93-5305

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 93-5305

HAROLD STAPLETON, et al.,

Appellants,

vs.

HARRY K. SINGLETARY, JR.,

Appellee.

INITIAL BRIEF OF APPELLANTS

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

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STAPLETON v. SINGLETARY
Case No. 93-5305

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 Appellants certifies that the following individuals and corporations have an interest in the outcome of this case.

Individuals

1. William Alderman
   Plaintiff/Appellant

2. Greg Apone
   Plaintiff/Appellant

3. Kevin Baker
   Plaintiff/Appellant

4. Charles Brightwell
   Plaintiff/Appellant

5. Larry Eugene Brown, Jr.
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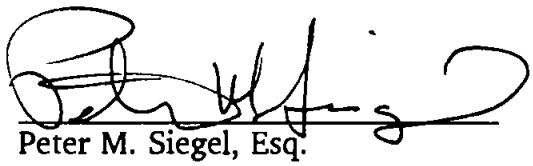
Respectfully submitted,



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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. It will be helpful in assisting the Court to understand the extensive factual record and the legal issues presented herein.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES

Whether the defendant's voluntary cessation of illegal conduct, after years of operating a punitive and obviously unconstitutional protective confinement system, and after a prolonged, and still incomplete elimination of all the aspects of that punitive system, satisfies the defendant's heavy burden to demonstrate that it is absolutely clear there is no reasonable expectation that its allegedly wrongful behavior could be expected to recur? Subsumed within this issue are two questions (1) whether the district court reversed the applicable burden of proof by holding that "[a]bsent a showing that the new administration might return to former unconstitutional practices, the decision to deny injunctive relief is not an abuse of discretion" and (2) whether the district court erred in refusing to grant declaratory or injunctive relief designed to prevent the defendant from reverting to its old ways?

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 CASE

1. Course of Proceedings Below: In the Complaint, filed September 30, 1988, plaintiffs alleged that the defendants,[1] as past and present administrators of the Florida Department of Corrections (hereinafter, collectively referred to as the "Department of Corrections" or the "Department"), violated the plaintiffs' right to be free from Cruel and Unusual Punishment and the plaintiffs' rights to equal protection and due process of law, because of the punitive conditions imposed on prisoners assigned to what, at the time this litigation began, was called protective confinement ("PC") and is now called protective management ("PM"). R1-1. In this Brief, whenever the term protective confinement or PC is used, it describes conditions prior to December, 1990. Protective management or PM describes conditions thereafter.

The Court certified a class, "consisting of all persons who are currently incarcerated at prisons operated by the Florida Department of Corrections or who will be incarcerated at prisons operated by the Florida Department of Corrections in the future and who are or will seek to be placed in protective confinement for their own safety." R1-30-7.

After more than two years of litigation, the Department announced in November, 1990 that it was revising the PC rule in response to this litigation, that the plaintiffs were the prevailing parties, and that the conditions which led to this litigation no longer existed. R2-65. But, the Department never admitted, at any time during the litigation, that any of

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1. The only defendant presently before the Court is Harry K. Singletary, Jr., in his official capacity as Secretary of the Florida Department of Corrections. He was substituted for former Secretary and Defendant Richard L. Dugger. R3-96.

its actions were unconstitutional. Quickly after announcing its change of heart, the defendant filed a Motion for Summary Judgment, contending that the matter was moot. R3-86. A state-sponsored tour of prison facilities, R3-89, demonstrated that many of the policies announced by the central office had not been implemented. R11-545-8; R11-550-16; R11-560-13. The Department withdrew its motion. R3-90.

The district court found that the PM rule as implemented, with three exceptions, passed constitutional muster. It ordered the defendant to remove window screens and shields that served no penological purpose and it enjoined the use of cartoons or video tapes as the sole method of providing religious services. R6-214.

In the end, despite a lengthy trial, a voluminous record, admission by the Department's own expert witness that the protective confinement system was overly restrictive, punitive, and violative of the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment, R16-1587-2, proof that the PC system inflicted significant physical and mental harm (See pages 7 - 8, *infra*), no dispute about the existence of the conditions or their consequences, no evidence from the Department asserting any penological justification or rational basis for them, Findings of Fact and Conclusions of Law running to 72 pages, a finding that the PC system imposed "obviously unconstitutional conditions on those in need of protection," R6-212-12, and the granting of minor injunctive relief, R6-214, the district court failed to enter declaratory or injunctive relief which would prevent the Department from returning to its old ways and failed to create a mechanism to monitor or observe the new, protective management system to insure that it would operate in a way not violative of the plaintiffs' constitutional rights. Instead, after granting limited relief, the district court told the

plaintiffs they could bring a new suit if prison conditions again fell below constitutional standards, R6-212-71, and ordered the case closed. R6-213.

This appeal followed. R7-238.

2. Statement of Facts.

A. The Practices Giving Rise to this Litigation. A diverse group of inmates, including those seeking refuge from sexual assault or prison gangs, informants, those fleeing extortion activity, those with mental problems, former law enforcement officers, sex offenders, and many others make up the small segment of a prison population requiring protection from other inmates. Pl. Ex. 1237, p. 8. When this litigation commenced, there were 25 Florida prisons which housed 540 inmates in protective confinement. Pl. Ex. 1313. Protective confinement was defined as "the removal of an inmate from the general population for the protection of the inmate where such confinement is requested by the inmate or is directed by the Senior Correctional Officer." Rule 33-3.0082(1), F.A.C. (1985). Pl. Ex. 1241. The PC rule provided that conditions for those in "protective confinement shall be as near that of the general population as assignment to protective confinement and the housing area will permit." Rule 33-3.0082(4), F.A.C. (1985).[2]

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2. The Rule also provided that:

> To the extent practicable meaningful and appropriate work opportunities will be available to inmates in protective confinement during the day, evening or night hours if the staff feels the work would not subject the inmate to danger and if adequate staff protection can be provided. If the inmate cannot be taken outside of the security of the cellblock, other approaches to work are encouraged, such as work in the walkway in front of the cell if staff protection can be provided, or in the cell.

(continued...)

The provisions of the PC rule would lead an unaware reader to conclude that inmates assigned to protective confinement were treated, in general, in a fashion similar to the treatment afforded general population inmates. Nothing could have been further from the truth. Although the rule provided that "[p]rotective confinement is not disciplinary in nature and inmates in protective custody are not being punished," Rule 33-3.0082-(4), F.A.C. (1985), the undisputed facts belied that self-serving assertion. The Department admitted that conditions were not comparable. R10-406-9. Gary Reposa, an inmate sent from Texas to Florida for protection, described what protective confinement was really like:

> . . . you are locked in your cage 24 hours a day down here. And you come out every other day for a shower, five minutes every other day, boom, boom, back into the cage. The only time you come out after that would be for a call out for a dental, maybe, if you have one, or some kind of medical or a counselor want to see you. And then Friday you get two hours because that's what the state has to give you. That's all we get is that two hours on Fridays. If you have 30 days already in, you get two hours.
>
> The shower every other day, in the summer -- in the winter time, you know, that's cool. In the summer time, you're sweating in them cells all day, every other day, then Friday to Monday is your three day one. I don't like that. I mean, the [general] population, they get showers every day.
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> * * * *

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2. (...continued)
Rule 33-3.0082(5), F.A.C. (1985). In a like vein, the Rule continued:

> Inmates in protective confinement should be permitted to participate in various self-improvement programs to the extent possible. Such programs may be scheduled in their housing areas, or in separate locations within the institution that conform with the need for security. Such program participation may involve correspondence courses or self-directed study activities.

Rule 33-3.0082(7), F.A.C. (1985).

I don't know if you smoke or not, but if you ever have, you know it's a little nerve racking not to be able to smoke. But I don't like that, not be able to smoke. I've never abused that privilege.

I don't like not being able to have hot water. I don't know why they don't have it but is probably a reason, like, way back someone threw some hot water on someone. I don't know that it was, but we don't have that.

And I don't like having my cell shook down once, twice weekly, if they're not on your case. They [correctional officers] tear it apart and they're not doing their job, they don't fold the stuff back. There is a proper way to be shook down, they fold your blankets up and stuff.

* * * *

And it seems to me that they want to make it where it is not nice down there, so no one want to stay down there. They force you to check out. They forced me to check out two times. This is my third time now, but this time here I'm trying to go home.

Q. Anybody said that to you?

A. Always.

Q. Has anybody ever said, We are trying to make this bad for you?

A. No. no. They say, if you don't like it, check out; if you want water, check out and get some; you want to go to the yard, check out and get it.

R5-166-20, Pl. Ex. 1261.

