injunction was issued on use of videos as religious activity, a topic not mentioned in the Pretrial Stipulation, R-4-129) and window shields and screens. <u>None of those findings are expressly identified and challenged in the inmates' appeal brief.</u> Defendant moved for rehearing/clarification, R-7-226, which

Motion was denied, R-7-229. This appeal and cross-appeal followed, R-7-238, 240. Defendant conceded Plaintiffs' prevailing party status, through June 30, 1992, and settlement of fees claims was reached, with stay of the remainder of the fees claim. R-1st Supp.-248, 249.

2. Statement of Facts:

A. Appellants' Fact Statement Revisited: Myriad assertions in Appellants' Statement of Facts are inferences not supported by Appellants' record references, are out of context, or are contradicted by record references. In several instances their text is mere argument. The most blatant examples of these discrepancies are presented in Singletary's June 1, 1994, Motion to Strike. Many of these "facts" are reiterated as Appellants' argument in other portions of their brief.

B. The Secretary's Statement of Facts: FDOC began to implement PM on November 17, 1990, and promulgated regulations at 33-3.0081 and 33-3.0082, F.A.C. FDOC consolidated its PM (previously called PC) to 10 facilities - Florida State Prison, Union, Martin, Broward (female - for long term PM), Hendry, Marion, Okaloosa, Polk,[1] Tomoka and Florida Correctional Institution (female - for short term PM). Each PM facility operates with a schedule of out-of-cell activities. Notice of the available activities was provided to PM inmates. For those inmates seeking admission to PM, the regulations incorporate a review process at the institutional and regional level, with a right to file a grievance to the central office. FDOC's Inmate

[1]Polk was designated long term in October, 1992. R-13-1052.

Grievance Procedure has, pursuant to Part 40 of Title 28, C.F.R., been certified by the United States Department of Justice. (Joint Status Report, R-4-113.)

FDOC is a $1 billion agency and has 48,000 inmates in 46 major institutions. It is divided into five regions with each having a regional director who answers to the Assistant Secretary. Each has a PM unit in it. R-13-969, 970. Central Office is divided into an Office of Programs, headed by Assistant Secretary Wilson Bell, and an Office of Operations, headed by Assistant Secretary Ron Jones. The Office of the Inspector General has authority to initiate investigations without the knowledge or approval of the Secretary. Inspectors are in each of the five regional offices. FDOC has 22,000 authorized positions. Because of lack of funding, it maintained approximately 900 vacant positions, many of which were correctional officers. The "critical complement" of staff at each institution is a base line which must be filled to operate the institution. Because of budget constraints, most institutions were running at critical complement at time of trial. The Florida Legislature did not fund additional positions or programs or PM. R-13-953, 967, 972, 974, 975. FDOC requested funding for PM, and because of lack of funding, money was "taken out of our hide" from existing resources for PM. R-13-958. Failure to obtain funds for programs in June 1992 caused severe cutback of CESA education opportunities for all inmates, the adverse consequences of which were just being remedied the month before trial. R-13-967; R-15-1388, 1398, 1399; R-16-1420, 1425.

In 1992, the average inmate served 31.5% of sentence. To maintain legal capacity, there were early releases. Inmates who were control release eligible served approximately 23% of sentence. The few control release eligible inmates were those meeting the criteria at Florida Statute §947.146(4), which excluded inmates with certain offenses. R-13-971. "The budget is balanced...by letting inmates out of the system." During the 1991-92 fiscal year, the FDOC budget was reduced by $47 million and the Department was unable to open two new prisons because funds for staff were not available. R-13-972. The Department held 240 positions vacant. R-13-974. The Department runs off "lapse" which requires it to operate at less than critical complement on occasion. R-13-974, 975; Def. Ex. 20.

Singletary was appointed Secretary by the newly elected Governor Lawton Chiles in Spring, 1991. Prior to that time, he was Assistant Secretary for Operations where he reported to the Deputy Secretary and the Secretary. R-13-875, 876, 947, 948. He was then authorized to make recommendations concerning PC, but control rested in his superiors. R-13-948; R-14-1223. After this suit focused attention on PC and after the deficiencies were recognized by Secretary Dugger, Singletary was, in Fall, 1990, given authority to change PC. R-13-949; R-14-1118, 1119. Prior to that time, institution superintendents had discretion how to operate their facilities under the PC rules. R-13-949, 950. After Singletary was placed in control, Ron Jones was assigned compliance responsibilities for Central Office review and monitoring and to ensure that the PM rule was implemented across the system. R-13-950.

Singletary implemented a system of safeguards. He designated his Assistant Secretary responsible for compliance; involved the five regional directors in oversight; had the Department grievance process certified by the Department of Justice; and initiated a computerized management information system (MIS) and crisis information system (CIS). R-13-979. Inmates and others speaking on their behalf play a role in that grievance system. "That is one of the thermostats to set to adjust our system that there are problems and we react to those." R-13-980.

Singletary renewed the American Correctional Association accreditation process. R-13-982. He implemented "diversity training" to train staff to be sensitive to staff and inmates. R-13-982, 983.

There are three levels of review of the grievance process, the informal grievance at the institutional level, the formal grievance review with the institutional administration and review with the Office of Inmate Grievance at the Central Office of the Secretary. R-5-177; Pl. Ex. 1417, p. 6. The grievance administrator routinely works with the Assistant Secretary overseeing PM. R-13-1065. Two to three percent of grievances concern denials of PM. R-5-177; Ex. 1417, p. 17. The grievance coordinator approves for further investigation and remands back to the institution approximately 20% of the grievances. Ex. 1417, p. 22. The trial court concluded inmates have failed to use the grievance system, that they "rely instead on counsel to grieve directly to the federal court." R-6-212, p. 13. See e.g.

R-8-175; R-8-189; R-9-308; R-9-366; R-9-370; R-10-465; R-10-518; R-11-666; R-12-772; R-12-773; R-12-778; R-12-867. Plaintiffs' expert testified inmates should be required to exhaust grievance mechanism before resorting to the federal court, as a matter of sound public policy and to ensure efficient and effective allocation of resources. R-11-631.

Ten PM institutions were designated short term or long term, the former housing inmates for approximately 60 days or less and the latter for inmates who require long term protection needs, Def. Ex. 28-37. They are diverse in their age, configuration and design. Expert Shuler testified they are operated in a manner that comports with ACA accreditation. R-16-1535, 1536; Def. Ex. 40. With the exception of FSP, Union and Martin, they run at less than full PM capacity. Inmate turnover at the short term facilities is substantial because inmates are either returned to open population or transferred to long term facilities. This turnover impedes both program availability and participation. The goal of the short term facility is to resolve the perceived need for protection. R-14-1121, 1122, 1123; R-17-1653.

At implementation of PM, November, 1990, classification staff interviewed all PC inmates. Some were placed in PM, many were returned to population. At FSP approximately 42 PC inmates on M wing were assigned PM. R-9-294, 295; Stipulation; R-13-956, 957.

PM is the most significant new program affecting a large group of inmates. It was implemented without a new budget

dollar. R-13-975, 976. Every other program in the system was effected by cutbacks and freezes, but PM was "held harmless." R-13-977.

The Correctional Education School Authority (CESA) provides educational, vocational programs for FDOC. The CESA budget was reduced $4 million during the extended 1992 session of the Legislature. This cut was unanticipated. As a consequence a number of education programs were summarily curtailed. Some had yet to recover at time of trial. FDOC used some of its own funds to enable it to resume some CESA education programs. There was a lapse of CESA programs for all inmates throughout the system during Fall, 1992, because of that cut. R-13-967.

In November 1990, the Department implemented its formal PM "gatekeeping function" whereby inmates are evaluated under a formalized criteria. R-17-1688. "The Florida system is about the same as the federal system in regard to its gatekeeping function" but the federal system requires a 90 day wait for transfer. R-11-613, 614, 615, 622, 623. Another expert said one function of gatekeeping is to minimize risk of harm to PM inmates by excluding "wolves" and "predators" from PM, R-11-615, and said it is accepted practice that inmates seeking protection be placed in a spartan situation during which investigation is made to determine if the claim for protection is valid. R-11-536. Gatekeeping is important, all states do it, you have to assess the threat. During this period inmates have restricted access to programs and out of cell activities. Under rare circumstances this period of review may extend for months. R-11-613, 614. "By

not making a full panoply of programs available during this period there is less motivation for inmates to unreasonably seek PC." Pl. Ex. 1237, page 19, ACA report.

It is the practice of the Federal Bureau of Prisons that inmates in gatekeeping may be kept in the same wing with other inmates. R-11-577, 578. The experts agreed it is permissible to mix PM and non-PM if other security exists. R-16-1529; Pl. Ex. 1237, page 3, ACA report. In the "mixed" PM wings at FSP and Martin, non-PM inmates are housed on separate floors, behind locked doors, and in areas where PM inmates are not permitted. Movement of non-PM inmates is accompanied by brief lock down of PM inmates and by escort officers. R-9-231, 234; R-9-326, 327; R-9-337, 361, 362, 363; R-11-575, 576.

The preferred response to a protection claim is transfer to another institution. R-13-952. During January, 1992 through October, 1992, FDOC monthly moved 207 to 306 inmates between institutions to resolve protection needs. Def. Ex. 26; R-13-995, 996. When inmates are moved between institutions, whether as general population or AC, they have no job assignments. When they arrive at a new institution they go through brief orientation after which they are assigned a job. R-13-952.

A goal of a responsible and competent PM system should be to return inmates to general population and not to perpetuate or prolong PM. Pl. Ex. 1237, page 11, ACA report. Plaintiffs' expert agreed this objective is appropriate because of the cost of maintaining PM and the well-being of the inmate. R-11-627, 628.

Proper security for PM requires a combination of sight, sound, physical presence and potential for back up staff for out-of-cell activities including dayroom, work assignments, recreation and visitation. Only under ideal circumstances might inmates be allowed to use a recreation yard without all of these elements. R-10-446; R-14-1134; R-16-1518, 1579.

PM inmates are typically indebted gamblers, weak, homosexual, notorious, police or law enforcement informants, or former policemen, judges. Some go to "lay in" to avoid work or to "manipulate the system." R-11-567; R-16-1514, 1515; Pl. Ex. 1237, pages 2, 8, ACA report. For these reasons, PM requires more security. R-16-1516, 1520, 1521, 1523, 1577; Pl. Ex. 1237, page 2, ACA report.

PM inmates must be protected from other PM inmates. R-11-568, 569; R-16-1516; R-17-1611. Inmates seek PM to commit violence or to be sexual predators on weak inmates in PM. "They may try to get in to make a hit on somebody in there." R-11-569. Aggressive homosexuals go to PM to have other inmates available to them. R-17-1611. During the trial it was reported one FSP PM inmate attempted to rape and kill another PM inmate. R-17-1624. Illegal sex acts were committed by at least two Plaintiffs' trial witnesses. R-8-123; R-9-286.

