furthers the stated penological interests.[88] At oral argument, they emphasized that the "reasonableness standard is not toothless,"[89] Thornburgh v. Abbott, 490 U.S. 401, 414, 109 S. Ct. 1874, 1883 (1989), and cited the Ninth Circuit Court of Appeals for the following proposition:

> "Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point."

Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990). The plaintiffs bolstered their argument by citing a Seventh Circuit Court of Appeals decision in which the court recognized that prison officials "'cannot avoid court scrutiny by reflexive, rote assertions.'" Shimer v. Washington, 100 F.3d 506, 509-510 (7th Cir. 1996) (quoting Williams v. Lane, 851 F.2d 867, 886 (7th Cir. 1988) (Flaum, J. concurring)). The plaintiffs argue that the Commissioner's failure to produce any evidence showing the relationship between his stated penological interests and the regulation denying visitation is critical because the court

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88. Transcript of oral argument on objections to Magistrate Judge's recommendation, held May 14, 1997, at 16.

89. Id. at 48.

"'must look to see whether the prison's visitation practices actually further [his stated] objectives.'"[90]

The Eleventh Circuit Court of Appeals has not identified whether prison officials, when defending challenges to regulations, are required to meet the same rigorous evidentiary burden required by the Ninth Circuit. However, an examination of the Eleventh Circuit's law pertaining to first-amendment freedom-of-expression challenges is instructive on this issue. In a first-amendment challenge to a restriction of speech in a public forum, the Eleventh Circuit recently held that when demonstrating the significance of a government interest, officials "are not required to present detailed evidence," rather officials are "'entitled to advance [the governmental] interests by arguments based on appeals to common sense and logic.'" International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548, 1151 (11th Cir. 1997) (emphasis added) (quoting Multimedia Pub. v. Greenville-Spartanburg Airport, 991 F.2d 154, 161 (4th Cir. 1993)). Because of the great deference that the Eleventh Circuit has granted the government when defending first-amendment challenges in public fora, this court believes that the rigorous evidentiary burden articulated by the Ninth Circuit would not be required by the

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90. Plaintiffs' response to defendants' objections, filed April 8, 1997 (Doc. no. 384), at 88 (quoting Lynott v. Henderson, 610 F.2d 340, 343 (5th Cir. 1980)).

Eleventh Circuit when examining first-amendment challenges in a nonpublic forum such as a prison.[91]

Further, in addressing other first-amendment challenges to prison regulations, the Supreme Court has also applied a type of "common sense" analysis. The Court used this approach to strike down a regulation prohibiting inmates from marrying other inmates or civilians unless the superintendent of the prison found that there was a compelling reason for the marriage. See Turner, 482 U.S. at 98, 107 S. Ct. at 2266 ("Common sense likewise suggests that there is no logical connection between the ... restriction and [stated penological objectives]."). (emphasis added). And, the Supreme Court has also held that prison officials do not have the burden of "show[ing] affirmatively" that the accommodation of an asserted constitutional right "would be 'detrimental to proper penological objectives.'" Jones, 433 U.S. at 128, 97 S. Ct. at 2539 (finding that the prison's ban on inmate union

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91. The courts have traditionally held the government to stricter scrutiny when it defends restrictions on speech in public fora, than when it defends restrictions on speech in nonpublic fora. United States v. Kokinda, 497 U.S. 720, 726-27, 110 S. Ct. 3115, 3119 (1990) (plurality opinion). Prisons and military bases, examples of nonpublic fora, have been held to less than the rigorous "reasonableness" standard scrutiny in first-amendment challenges to regulations. See Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 134, 136, 97 S. Ct. 2533, 2542-43 (1977) ("Since a prison is most emphatically not a 'public forum,' these reasonable beliefs of [prison officials] are sufficient.").

solicitation and group meetings was rationally related to reasonable prison administration objectives).

In light of the "common sense" approach adopted by the Eleventh Circuit in considering freedom-of-expression issues in public fora, as well as the Supreme Court's use of "common sense" to evaluate the penological objectives of regulations impinging on constitutional rights, this court rejects the plaintiffs' argument that the Commissioner's failure to produce evidence demonstrating a valid, rational connection between their stated objectives and the denial of visitation policy necessarily results in a holding for the plaintiffs. Rather, the court will examine the evidence presented by both the plaintiffs and the Commissioner to determine whether the DOC's policy is rationally related to its two objectives of rehabilitation and deterrence.