It is uncontested that the housing of inmates in need of protection in near total lock-down conditions, with very limited opportunities for human interaction, exercise and participation in rehabilitative programs, resulted in the physical and mental deterioration of the inmates. R10-474-24; Pl. Ex. 1411 (Brodsky Deposition). For years prior to

December, 1990, the Department continuously presented inmates who needed protection with a Hobson's choice: either give up most programming and normal prison conditions, live in solitary confinement, and serve a longer sentence as the price of obtaining protection; *or* give up protection as the price of retaining access to the full spectrum of prison programs, including sentence-reducing gaintime. When asked why some inmates voluntarily left protection, a classification officer testified that: "Some of them, you know, just decide that not having access to the yard is worse than, you know, taking a chance on the other inmates." Pl. Ex. 1270, at page 10. Another classification officer, when asked what tools existed to encourage inmates to leave PC noted that: "Well, I think the main thing would be the differences you're discovered between how PC inmates are treated and other inmates are treated, the opportunity for programs and full-time work, longer visits, canteen privileges every day." Pl. Ex. 1306 at page 17. The very need to make such a "no win" election caused inmates mental anguish. R10-474-24. The prolonged lock-down conditions created "unpleasant emotions, anxiety, fear, anger, depression, lack of sleep, feelings of fatigue, feelings of hopelessness, suicidal thinking, anger, and rage." R10-475-10. Prolonged lock-down was also likely to aggravate preexisting mental health conditions -- and be particularly hard on those already depressed, R10-476-10; it made them much less capable of being rehabilitated. R10-476-3.

The Department admitted the existence of the near total, punitive lock-down conditions described by Mr. Reposa, as well as the near total absence of programs and activities for those in need of protection. It admitted that at the time the Complaint was filed, most protective confinement inmates were treated in a manner not significantly different from those inmates in administrative confinement. R4-129-6. In general, that

status, with its attendant restrictions, was used to house inmates suspected of criminal activity, or other types of wrongdoing, where there was some reason to believe the inmate might pose a security risk to the prison if left in open population. Rule 33-3.0081, F.A.C. (1990). The Department also admitted in the Joint Pretrial Stipulation that (A) many protective confinement inmates were confined to their cells 24 hours per day, seven days per week, except for limited recreation and shower time, (B) many protective confinement inmates did not have the opportunity for work assignments and, as a result, did not have the opportunity to earn the maximum amount of available incentive gaintime, thereby causing them to serve longer sentences, (C) most protective confinement inmates did not have the opportunity to participate in vocational, educational or self-betterment programs, other than by enrolling in correspondence courses if they could pay the cost while inmates in general population had the opportunity to participate in a range of vocational, educational and self-betterment programs, and to earn incentive gaintime for so doing, (D) most protective confinement inmates were not permitted to watch television while inmates in general population had access to television, (E) many protective confinement inmates received, at most, two hours of out-of-cell recreation per week, (F) most protective confinement inmates were limited to three showers per week while inmates in general population had the ability to take showers one or more times each day, (G) most protective confinement inmates were not permitted to visit the law library or regular library, although a runner system did exist, (H) most protective confinement inmates were not permitted to attend religious services or otherwise participate in group religious activities, and (I) protective confinement inmates were generally not permitted to use the telephone except

in emergencies or to contact their attorneys about pending matters while inmates in general population at most prisons had daily access. R4-129-6.

To be in PC meant, for most inmates, a longer period of incarceration because PC inmates were unable to work and, therefore, unable to earn incentive gaintime. Pl. Ex. 397; Pl. Ex. 401; Pl. Ex. 424. On the other hand, work was always found for general population inmates. Pl. Ex. 1258, Dean Deposition, at page 31; Pl. Ex. 1253, Cook Deposition, at page 36; Pl. Ex. 1289, Collins Deposition, at page 43. An inmate who grieved the lack of gaintime was told that he was at fault for needing protection and, therefore, not deserving of gaintime. Pl. Ex. 900. Soon after the commencement of this litigation, the Department acknowledged that only 29.6% of PC inmates had job assignments. Pl. Ex. 1313, Answers to Interrogatory No. 1.a. and 1.b. And, things got worse, not better. Fifteen months later, the number had fallen to 17.5%. Pl. Ex. 1163. The Department further acknowledged that the amount of incentive gaintime awarded to PC inmates was substantially less than awarded to general population inmates. Pl. Ex. 1312, Answers to Interrogatory No. 1.c. and 1.d. Statewide, for the month of October, 1988, general population inmates averaged 15.10 days of incentive gaintime while PC inmates averaged 6.00 days. Pl. Ex. 1312. The harm to an inmate who, as a result of his need for protection, is locked down and cannot work, or attend school, and thus cannot earn incentive gaintime, is obvious -- he or she serves a longer period of incarceration.

B. <u>The Change from Protective Confinement to Protective Management.</u> In November, 1990 the Department, admittedly in response to this litigation, revised the rule governing the treatment to be afforded those inmates in need of protection. R2-65. The term protective management ("PM") was adopted to replace the term protective confine-

ment. The revised rule provides that: "[p]rotective management is not disciplinary in nature and inmates in protective custody are not being punished" and adds that protective management inmates "are not in confinement." Rule 33-3.0082, F.A.C. (1990). Pl. Ex. 1242. As with the prior rule, it provides that the "treatment of inmates in protective management shall be as near that of the general population as the individual inmate's safety and security concerns permit." Rule 33-3.0082, F.A.C. (1990).

Instead of housing inmates in need of protection at whatever prison they happened to be at when they made their request for protection, ten prisons were designated to have protective management units. R4-129-5. Instead of the former practice of automatic admission to PC on request, R13-1018-1; R13-1044-4, under the PM rule those seeking admission are carefully screened for need. R6-1045-8. Although the Department anticipated that with better conditions the number of PM inmates would grow, because of the admission process and transfers, it shrunk -- it wasn't even necessary to open some of the PM units. R14-1156-1. There was about a 50% drop in the number of inmates assigned to PM units, R13-1045-8, primarily because inmates in need of protection, where possible, were transferred to other prisons as a means of eliminating their need for protection. R14-1156-1.

C. Resistance to Change. After November, 1990, significant steps were taken by the Department to improve conditions and eliminate unnecessary and punitive restrictions for those needing protection. But elimination of the punitive conditions did not happen overnight. Despite defendant's Motion for Summary Judgment, R3-86, much remained to be done. Plaintiffs' correctional expert, Jack Fevurly, had the opportunity to make before and after tours, visiting a number of the major prisons in the State first in October, 1990

and then, after the new PM rule had allegedly mooted this case, in February, 1991. R11-571-7. Defendant made no efforts to rebut his testimony about those tours. Perhaps the most notable, and negative change, occurred at Florida State Prison. There, prior to the change from PC to PM, inmates on the M-Wing program at Florida State Prison held paying jobs and seemed relatively happy. The program ran well with few complaints. R11-540-12. After the changeover to PM, the situation was "utter chaos." R11-540-20 *et seq.* By and large, the inmates were locked down. R11-597-13. The Department was not in compliance with its new rule. R11-545-17.

At Union Correctional Institution, in February, 1991, continuing problems with gaintime and with educational programs demonstrated lack of compliance with the new rule. R11-550-1 *et seq.* At Martin Correctional Institution, besides the window shields, recreation was still limited to two hours per week, R11-551-1, there was no recreation equipment, R11-551-19, canteen was still limited to one day per week, R11-551-9, and there were no tables or chairs in the cells, R11-553-5. At Charlotte Correctional Institution, in February, 1991, PM inmates were forced to eat in five to seven minutes, R11-554-22, out-of-cell time was limited to six hours per day, R11-555-4, outdoor recreation was limited to two hours per week, R11-556-5, showers were limited to three per week, R11-559-8, and work opportunities were not available. R11-556-17. Charlotte was not in compliance with the new rule. R11-560-13.

Some steps necessary to eliminate the punitive restrictions imposed on those in need of protection were not taken until the eve of trial. For example, at Polk Correctional Institution, outdoor recreation was increased from one day per week for two hours to eight hours per day, two days per week, R12-783-15, by the simple expedient of leaving the door

to the recreation yard open. R12-785-25. Library time was increased from two hours to 6½ hours per week. R12-786-5. Educational programs were provided. R12-791-24. At Marion Correctional Institution, a schedule of activities was posted. R11-658-22. Lock-downs ended. R11-661-24. PM inmates were able to access the large recreation yard. R11-664-15. The Chaplain began to conduct religious services. R11-671-11. At Martin Correctional Institution an activity schedule was posted. R9-302-16. Educational and religious programs began. R8-154-13. Canteen visits increased from one to three days per week. R8-154-17. An inmate law clerk became available. R8-162-5.

Other corrective steps were taken during the course of the trial. For example, at Polk Correctional Institution, inmates no longer were forced to go to an activity, such as chapel. R13-1064-14; R13-941-2; R13-984-15. They could skip breakfast -- could sleep in. R13-1064-17. At Union Correctional Institution, arrangements were made to put a cold water fountain on the PM Wing. R13-1066-6. An inmate was permitted to have colored pencils in his cell for hobby craft. R13-1076-9. At Marion Correctional Institution, PM inmates who didn't wish to go the library, instead of being locked down, were permitted to go the dayroom, visitors were no longer required to give advance notice, and a runner was designated to bring newspapers to the PM unit. R13-1066-20.

D. Continuation of Problems. The PM system still punishes inmates in protection as compared to inmates in general population. It does not eliminate all the "obviously unconstitutional conditions" in place at the time this litigation commenced. PM inmates still suffer psychological harm. PM inmates still perceives themselves as receiving, without justification, much less than general population inmates. In addition to being unpleasant, and inconvenient, it is stigmatizing, and demoralizing. R10-481-6. Other factors, the

opaque shields which covered the windows at Martin,[3] lack of religious services,[4] and lack of rehabilitative efforts, also have a direct, deleterious impact on mental health. R10-481-12.