Plaintiffs' expert testified the foremost responsibility is to maintain control. That responsibility cannot be accomplished if "manipulators" have the ability to control or manipulate the administration of the institution and that inmates who have been screened for PM should not, absent

extraordinary security implementation, be allowed to work in the company of or in close proximity to non-PM inmates. R-11-626, 627.

The ACA reports a legitimate penological purpose is served by tolerating less than identical and less than comparable access to certain nonessential types of activities which do not impact on length of sentence served or significantly on physical health. It is appropriate that the protection program not be "unduly attractive" to spurious cases. Pl. Ex. 1237, page 19. Plaintiffs' expert agreed PM should not be a "favored class." R-11-614, 615, 616. "The relative quiet of solitude of PC units make them attractive to certain inmates who see PC as a preferred status for serving their sentence." Pl. Ex. 1237, page 2, 20, ACA report. Plaintiffs' expert agreed if exactly the same access to privileges, equipment and programs is provided PM, it becomes so attractive that every inmate would want to be put in the PM unit because of its benefits. R-11-569; Pl. Ex. 1237, page 2, ACA report. "Dramatic changes that disadvantage the general population, favoring what is viewed by most inmates as a despised group, are likely to create widespread problems...new changes are made they must be carefully balanced...."

Different FDOC institutions have different missions. R-14-1164, 1165, 1166. All jobs and programs are not offered at all institutions, although there are certain types of core jobs such as food service, housemen, ground squads, that are basic functions in each institution. R-14-1228, 1229. There are not enough jobs for all inmates who are currently incarcerated. R-

14-1227, 1228. There are waiting lists for some jobs. R-14-1228, 1229. Inmate job assignments, including possible assignment to PRIDE, are affected by medical and psychological grading provided each inmate. R-13-960.

Statistics generated by the Office of Programs, which maintains the official gaintime awards, R-14-1107, show the PM population September 30, 1992 - excluding inmates who are statutorily ineligible for incentive gaintime and those admitted during the month of September, 1992 - (a) PM inmates with above satisfactory ratings received an average of 7.3 days incentive gaintime at FSP, as compared to 7.7 days per non-PM inmates. PM inmates with outstanding rating at FSP received 16.3 days incentive gaintime, the same as for non-PM inmates; (b) PM inmates with above satisfactory rating at Union CI received 8.1 days incentive gaintime as compared to 9.5 days for non-PM. PM inmates with outstanding ratings at Union received 20 days incentive gaintime, more than 19.8 days for non-PM inmates; (c) PM inmates at Martin CI with outstanding rating received 18.4 days incentive gaintime, more than 18.3 days incentive gaintime for non-PM inmates; (d) at Polk CI PM inmates with outstanding rating received 18.6 days incentive gaintime and non-PM inmates received 19.6 incentive days gaintime; (e) at Hendry CI PM inmates with outstanding rating received 20 days incentive gaintime, more than non-PM inmates with outstanding rating of 19.9 days incentive gaintime. Def. Ex. 25; R-16-1470, 1472.

Ron Jones, in the Office of Operations, generated some informal reports, Pl. Exs. 1401, 1402, 1403, suggesting some lack

of comparability in October, 1992, at FSP but his office does not keep the official Department records, had no statistics assistance, and he did not know how the reports were prepared. R-14-1107, 1112.

Utilizing statistical controls he deemed appropriate, Dr. Bill Bales, Bureau Chief of Statistics, the only statistician who testified, reported the average incentive gaintime (for offenders eligible to earn incentive gaintime) earned during October, 1992, on a statewide basis was 4.9 days for general population and 5.7 days for PM inmates (respectively) with above satisfactory rating; 19.3 days versus 18.9 days for general population and PM (respectively) with outstanding rating. R-16-1477, 1478; Def. Ex. 47.

Pl. Ex. 1405, 1406 and 1407, prepared by FDOC at the instruction of Plaintiffs' counsel, R-16-1473, 1474, 1475, 1476, purporting to represent statistical comparisons of gaintime awards to PM and general population inmates for the month of October, 1992, all contain disclaimers. Dr. Bales testified they are premised on statistically invalid methodology because they include inmates who, by definition, are ineligible to receive gaintime and who would be reported as earning zero hours gaintime due to their sentence. "By including people who are ineligible you are inflating the denominator and equation and skewing the numbers. You can't make comparisons." R-16-1474-1478, 1501-1503.

Analysis presented by Assistant Secretary Wilson Bell, whose Office of Programs oversees the official PM gaintime

records, R-14-1230, was that all Plaintiffs' inmate trial witnesses received comparable or increased gaintime awards during PM tenure as compared to their population status. R-14-1249-1296; R-15-1299-1315; R-16-1438-1456. Some inmate witnesses acknowledged they got 20 days gaintime a month, e.g. R-8-124; R-9-267; R-10-463; R-12-814.

Plaintiffs' expert agreed, and the Court recognized, the motivational level of certain types of PM inmates to participate in group programs may be lower than the motivational level of population inmates, either because they seek protection to "lay in" or because of their apprehension of groups and desire to isolate themselves. R-6-212-24-#56; R-11-632, 633.

The Parole Commission is the Control Release Authority (Fla. Stat. §947.146). A representative of the Commission testified assignment to PM status has no, per se, effect on control release eligibility. Program participation or lack thereof by a PM inmate is not considered as an eligibility consideration for control release. Designation as a PM inmate would have no effect on control release eligibility if brought to the attention of the control release authority. R-5-175-6. Only a "small pool" is eligible for control release. R-13-971. Decisions to modify CRD are the responsibility of the Parole Commission.

He testified assignment to PM status has no, per se, effect on eligibility for parole. Participation in recommended self-improvement programs could have the effect of reducing an established presumptive parole release date, however,

availability of the recommended programs is considered by the Commission as it makes its determination. "Where no programs are available to an inmate, this information could be significant. If so, it should be noted in the narrative report." R-5-175-8; Ex. 1, FPPC Training Manual, page 56. In all cases, availability of the recommended or required program is considered by the Commission and if the inmate has not participated in such a program, one of the things considered in the inmate's narrative report would be that the program simply was not available to the inmate. R-5-175-38, et seq.

Plaintiffs presented no evidence that any inmate was denied a program or service specified in a mutual participation agreement and no evidence of any inmate whose control release or parole status was adversely effected by the mere fact of his designation as a PM inmate or because of unavailability of PM programs.

FSP is unique and is the most secure prison in Florida. It houses inmates in single cells who, because of their sentences, behavior or both, require that secure environment. All of its programs are restricted in comparison to other institutions. "The inmates there are the end of the line." R-17-1607. "They are the worst of the worst in the system." R-13-957. The only academic and vocational programs offered to any inmates are correspondence courses. R-17-1618, 1619, 1632. FSP does not award 4 days of gaintime for having a clean cell or for undocumented unapproved activities. R-17-1620.

Prior to November, 1990, there was no PC wing at FSP. There was an M wing, the population of which included some small, weak and homosexual inmates. Inmates in that wing were screened for compatibility, although not by a standardized criteria. "It was a patchwork." R-13-954, 955, 1017, 1018. "M wing was a hybrid." R-9-294, Stipulation; R-17-1646, 1647. There was no M wing exercise, no law library. R-9-221.

The "bullet hole" screen at FSP is used in the windows in 10 of the 96 cells at the PM wing. This was the material used to repair all broken screening at the time. R-14-1162; R-17-1615. All of the windows at FSP were in terrible shape. R-17-1615. Light passes through the screening. Def. Ex. 30. Inmates in cells with this screen are reassigned upon request to other cells. R-9-364; R-10-460; R-10-510. Some can be opened and closed with a coathanger, but staff and crews are available to open and close the windows upon inmate request. R-10-456; R-17-1615, 1616, 1629.

PM inmates at Martin, a new facility, were housed in Building #H-5 at the time of trial. That building was temporarily designated for PM because it was the only building at Martin which had a fully operative locking system. It was at the end of the compound and also had a fenced recreation yard. R-13-932, 933, 959; Def. Dem. Ex. 33. At trial, the Deputy Secretary testified the PM population was to be moved from it in the near future; R-17-1684. They were moved before the injunction.

Window shields were on #H-5 prior to its designation as a PM building. The shields were used to minimize "hollering,

throwing things and passing contraband" to confinement inmates. R-13-960. The shields are opaque, shade the windows, and are 18 inches from the building. Def. Ex. 33. Building #H-5 has a forced ventilation system with fans and ducts. R-14-1146.

The A building at Union was designated PM because it is distant from population housing, is comprised of single cells in a building amendable to division for PM purposes and otherwise has a fenced recreation yard for its sole use. R-14-1158, 1159; Def. Dem. Aid 37.

Department policy for pre-scheduled legal access for PM is at 33-3.0082(6)(d), F.A.C. Inmates "get as much time as necessary to complete their legal work if they have deadlines, if it goes beyond the normal time set aside for inmates to go to the library." R-13-986; R-16-1416. Plaintiffs' expert acknowledged the amount of time should be defined and controlled to prevent gang meetings and other improper purposes. Exceptions should be made for prisoners who have impending cases to enable them to meet their needs. "Access to court is an individual thing which does not lend itself to scheduling by groups." R-10-444. Inmate Wilson testified he found legal access time sufficient. R-8-74, 105, 131. A new law library access rule was promulgated because of the class action litigation in Hooks v. Wainwright, 536 F.Supp. 1330, dism., 716 F.2d 913, rev., 775 F.2d 1433, reh. denied, 781 F.2d 1550, cert. denied, 479 U.S. 913 (1986). R-6-190; R-6-200; R-16-1451, 1452.

Plaintiffs' expert agreed an appropriate method of making a law library available to PM is to schedule it for

exclusive use by them when there is not high volume demand by open population inmates and to afford the opportunity for other use by PM at other times if they are unable to accomplish their needs during the scheduled time. R-11-619-620.

FDOC was the subject of a twenty year long statewide class action suit, Costello v. Singletary, addressing totality of conditions including health care, "habitability" and overcrowding, which suit was under the auspices of a special master and monitor from 1985 until 1992. Temperature in Union building A was addressed and improvements were made. R-14-1146, 1147, 1148, 1202, 1203. This suit was closed in 1993. R-6-195.

Plaintiffs presented no objective evidence of current temperatures or comparative temperatures in Martin #H-5 or Union A building to housing areas used by general population.

On September 30, 1992, 308 inmates were in PM. The primary offense for 31.2% was murder or manslaughter; sexual offenses for 14%; robbery for 15%; and other violent offenses represented 39% of PM. The average number of DR days during commitment was 337. Forty percent of PM offenders had life sentences. The average sentence length for non-lifers in PM was 45.6 years. The average number of days in PM from January 1, 1992, through September 30, 1992, was 162; the median days in PM was 66.5; 50% spent 64 days or less in PM and 70% of PM offenders spent 184 days or less in PM. 28% of PM offenders spent more than one year in PM. Def. Ex. 22. R-16-1465, 1466. Because of their offenses or recent incarcerations many, with mandatory sentences and life sentences, were not eligible for any incentive

gaintime. R-14-1231, 1254, 1255; R-16-1502, 1503. PM sentences breakdown "is not representative of the general population [sentence breakdown]...where around 10% are life sentences." R-16-1485-16.