As stated above, the only evidence provided by the Commissioner in support of the policy was the testimony of Gary Montgomery, which the court has deemed inconclusive. In contrast, the plaintiffs presented evidence in the form of expert testimony and penological literature to support their argument that the policy is not rationally related to a legitimate penological objective. The plaintiffs' experts testified that visitation serves an important purpose in rehabilitating inmates and deterring future criminal conduct. One expert testified that "one of the most important factors in

helping people stay out of prison is having supportive and positive relationships outside."[92] Another expert stated, "Visiting is probably without question the most important activity that takes place in a prisoner's life.... visiting is critically important and should not be curtailed except for specific violations of visiting regulations by the inmate."[93] This expert also testified to some of the deleterious effects of denying visitation: "[I]t would generally bring about bitterness, unhappiness, resentment, and very often, unfortunately, retaliation, because that's the only way that inmates sometimes feel that they can respond."[94] Further, the expert noted that because the suicide rate for inmates is highest at the initial period of confinement, close contact with family members is necessary to assist the inmate in surviving the initial adjustment period.[95] The third expert to testify for the plaintiffs on the issue of visitation stated that he found the DOC's policy to be "outrageous." He added that he found "absolutely no reason not to let inmates maintain their social life and social relationships. They should have visits with their parents, with their siblings, with their

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92. Transcript of hearing before the Magistrate Judge, at 405 (testimony of Frank Rundle, M.D.).

93. Id. at 310-311 (testimony of Alan Breed).

94. Id. at 312.

95. Id. at 313.

spouse and children."[96] In addition to the plaintiffs' experts, the Commissioner testified that it was a fair statement that it is "generally believed among correctional commissioners throughout the country that you should not take visitation away unless it's for a violation of prison rules."[97] Finally, none of the parties' experts could point to any research regarding the relationship between the denial of visitation and the Commissioner's stated objectives.[98]

The court is thus faced with conflicting policy rationales. On the one hand, there is a general consensus in the corrections field that visitation has a beneficial effect upon inmates. Common sense would dictate that because visitation is so important, it should not be denied but for compelling reasons, such as abuse of the privilege. On the other hand, the Commissioner's argument that a temporary denial of this privilege supports rehabilitation and deterrence is also grounded in common sense. Denial of visitation privileges reduces, if not eliminates, outside distractions to the inmates, thereby aiding the rehabilitation process. Similarly, the loss of visitation privileges deters rational judicial

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96. Id. at 804 (testimony of George Sullivan).

97. Id. at 879 (testimony of the DOC Commissioner).

98. Id. at 343, 345 (Alan Breed testifying for the plaintiffs that no studies have been completed that clearly reflect whether the program works), 1151 (Gary DeLand testifying for the Commissioner).

entries from becoming recidivists and violating the conditions of their parole. ATU inmates know that if they become repeat offenders or parole violators, they will reenter the prison system in the austere conditions of the ATU, rather than in the general prison population. Further, although the plaintiffs' experts may disagree with the Commissioner on the overall effect of the policy, none of the plaintiffs' experts testified that the Commissioner would be unable to effectuate his objectives by implementing the policy.

Moreover, it is most important to keep in mind that the issue is only the temporary, and not permanent, elimination of visitation privileges. Indeed, throughout his prison stay, an inmate may, off and on, lose his visitation privileges for reasons unconnected to assignment to the ATU unit. If the court were confronted with a permanent elimination, or an elimination that extended significantly throughout a prisoner's stay, the concerns raised by the plaintiffs' experts--that visitation serves an important purpose in rehabilitating inmates and deterring future criminal conduct--could present a question of constitutional breach. However, an inmate who successfully completes the ATU program can still enjoy the benefits of visitation during the remainder of his prison life.

Thus, this court concludes that the DOC's denial of visitation privileges for ATU inmates passes the "common sense" test for its rational relationship to the legitimate

penological objectives of deterrence and rehabilitation; furthermore, the court cannot conclude that the connection between the policy and the Commissioner's objectives is so remote to be considered "arbitrary or irrational." Turner, 482 U.S. at 89, 107 S. Ct. at 2262. The plaintiffs, and other specialists in the field of corrections, may disagree with the Commissioner's policy, but without evidence to support a finding that the policy lacks "common sense," the court must defer to the expertise of the State's prison administrators.

C. Alternative Means to Exercise the Right

The second factor of the Turner analysis asks whether alternative means of expressing the constitutional right remain open to the prisoners. 482 U.S. at 89-90, 107 S. Ct. at 2262. The Magistrate Judge rejected the alternatives proffered by the Commissioner that included mail and telephone communication. The Magistrate Judge found that the "alternatives to visitation which are fueled by literacy and ability to pay are counterfeit means of maintaining ties to family and deterring recidivism."[99] The Commissioner objects to this finding.[100]

In considering the alternative means, the court must view the asserted right "sensibly and expansively." Pope v.

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99. Recommendation of the Magistrate Judge, at 83.