Programs and activities provide a means for inmates to work toward their own rehabilitation. Because PM inmates are given only limited opportunities to participate in self-betterment programs, they are less likely to rehabilitate themselves and thus more likely to suffer the psychological effects of continued failure and despair; recidivism is more likely. R11-538-24. The absence of similar religious, educational, R11-538-15, vocational,

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3. The shields, which are made of opaque plastic or fiberglass, are depicted in the pictures which are part of Def. Ex. 33. Dr. Halleck, a psychiatrist with extensive prison experience, testified that the window screens served no purpose other than to make conditions of confinement more punitive. R10-482-5. Assistant Secretary Jones agreed that the window shields were not necessary for a PM unit. R14-1149-24. They have a significant adverse psychological effect; in addition to making the quality of life much worse, the inmate also perceives himself as being singled out for unusual and unnecessary punishment. R10-482-12. The screens also interfere with ventilation and increase the temperature of the unit. R10-497-1; R10-499-8. It defies understanding why they have not been removed. R10-497-21. Cloid Schuler, defendant's correctional expert, agreed the shields served no legitimate penological purpose. R16-1566-1.

4. Access to communal religious services is important. R11-562-22. There is no justifiable penological purpose for not offering communal religious services in a manner comparable to that offered to general population inmates. R11-563-5.

R11-538-18, employment and recreational opportunities is likely to cause inmates mental anguish and to have long-term effects because of the unavailability of this important factor to an inmate's rehabilitation. R10-477-13; R10-481-6.

An inmate's participation in institutional programs also directly impacts on his chances for earlier parole or controlled release. The Rules of the Florida Parole Commission provide that the factors looked to when determining whether to grant or deny parole encompass a variety of items relating to institutional programs, including work assignments, gaintime, completion of high school, college, or other academic courses of study, completion of training programs designed to provide vocational skills and successful counselling. Rule 23-21.013(2), F.A.C. (1992) (parole); Rule 23-21.010, F.A.C. (1992) (controlled release). The inmate must earn a reduction in his parole release date; one way to earn the reduction is by program participation. R5-175-37, Rudloff deposition. The Parole Commission obviously cannot consider any of the factors enumerated above or give a PM inmate credit if the inmate does not have the opportunity for exposure to the identified factors. Parole Examiners, who look for program participation as proof of rehabilitation efforts, have looked with disfavor on inmates in protection. Pl. Ex. 1200. The recommendation in Plaintiffs' Exhibit 1200, that the inmate "request removal from protective custody to better himself while serving time in the prison system," is apparently not unusual. R5-175-31, Rudloff deposition. Protective management inmates, like PC inmates before them, are denied the opportunity to partake in the activities which will enable them to be paroled.

i. Jobs and GainTime: Providing jobs -- and thus the ability to earn incentive gaintime on a basis comparable to that available to the general population -- is a still

unrealized major goal of this litigation. The PM rule is phrased in mandatory terms and provides:

> Work assignments - within 10 days of the protective management determination, work opportunities consistent with medical grades *shall* be available to inmates in protective management during the day, evening or night hours. . . . Those who accept work assignments *shall* be subject to awards of gain time pursuant to Rule 33-11.0065 in the same manner as the general population.

Rule 33-3.0082(5), F.A.C. (1990) (emphasis supplied). The PM rule is consistent with the general policy of the Department, which calls for jobs to be assigned to all inmates within 10 days of their arrival at a prison. R14-1228-14; R16-1429-23. An inmate who performs his job in an "outstanding manner" may receive up to sixteen days of incentive gaintime per month. Rule 33-11.0065(3)(d)(1), F.A.C. (1992). He may receive another four days for participation in self-betterment programs, for good institutional adjustment, or just for being cooperative in his housing area. R14-1271-18.

After adoption of the PM rule, the Department began to assign PM inmates to a range of jobs, such as houseman, kitchen trash and clean-up workers, outside grounds maintenance and the like. R8-56-2; R8-57-2; R8-96-7; R8-175-3; R12-735-6; R12-757-18. However, the Department has never provided any paying jobs to PM inmates, R9-240-5, forcing them to rely solely on family and friends for support. R12-862-24; R9-233-21. At several prisons, Food Service America, a private corporation, operates the kitchen. General population inmates assigned to kitchen duty are paid. About 10% of a prison's population is so employed. R13-1054-1. Yet, PM inmates, who work in the kitchen at night doing the same kind of work as done by the day workers, are not paid. R13-1054-13. They are not considered part of the contract between the Department and the food service provider.

R13-1054-16. Similarly, PRIDE, the prison industries program, provides paid employment to approximately 2,500 general population inmates. R13-884-12. No PM inmates are allowed to hold PRIDE jobs. R9-240-5. Even worse, when this litigation began, inmates in need of protection at Florida State Prison were assigned to what was then known as the M-Wing program and were paid for working in the PRIDE garment factory. R9-294-16. During the changeover from PC to PM, they all lost their jobs. R13-940-3. Since then, no effort has been made to return them to paid employment. R13-940-20. Instead, many have been assigned to the "gun squad," an outside grounds detail considered punitive by the inmates since in the past only inmates assigned to close management status as the result of disciplinary problems have held such jobs. R9-339-15; R10-456-20. There are no armed work squads for general population inmates. R13-1046-3.

Although the disparity today is far less, PM inmates still earn less gaintime than general population inmates. The Department took the position, and the district court agreed, that incentive gaintime awards are comparable and that the statistics used by the plaintiffs, although furnished by the Department, do not fairly represent the award of incentive gaintime under the PM rule. R6-212-22. Yet, the Department presented no data, or explanation, that can account for the fact that ***no*** PM inmate at Florida State Prison was able to earn the maximum amount of available incentive gaintime while 11.9% of the general population inmates earned the maximum. Pl. Ex. 1426. Likewise, the Department presented no data, or explanation, to account for the fact that only 32.2% of the PM inmates at Union Correctional Institution were able to earn the maximum amount of available incentive gaintime while 63.6% of the general population earned the maximum amount. Pl. Ex. 1426. Nor could the Department account for the fact that statewide,

13.7% of general population inmates received no gaintime for the month of October, 1992, while 44.5% of PM inmates received no gaintime. On the other hand, 51.6% of general population inmates received the maximum amount of 20 days while only 20.1% of PM inmates received a like amount. Pl. Ex. 1407.

The statistics relied upon by the Department show a continuing, albeit smaller disparity, indicating that PM inmates rated outstanding average 18.9 days per month while general population inmates average 19.3 days per month. Def. Ex. 47. The charts below, which summarize date provided to Assistant Secretary Jones to enable him to monitor gaintime comparability, show that for the largest category of PM workers at Florida State Prison, those assigned to the job category, "utility man," the disparity is obvious.

Average Incentive Gaintime Earned September, 1992			
Protective Management Inmates		General Population Inmates	
Average Days Worked	Average Gaintime Awarded	Average Days Worked	Average Gaintime Awarded
October, 1992 Outstanding Job Performance Rating			
11.53	9.67	20	16
Above Satisfactory Job Performance Rating			
7.56	4	20	8

Source: Pl. Ex. 1402

Average Incentive Gaintime Earned October, 1992			
Protective Management Inmates		General Population Inmates	
Average Days Worked	Average Gaintime Awarded	Average Days Worked	Average Gaintime Awarded
October, 1992 Outstanding Job Performance Rating			
15.5	14.42	30	16
Above Satisfactory Job Performance Rating			
14	7.3	30	8

Source: Pl. Ex. 1403

It is apparent from the charts[5] that PM utility men lack the opportunity to work full time, as acknowledged by Assistant Secretary Jones. R14-1181-15. As a result, they

5. These charts specifically exclude the *Waldrup* eligible inmates, as the Department contends is necessary for a proper comparison. R14-1187-11. *Waldrup v. Dugger*, 562 So.2d 687 (Fla. 1990) held that a law which reduced the maximum amount of available gaintime could not be applied to inmates whose crimes were committed prior to the law's enactment. *Waldrup* eligible inmates are those whose crimes were committed between 1978 and 1983. They can earn one day of gaintime for each day worked plus six additional days per month for participating in self-betterment activities. Thus, in a 31 day month, they can theoretically earn a maximum of 37 days of gaintime. All other eligible inmates can earn a maximum of 20 days gaintime, 16 for work performance and 4 for other activities, including self-betterment programs. R14-1238-5.

continue to be punished by receiving less than the full amount of available incentive gaintime. R14-1175-5. Clearly, gaintime was awarded on the basis of days worked, not on the basis of performance ratings. R14-1180-5. For example, Arthur Schaffer testified that he received only 11 and 14 days incentive gaintime for months in which he was rated outstanding. When he complained, he was told he didn't work enough days, although he worked every available day. R9-359-23; R9-376-11; R9-376-14. Yet, Department policy does not require full-time work in order to receive the full amount of incentive gaintime; an eligible inmate who performs the work assigned to him in an outstanding manner is entitled to a full measure of incentive gaintime even if he does not work every day. R15-1327-8. The Department's Assistant Secretary responsible for PM acknowledged that a number of inmates in PM at Florida State Prison did not have the opportunity to work full-time and, therefore, did not receive the maximum amount of gaintime, R14-1181-15, whereas general population inmates appeared to have that opportunity. R14-1181-24.