For the period January 1, 1990, through September 30, 1992, the average number of days in PM for inmates assigned to a different housing status at the same institution was 40 and the median days in PM was 9. For inmates transferred to a new institution, the average days in PM was 66 and the median days in PM was 35. Def. Ex. 23; R-16-1467, 1468. From this data the Court may infer PM is, for most, a relatively short term status.

The average number of days in AC for PM review ("gatekeeping") for the interval May 24, 1992, through November 24, 1992, was 16.2 days. For all major institutions, 4,320 inmates were reported to be in "gatekeeping" at some time during that interval. Def. Ex. 24; R-16-1468, 1469.

The PM rule for out-of-door exercise requires a minimum of two hours per week. 33-3.0082(6)(a), F.A.C. That minimum out-of-door exercise time - coupled with work, dayroom and other out-of-cell activities including movement to dining, canteen, library, and visitation - is sufficient to sustain cardiorespiratory and muscular fitness. Def. Ex. 41, p. 2, Report; R-10-496. See also brochure - Exercise While in Confinement; Def. Ex. 48. Inmates exercise at work, e.g. R-12-746. The ACA standard for PM inmates is #3-4248, concerning out-of-cell exercise opportunities. That rule requires one hour a day, five days a week "out-of-cell" opportunities. Because of

dayroom access, out-of-door exercise, work assignments, visitation and canteen activities, inmates in PM far exceed the requirement of that (out-of-cell) standard. R-16-1594.

To implement alternative programs and job assignments during night and morning shifts, alternative staffing patterns with a "trickle down effect" on dining, sleeping, and other activities with a fiscal impact are effected. R-11-612; R-12-775, 776; R-14-1129. See also Pl. Ex. 1237, page 20, ACA report, with a caveat concerning changes favoring a "despised group" - PC - which disadvantage general population.

PRIDE is a for profit corporation which manages prison industries. Inmates meeting PRIDE's skill and security requirements work for PRIDE and are paid nominal hourly wages. R-13-935, 936, 937, 939, 940. FDOC policy does not, per se, preclude assignment of PM inmates to PRIDE. R-13-1047, 1048. Factors restricting or impairing PRIDE assignments include mixing population and PM, skill levels, insufficient numbers of PM to complete a PRIDE shift work force, mental and medical health grades, security concerns, staffing and duration of PM inmate status in the institutions wherein PRIDE work is available. PRIDE is a separate entity with a different objective than FDOC, i.e., returning a profit. R-13-936, 938, 939; R-16-1432, 1455, 1456; R-16-1525; R-17-1667.

Not all PM inmates participate in out-of-cell programs. R-8-60, 61, 98, 135; R-9-304; R-12-742; R-12-804; R-17-1618, 1635; R-17-1653.

Scheduled out-of-cell activities require substantial physical movement of PM inmates, out-of-cell and out-of-dayroom areas, to other buildings and areas. PM movement requires escorts and "lock down" of open population. Dining halls, law libraries, visitation rooms and open population exercise areas are reserved exclusively for PM during the scheduled activity time. R-8-86; R-8-171; R-9-290; R-17-1662. Movement requires additional security. R-11-617.

PM inmates in 1992 did not operate any canteen. Singletary's justification was because of staffing and security concerns and the relative smaller number of PM inmates who could use a PM canteen. R-13-1049, 1050; R-17-1674, 1678.

It is Singletary's policy that PM inmates have access to Alcoholics Anonymous and Narcotics Anonymous. R-8-61; R-8-177; R-9-320; R-12-741; R-13-1074; R-15-1308, 1345, R-16-1408. The ability to fully implement that policy is confounded by the fact that NA and AA are group sessions and cannot be easily accomplished with a sole participant. Where there is an insufficient group, arrangements have been made at FSP for individuals to have individual counselling. R-17-1635.

Plaintiffs' expert agreed that it would be harder to provide a full range or opportunities for a smaller number rather than a larger number of inmates and he would expect to find some differences which would be to the disadvantage to PM. "...Obviously [there] cannot be...identical conditions." R-10-419, 447, 448. He agreed that security is a central overwhelming concern in all prisons, particularly with persons serving longer

terms for more serious offenses, R-10-421, and that it would be "very hard to treat a small number of people to give them as much choice as a large number." R-10-447-448.

In Williams v. Lane, the Illinois PC case, Professor Morris and Mr. Mahoney were special master and monitor, to impose a remedy at one prison after adjudicated violation and failure to implement a remedy. "By refusing to meaningfully comply with the district court's request for aid in fashioning a remedy defendants ensured a harsher result than would have otherwise been warranted." Williams, 851 F.2d, at 886. The Stateville PC inmates are "not quite as well off" as the general population inmates. R-10-442. They agreed even the Stateville PC court's remedy has some "deleterious aspects," some "stigma" and some issues "aren't equal." R-11-704.

Singletary disavowed, repudiated and dismantled PC. Despite his initial skepticism, he anticipates no circumstances whereby PM would be replaced or diminished by a rule and practice like PC. "There is no reason for anybody to change this system." R-6-212-7-#12; R-13-897, 915, 917, 918, 1007, 1008, 1009.

During the 24 months between implementation of PM and trial - November, 1990 through November, 1992, Plaintiffs' class counsel had direct access to the Assistant Secretary and reported approximately two dozen PM "problems" of which Mr. Jones estimated that approximately 3/4 had merit and were resolved. Those matters received the same attention they would have received had they been submitted by inmates using the grievance system or by families, friends, clergy or other representatives

using the grievance system or the correspondence system. R-17-1697, 1698; Def. Ex. 19.

Singletary has redundant monitoring mechanisms to correct "problems," e.g. R-8-209; R-9-312; R-9-333, 334; R-9-353; R-12-801, 802, 803; R-12-865; R-14-1103; R-17-1617, 1618; R-17-1663, 1664; R-17-1697, 1698.

All experts for both parties testified that complaints and grievances and "screw-ups" are inevitable in a large prison system. See R-11-579; R-11-721-722; R-16-1529.

Experts for Plaintiffs and Defendant praised Singletary's PM as one of the best in the nation. R-11-623; R-11-721; R-16-1513; R-16-1594. Plaintiffs' expert agreed "it makes sense...to have a series of facilities across the State that handle a variety of security classifications to provide a range of protective management options." R-11-710. Plaintiffs' expert could envision no additional safeguard or oversight which could be implemented to better assure compliance with Singletary's PM rule. "I can't think of any omissions." R-11-721. Another of Plaintiffs' experts attested to both the credentials and the professionalism of three of Singletary's regional directors and endorsed his professionalism and responsibility. R-11-717.

3. Standard of Review: Denial or issuance of declaratory and injunctive relief is evaluated for abuse of discretion. Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968); Securities and Exchange Commission v. MacElvain, 417 F.2d 1134 (5th Cir. 1969), cert. denied, 397 U.S. 972 (1970). To succeed

on an attack on exercise of discretion, the challenger must establish there was no reasonable basis. United States v. W.T. Grant Co., 345 U.S. 629, 634, 73 S.Ct. 894, 97 L.Ed.2d 1303 (1953). Even where it is argued that the District Court's fact determinations result from an erroneous view of legal principles which govern the fact-finding process, that review does not permit the Court to retry issues of fact, re-weigh evidence de novo, or otherwise disturb findings because the Court would have reached a contrary result on the same evidence. First Alabama Bank v. First State Insurance Co. Inc., 899 F.2d 1045, 1057 (11th Cir. 1990). Findings of fact are subject to the clearly erroneous standard of Rule 52(a), Fed.R.Civ.P., and whether one is left with the "definite and firm conviction" that a mistake has been committed. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).[2]

SUMMARY OF ARGUMENT - ANSWER BRIEF

I.

It was not error for the District Court to decline to enter injunctive relief imposing additional monitoring mechanisms on PM. Since Fall, 1990, when he was given authority to change the "PC" system, Singletary initiated and completed a massive project to remedy "obviously unconstitutional conditions" for inmates in protection. He did this by rewriting the rule, 33-3.0082, et seq., F.A.C., obtaining certification of a new

[2] Where there may be two permissible view of evidence the fact finder's choice cannot be clearly erroneous. Taylor v. Hudson Pulp Co., 788 F.2d 1455 (11th Cir. 1986).

grievance procedure, implementing a computerized management information system with daily reporting and review, designating the Assistant Secretary of Operations to oversee PM and consolidating inmates into PM units at ten facilities. He implemented a policy favoring transfers of inmates to alleviate protection needs. For 2 years he granted Plaintiffs' counsel direct access to his Assistant Secretary to monitor PM.

To the extent that some discrepancies exist between PM and general population programs (and they do), those discrepancies are the consequence of differences inherent in the inmates' security needs, unauthorized employee misconduct, happenstance departures from Singletary's policies, practices and procedures and failures of Plaintiffs to use the grievance process and other mechanisms to bring "problems" to his attention. Gaintime discrepancies are due to the transient nature of the "protective management" status for many of the inmates in it, the nature of many of Plaintiffs' sentences which allow no gaintime and their motivation levels.

Singletary expressly repudiated the old PC system, sees no reason to return to it, and confirmed efficiencies of PM because of the substantial reduction in the number of inmates requiring protection under the new PM system. The old PC system was not "his system." The continuing need for liberal gaintime awards to enable the Department to operate within its budget and its lawfully designated capacity was affirmed in the record. There is every reason for Harry Singletary not to return to the inefficiencies, deficiencies and legal risks of the "obviously

unconstitutional" PC. There is no reason for him to return to it.

II.

PM inmates have comparable opportunities to work and participate in self-betterment programs to enable them to earn incentive gaintime and reduce the length of their incarceration. Many PM inmates, because of their sentences, are not eligible for gaintime. Others, particularly at FSP, have unique security needs and "end of the road" behavior patterns which reasonably restrict their ability to the panoply of activities otherwise available for PM inmates. Unrebutted statistical evidence from the FDOC Office of Programs and the Bureau of Statistics and unrebutted expert testimony is that there is no disparity between PM gaintime awards and general population awards. The Court correctly discounted the value of internal reports prepared for use by the Assistant Secretary for Operations which conflicted with official records maintained by the Assistant Secretary for Programs. The reports upon which inmates rely lack foundation and are faulty.

SUMMARY OF ARGUMENT - CROSS-APPEAL

I.

Use of bullet screens at FSP is not enjoinable because those screens caused no constitutionally cognizable hardship, were relatively few in number, could be opened and closed, allowed light and ventilation, and inmates were able to transfer to other cells.