100. Defendant's objections to the Magistrate Judge's recommendation, at 51.

Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996). Here, the Commissioner contends that inmates are permitted to communicate with family and friends by sending and receiving mail, as well as by making telephone calls. In Pope, the Eleventh Circuit considered an inmate's challenge to a telephone-access policy that limited the number of persons an inmate could place on a calling list. Recognizing that visits and correspondence were alternatives to telephone calls, the court held that other avenues existed for exercising what the court defined as "the First Amendment right to communicate with family and friends." Id. Because the plaintiffs are able to make such calls and to send and receive mail, the court finds that other avenues exist for ATU inmates to exercise their first-amendment right to freedom of association.

As stated, the Magistrate Judge reached a different conclusion. Based on the high illiteracy rate in inmate populations,[101] as well as the costliness of telephone calls made from the penal institutions,[102] the Magistrate Judge found

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101. In a 1996 DOC ranking of the 21,320 inmates in Alabama's prison population, the average education level was the tenth grade, but the average reading level was below the sixth grade; more than 30% of the inmate population read at the third-grade level or below. Plaintiffs' exhibit number 70, at 6.

102. The DOC places a surcharge on collect calls made from the institutions and collects a considerable profit from such calls. Transcript of hearing before the Magistrate Judge, at 314 (testimony of Allen Breed).

that the alternatives were "counterfeit" means of permitting the inmates to maintain ties to family and to deter recidivism.[103] The court agrees with the Magistrate Judge that low reading ability and cost can interfere with ability of some inmates to communicate with friends or family. However, this assumed interference[104] does not necessarily result in a finding that the alternatives are inadequate. In Pell v. Procunier, the Supreme Court upheld an institution's prohibition of face-to-face meetings between inmates and the press, and rejected the plaintiffs' argument that mail was an ineffective means of communication because some prisoners are illiterate or inarticulate. The Court stated: "Merely because such inmates may need assistance to utilize one of the alternative channels does not make it an ineffective alternative, unless, of course, the State prohibits the inmate from receiving such assistance." 417 U.S. at 828 n.5, 94 S. Ct. at 2807 n.5.

The court's conclusion should not be understood, however, to equate visitation with telephone calls or written

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103. Recommendation of the Magistrate Judge, at 83.

104. The plaintiffs did not present evidence of either problem interfering with inmate communication. The two inmates who testified before the Magistrate Judge stated that they sent and received mail, and neither made any mention of the cost of phone calls. See transcript of hearing before the Magistrate Judge, at 356-57 (testimony of Daniel Green that he sent and received mail and that his family could afford the collect phone calls), and at 577-79 (testimony of Gary Montgomery that he sent and received mail and that family accepted collect phone calls).

communication. Certainly, there are some instances when mail and telephone communication will not be an adequate substitute for visitation, particularly when an inmate seeks to visit with friends or family who cannot read or speak, such as infants and small children. However, the court finds that this potential deprivation is slight due to the limited duration of the denial of visitation policy.

D. Impact of Asserted Right on Allocation of Prison Resources

The third factor in assessing the reasonableness of a regulation that impinges on an inmate's constitutional rights asks what impact the accommodation of the asserted constitutional right will have upon guards and other inmates, and on the allocation of prison resources generally. Turner, 482 U.S. at 89-90, 107 S. Ct. at 2262. The Magistrate Judge found that "[t]he accommodation that the plaintiffs' seek ... cannot be viewed as costly to the defendant or as an undue infringement upon the due deference to which prison officials are entitled in administering their institutions."[105] This court agrees with the Magistrate Judge's finding. The Department of Corrections has an established visitation policy, and the burden of allowing ATU inmates to receive visitors would be negligible at best. This factor, however, is not

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105. Recommendation of the Magistrate Judge, at 83.

dispositive on the issue of the constitutionality of the regulation.

E. Ready Alternatives to Denial of Visitation

The fourth and final factor in assessing the reasonableness of a regulation is whether there are ready alternatives to the regulation. Turner, 482 U.S. at 89-90, 107 S. Ct. at 2262. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimus cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." Id. "[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." Id.

In her recommendation, the Magistrate Judge listed several restrictions that proscribe the conduct of ATU inmates.[106] The Magistrate Judge found that these restrictions advance the state's penological interests without burdening the inmates'

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106. Id. at 85 (alternative restrictions which do not burden an inmate's first-amendment right include (1) wearing shackles for up to ten hours a day; (2) working on sites several miles from the prison; (3) exposure to inclement weather and to snake and insect infested working conditions; (4) submitting to daily strip searches; (5) loss of commissary privileges; (6) loss of television privileges, and (7) additional incarceration in the ATU for rules violations).

first amendment rights.[107] However, the final prong of Turner is not a "least restrictive alternative" test. "[P]rison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." Turner, 482 U.S. 90-91, 107 S. Ct. at 2262. Accordingly, the court disagrees with Magistrate Judge and finds that the other restrictions, while arguably less restrictive than the denial of visitation privileges, do not fully accommodate the stated penological objectives. Thus, the visitation policy is not an exaggerated response to the goals of deterrence and rehabilitation. Accordingly, this court also finds that the denial of visitation privileges to ATU inmates for a period of 90 days is constitutionally permissible, and therefore sustains the Commissioner's objections to the Magistrate Judge's recommendation.