In addition to the 16 days of gaintime awarded for work, inmates can receive an additional 4 days for participation in self-betterment programs, for good institutional adjustment, or simply for cooperative behavior. R14-1271-18. Although the Department claims there is always a way for an inmate to earn the extra four days, even in the absence of work, R15-1326-2, or the complete absence of self-betterment programs, R15-1382-23, and that the policy applies to all prisons, R15-1378-25, data from Florida State Prison

negates that claim -- nobody in PM earned 20 days.[6] R15-1305-22; R15-1386-21; R8-159-3; R9-340-14.

ii. Academic, Vocational and Self-Betterment Programs: The PM rule provides that:

> Self-improvement programs or leisure activities *shall* be available in their housing area, or in separate locations within the institution that conform with the need for security. Such program participation may include academic education, vocational training, correspondence courses or self-directed study activities, religious activities, television, quiet activities or letter writing.

Rule 33-3.0082(6)(c), F.A.C. (1990)(emphasis supplied).

The promise of self-improvement programs has proved empty for many PM inmates. Little academic instruction of any type is available. Even fewer vocational programs are available. The Department makes available to general population inmates a broad range of academic and vocational courses including classroom instruction in Adult Basic Education (ABE) and General Educational Development (GED). Vocational training teaches inmates a job skill to qualify them for jobs within the institution and to prepare them for legitimate employment upon their release. R11-538-15. Alcoholics Anonymous or Narcotics Anonymous programs are generally available to general population inmates.

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6. An inmate who attempted to earn the extra four days by going to a Bible Study Course was unsuccessful. R9-341-23. Likewise, an inmate who volunteered his time in the law library did not qualify for the extra four days. R15-1375-5. See also, Pl. Exs. 1400 - 1403. An inmate who was able to consistently earn the extra four days while in PM at one prison, could not do so while in PM at another. R15-1386-21.

R16-1406-1; R9-320-25. They are often not available to PM inmates. R9-305-3; R8-177-20. The absence of such programs is contrary to the Department's rule on operation of protective management units. R13-929-23. Participation in an educational or vocational program is one method by which an inmate can earn incentive gaintime. R13-941-18. See Rule 33-11.0065(3)(d)(1), F.A.C. (1992). Moreover, because academic achievement, as well as participation in educational programs, is one factor to be considered in determining custody levels, [R13-942-12; see § 944.1905(3)(b), *Florida Statutes* (1991)], PM inmates unable to participate in programs may not be able to achieve a custody reduction, and thus may be denied the opportunity to participate in work release or other programs requiring minimum custody status. Their ability to achieve parole, or an earlier Controlled Release Date (CRD) may be adversely affected on the grounds that they have failed to participate in self-betterment programs. R13-942-21; R13-943-6. Parole examiners frequently stress that satisfactory participation in self-improvement programs is necessary for an inmate to earn a recommendation for a reduction in his presumptive parole release date. R10-523-19. Parole Examiners say so explicitly, R10-524-2; R5-175-32. The district court's observation that "the parole decision is not made by the Department," R6-212-68, simply ignores cause and effect. The record is clear, the absence of educational, vocational and self-betterment programs can lead to longer prison sentences.

iii. Other Problems. In addition to the jobs, education and gaintime deficiencies highlighted above, there are a range of other problems which, standing alone, probably cannot support the finding of a constitutional violation. However, when examined in the light of the history of this litigation, they provide ample support for plaintiffs' position that not all the unconstitutional aspects of the PC system have been

eradicated and that, as a result, the district court should have retained jurisdiction for a reasonable period of time to monitor the implementation of the PM system. The problems include:

a. Lock-down. Another major goal of this litigation was to eliminate the near total lock-down conditions imposed on inmates in need of protection. By and large, that goal has been achieved. Yet, at some prisons, PM inmates were locked in their cells unnecessarily. This was true at Marion Correctional Institution, where PM inmates were locked in for several hours each morning, and on Sunday evenings if they did not wish to go to the library. R11-661-16.[7] At Polk Correctional Institution, when PM inmates completed their morning work assignment, they were locked down until lunch. R12-807-15. The district court found this to be "unnecessary" but not "irrational." R6-212-69. Yet, general population inmates are not locked down at any time and can stay in their dayroom, watch television, or engage in other activities during free time. R11-662-17.

b. Threats and Harassment. Protective management inmates are frequently the victims of threats, harassment and ridicule, from both other inmates and staff. R8-89-5; R8-197-7; R12-752-16; R12-796-22; R12-797-1; R10-458-14. At some institutions, work assignments bring PM inmates into close proximity with general population inmates. The result, verbal threats, harassment and ridicule, not a new, Pl. Ex. 944, but a continuing problem. Pl. Ex. 1251. At other times, staff are the perpetrators of the verbal disrespect.

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7. This practice changed after plaintiffs' counsel's visit in October, 1992, as part of trial preparation. Inmates were no longer locked in. They could stay in dayroom and watch TV. R11-661-24; R13-1066-20.

R9-356-12; R9-261-25; R9-307-20. Harassment is against DOC policy, R13-983-22, and correctional officers have been disciplined for harassing PM inmates. R13-984-1.[8] But, the problem is compounded by using PM units to house other types of inmates. At Martin Correctional Institution, PM inmates and administrative confinement inmates (who are seeking admission to protective management, but who have not been approved) are housed in the same unit, exacerbating the threats, harassment and ridicule. R8-154-23; R9-301-7. The same was true at Florida State Prison, where administrative confinement, disciplinary confinement and close management inmates were housed on the upper floors of the PM wing, R9-228-12, resulting in sexual harassment, food throwing, and other problems. R9-228-25; R9-234-14; R9-296-15.

c. Visiting. Unlike the PC rule, which did not mention visiting, the PM rule calls for a schedule to be implemented "to ensure a minimum of two hours a week for inmates to receive visits." Rule 33-3.0082(6)(f), F.A.C. (1990). Although PM inmates can now regularly have visitors, serious problems continue to exit. Individuals who wish to visit general population inmates, if they are on the inmate's approved visiting list, Rule 33-5.006, F.A.C. (1992), need only "present themselves at the entrance of a correctional institutional during the regular visiting period for that institution." Rule 33-5.008, F.A.C. (1992). R13-944-6. At one prison, until corrected during the course of the trial, individ-

8. A staff member who, in response to an informal appeal seeking the opportunity to continue the Alcoholics Anonymous Program told the inmate, "A.A. is no longer available to inmates in P.M. -- too bad," Pl. Ex. 1231, was disciplined.

uals on the approved visiting list of PM inmates were required to make advance arrangements despite the fact that nothing in PM Rule requires approved visitors to give advance notice of visits. R13-944-12. The Department conceded during trial that the advance notice requirement was wrong. R13-944-16.

General population inmates may receive visits on weekends and holidays, generally for six hours. Rule 33-3.008(2), F.A.C. (1992). For PM inmates, the rule suggests visiting before or after general population visiting, or on different days. Rule 33-3.0082(6)(f), F.A.C. (1990). Application of that provision has served to limit the amount of time available for visits. Pl. Ex. 1216; R8-76-14; R8-152-16; R8-163-14. It has also shifted visits to evenings or weekdays, thereby working a hardship on many visitors and resulting in fewer visiting opportunities for PM inmates. R8-185-10; R8-185-25; R9-349-1. Yet, the published policy of the Department is that visiting opportunities should be comparable, consistent with safety and security, R13-944-22, and that extended visits should be allowed to those coming from far away. R13-986-23.[9] The day and time constraints make it doubtful that the policy has been honored. As the district court remarked, the visiting opportunities for PM inmates and general population inmates are not comparable. R13-945-18. Nevertheless, no relief was granted to improve visitation for PM inmates.

d. Canteen. At most prisons, general population inmates have access to the prison canteen on a daily basis -- or even several times a day on weekends. R8-193-6.

9. The experience of inmate Ronald Weaver, a former police officer, whose visitors had to travel 9½ hours and who were only able to obtain a visit lasting more than 2 hours every three or four months, casts into doubt the application of this policy. R8-153-4.

Protective management inmates, on the other hand, are generally limited in the number of canteen visits they can make. R11-551-9; R8-78-8; R8-154-17. At some prisons, the number of items that can be purchased each trip is limited, thereby increasing the disparity. R10-459-4. Complaints about the limitations have proved unsuccessful. R10-459-9. At Union Correctional Institution, canteen and dayroom activities are scheduled at the same time on two of the three canteen days; to participate in one, the inmate must forgo the other. R8-101-6; R8-192-11.

e. Other Problems. At Martin and at Union Correctional Institution, the PM cells lack tables and chairs; general population cells have them. R11-553-5; R11-603-6. Tables and chairs are called for by applicable American Correctional Association standards. R11-603-6. At Marion Correctional Institution, the only newspaper vending machine is on the open compound -- until this problem was resolved during the course of the trial, PM inmates did not have access to a newspaper. The solution was simple, use an open population runner. But, as with many other common sense solutions, it took the intervention of the Department's Assistant Secretary to implement a cure. R13-1066-20.