II.

Use of window shields at the temporarily designated Martin building #H-5 was not enjoinable because they cause no constitutionally cognizable hardship, the building had a forced air ventilation system, the opaque screens allowed ventilation and light, and inmates were otherwise only occasionally in their bunk cell.

III.

Use of video religious services was not actionable against Singletary. It was not Singletary's policy, pattern, or practice to use videos and animation as religious services. That use by some subordinates was not causally linked to him and was not enjoinable.

ARGUMENT - APPEAL

I.

SECRETARY SINGLETARY'S CESSATION OF ILLEGAL PRACTICES OF HIS PREDECESSOR, HIS REPUDIATION OF THEM, AND SINGLETARY'S IMPLEMENTATION OF MONITORING MECHANISMS PRECLUDED THE NEED FOR INJUNCTIVE RELIEF WHERE THERE WAS A DEARTH OF INMATE COMPLAINTS ABOUT PM AND NO CAUSAL CONNECTION BETWEEN PLAINTIFFS' "PROBLEMS" AND SINGLETARY'S POLICY, PRACTICE AND CUSTOM. THE COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO IMPOSE OMNIBUS INJUNCTIVE RELIEF AND ADDITIONAL COMPLIANCE MONITORING MECHANISMS

The Court did not abuse its discretion by acknowledging Singletary's repudiation of PC and his "genuine effort" implementation of a PM system with multiple safeguards to assure its implementation. There is no clear record of present or future harm to warrant injunctive relief. Appellants miscast the fact record in this cause, the Court's ruling and applicable law. They obscure the burden required of them and their own lack of diligence.

A. The Court Did Not Adjudicate This Case Moot: Appellants miscast the Court's ruling as it nowhere determines this case is moot. Rather, the Court declined to grant the extensive injunctive relief based upon its review of the evidence, its weighing of the testimony and its assessment of Singletary's credibility and conviction. R-6-212-#12, #13, #14, #26. "Singletary is committed to PM and does not intend to renew the repudiated PC. His department has made a genuine effort to remedy obviously unconstitutional conditions...." Hence, all the Appellants' case authority describing burden of demonstrating mootness are inapplicable. Regardless, he has carried that burden. This is not a case in which "the defendant is free to return to his old ways." Harry Singletary was not a Defendant prior to his substitution in July, 1991. Until Fall, 1990, he was in no position to change the policies of the previous Secretary. Policies, practices and procedures at issue in Plaintiffs' 1988 Complaint were not Singletary's. He declined to defend those old ways and expressly repudiated them. R-13-914, 915, 917, 1008, 1009. See also Comments to Rule 25,

Fed.R.Civ.P., 1961 Amendment, "where the successor does not intend to pursue the policy of his predecessor...it will be open to him...to take steps to avert a...decree." Singletary took those steps.

The inmates ignore the significance of this "change of the guard." For example, see American Civil Liberties U. of Mississippi v. Finch, 638 F.2d 1336 (5th Cir. 1981) and Mayor v. Educational Equality League, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974).

The trial court's findings and Judgment spoke not to its power or jurisdiction under Article III to provide relief, i.e. mootness, but to exercise of discretion in using that power. See Chamber of Commerce, Etc. v. United States Department of Energy, 627 F.2d 289, 291 (D.C. Cir. 1980) and Penthouse Intern., Ltd. v. Meese, 939 F.2d 1011, 1019 (D.C. Cir. 1991). Declaratory and injunctive relief, like other forms of equitable relief, are discretionary. Penthouse International, supra; A.L. Mechling Barge Lines, Inc. v. United States, 386 U.S. 324, 331, 82 S.Ct. 337, 342, 7 L.Ed.2d 317 (1961). The vigor of the inmates' demands for Court relief should be tempered by their failures to use the grievance process and other mechanisms.

The error of their argument is apparent from their extensive reliance on Secretary of Labor v. Burger King Corporation, 955 F.2d 681 (11th Cir. 1992), despite the case's admonitions that "the only issue before this court is whether the district court erred in dismissing the lawsuit as moot..." and that "the question of whether or not a permanent injunction

should be issued...is not before this court." 955 F.2d 683, 684. Burger King is distinguishable. Florida's 10 PM prisons have nothing in common with a nationwide chain of restaurants. The chain of command and control is different. The presence of inmates' counsel is profound in prisons. Lastly, Singletary's "promise" came 24 months before the eve of trial. He delivered on it with a "genuine effort."

The ample findings by the trial court, including its findings that the PC system imposed "obviously unconstitutional conditions" and its findings at Nos. 12, 14, 26, 28 and 30 evidence the Court not only recognized its jurisdiction, but acted on it, and made specific findings with regard to Defendant Secretary Singletary's sincerity, efforts and credibility to warrant its position.[3]

In Lovell v. Brennan, 728 F.2d 560, 563 (1st Cir. 1984), the Court agreed it was not abuse of discretion to deny injunctive relief with regard to current conditions in light of improvements. As a matter "relating to the exercise rather than the existence of judicial power," Lovell affirms the burden of persuasion to issue injunction lies with the moving party. That

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[3] In Pembroke v. Wood County, Texas, 981 F.2d 225, 228 (5th Cir. 1993), the Court affirmed a District Court's refusal to grant equitable relief, recognized what the trial court had described as defendants' "good attitudes" and concluded "the fact finder is in the best position to judge the credibility of witnesses." See also Thelma Raley, Inc. v. Kleppe, 867 F.2d 1326 (11th Cir. 1989).

burden is heavier in a case in which a prison administrator's discretion is called to task. See, e.g. Fromer v. Scully, 874 F.2d 69, 74 (2nd Cir. 1989); Hay v. Waldron, 834 F.2d 481, 485 (5th Cir. 1987).

Appellants' record references in this portion of the brief is flawed for reasons in addition to those noted in the Motion to Strike. Argument that (then Assistant Secretary) Singletary "adamantly defended each and every one of the obviously unconstitutional conditions of PM" lacks record cite. (Appellants apparently agree at page 6 of their brief that the PC rule was, on its face, acceptable. "The provisions of the PC rule would lead an unaware reader to conclude that inmates assigned to protective confinement are treated, in general, in a fashion similar to the treatment afforded general population inmates." Brief, p. 6 There is no record that Singletary defended the conditions or the "practices in force at the time this litigation commenced."

Evidence that Singletary "seized the opportunity to suggest changes in the PC system" are in Pl. Ex. 45, institution surveys which resulted in his being given authority to change PC and the implementation of PM. "Those things became very evident, we had flaws in our system." R-13-949, 1010.

Inmates' argument that the Department failed to supervise staff and enforce written rules of the PM system is without record citation other than a few incidents of employee misconduct and faulty judgment. There is no record that Singletary is "often" unable to control individual prison

officials. Termination and discipline have been meted out, e.g. R-13-984, however, departures from Department policy are to be expected in a department of this size. R-6-212-13-#30; R-11-721, 722.

B. Case Law Governing Injunctions: Injunction, as an equitable remedy, is subject to general equitable considerations. The general principal that "he who seeks equity must do equity" is applicable. 42 Am.Jur.2d, Injunctions, §36, page 775. Injunction will rarely be granted when it will operate an inequity or be contrary to the justice of the case, or when it will be productive of public or private mischief. 42 Am.Jur.2d, Injunctions, §56, page 798. Relief should be confined to those who manifest reasonable diligence in asserting their rights and denied those who sleep on those rights to the prejudice of the party against whom relief is sought. 42 Am.Jur.2d, Injunctions, §61, page 805.

Plaintiffs' failures to use the grievance system and, instead, their mischief in relying upon counsel and the federal court to resolve their "problems" without exhausting the grievance process dictates against further injunctive relief. See also Exhaustion requirement at 42 U.S.C §1997e.

The party seeking the injunction must prove to the Court that relief is needed. Their's is the burden. Walling v. Gulf States Paper Corporation, 143 F.2d 301 (5th Cir. 1944). The necessary determination is that there exists some cognizable danger of recurrent violation, more than the mere possibility. Issuance is based upon all circumstances, discretion is broad and

a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and the character of past violations. Meltzer v. Bd. of Public Instruction of Orange Cty., 548 F.2d 559, 567 (5th Cir. 1977) citing United States v. W.T. Grant, 345 U.S. 629 at 632 (1953), reversed on other grounds, 577 F.2d 311 (5th Cir. en banc 1976), cert. denied, 439 U.S. 1089 (1979). Courts have exercised discretion to deny injunctive relief where the record evidence that equities do not favor the requesting party. Lovell, supra; Pembroke, supra; Lewis v. Hyland, 554 F.2d 93 (3d Cir. 1977). There, the Court of Appeal found no proof of a deliberate pattern or practice of constitutional violations on the part of the named defendants, rather, random acts of a minority of subordinates.

Such is the state of this deficient record against Harry Singletary.

C. Plaintiffs Presented No Proof Of A Causal Connection Between Singletary's Policy, Practice And Custom and Their "Problems": One of the elements of a successful §1983 claim is proof of a causal link to the defendants. In Rizzo v. Goode, 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. 598 (1976), injunctive relief was denied because plaintiffs failed to prove an affirmative link between incidents of police misconduct and Mayor Rizzo's policy, pattern and practice. There, as here, the plaintiffs presented no showing of defendant's authorization or approval of the employee misconduct and the only evidence was anecdotal incidents of misconduct over a multi-month period in a

city of substantial population with thousands of employees. Injunctive relief was denied by the Third Circuit in Lewis, supra, for similar reasons. "The now required element of a causal relation to the responsible authorities is fatal to the relief sought where proof of such relationship is wanting." 555 F.2d at 101.

This same absence of proof of causal relation is fatal to Plaintiffs' claim for injunctive relief, particularly when coupled with their lack of diligence and failures to use the certified grievance process.

D. Case Law Governing PM Equal Protection Claims: The trial court at R-6-212-59 through 64 articulated cases construing the equal protection clause in the prison context. Significant in the Court's findings and in those cases are the undisputable conclusions that differences in treatment are constitutionally permissible, that fiscal concerns must be weighed and that security is the paramount consideration in evaluating constitutional allegations against prison administrators.

In French v. Owens, 777 F.2d 1250 (7th Cir. 1985), the Seventh Circuit concluded that a district court had, in requiring equality of access to programs, undermined the State's ability to operate an effective PC program:

> The rationality of a distinction between privileges for prisoners in general population and those in protective custody goes to the fundamental purpose of such segregation. Protective segregation is offered inmates for their safety, the safety of others in confinement, and to ensure institutional

> security and order. To allow prisoners in protective custody to enjoy all of the same privileges to the same degree as those in the general population would eviscerate the nature of protective segregation. Because the differences in treatment among prisoners in protective segregation and the general population has a substantial, rational basis in the legitimate state interest of prison security, we hold that [Plts.'] rights of equal protection have not been abridged.

In Taylor v. Rogers, 781 F.2d 1047, 1050 (4th Cir. 1986), the Fourth Circuit held:

> That conditions imposed on prisoners requesting protective custody less favorable than those afforded the general population do not give rise to the meritorious claim of denial of protection...where the restrictions bear a rational relationship to the protection of the prisoner requesting such relief and where the restrictions "are not so onerous as to jeopardize his health.

See also Crozier v. Shillinger, 710 F.Supp. 760, 764 (D. Wyo. 1989):

> While protective custody may be sought for a variety of reasons, the bottom line is the prisoner's legitimate expectation that reasonable steps will be taken to insure his or her safety. With this expectation must come the realization that a price must of necessity be exacted; otherwise the concept itself would be rendered meaningless.

Crozier, citing Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), held "to the extent that conditions of confinement were more restrictive, or were even harsh, they are part of the penalty that criminal offenders pay for their offenses against society" and their claimed need for extra security in light of their PC claims. Crozier, at 764.

The judicial deference to be afforded prison administrators in matters concerning prison security and penal interests is delineated in Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987):

> When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest. In our view, such a standard is necessary if prison administrators...and not the courts are to make the difficult judgments concerning institutional operations. (Citations omitted.)
>
> Subjecting the day to day judgments of prison officials to inflexible, strict scrutiny analysis would seriously impair their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a least restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.

482 U.S. at 89.

The Turner Court otherwise reviewed its prior decisions and identified factors relevant in determining the reasonableness of a prison practice. One consideration is the impact accommodation the asserted constitutional right will have "on the allocation of prison resources." Turner, at 90. "When accommodation of an asserted right will have a significant ripple effect on fellow inmates or other prison staff, Courts should be

particularly deferential to the informed discretion of correction officials." This standard was applied in O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), wherein the court determined that prison regulations preventing Muslim inmates from attending weekly congregational services did not violate (even) the most fundamental of First Amendment rights. The majority of the Court was unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to accommodate inmates' constitutional rights and found "the limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives - including deterrence of crime, rehabilitation of prisoners, and industry security." 482 U.S. at 348.

A significant part of Singletary's defense dealt with budget cutbacks and allocation of scant prison resources between the different configurations of PM institutions. Programs admittedly differ between the PM units. However, "[t]he Constitution does not mandate a lowest common denominator standard whereby a practice at one penal institution must be permitted at all institutions." Bell v. Wolfish, 441 U.S. 520, 554, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

Fiscal concerns, like security concerns, have long been recognized as legitimate penal interests, e.g., Martinelli v. Dugger, 817 F.2d 1499, 1506 (11th Cir. 1987), cert. denied, 484 U.S. 1012, 108 S.Ct. 714, 98 L.Ed.2d 664 (1980) (prison authorities can make reasonable attempts to balance a prisoner's

freedom of religion with the goal of avoiding excessive administrative expense); Bach v. Coughlin, 508 F.2d 303, 307 (7th Cir. 1974) (prison authorities can make reasonable attempts to balance a prisoner's right of access to Courts with prison budgetary considerations); Walker v. Blackwell, 411 F.2d 23, 26 (5th Cir. 1969) (considerations of administrative expense outweigh prisoner's right to a religious diet); Lovell v. Brennan, 728 F.2d 560, 561 (1st Cir. 1984) (PC creates special administrative and fiscal burdens which are relevant factors in assessing reasonableness); Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981) (costs constrain ability to act); Berg v. Kincheloe, 794 F.2d 457, 461 (9th Cir. 1986) (manpower limitations place constraints on ability to act).

E. Case Law Governing Eighth Amendment Claims: The trial court's Eighth Amendment analysis, R-6-212-57, 58, recognized the general standard of Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) and Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), that conditions are not cognizable under the Eighth Amendment unless they "shock the conscience."

This record supports no sincere Eighth Amendment attack against Singletary's PM policy, practice or procedure. Nor should anecdotal employee misconduct and departures from his policy, practice and procedure and from the PM rule suffice to sustain a claim against him. Isolated incidents do not establish a policy or practice that violates the Constitution. See Lovell v. Brennan, supra.

F. The Court Did Not Abuse Its Discretion By Declining To Issue An Injunction To Require Additional Compliance Monitoring Mechanisms: Plaintiffs present a dearth of evidence to sustain their claim for injunctive relief. Their incidence proofs are anecdotal and their lack of diligence is apparent. The case law presented above dooms their claim. Public interest is disserved and private mischief, by inmates who complain first to the federal courts, is advanced if injunctive relief is imposed under the facts of this case.

II.

INMATES IN PROTECTIVE MANAGEMENT EARN INCENTIVE GAINTIME COMPARABLE TO INMATES IN GENERAL POPULATION. THE DISTRICT COURT'S FINDING COMPARABLE GAINTIME AWARDS IS NOT CLEARLY ERRONEOUS

The inmates urge that the District Court's finding that gaintime awards between PM inmates and general population inmates are comparable is clearly erroneous. They targeted this finding as a primary issue on appeal, yet only devoted a page and a half to the argument in support of this claim. The District Court devoted 16 pages to this issue, analyzing each of the gaintime awards systems, the various eligibilities and exclusions for gaintime awards, the factors such as disciplinary action, in-transit status, motivation levels, reception and orientation, etc., that affect gaintime awards, the various statistical comparisons offered by the Plaintiffs and Defendants, and lastly, the gaintime history of 18 class Plaintiffs and witnesses for

trial during the period of March, 1990, through December, 1992. R-6-212-18 through 34, App. A. All of the District Judge's findings are supported by competent evidence in the record and the inmates have failed to undermine these findings by pointing to a lack of evidence to support those findings. Instead they have taken a threefold position: 1) that the District Court erroneously "focused almost exclusively on the gaintime records of the testifying class representatives," I.B. at 50; 2) that the District Court overlooked the relevant statistics about the class as whole; and 3) that the specifics provided by their exhibits 1401, 1402 and 1403, clearly demonstrated a disparity in the gaintime award to PM inmates as compared to the gaintime awarded to general population inmates.

First, the District Court did not rely solely upon the gaintime histories of the 18 class Plaintiffs and trial witnesses. As noted above, the District Court made a comprehensive analysis of all of the evidence presented at trial. The inmates suggest that the gaintime histories of the class Plaintiffs and trial witnesses are nothing more than anecdotal and should not be seriously considered. On the contrary, a class has been certified and the class Plaintiffs and trial witnesses are presumed to be representative of that class and its interests. The individual analyses of the gaintime histories of these Plaintiffs and witnesses clearly did not support their contention that there is deprivation of job opportunities for earning gaintime or a pattern of lower gaintime awards for PM inmates as compared to general population inmates. In fact, the

histories served to explain the factors that might cause a PM inmate to experience lower awards, such as placement in orientation and reception, in-transit status, the initial "gatekeeping" review period for PM placement and disciplinary action. App. A: Patrick Willis, p. 28-29; Ronnie Weaver, p. 29; Michael Wilson, p. 29; Michael Chester, p. 32; Alexander Czaplicki, p. 32-33; Harold Stapleton, p. 33-34.[4] Additionally, the gaintime histories of these class representatives and witnesses revealed that their patterns of gaintime earnings in PM status were comparable to their earnings in general population status. App. A: Terry Royal, p. 26-27; Charles Brightwell, p. 27; Frederick Reinhart, p. 28; Michael Wilson, p. 29; Cary Rininger, p. 32; Fred Lewis, p. 33. Moreover, for at least two of these inmates, awards of gaintime after placement into PM status provided them with the opportunity to consistently receive maximum gaintime awards, something which they had not been able to achieve in general population status. App. A.: Brian Kennedy, p. 29-30; Michael O'Donnell, p. 30-31. The inmates, who have the burden of proof to demonstrate the claimed inequities, produced no witnesses to demonstrate the claimed inequity by showing a drop in level of gaintime awards as a result of removal from general population to PM status or by showing a comparable

[4]Specific record references for the trial court's Findings of Fact about the inmates' trial witness' gaintime awards are at R-5-187-16 through 31. "T" reference is to transcript number.

job status and work pattern between a PM inmate and GP inmate and a disparate level of gaintime awards.

Instead, the inmates rely solely upon statistical comparison reports filed as Pl. Exs. 1401, 1402 and 1403. These exhibits are reports that were prepared at the request of the Assistant Secretary for Operations, Ron Jones, as part of a general overview of gaintime earnings for PM inmates. Unfortunately, while a good faith effort on the part of Assistant Secretary Jones to provide oversight, these reports proved to be statistically flawed, at least insofar as one analyzed institution. R-14-1107, 1111, 1112; R-14-1245, 1248. Assistant Secretary Jones testified that his area of operations was not responsible for the assessment of gaintime awards or maintenance of the documentation relative to the awards. R-14-1107. Mr. Jones did not purport to be an "expert" in the area of gaintime and he conceded that he was unaware of the parameters placed upon gathering the information and the criteria used to develop the "average" awards. R-13-1057; R-14-1112. Despite the unreliability of these statistics, Plaintiffs urge this Court to declare the District Court's findings clearly erroneous based upon strained inferences from these reports. In the Plaintiff's statement of facts, the only charts presented for this Court's consideration are limited excerpts of the unreliable data from Pl. Exs. 1402 and 1403 showing alleged comparisons between PM inmates and GP inmates at FSP in September and October, 1992, who were working as utility inmates. It is worthy to note that the Plaintiffs chose not to provide in the statement of facts other

comparisons in those same reports that did not reveal a significant disparity between PM and GP earnings for other job classifications. App. A at p. 24. However, the District Court properly discounted the value of these exhibits, as well as other Plaintiffs' exhibits (Pl. Exs. 1405-1407) that were statistical comparisons prepared at the request of Plaintiffs' counsel, but which did not contain proper statistical controls.[5] R-6-212-22, 23, 24, 25, 26. These reports were discredited by Assistant Secretary Jones, R-13-1057, Assistant Secretary Wilson Bell, R-14-1245, 1248, and the agency's statistical expert, Dr. William Bales, R-16-1474, 1475, 1476.