At Union Correctional Institution, the PM Unit is located in a sealed building, R8-108-23, lacking air-conditioning, R8-108-12, a building that gets very hot, as indicated in the testimony of the inmates and the experts who visited the Unit, and as confirmed by temperature logs. Pl. Ex. 950. General population inmates, on the other hand, are generally housed in buildings with windows that open. R8-210-14. A few are housed in air-conditioned buildings. R8-109-13.

The PM rule provides for "a minimum opportunity of two hours per week of exercise out of doors" and mandates that "[s]imilar recreational equipment shall be avail-

able as is available for general population inmates for the exercise period provided that such equipment does not compromise the safety or security of the institution." Rule 33-3.0082(6)(a), F.A.C. (1990). General population inmates have access to a wide variety of recreational opportunities, usually every day, including fields for baseball, football and soccer, full-sized basketball courts, and a wide range of weight training and exercise equipment; generally, PM inmates have far more limited time and facilities. R8-161-11; R11-551-1; R8-83-12; R8-84-15. The language of the PM Rule is deficient, R10-487-24, and does not reflect sound correctional practices. R16-1554-7. Indeed, the Department admitted that recreational opportunities for PM inmates at Martin and Polk Correctional Institutions were not comparable to those available to general population inmates. R13-1073-13; R13-1073-19.

E. Deficiencies of the Grievance System. The district court's rationale for rejecting further relief was that the defendant was responding "promptly and genuinely" to newly discovered information and that the "constantly improving conditions lessen the need for injunctive relief." R6-212-70. The district court, therefore, presumed that the plaintiffs could "use the grievance procedure to solve isolated problems and that the Department will evaluate grievances and otherwise carry out their duties in compliance with the Constitution without further monitoring by the federal courts." R6-212-71.

Prior to and during this litigation, many inmates tried to use the grievance process. Their efforts were uniformly unsuccessful. Pl. Ex. 1233; Pl. Ex. 1234. Each restriction grieved, even those apparently in direct contravention of Rule 33-3.0082, F.A.C. (1985),[10]

10. Pl. Ex. 778; Pl. Ex. 1221; Pl. Ex. 1228.

and even those which called for relatively minor policy changes,[11] were upheld at all levels of the system. And, sometimes having your grievance granted didn't mean much. At one prison, inmates who submitted grievances asking for jobs, and incentive gaintime, were told that their grievances were granted -- a task force would study the issues. No jobs, no gaintime. Appeals to Tallahassee were denied. Pl. Ex. 1206; Pl. Ex. 1208. Other inmates simply received the runaround. Pl. Ex. 1246; Pl. Ex. 1247. The Department was unable to present even a single instance wherein it granted relief to an inmate in protection complaining about restrictions on activities and programs.

The Department's grievance statistics demonstrated that the percentage of grievances granted was very low; the percentage of grievances rejected for alleged lack of compliance with grievance procedures was very high. Def. Exs. 7, 8 & 10.[12] The grievance process only tracks grievances about admission to PM and about transfers to eliminate the need for protection. R13-930-7. It does not track complaints about PM conditions, such as lack of educational opportunities, lack of work opportunities, absence of religious services, limited visits, etc., etc. R13-930-21; R13-1032-20. Even as to those matters it tracks, the periodic grievance reports do not provide any information about success, the statistics lump together all types of grievances. *See* Def. Exs. 7 - 10. And, those with overall responsibility for implementation of the protective management rule do not necessarily see the grievances.

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11. Pl. Ex. 1207 (allow smoking); Pl. Ex. 1205 (allow radios).

12. The three months for which statistics were available show that only 5.5% of grievances were approved while 57.6% were denied and 36.6% rejected for failure to comply with grievance procedures.

R13-941-12. That is a decision left to the discretion of the grievance administrator. R13-1065-4. The grievance process is simply not adequate to insure compliance with a new operational program. R11-696-22.

3. Standard of Review: Whether the implementation of the PM rule served to moot the matter is a legal issue subject to *de novo* review by this court. *Secretary of Labor v. Burger King Corp*, 955 F.2d 681, 683-84 (11th Cir. 1992). Although the denial of declaratory and injunctive relief is generally evaluated on an abuse of discretion basis, *Pullum v. Greene*, 396 F.2d 251, 256 (5th Cir. 1968), where the trial court misapplies the law, this Court will review and correct the error without deference to the district court's determination. *Wesch v. Folsom*, 6 F.3d 1465, 1469 (11th Cir. 1993); *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1989). Moreover, "[t]he clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles." *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 820 (11th Cir. 1991).

Whether the district court erred in finding that gaintime awards between protective management and general population inmates are comparable is a finding of fact subject to the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. The issue is whether one is left with the "definite and firm conviction" that a mistake has been committed. *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

SUMMARY OF ARGUMENT

I. The defendant has made an effort to remedy "obviously unconstitutional conditions" for those in need of protection. But, the defendant failed to meet its heavy burden of proof to demonstrate that it is absolutely clear there is no reasonable expectation that the wrong will be repeated. The district court, however, reversed the applicable burden of proof, holding that "[a]bsent a showing that the new administration might return to former unconstitutional practices, the decision to deny injunctive relief is not an abuse of discretion." R6-212-64. Yet, there are two immediate and real reasons why the Department could return to the old PC system -- and thereby force the filing of new litigation. First, the Department *never* admitted that any part of the PC system violated the constitutional rights of the plaintiffs. Second, the district court never directly addressed the issue. In fact, it specifically disclaimed an obligation to do so. R6-212-56.

The voluntary cessation of illegal conduct does not render a case moot; a case will not be dismissed as moot if the defendant is free to return to his old ways. The burden of demonstrating mootness is a heavy one. The defendant must demonstrate that it is "*absolutely clear*" that the allegedly wrongful behavior could not reasonably be expected to recur. Here there is a long history of wrongdoing. The district court's denial of meaningful injunctive and declaratory relief is tantamount to a finding of mootness. When this case began in 1988, the current defendant, who was then an Assistant Secretary, was designated by the Department as its representative. Tooth and nail, he defended each and every one of the obviously unconstitutional conditions. Later, of course, he recanted. The system changed. But, the defendant was making changes not only on the eve of trial, but even

during the trial. That was necessary because the Department is often unable to control the actions of individual prison officials. Moreover, the PM rule contains a great many ambiguous provisions, provisions which have been used in the past, and can be used in the future, to severely limit the programs and activities available to PM inmates.

The evidence is clear. Seemingly as the result of three factors: (1) the ambiguities inherent in the PM rule, (2) uncontrolled local level decision-making, and (3) lack of comprehensive oversight, not all the prior, obviously unconstitutional protective confinement conditions, have not been eradicated. Comparability has not been achieved. The Department's failure to properly supervise its staff and to enforce its written rules can fairly be said to constitute the continuation of the deliberate indifference shown by past administrators, especially since the comparability issue is a long-standing deficiency well-known to the defendant. In the circumstances presented in this case, where the district court has described the PC system as "obviously unconstitutional" and further found that, even after implementation of the new PM system, injunctive relief was merited as to certain aspects of the system, it was error for the district court to fail to enter meaningful relief which would prevent the defendant from returning to its old ways and it was error for the district court to fail to retain jurisdiction for purposes of monitoring the implementation of the new system.

II. The PC system forced inmates to compromise their personal safety if they wished to work, and participate in self-betterment programs, which would enable them to earn incentive gaintime and thus reduce the length of their incarceration. The PM system acknowledges that inmates in need of protection should have the same opportunities as inmates in open population. But, the evidence clearly demonstrated a continuing disparity

in the gaintime awarded to PM inmates as compared to the gaintime awarded to general population inmates, particularly for inmates at Florida State Prison. Although 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, earn less incentive gaintime than general population inmates, as a group. Def. Ex. 47. When one looks at these facts, one is left with the "definite and firm conviction" that a mistake was committed by the district court. Inmates are still being punished solely as a result of their need for protection.

ARGUMENT

I.

VOLUNTARY CESSATION OF ILLEGAL CONDUCT UNDER PRESSURE OF PENDING LITIGATION DOES NOT MOOT A CONTROVERSY -- THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GRANT MEANINGFUL DECLARATORY AND INJUNCTIVE RELIEF IN THE ABSENCE OF FINDINGS THAT THE DEFENDANT HAD MET ITS BURDEN TO CLEARLY PROVE THE ABSENCE OF ANY REASONABLE EXPECTATION THAT THE WRONG WOULD BE REPEATED

The district court's described the "repudiated" PC system as imposing "obviously unconstitutional conditions for those in need of protection." R6-212-12. The Department's own expert witness admitted that the protective confinement system was overly restrictive, punitive, and violative of both the Cruel and Unusual Punishments Clause and the Equal Protection Clause. R16-1587-2. The record established that the PC system caused inmates to serve longer periods of incarceration and inflicted significant physical and mental harm. See pages 7 - 8, *supra*. There was no dispute over the existence of the restrictive and

punitive conditions alleged, or their consequences. There was no evidence from the Department asserting any penological justification or rational basis for the punitive condition formerly imposed. Nevertheless, despite all this, the district court limited relief to minor aspects of the just-changed conditions. It failed to enter declaratory or injunctive relief to prevent the Department from returning to its old ways. Moreover, it failed to provide for a monitoring mechanism, or even a period of observation, to insure that the new protective management system would be fully implemented in a constitutional manner. Instead, it told the plaintiffs they could bring a new suit if prison conditions again fell below constitutional standards, and ordered the case closed.