Finally, the only official statistical gaintime data before the Court are Def. Exs. 25 and 47. Dr. Bales's testimony, R-16-1457, et seq., and Assistant Secretary Bell's analysis of the gaintime awards of Plaintiffs' trial witnesses, R-14-1249, et seq., R-15-1299-1315, demonstrate that there is no statistically significant difference in the gaintime earned by eligible PM inmates and those eligible inmates in general population. Utilizing appropriate statistical controls, the average gaintime

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[5]Each exhibit bears the disclaimer: "Inmates who are ineligible to earn Incentive Gaintime are included in these figures: i.e., full Waldrup Cases, mandatory sentences, life sentences, and new admissions." Because some of the awards, such as those for life sentences and mandatory sentences, would have been recognized as "0" day awards due to ineligibility for gaintime application, the statistics would be drastically skewed. R-16-1474, 1502.

awards during October, 1992, on a statewide basis for GP inmates and PM inmates were as follows:

Rating	Avg GT: GP inmates	Avg GT: PM inmates
Above Satis.	4.9	5.7
Outstanding	19.3	18.9

The Plaintiffs make the conclusory statement in their initial brief that "[a]lthough the disparity in gaintime awards as alleged by the Plaintiffs and as admitted by the Defendant are quite different, the bottom line, even using the Defendant's position, demonstrated that PM inmates, as a group, earned less incentive gaintime than general population inmates, as a group." I.B. at 50. The record reference is to Def. Ex. 47, App. B. The above statistics taken from Def. Ex. 47 do not support Plaintiffs' statement. While as a whole, PM inmates received slightly less gaintime on average for an outstanding rating, PM inmates received as a whole slightly more gaintime on average for an above satisfactory rating, for the period of the sample. What the statistics do reveal is comparability. To the extent that differences exist, they may be reasonably attributed to PM inmates' reluctance to join in group activities, R-6-212-24, and to transit time inherent in movement of inmates from institution to institution to resolve their PM needs, R-14-1124, when they have no jobs. R-6-212-23, 24, 25.

The award of the various types of gaintime is a complex and varying process. The inmates have taken the position that as PM inmates they should receive maximum gaintime awards even for as little as one day's work a month, if one day is all that is

available. This would treat PM inmates in a more favored posture than GP inmates for whom only one day of work was available. Gaintime is awarded based upon a combination of factors, within a range designated for the performance rating. Although incentive gaintime is not day-for-day gaintime as in the case of Waldrup-eligible inmates, number of days worked is a consideration when assessing where within the range the award should fall. Neither the Department's rule nor the gaintime laws require maximum awards of gaintime, even for outstanding performance, for a single day's work. See R-6-212-18, 19, 20, 21, 22. The inmates' simplistic and myopic approach to the award of gaintime necessarily excludes many of the variables that are considered in making gaintime awards. The valid statistical comparisons demonstrate that PM inmates receive comparable gaintime awards to GP inmates -- they are entitled to no more. The inmates failed to carry their burden to provide evidence to support their claim to the contrary. The District Court's finding of comparability is supported in the record and, therefore, not clearly erroneous.

ARGUMENT - CROSS-APPEAL

THE TRIAL COURT MISAPPLIED CONTROLLING LAW WHEN IT ENJOINED THE SECRETARY TO REMOVE "BULLET" SCREENS AT FSP AND WINDOW SHIELDS AT MARTIN AND TO CEASE USE OF VIDEOTAPES AS RELIGIOUS SERVICES AT THREE INSTITUTIONS

A. FSP Bullet Screens: Paraphrasing the Fourth Circuit, en banc, in Sweet v. South Carolina Department of Corrections, 529 F.2d 854 (4th Cir. 1975), conditions imposed on

prisoners requesting protective custody less favorable than those afforded to general population do not give rise to meritorious claim where the restrictions bear a rational relationship to protection and where the restrictions are not so onerous as to jeopardize health. "Bullet hole" screen pictures at Def. Ex. 30B demonstrate that light and air freely flow through. Inmate and non-inmate testimony at R-17-1615, 1616, 1617 demonstrate, although with some differences of opinion, that staff was available to open and close the windows if the inmates were unable to do so with a coathanger. R-17-1615, 1616, 1617. Similarly, inmates move from the few cells with bullet screens upon request. R-10-510. This screen was used because it was "the stock that was available...to put on the window." R-17-1615. There was no testimony these screens jeopardized inmate health.

Under these circumstances, the trial court misapprehended testimony of record, misapplied the appropriate legal standard for actionable claims, or otherwise abused its discretion by enjoining the Secretary to remove the bullet screens from 10 of the PM cells at FSP.

B. <u>Martin Window Shields</u>: Witness testimony evidences why building #H-5 was temporarily designated as the PM unit at Martin, R-13-932, 933; R-13-933; R-13-959; R-13-960, and that PM population was soon to be removed from the building after the cell locking mechanisms in an adjoining building were fixed. R-14-1151. The inmates were removed, prior to the injunction. R-14-1146.

Testimony otherwise evidences that #H-5 was a new building with a forced air ventilation system, R-14-1146, a system about which Plaintiffs' expert was unaware and "needed to know more," R-10-497, and that the shields were opaque and some distance from the building. Def. Ex. 33. Examination by Plaintiffs' counsel otherwise confirms that "PM inmates at Martin are basically out of their cell except for count, evening, and sleep time." R-13-1022-24. See also Def. color-coded Dem. Aid #33, depicting areas of PM movement to the visiting park, the health clinic, food service building, education building and canteen, in addition to their adjoining fenced outside recreation yard.

It cannot be said that Singletary's use of the opaque fiberglass screens at this temporary PM building jeopardized inmate health or was a violation of the Fourteenth Amendment warranting injunctive relief.

C. Videotapes As Religious Services: The trial court misapplied controlling law when it enjoined the Secretary from using cartoons or videotapes as religious services for PM at Marion, Polk and Union.

Its injunction was based upon the testimony of three inmates. R-8-81; R-8-110; R-11-670; R-11-671-18; R-12-805; R-12-857, 858, 859. This is testimony about institutional level misconduct. There was no evidence that this use was the "practice, pattern or custom" of Harry Singletary. Video religious service was not even an issue identified in the Pretrial Stipulation. R-4-129. See also R-6-212-16, 17,

enumerating matters at issue for trial. Rather, these are incidents, which Singletary said "were wrong" and should be corrected, R-13-929-20. Their use is not acceptable under the rule, R-16-1411, and is akin to the incidents of misconduct which the Supreme Court in Rizzo, supra, determined were insufficient to afford basis for relief. Singletary is not "causally linked" to these incidents. Inmate Lewis grieved, but only to the Superintendent. R-12-866. He never grieved to Singletary. R-12-866, 867. At Polk, the PM inmates voted and elected to watch animation. R-17-1657-20. The Polk superintendent received no complaints about use of the videos. R-17-1659-9. There is no record that any of these inmates grieved a violation of the PM religious activities rule, 33-3.0082(6)(b), F.A.C., to Singletary for correction. R-14-1227-4. Injunction against Singletary under these circumstances was unwarranted and contrary to Rizzo and controlling law.

CONCLUSION

The trial record was extensive, witness testimony numerous, including transactions over a five year period. Documentary evidence was massive. The trial court was in the best position to evaluate the credibility and weight to be given to that evidence. Neither that record nor the inmates' arguments warrants remand for entry of further injunctive and declaratory relief to create other means to monitor Singletary's PM. A viable system is in place if the inmates will use it. The limited injunctive relief that was entered was based on erroneous application of controlling law and should be reversed accordingly.

Respectfully submitted,

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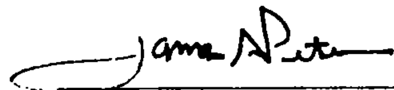
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct bound copy of the foregoing **ANSWER BRIEF/INITIAL BRIEF OF CROSS-APPELLANT** has been furnished by U.S. Mail to **RANDALL C. BERG, JR.**, Esquire and **PETER M. SIEGEL**, Esquire, Florida Justice Institute, Incorporated, 720 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2309 and **PETER P. SLEASMAN**, Esquire, Florida Institutional Legal Services, Inc., 1110-C Northwest 8th Avenue, Gainesville, Florida 32601 this 2 day of June, 1994.



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APPENDIX A

constitutional dimension (see DE 113).

B. Specific Complaints

45. Through their trial presentation and proposed Findings of Fact and Conclusions of Law (DE 188), Plaintiffs have focused on thirteen specific areas of alleged constitutional violations, which will be addressed individually.

i. Work-related Gaintime

46. Job assignment and program participation affect an inmate's ability to earn certain types of gaintime to be applied as a reduction of the overall release date.

47. Inmate job assignments are not gaintime rich or gaintime poor. Each offers the same opportunity to earn gaintime.

48. There presently are six categories of gaintime applied by the Department, only three of which relate to job assignment and program participation: educational gaintime, incentive gaintime, and work and extra gaintime.[6]

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[6] Two categories of basic gaintime are applied as lump sum awards based solely upon the date of offense and length of sentence. For prisoners whose offenses were committed prior to July 1, 1978, Weaver gaintime is awarded at a progressive formula of 5 days per month for the first and second years of sentence, 10 days per month for the third and fourth years of sentence, and 15 days per month for the fifth and succeeding years. Fla. Stat. § 944.27 (1977); see also Weaver v. Graham, 450 U.S. 24 (1981). For prisoners whose offenses were committed on or after July 1, 1978, reform gaintime is awarded at the rate of 10 days per month based upon length of sentence. Fla. Stat. § 944.275(4)(a) (1991). Some prisoners may be excluded from eligibility to receive these awards by statute. An inmate may also be favored with an award of meritorious gaintime of up to 60 days for an outstanding deed,

a. An inmate may receive up to 60 days of educational gaintime for completing the requirements for, and receiving, a general education development ("GED") certificate or vocational certificate. Fla. Stat. § 944.275(4)(d). An inmate may also receive an additional 6 days of gaintime for completing 150 hours of mandatory literacy coursework. Opportunities to participate in these educational programs and receive these awards are available both to the GP and protective management inmates at any given institution.

b. Inmates whose offense dates fall before July 1, 1978 or after June 14, 1983, may earn monthly awards of up to 20 days of incentive gaintime for work assignments and other productive activities, including participation in educational or vocational programs. Fla. Stat. § 944.275(4)(b). A Department rule establishes guidelines for awarding incentive gaintime. Fla. Admin. Code r. 33-11.0065. The rule provides for an award of 0-8 days for a rating of above satisfactory; 9-16 days for a rating of outstanding; and an additional 0-4 days for overall institutional adjustment, participation in self-betterment programs, and/or simply keeping one's cell clean. No incentive gaintime may be awarded if an inmate is rated only satisfactory in work and overall institutional adjustment. An award of incentive gaintime does not directly correlate to the number of days actually worked. Once rated,

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such as saving a life, aiding an officer, or any other act which is considered outstanding and commendable. Id. at § 944.275(4)(c).

A-2

an inmate may receive an award that falls anywhere within the range designated for the rating category. The specific award is determined by an inmate's classification team.

c. In Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990), the Florida Supreme Court held that a revised incentive gaintime provision, which decreased the maximum amount of incentive gaintime available, was unconstitutional as applied to offenders whose offenses were committed prior to the effective date of the revision. Thus, inmates whose offense dates fall between July 1, 1978 and June 14, 1983 must be awarded incentive gaintime in accordance with the statutes in effect at that time, which authorized up to 37 days per month of work and extra gaintime, now generally referred to as Waldrup gaintime.[7] A Waldrup inmate may receive day-for-day gaintime for each day of labor performed, based upon a 4-tier evaluation: below satisfactory (no award); satisfactory (50% of maximum award calculated); above satisfactory (75% of maximum award calculated); and outstanding (100% of maximum award calculated). In addition, an inmate may receive an extra discretionary award of 0-6 days per month for institutional adjustment or program participation.

There were approximately 5000 inmates in custody affected by Waldrup. The previous incentive gaintime awards earned by these inmates from July 1983, when the statutes changed, to

[7] Inmates cannot receive both work and extra gaintime and incentive gaintime on the same sentence.

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April 1990, when the Department began actual awards under Waldrup, were converted into work and extra gaintime awards through use of a pro rata formula which essentially provided a windfall benefit to this group of inmates. The pro rata formula was chosen as the conversion mechanism because the Department lacked the documentation to make actual assessments under the complex formula established by prior statutes and rules. However, in April 1990, the Department was able to begin making awards of work and extra gaintime on the basis of actual performance, as assessed under the prior statutes and rules. Overall monthly awards of work and extra gaintime for this group of inmates diminished when the pro rata formula was discontinued in favor of actual performance awards. All inmates affected by the Waldrup decision were notified that actual awards following the conversion would most likely be lower. Because the conversion awards represent inflated awards, awards made to inmates during the conversion period do not provide a valid basis of comparison to present earnings in either GP or PM status.

49. Not all inmates are eligible to earn full gaintime. For example, inmates recently received into custody of the Department will not be eligible for full gaintime awards until they have completed orientation and received job assignments. Inmates in transit, such as the 2500 inmates transferred between January 1992 and October 1992 to resolve protection

claims, do not receive full gaintime.[8] Inmates serving certain types of sentences, such as minimum mandatory terms, are ineligible to earn gaintime.

50. Disciplinary action adversely affects the award of gaintime. Disciplinary action in a given month invalidates any monthly award of work or incentive gaintime and may limit future awards during an extended disciplinary confinement status. Receipt of a disciplinary report ("DR") renders a Waldrup inmate ineligible for extra gaintime for the following six months.

51. Gaintime awards fluctuate from month to month across the entire prison population, as a result of variances in job ratings and other factors, such as transfers.

52. The PM rule provides that "[t]hose who accept work assignments shall be subject to awards of gain time pursuant to Rule 33-11.0065 in the same manner as general population." Fla. Admin. Code r. 33-3.0082(5).

53. Plaintiffs introduced three exhibits prepared for them by the Department's Bureau of Planning, Research & Statistics, numbered 1405-07, that purport to represent statistical comparisons of gaintime awards to PM and GP inmates for October 1992. Plaintiffs' Exhibit 1407, for example, indicates that the 299 PM inmates received an average

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[8] A non-Waldrup inmate may earn 0-4 days of incentive gaintime while in reception/orientation or transit status. A Waldrup inmate may earn 0-6 days of extra gaintime while in reception/orientation or transit status.

of 7.9 days, while 35,660 GP inmates received an average of 13.9 days. Each exhibit, however, bears the disclaimer, "Inmates who are ineligible to earn Incentive Gaintime are included in these figures: i.e., full Waldrup Cases, mandatory sentences, life sentences, and new admissions." Plaintiffs have provided no proof of the number of gaintime ineligible GP and PM inmates. Thus, the Court can note that 44.5% of the PM inmates received a zero award, compared to only 13.7% of the GP inmates, but is unable to determine whether this difference is caused by a large number of gaintime ineligible PM inmates, a denial of comparable job opportunities to PM inmates, or both. In short, by including people who are ineligible, these statistics lose all analytical value.[9]

54. In addition, Plaintiffs introduced three exhibits prepared at the request of the Assistant Secretary of Operations, numbered 1401-03, that purport to list the gaintime ("GT") awards to non-Waldrup PM inmates in each of the months from August 1992 through October 1992 and compare the award given to the average non-Waldrup GP inmate performing the same type of job. Plaintiffs' Exhibits 1402 and 1403 reflect the following effort and gaintime reward for utility workers at Florida State Prison:

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[9] Plaintiffs argue, in their proposed Findings of Fact and Conclusions of Law, that "[t]he burden is clearly on the Department to explain" the discrepancies suggested by Exhibits 1405-07 (DE 188 at ¶ 39). But it is Plaintiffs who must prove to this Court that SINGLETARY has intentionally violated their constitutional rights. See infra at 61.

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-September 1992

Rating (#)	Avg Days Worked (PM)	Avg GT Award (PM)	Avg Days Worked (GP)	Avg GT Award (GP)
Above Satis. (9)	7.56	4.00	20.00	8.00
Outstanding (15)	11.53	9.67	20.00	16.00

-October 1992

Rating	Avg Days Worked (PM)	Avg GT Award (PM)	Avg Days Worked (GP)	Avg GT Award (GP)
Above Satis. (3)	14.00	7.38	30.00	8.00
Outstanding (26)	15.50	14.42	30.00	16.00

55. However, the disparity is not as large when one looks at *all* job classifications, not simply utility worker:

-September 1992

Rating (#)	Avg Days Worked (PM)	Avg GT Award (PM)	Avg Days Worked (GP)	Avg GT Award (GP)
Above Satis. (23)	20.0	6.4	20-30	8.0
Outstanding (22)	14.8	11.9	20-30	16.0

-October 1992

Rating (#)	Avg Days Worked (PM)	Avg GT Award (PM)	Avg Days Worked (GP)	Avg GT Award (GP)
Above Satis. (15)	20.0	7.7	20-30	8.0
Outstanding (47)	18.5	14.7	20-30	16.0

56. The willingness of PM inmates to participate in work activities or group programs may, on the whole, be lower than that of GP inmates, because some inmates go to PM to "lay in"

or to isolate themselves from the population at large. This factor could account, at least in part, for any discrepancy in work evaluation and gaintime earnings between PM and GP inmates.

57. Moreover, the figures for GP inmates do not seem accurate. It strains credulity to imagine that the *average* gaintime award for nearly 36,000 working GP inmates is the maximum 8 days for above satisfactory performance, or 16 days for outstanding performance, authorized by the regulations. This imprecision in the GP comparison statistics likely flows from the nature and purpose of the exhibits. These documents are not the official gaintime records of the Department, which are maintained by the Office of Programs. Ron Jones, Assistant Secretary of *Operations*, requested general information to provide an overview of gaintime awards. But he is unaware of the criteria used to come up with the "average" awards.

58. SINGLETARY introduced his Exhibit 25, a chart prepared by the Bureau of Planning, Research & Statistics, which purports to compare the average incentive gaintime awards[10] to inmates at several institutions on September 30, 1992, excluding those who are statutorily ineligible for incentive gaintime and those admitted during September 1992:

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[10] Plaintiffs' statistics apparently measured only that portion of incentive gaintime based upon job performance, while SINGLETARY's statistics included the 0-4 day institutional adjustment awards.

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Institution	Rating	Avg GT: non-PM	Avg GT: PM
FSP	Above Satis.	7.7	7.3
FSP	Outstanding	16.3	16.3
Union	Above Satis.	9.5	8.1
Union	Outstanding	19.8	20.0
Martin	Outstanding	18.3	18.4
Polk	Outstanding	19.6	18.6
Hendry	Outstanding	19.9	20.0

59. Utilizing statistical controls deemed appropriate by Dr. Bill Bales, Bureau Chief for the Bureau of Planning, Research & Statistics, the Department reported that, for offenders eligible to earn incentive gaintime, the average incentive gaintime award during October 1992 on a statewide basis were as follows:

Rating	Avg GT: GP inmates	Avg GT: PM inmates
Above Satis.	4.9	5.7
Outstanding	19.3	18.9

60. Wilson Bell, the Department's Assistant Secretary for Programs, presented testimony regarding the pattern of gaintime earnings of each of the inmates who were named as class members and witnesses for trial. Dr. Bell compared earnings of each individual inmate during prior periods in GP with earnings while in long-term PM.

a. Terry Royal: Royal is eligible for work and extra gaintime under the Waldrup decision. In 1990, following the completion of the conversion of previously earned incentive

gaintime into work and extra gaintime, Royal began to be assessed for monthly awards under the statutes and rules in place prior to June 15, 1983. From April 1990 through November 1990, while in GP, Royal earned gaintime in a range encompassing a low of 12 days during one month and a high of 22 days during one month. In 1991, after being placed in PM, he earned a low of 15 days of gaintime in a single month and a high of 23 days during 4 months.

b. Randy Wheeler: Wheeler is also eligible for awards of gaintime pursuant to Waldrup. Following conversion of previously earned incentive gaintime, Wheeler earned a low of 10 and a high of 22 days of work and extra gaintime in one month. Wheeler was placed into PM in December 1990, where he earned a low of 12 days of gaintime to a high of 23 days during four months in 1991. Wheeler continued to earn in the range of 20 days per month during 1992, except during a brief transfer between institutions.

c. Charles Brightwell: Brightwell is likewise a Waldrup inmate. From March 1990 through the end of 1990, while in GP, Brightwell earned a low of 0 days to a high of 23 days of gaintime in a single month. During the calendar year 1991, while still in GP, Brightwell earned a low of 0 days during five months, because of disciplinary reports and confinement, and a high of 23 days. In May 1992, Brightwell was transferred to protective management, where he earned a low of 5 days to a high of 23 days per month, a range similar to his

experience in GP.

d. Frederick Reinhart: Reinhart is another <u>Waldrup</u> inmate. Beginning in April 1990, Reinhart was in a close management status, which precluded him from earning gaintime. In June 1990, Reinhart was assigned to be a "runner." As a runner, Reinhart was able to earn 30 days of work gaintime in June 1990 and 31 days in July 1990. Remaining in GP from August 1990 through November 1990, Reinhart earned 16 days in August, 0 days in September, 0 days in October, and 12 days in November. In December 1990, Reinhart was placed into long-term protective management, where he received a job assignment and earned gaintime continuously through November 1992, ranging from a low of 2 days in July 1991 to a high of 18 days in June 1991. The majority of Reinhart's awards fell within 11 to 13 days per month.

e. Patrick Willis: Willis entered the prison system in March 1992 and was awarded nominal gaintime during the reception process in March and April 1992.[11] Willis arrived at his permanent institution in May 1992 and received a DR, which invalidated any gaintime award to be earned that month. Willis was transferred into PM later that month, where he

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[11] During the reception process, an inmate is screened by medical and may receive medical treatment prior to transfer to a permanent institution. Classification staff develop a social history, mental health profile, establish an institutional inmate jacket, review commitment papers, and determine an appropriate permanent assignment. This process can take six to eight weeks, during which there is no job assignment.