The district court, in the face of the clear record of harm, reversed the applicable burden of proof, holding that "[a]bsent a showing that the new administration might return to former unconstitutional practices, the decision to deny injunctive relief is not an abuse of discretion." R6-212-64. Because the district court misapplied the law, its refusal to grant meaningful declaratory or injunctive relief is not entitled to the usual deference afforded discretionary decisions of the district courts. *Wesch v. Folsom*, 6 F.3d 1465, 1469 (11th Cir. 1993).

A. The Case is Not Moot. There are two immediate and real reasons why the Department could return to the old PC system -- and thereby force the filing of new litigation. First, the Department *never* admitted that any part of the old PC system infringed on the constitutional rights of the plaintiffs. Second, the district court never directly addressed the issue. In fact, it specifically disclaimed an obligation to do so. R6-212-56.

Although the district court did not specifically find that the case was moot, its denial of any meaningful relief was tantamount to such a finding. Yet, the voluntary cessation of illegal conduct does not render a case moot; a case will not be dismissed as moot if "[t]he defendant is free to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed.2d 1309 (1953); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). "The burden of demonstrating mootness is a heavy one." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). The defendant must demonstrate that it is "*absolutely clear*" that the allegedly wrongful behavior could not reasonably be expected to recur. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66, 108 S.Ct. 376, 386, 98 L.Ed.2d 306 (1987) (emphasis added). Nevertheless, a case may become moot if the defendant demonstrates that "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis, supra*, 440 U.S. at 631, 99 S.Ct. at 1383 (citations omitted), quoting *W. T. Grant, supra*, 345 U.S. at 633, 73 S.Ct. at 897, 97 L.Ed. at 1309. Here, at least to the extent the district court found some relief necessary, the defendant never left its old ways.

The heavy burden placed on a defendant alleging mootness is evident from *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.), *cert. dis'd, sub nom, Ledbetter v. Jones*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981). In that case, the plaintiffs challenged conditions in the Jackson County Jail. During the pendency of the suit, the defendants alleged that the need for an injunction had been eliminated by the construction of a new jail. This

Court held that the changes made by the defendants did not "remove the necessity for injunctive relief, for practices may be reinstated as swiftly as they were suspended." 636 F.2d at 1375. Similarly, in *National Advertising Co. v. City of Fort Lauderdale*, 934 F.2d 283 (11th Cir. 1991), the City's amendment of its sign ordinance did not render moot the plaintiff's action for declaratory and injunctive relief. In rejecting the mootness claim, this Court held that:

> The City presently possesses the power and authority to amend the sign code. It remains uncertain whether the City would return the sign code to its original form if it managed to defeat jurisdiction in this case. Neither the City nor the district court has established that the likelihood of further violations is sufficiently remote to dismiss National's claims.

934 F.2d at 286.

The defendant has failed to meet its heavy burden of proof demonstrating that it is absolutely clear there is no reasonable expectation that the wrong will be repeated. As the evidence makes clear, and seemingly as the result of three factors (1) the ambiguities inherent in the PM rule, (2) uncontrolled local level decision-making, and (3) lack of comprehensive oversight, significant problems remain in the area of jobs, gaintime, and educational, vocational and self-betterment programs. Not all the prior, obviously unconstitutional conditions, have been eradicated. Comparability has not been achieved. The Department's failure to properly supervise its staff and to enforce its written rules can fairly be said to constitute the continuation of the deliberate indifference shown by past administrators, especially since the comparability issue is a long-standing deficiency well-known to the defendant. The limited relief granted by the district court, R6-214, is enough to demonstrate this matter is not moot.

B. The District Court Abused in Discretion by Withholding Meaningful Declaratory and Injunctive Relief. Absent proof that it is "*absolutely clear*" that the allegedly wrongful behavior could not reasonably be expected to recur, it is an abuse of discretion for a district court to fail to grant meaningful injunctive and declaratory relief. While changed circumstances during the pendency of an injunctive action may affect the scope of injunctive relief, they do not bar the entry of injunctive relief. *Davenport v. DeRobertis*, 844 F.2d 1310, 1313-14 (7th Cir.), *cert. denied sub nom, Lane v. Davenport*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988); *Williams v. Lane*, 646 F.Supp. 1379, 1409 (N.D. Ill. 1986), *aff'd*, 851 F.2d 867 (7th Cir. 1988), *cert. denied*, 488 U.S. 1047, 109 S.Ct. 879, 102 L.Ed.2d 1001 (1989). Indeed, where changes have been made under pressure of litigation, it is not an abuse of discretion to order the defendant to conform to its own, newly promulgated procedures. *Eng v. Smith*, 849 F.2d 80, 82-83 (2d Cir. 1988).

In *Secretary of Labor v. Burger King Corp*, 955 F.2d 681 (11th Cir. 1992), this Court recently reviewed the standards for determining whether injunctive relief should be denied on mootness grounds. There the Department of Labor sought a permanent injunction against Burger King, alleging violations of the Fair Labor Standards Act with reference to employment of minors. Burger King submitted a new policy wherein it discharged all employees younger than 16 years of age, prohibited the subsequent employment of minors, and argued that its actions rendered the suit moot. Reversing the district court's mootness dismissal, this Court reiterated the rule from *W. T. Grant* that voluntary cessation of allegedly illegal conduct does not render a case moot, holding:

> Because of the possibility that the Defendant could merely return to his old ways, "[t]he test for mootness in cases such as this is a stringent one... A case might become moot if subse-

> quent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *Greenwood Utilities Com'n. v. Hodel*, 764 F.2d 1459, 1462-63 (11th Cir. 1985), quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, & n. 10, 102 S.Ct. 1070, 1074, & n. 10. (1982). As the Supreme Court has noted, "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption. *United States v. Oregon State Medical Society*, 343 U.S. 326, 333, 72 S.Ct. 690, 695 (1952) [quoted in *Grant*.]

955 F.2d at 684. In reaching its decision, this Court found the following factual elements to be relevant: Burger King's five year history of violations; the timing of Burger King's "promise" which came on the eve of trial; and the inability of Burger King management to control the actions of individual restaurants. 955 F.2d at 684-685.

The concerns which called for injunctive relief in *Burger King* are also present in the instant case. Here, there is a long history of mistreatment of inmates in need of protection. When this case began in 1988, then Assistant Secretary Singletary, who was designated by the Department as its representative, adamantly defended each and every one of the "obviously unconstitutional conditions." Later, of course, he recanted. Like Burger King, he was making changes not only on the eve of trial, but even during the trial. Like Burger King, the Department's management is often unable to control the actions of individual prison officials.[13] Moreover, the PM version of Rule 33-3.0082, like the PC version of

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13. Q-Wing at Florida State Prison presents a good example of this problem. Assistant Secretary Jones vehemently denied that PM inmates were housed on Q-Wing, the most restrictive housing wing at the most restrictive prison in the state. R14-1097-5 to (continued...)

Rule 33-3.0082, contains a great many ambiguous provisions, provisions which have been used in the past, and can be used in the future, to severely limit the programs and activities available to PM inmates, particularly since shortages of staff, and other factors, could easily become a common occurrence in large institutions operating on tight budgets.

Even now, as with the PC rule, Department staff interpret provisions in the rules that are phrased in terms of minimums as maximums. Pl. Ex. 1232. Published schedules mean very little, and change frequently; at Martin Correctional Institution new schedules went up the day before plaintiffs' counsel's planned visit six weeks before trial, educational programs were re-established, a "Psychology and Coping Skills" course was placed on the schedule, canteen visits were increased from one to four, and religious services were said to be available in the visiting park, although that was news to the inmates. R9-302-19; R9-307-11.

Nothing prevents the Department from returning to its old ways. Changes were made, and can be made in the future, on a purely administrative basis. R13-927-11. Secretary Singletary is a political appointee. He serves at the pleasure of the Governor. Section 20.315(4), *Florida Statutes* (1993). Nothing prevents Secretary Singletary, or a new Secretary, from again revising Rule 33-3.0082. As this Court said in *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1494 (11th Cir. 1993), "a change in

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13. (...continued)
R14-1102-17. Later, the Assistant Superintendent for Florida State Prison confessed, testifying that Florida State Prison saw no need to advise the Central Office of its actions. R17-1605-19 *et seq.*

membership could result in a change in . . . policy. . . " So too here. Nothing prevents a new Secretary from reverting to the old policy.

The Department suggests that a variety of procedures in place serve to insure the faithful implementation of the protective management rule and thus negate the necessity for intervention by the Court. Among them, the Department suggests that placing Assistant Secretary Jones in charge of PM implementation, and having him work through Regional Directors and Superintendents, R13-977-16, with the Regional Directors responsible for on-site monitoring of the PM Rule, R13-970-7, will help to assure compliance. But, the Department offered no evidence of any monitoring or corrective action taken by any Regional Director. To the contrary, the only evidence concerning a Regional Office indicated the Regional Office was acting contrary to the PM Rule. Pl. Ex. 1416; R17-1694-16. And, at Hendry Correctional Institution, 18 months after creation of the PM system, R14-1201-4, it took the Assistant Secretary to recognize that you can't play basketball on a soft sand yard and that the basketball hoop was unsafe. R14-1135-10. Why neither the prison superintendent or the Regional Director acted to cure such an obvious defect remains unexplained. R14-1201-9.