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received awards of 4 days per month from June through August, increasing to 20 days per month for September through November. The low awards for June through August resulted from satisfactory ratings for Willis' work assignments but above satisfactory ratings for self-betterment. His work performance then improved to an outstanding level, allowing him to earn the maximum incentive gaintime.

f. Ronnie Weaver: Weaver was incarcerated in November 1990 and immediately placed into PM. He was awarded nominal gaintime during the first three months while in reception/orientation and transit. In February 1991, Weaver arrived at his permanent institution and received a job assignment, earning 20 days of incentive gaintime per month through February 1992. Weaver received 16 days in March 1992 and 18 days per month from April through October 1992.

g. Michael Wilson: Wilson is eligible to earn incentive gaintime. While in GP in 1991, Wilson's earnings ranged from 0 days due to disciplinary action or minimal performance to a high of 20 days earned in eight of the twelve months. In 1992, Wilson's awards ranged from 6 days to 20 days per month, with the lower awards primarily due to transitory status. Wilson was in PM for five months during 1992. In three of those months, Wilson earned the maximum 20 day awards.

h. Brian Kennedy: Kennedy was incarcerated in October 1991 and remained in reception and transit status

through November 1991. Once placed in GP at his permanent institution, Kennedy earned 18-20 days of incentive gaintime for three months. For the remainder of his months in GP, Kennedy received no gaintime due to disciplinary action or minimally satisfactory job performance. In September 1992, Kennedy was placed in PM, where he consistently has received maximum awards of 20 days of incentive gaintime each month.

i. Samuel Hinote: Hinote remained in reception and transit from September 1991 until January 1992. His incentive gaintime earnings during the first quarter ranged between 15 and 18 days per month, but dropped to 0 days during the second quarter because of minimally satisfactory job performance. During the third quarter, Hinote earned only 2 days of gaintime. In September 1992, Hinote was placed into administrative confinement pending a PM status determination. The request for protection was resolved by transferring Hinote to another permanent institution, where he was released into GP. Hinote received a full-time job assignment at that time and has been earning maximum gaintime awards. Hinote was never placed into PM since his protection needs were resolved through transfer.

j. Michael O'Donnell: O'Donnell entered the prison system in June 1990 and remained in reception through July 1990. After reaching his permanent institution, O'Donnell earned only nominal awards because continuing mental health concerns prevented him for working. In April 1991, O'Donnell

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was transferred to the Corrections Mental Health Institution for treatment, where he remained until February 1992. After two months in orientation and transit, O'Donnell reached his permanent institution in May 1992, where he was initially placed into GP. O'Donnell earned 15 days in May and 16 days in June 1992. In July, O'Donnell requested protection and was placed into PM, where he has consistently earned the maximum incentive gaintime awards of 20 days per month.

k. Timothy Upshaw: Upshaw is eligible to earn incentive gaintime. During 1990, while in GP, Upshaw received a range of gaintime awards from 1 day per month for seven months to 20 days per month for three months. In 1991, Upshaw was in transit through February, and reached a permanent institution in March. Upshaw earned 20 days in March and April, 16 days in May and June, 12 days in July, 5 days in August, 20 days in September, and 0 days in October 1991. In November 1991, Upshaw was placed in PM, where he received a job assignment and earned 20 days for November, 12 days for December, and 20 days for January 1992. In February, Upshaw returned to GP and earned 20 days. In late March, Upshaw's PM status was reinstated for long-term protection. Since returning to PM, Upshaw has received varying gaintime awards, primarily due to disciplinary action.

l. Willerton Brown: Brown was initially received in 1984 and is eligible for incentive gaintime. His gaintime awards for 1990 showed earnings of a low of 0 days due to

disciplinary action in two months to a high of 20 days during 6 months. In 1991, Brown received gaintime awards again ranging from a low of 0 days due to disciplinary action during 4 months to a high of 10 days during 2 months. In 1992, this pattern continued. In April 1992, Brown was placed in PM, where his pattern of disciplinary violations and minimally satisfactory performance has continued. However, on two occasions, Brown has earned maximum awards of 20 days while in PM.

m. Michael Chester: Chester remained in reception and transit from January through March 1992. He arrived at his permanent institution in April 1992, was assigned a job and earned 18 days of incentive gaintime. After a transition period, Chester was placed in long-term PM, where he has earned 18 days per month during three months. No gaintime was awarded for July 1992 and only 2 days for August 1992, due to disciplinary action.

n. Cary Rininger: Rininger entered the prison system in January 1992 and remained in reception and transit until April 1992. After arriving at his permanent institution, Rininger received DR's for 5 months. In September 1992, Rininger was transferred into PM, where he earned 8 days the first month, 20 days the second month, and received a DR in the third month of PM status.

o. Alexander Czaplicki: Czaplicki was incarcerated in April 1992 and remained in reception and transit through

June 1992. In July, Czaplicki received a DR and in late July, he requested protection. In August, while pending consideration for PM, Czaplicki earned 18 days of gaintime. In September, Czaplicki was placed in PM and earned 20 days of gaintime. Due to continuing disciplinary problems, however, Czaplicki's awards dropped to 0 thereafter.

p. Fred Lewis: Lewis remained in reception from June through July 1991. Upon arriving at his permanent institution, Lewis received a job assignment and his awards have ranged from a low of 0 days due to disciplinary action to a high of 20 days. During the first half of 1992, while still in GP, Lewis's gaintime earnings continued to fluctuate from a low of 0 days due to disciplinary action to a high of 20 days for 2 months. In July 1992, Lewis was placed into PM, where his gaintime earnings have continued in the same pattern, with a low of 0 days for three months due to disciplinary action and a high of 20 days for the two months not in disciplinary confinement.

q. Arthur Schaffer: Schaffer originally received the death penalty, but in December 1990, his sentence was commuted to life. Schaffer was placed directly into PM upon removal from death row. In 1991, Schaffer consistently earned 16 days per month, except for March, when he received only 14 days. In 1992, Schaffer earned 16 days for each of the first nine months, but only 11 days in October and 15 days in November.

r. Harold Stapleton: Stapleton was paroled in 1989

and returned to the Department's custody as a parole violator in January 1991. During 1991, while in GP, Stapleton received maximum 20-day awards during eight of the months and 0-day awards in two months due to disciplinary action. In 1992, Stapleton's performance deteriorated and he began receiving nominal awards. In June 1992, Stapleton was placed into PM, where he has earned 4 days for June, 8 days for July, and 12 days for each month from August through December. These mid-range awards are due to Stapleton's performance being rated as only above satisfactory rather than outstanding.

ii. Jobs

61. All able-bodied GP and PM inmates are expected to work. See Fla. Stat. § 946.002; Fla. Admin. Code r. 33-3.0082(5). Working may shorten an inmate's sentence, Fla. Stat. § 944.275, reduce his custody status, id. at § 944.1905(3)(c)-(d), and alleviate boredom. Even "make work" jobs are helpful to self-esteem and mental health.

62. Not all jobs are offered at all institutions, although certain types of core jobs, such as food service, houseman, and grounds squad, are basic to each facility.

63. There are not enough jobs for all inmates who are currently incarcerated. Waiting lists are maintained for some jobs.

64. Inmate job assignments are affected by medical and psychological grades, which are given to each inmate in the Department system.

APPENDIX B

Response to Peter M. Siegel's Letter
Dated December 3, 1992: Item D

Average Incentive Gaintime Earned During October 1992
Non Waldrup Offenders Eligible to Earn Incentive Gaintime

	Above Rating		Outstanding Rating	
	General Population	Protective Management	General Population	Protective Management
Statewide	4.9	5.7	19.3	18.9
Apalachee - West	6.5	N/A	19.8	N/A
Apalachee - East	6.9	N/A	19.5	N/A
Jefferson	8.1	N/A	18.9	N/A
Jackson	5.8	N/A	19.6	N/A
Calhoun	9.1	N/A	19.1	N/A
Century	8.0	N/A	19.9	N/A
Holmes	8.8	N/A	19.3	N/A
Walton	6.9	N/A	19.6	N/A
Gulf	6.1	N/A	18.8	N/A
Okaloosa	8.6	N/A	19.8	N/A
River Junction	7.0	N/A	20.0	N/A
Liberty	7.2	N/A	19.5	N/A
Columbia	7.3	N/A	19.4	N/A
FSP - O Unit	5.6	N/A	19.4	N/A
FSP - Main	6.7	7.7	16.9	15.2
New River West	7.2	N/A	19.6	N/A
N. Florida RMC - Hosp.	4.5	N/A	19.5	N/A
N. Florida RMC - W	2.4	N/A	19.3	N/A
N. Florida RMC - M	2.8	N/A	19.0	N/A
New River East	5.8	N/A	19.6	N/A
Cross City	6.9	N/A	19.2	N/A
Mayo	6.2	N/A	19.4	N/A
Union	7.3	8.9	19.8	20.0
Putnam	2.9	N/A	19.9	N/A
Hamilton	7.8	N/A	19.4	N/A
Madison	5.9	N/A	19.3	N/A
Union - Medical	1.7	N/A	17.0	N/A
Lawtey	8.1	N/A	19.6	N/A
Baker	6.8	N/A	19.4	N/A
Lancaster	6.0	N/A	18.7	N/A
Tomoka	7.7	7.2	19.2	20.0
Marion	6.9	N/A	19.5	19.7
Sumter	7.8	N/A	19.5	N/A
Sumter - BTU	5.4	N/A	16.3	
Brevard	7.4	N/A	18.7	
Lake	7.1	N/A	18.9	
FCI	5.1	N/A	19.5	
FCI - Forest Hills	6.1	N/A	19.5	
Central Florida RMC	2.5	N/A	18.9	
Central Florida - E	3.2	N/A	19.4	
Central Florida - S	2.0	N/A	20.0	

DEFENDANT'S EXHIBIT
CASE NO. 88-14178-Civ
EXHIBIT NO. 47

Response to Peter M. Siegel's Letter
Dated December 3, 1992: Item D

Average Incentive Gaintime Earned During October 1992
Non Waldrup Offenders Eligible to Earn Incentive Gaintime

	Above Rating		Outstanding Rating	
	General Population	Protective Management	General Population	Protective Management
S. Florida RMC	2.6	N/A	19.1	N/A
S. Florida RMC - S	3.4	N/A	19.6	N/A
Glades	7.4	N/A	18.9	N/A
Indian River	6.7	N/A	15.1	N/A
Martin	3.8	2.3	18.5	19.0
Broward	5.0	N/A	19.4	N/A
Hardee	7.3	N/A	19.5	N/A
Avon Park	4.9	N/A	19.5	N/A
Avon Park - O Unit	10.7	N/A	19.9	N/A
DeSoto	8.0	N/A	18.8	N/A
Charlotte	6.4	N/A	19.1	N/A
Hillsborough	6.8	N/A	19.3	N/A
Zephyrhills	7.3	N/A	18.9	N/A
Hendry	8.2	N/A	19.8	20.0
Polk	7.4	5.7	19.7	20.0

N/A - No inmates were in this category.

Prepared by:
Bureau of Planning, Research & Statistics
December 9, 1992