The Department further suggests that relief is unnecessary because inmates can use the grievance process to correct any problems which might occur in the future. But, a grievance system cannot serve as the primary monitoring source. R11-696-22. Some inmates fear retaliation if they use the grievance system. R8-92-6; R8-118-1. Although against Department policy, it does happen. R14-1197-11. One inmate, who grieved lack of canteen access, testified that he was told: "I don't want you to think I am blackmailing you, but I wouldn't press this issue any further." R9-312-14. Some inmates further

believe that a grievance which pits the word of an inmate against the word of a staff member, such as a grievance complaining of harassment, is doomed to failure. R12-773-11. That view was confirmed by Assistant Secretary Jones. R14-1198-7.

Prior to and during the course of this litigation, many inmates tried to use the grievance process. Their efforts were uniformly unsuccessful. Pl. Ex. 1233; Pl. Ex. 1234; Pl. Ex. 1414. Each restriction grieved, even those apparently in direct contravention of an applicable rule (Pl. Ex. 778; Pl. Ex. 1221; Pl. Ex. 1228), and even those which called for relatively minor changes, were upheld at all levels of the system. A grievance complaining about PM inmates having to choose between TV and canteen was marked granted, R12-772-16, but nothing changed, R12-773-1. At Florida State Prison, a grievance about lock-down conditions was denied. R9-357-14. Lock-down ended immediately after counsel's visit. R9-375-3. A grievance about lack of sleeping time for those assigned night kitchen duty failed, R12-757-18, as did a grievance about mixing general population and PM inmates in the dining room. R12-762-11. It took the intervention of counsel and Assistant Secretary Jones to fix the problems. R12-762-4; R13-1069-9; R14-1129-15. A grievance complaining of the short time allowed PM inmates to eat was denied, R8-91-16, despite its merit. R13-984-21.[14]

14. The inmate's complaint was amply supported by the PM schedules submitted to Assistant Secretary Jones. Some showed as few as 7 hours per week to eat 21 meals, ***including*** the time to walk from the housing area to the dining room and return. R14-1193-2.

Despite arguing that the grievance system could remedy future problems, the Department did not present even a single grievance granting relief to an inmate in protection complaining about restrictive conditions or programs and activities. Perhaps that is because those with overall responsibility for implementation of the protective management rule do not necessarily see grievances. R13-941-12. That is a decision left to the discretion of the grievance administrator. R13-1065-4. Nor does the grievance process track complaints about PM conditions, such as those concerning religious services, visits, or program participation. R13-930-21; R13-1032-20. The grievance process is simply not adequate to insure compliance. R11-696-22.

The Department further suggests that its critical incident system, R13-979-1, management information system, R13-979-6, complaint letter logging system, R13-979-9, and Inspector General able to investigate complaints, R13-979-12,[15] will also serve to insure compliance. While all are undoubtedly valuable, the record in this case compels the conclusion that something more is necessary given that the Department did not identify a single occurrence where any of these mechanisms corrected an erroneous implementation of the PM rule.

The Department also took the position that placing Assistant Secretary for Operations Ronald Jones in charge of the PM system would help to prevent a return to the old, obviously unconstitutional system. R13-977-16. However, he was the Department official directly responsible for the old PC rule. R13-1040-11. With his new responsibility

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15. The Inspector General has never done an investigation about conditions for inmates in protective management. R13-882-13.

for the PM system, Assistant Secretary Jones concluded that incentive gaintime for PM inmates and general population inmates was comparable, relying on reports prepared for him from a management and monitoring standpoint. R14-1107-17. These reports, Plaintiffs Exhibits 1402 and 1403, clearly document that the gaintime earned by PM inmates at Florida State Prison was significantly less than the gaintime earned by general population inmates. Assistant Secretary Jones did nothing to find out why the disparity existed. R13-1060-11. Nor did he feel it necessary to review gaintime comparability for *Waldrup* eligible PM inmates. R14-1187-21.

The vigor of the central office in terms of monitoring local prison officials is also questionable. Although the Assistant Superintendent at Florida State Prison (FSP) testified that Alcoholics Anonymous and Narcotics Anonymous programs were available to PM inmates, R17-1633-25, the Institutional Operating Procedure (IOP) for that prison, approved nearly two years after the creation of the PM system, specifically states that such programs are only available to general population inmates. R17-1635-5. Similarly, another IOP, approved 18 months after creation of the PM system, does not authorize PM inmates to have radios. R17-1636-7. Another limits the reading material available to PM inmates. R17-1638-15. IOP's are sent to the Central Office for review and approval. R17-1636-2; R17-1639-3. Why then, was Florida State Prison permitted to promulgate IOP's clearly contrary to the PM rule? The same lack of attention is evident is Assistant Secretary Jones' failure to meaningfully examine the daily schedules submitted by each prison with a PM unit.[16]

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16. See footnote 14, *supra.*

Despite all these mechanisms, almost all corrective action after implementation of the PM rule required the intervention of plaintiffs' counsel, acting through Assistant Secretary Jones. For example, at Martin Correctional Institution, general population inmates were allowed in the PM control room. It took the Assistant Secretary of the Department to put a stop to the practice. R14-1086-24. At Okaloosa Correctional Institution, general population inmates were in the dining room while PM inmates worked in an unsecured kitchen. Again, it took the Assistant Secretary to remedy the problem. R12-761-9.[17]

Moreover, the Department officials who now have the principal responsibility for implementing and enforcing the new PM rule, Secretary Singletary and Assistant Secretary for Operations Jones, are the very same officials who were responsible for, and vehemently defended, the protective confinement rule which led to the initiation of this litigation. R13-876-23; R13-1040-20. Although Secretary Singletary now asserts that the Department will never return to the practices which led to this litigation, in 1985 the Department's General Counsel advised then Assistant Secretary Singletary that the "cases evidence a trend toward requiring 'equal' treatment for inmates requiring placement in a protective custody unit." Pl. Ex. 1217. Rather than act on the General Counsel's analysis, he signed-off on the rule and practice in force at the time this litigation commenced. R13-1041-10. In September, 1989, a year after this litigation was filed, the Department's General Counsel presented still Assistant Secretary Singletary with a draft of minor amendments to Rule 33-3.0082. Again, Assistant Secretary Singletary did not seize the opportunity to suggest the

17. A grievance at the local level was denied. R12-761-23.

type of changes that he now suggests demonstrate his commitment to permanent change. R13-878-15; Pl. Ex. 160. Instead, in 1989 he reaffirmed that the intent of the Department was to treat inmates in protective confinement in the same way it treated inmates in administrative confinement, *i.e.*, to continue all the unnecessary and punitive restrictions admitted in the Joint Pretrial Stipulation. Pl. Ex. 287. When his deposition was taken in 1989, he continued to defend the punitive restrictions imposed on PC inmates. R13-885-15; R13-913-17; R13-915-17; R13-916-23. These factors, combined with the Department's history of violating the Constitutional rights of those in need or protection, indicate the defendant has not met his "heavy burden" of showing that there is no reasonable expectation that these violations will recur.

The district court reversed the applicable burden of proof, holding that "[a]bsent a showing that the new administration might return to former unconstitutional practices, the decision to deny injunctive relief is not an abuse of discretion." R6-212-64. Here, not all the "obviously unconstitutional conditions" imposed on those in need of protection have been eliminated. That is why it was necessary for the district court to order removal of the screens and shields and end the use of cartoons and videotapes as religious services. As the Supreme Court said in a related context, "[i]n determining whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but 'to every facet of school operations, faculty, staff, transportation, extra-curricular activities and facilities.'" *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 638, 112 L.Ed.2d 715 (1991).

In the more recent case of *U.S. v. Fordice*, ___ U.S. ___, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992), the Supreme Court set forth an analytic framework for evaluating whether the

last vestiges of a segregated school system were eliminated. According to the Court, if "the State perpetuates policies and practices traceable to the prior system that continue to have segregative effects . . . and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system." 112 S.Ct. at 2737. In *Knight v. State of Alabama*, 14 F.3d 1534 (11th Cir. 1994), this Court discussed the application of *Fordice* and noted that "[t]he Supreme Court prescribed a three-step analysis for determining whether a state has fully met its remedial obligation. The first step requires a simple assessment of whether any particular policy that has been challenged as segregative is 'traceable' to decisions that were made or practices that were instituted in the past for segregative reasons, thus rendering it a vestige of segregation." The second step relieves the State of its duty to eliminate or modify the policy if it proves that the challenged policy, shown by plaintiffs to be traceable to segregation, has no segregative effects. The third step mandates that the defendant adopt practicable and educationally sound alternatives that will bring about the greatest possible reduction in the segregative effects if the defendant fails to "demonstrate either (1) that the policy, in combination with other policies, has no current segregative effects, or (2) that none of the full range of less segregative alternative remedies are practicable and educationally sound." 14 F.3d at ___. While the instant case is not a race case, the analytic principles identified in *Fordice* counsel that the district court abused its discretion in not entering meaningful relief. Some of the punitive and restrictive policies of the PC system continue. Jobs, education, self-improvement programs, gaintime, parole consideration, and duration of incarceration are still adversely impacted by the policies and practices previously in use. There are practicable and sound alternatives that will bring

about a greater reduction in the lack of comparability between general population and protective management inmates and fully eliminate the last vestiges of the punitive PC system. The plaintiffs are entitled to whatever relief is necessary to eliminate all punitive aspects and to make comparability a reality.

Having ordered some relief, the district court concluded that the "constantly improving conditions lessen the need for injunctive relief", R6-212-70, declined "to act as a 'super-superintendent'", R6-212-71, and remitted Plaintiffs to the grievance procedure to "solve isolated problems." R6-212-71. The problem with this resolution of the case is that it is absolutely clear that the only reason the Department ever took any steps to improve conditions for those in need of protection stemmed from the pressure of this litigation. And while the Department did resolve problems brought to its attention by plaintiffs' counsel, the Department did not identify a single instance where an inmate, using the grievance process, was able to resolve a problem about PM conditions. Nor did the Department identify a single problem, other than the basketball yard and hoop, solved entirely though its own initiative. Instead, at trial, both Secretary Singletary and Assistant Secretary Jones testified at some length about the errors made at individual prisons, errors they first learned of by hearing trial testimony. R13-984-8 *et seq.*

Although the district court minimized the continuing disparity between PM inmates and general population inmates, it is clear that not all the punitive aspects of the protective confinement system have been eliminated. Protective management inmates are still denied comparable jobs and gaintime, comparable educational and vocational opportunities, and comparable self-betterment programs. They continue to be forced to forfeit their right to participate in prison programs and activities, and thus shorten their period of incarceration,

in order to preserve their right to personal safety. The Department persists in this practice despite the mandate of its own rule that the "treatment of inmates in protective management shall be as near that of the general population as the individual inmate's safety and security concerns permit." Rule 33-3.0082, F.A.C. (1990).

The district court described the PC system as imposing "obviously unconstitutional conditions for those in need of protection." And, the plaintiffs proved the existence of continuing, albeit limited, constitutional violations which did cause the district court to grant injunctive relief narrowly directed to the specific violations found. Having established both prior and current constitutional violations, the plaintiffs met the threshold requirement for relief. *See Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974); *Taylor v. Sterrett*, 600 F.2d 1135, 1141 (5th Cir. 1979). Where unconstitutional conditions continued to exist at trial, it was an abuse of discretion to refuse to grant at least declaratory relief. *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986); *Morrow v. Harwell*, 768 F.2d 619 (5th Cir. 1985).

Plaintiffs do not suggest that the district court should act as a "super-superintendent" or micro-manage the Department of Corrections. Rather, as articulated by plaintiffs' expert, Professor Norval Morris, plaintiffs believe that differences in treatment which affect an inmate's duration of imprisonment and differences in treatment which affect an inmate's access to self-development programs, such as substance abuse and literacy programs, cannot be tolerated. R10-407-19. Likewise, differences in treatment which adversely impact on an inmate's physical and mental health cannot be tolerated. That being the case, it is incumbent upon the Department to design and implement a plan which will overcome

these problems. The rule is in place. What is lacking is a mechanism to monitor the rule to be sure that, as implemented, the rule achieves it purpose.

In *W. T. Grant*, the question was whether the district court had the power to grant an injunction when the illegal conduct had been fully discontinued. According to the Supreme Court, it did, despite the fact there was no "danger of recurrent violation." 345 U.S. at 633. Here, of course, as evidenced by the limited relief the district court did grant, the illegal conduct had not been fully discontinued. It must also be remembered that while the Department concedes that plaintiffs were the catalyst for the change from PC to PM, the Department refuses to concede that the protective confinement system violated the constitutional rights of the plaintiffs. R8-10-23. In a similar context, this Court rejected a mootness claim where the defendants refused to acknowledge the unconstitutionality of their rule, despite an in court concession that the challenged rule would not be applied to the plaintiff, finding that in the absence of such a concession, "we have no reason to think that it would not be enforced in the future." *American Civil Liberties Union v. The Florida Bar, supra*, 999 F.2d at 1494. In not admitting wrongdoing, the Department leaves this Court no choice but to remand for the granting of further relief.

The PM rule can provide an adequate framework for the implementation of a protective management system that eliminates the punitive aspects of the prior system and provides comparability between inmates in need of protection and inmates in general population. But programs, not rules, create comparability. R10-445-20. The critical issue is not what is written, the critical issue is what is done. Implementation of a PM system which will provide comparable opportunities to all inmates needs somebody watching it,

it needs hands-on-management.[18] R10-441-23. Unfortunately, the *mea culpa*'s offered by the Department at trial demonstrate the absence of the necessary hands-on management.

In the circumstances presented in this case, where the district court has described the PC system as "obviously unconstitutional" and further found that, even after implementation of the new PM system, injunctive relief was merited as to certain aspects of the system, it was an abuse of discretion for the court to fail to enter relief designed to prevent the defendant from returning to its old ways.

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18. As Michael Mahoney, who has served as a Court Monitor in numerous cases testified, in monitoring:

> I rarely find fault with policies, stated procedures or rules.
>
> Where the breakdown usually falls is in the implementation process. In order to move for implementation of a new rule, new policy, or new direction, it takes a number of things. It takes commitment from the top of the department to exercise in the spirit and letter of the new policy that this is going to be the policy, and we are going to move full scale ahead.
>
> The second thing it takes is training, and at all levels particularly when you have a variety of institutions operating a policy system-wide for ongoing training, technical assistance from central office, and another that can help, a monitoring system that could provide ongoing monitoring as to compliance issues. There are other kinds of mechanics, training, technical assistance, central office oversight, and supervision, and grievance, and other management systems can be put into place, but clearly successful implementation of a new direction whether it be by court order policy directive needs ongoing monitoring to insure compliance over time. We are talking about in this case with protective management a new approach, and a new responsibility to a difficult problem that has been around for awhile, and calling for some creativity and commitment over time.

R11-695-11.

II.

INMATES IN PROTECTION STILL EARN LESS INCENTIVE GAINTIME THAN INMATES IN GENERAL POPULATION -- THE DISTRICT COURT'S FINDING THAT GAINTIME AWARDS ARE COMPARABLE IS CLEARLY ERRONEOUS

The old PC system forced inmates in need of protection to serve longer sentences as a result of the near total lack of jobs and educational opportunities. In a very direct, one-to-one manner, inmates were forced to abandon their constitutional right to protection in order to shorten their duration of incarceration. The unconstitutional trade-off continues. Nevertheless, the district court found that the awards of incentive gaintime to protective management inmates and to general population inmates were comparable. In reaching this finding, the district court focused almost exclusively on the gaintime records of the testifying class representatives. R6-212-26 *et seq.* It totally overlooked the relevant statistics, all of which were provided by the defendants, about the class as a whole. Although 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. Def. Ex. 47.

When brought down to specifics, Plaintiffs' Exhibits 1401, 1402 and 1403 clearly demonstrated a disparity in the gaintime awarded to PM inmates as compared to the gaintime awarded to general population inmates. Moreover, the fact that no PM inmate at Florida State Prison was able to earn the maximum amount of available incentive gaintime while 11.9% of the general population inmates earned the maximum as well as the fact that only 32.2% of the PM inmates at Union Correctional Institution were able to

earn the maximum amount of available incentive gaintime while 63.6% of the general population earned the maximum amount, also demonstrated the continuing disparity. See pages 16 -20, *supra*.

The Department advanced several arguments to justify the lesser awards of gaintime to PM inmates. It suggested that at some of the prisons which were designated as short term, the coming and going of the inmates might interfere with their ability to earn gaintime. However, PM inmates at short term facilities earned more gaintime than PM inmates at long term facilities. R14-1182-25 *et seq*. The Department also suggested that lesser gaintime awards might be attributable to an inmate's presence at a particular prison for only part of a month. That, however, was clearly not the case for the PM utility workers at Florida State Prison. R14-1174-3 *et seq*. When one looks at these facts, one is left with the "definite and firm conviction" that a mistake has been committed. *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

CONCLUSION

Appellants respectfully request that this matter be remanded for entry of injunctive and declaratory relief which will prevent the defendant from returning to its old ways, that the district court be instructed to retain jurisdiction for a reasonable period of time, and that the district court be instructed to create a means to monitor the defendant's implementation of the protective management rule until the last vestiges of the protective confinement system are eliminated and until full comparability is achieved.

Respectfully submitted,

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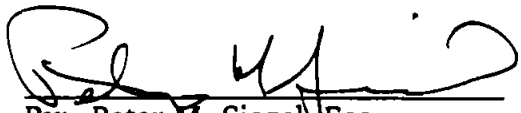
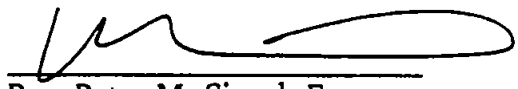


By: Peter M. Siegel, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to James A. Peters, Esq., Florida Department of Legal Affairs, The Capitol, PL-01, Tallahassee, Florida 32399-1050, by United States Mail on this 4th day of April, 1994.



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