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107. Id.

VI. HITCHING-POST CLAIM

The plaintiffs' second claim concerns the DOC's use of a device referred to as a "hitching post."[108] In a two-pronged attack, the plaintiffs allege that use of the hitching post violates their fourteenth-amendment right to procedural due process, as well as their eighth-amendment right to be free from cruel and unusual punishment. After conducting an evidentiary hearing,[109] the Magistrate Judge concluded that the Commissioner's use of the hitching post violated both the eighth and fourteenth amendments.[110]

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108. As the Magistrate Judge noted, witnesses throughout the evidentiary hearing used different terms to describe the restraining bar to which inmates were handcuffed, including "hitching post," "restraining bar," "bar," "hitching rail," and "rail." Recommendation of the Magistrate Judge, at 12. For the sake of consistency, the court will refer to this device as a "hitching post."

109. The Magistrate Judge heard the testimony of ten inmates who had been placed on the hitching post in different institutions. In addition, nine present and former DOC officers, as well as six expert witnesses (five for the plaintiffs and one for the Commissioner), testified on the use of the hitching post in Alabama's prisons. Further, the Magistrate Judge herself called one witness to testify as to his interaction with an inmate who had been placed on the hitching post.

110. Although the plaintiffs did not raise it as an issue, the Magistrate Judge also found that the use of the hitching post violated the plaintiffs' substantive-due-process right under the fourteenth amendment. Recommendation of the Magistrate Judge, at 92-93. The plaintiffs state that a substantive-due-process claim is analogous to an eighth-amendment claim and ask that this court not address the issue of substantive due process. Plaintiffs' response to defendant's objections, filed April 8, 1997 (Doc. no. 384), at

(continued...)

The DOC Commissioner has raised a considerable number of objections to the Magistrate Judge's findings of facts and conclusions of law. The court will address these objections in the following manner. First, the court will examine the evidence, admitted at the hearing before the Magistrate Judge, concerning the ways in which the hitching post has been and is being used. The court will pay special attention to the following aspects of the hitching post: the events that trigger an inmate's placement on the post; the length of time an inmate remains on the post; the manner in which an inmate is shackled to the post; the conditions under which an inmate remains on the post (i.e., access to water, food, and restroom facilities, as well as climate conditions); the means by which an inmate can secure his release from the post; and, finally, the disciplinary sanctions that result from being placed on the hitching post. Second, the court will analyze the plaintiffs' constitutional contentions. Beginning with the plaintiffs' eighth-amendment claim, the court will discuss whether the plaintiffs have satisfied their burden of showing both the objective and subjective components of the eighth-amendment framework. Next, the court will address the plaintiffs'

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110. (...continued)
73 n.18. For the reasons set infra, the court will not adopt that portion of the Magistrate Judge's recommendation dealing with the plaintiffs' substantive-due-process right, but will analyze such contention within the eighth-amendment framework.

procedural-due-process claim, including whether the plaintiffs have demonstrated that use of the hitching post violates their constitutionally-created or state-created liberty interests. Although somewhat complicated by the fact that, as discussed below, the Commissioner has not utilized the hitching post in a consistent manner in the DOC's penal institutions in Alabama, the court will undertake its analysis of the plaintiffs' constitutional claims as they relate to both the DOC's policy governing use of the hitching post and its manifested use.

A. The Hitching Post

On October 26, 1993, the DOC adopted Administrative Regulation Number 429, entitled "Refusal to Work" (hereinafter "Regulation 429").[111] This regulation states that any inmate who "refuses to work or is otherwise disruptive to the work squad" shall be placed upon a "restraining bar," or as others have termed the device, the hitching post.[112] Although the Magistrate Judge devoted considerable space in her

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111. Plaintiffs' exhibit 12, at 1; see also transcript of hearing before the Magistrate Judge, at 864 (testimony of the DOC Commissioner). However, at oral argument on the Commissioner's objections to the Magistrate Judge's recommendation, counsel for the Commissioner stated that the hitching post was used by the DOC "for quite some time" before the 1993 policy was written. Transcript of oral argument on objections to Magistrate Judge's recommendation, held May 14, 1997, at 81.

112. Plaintiffs' exhibit 12, at 1.

recommendation outlining the manner in which the DOC has utilized this device, the court, after conducting an independent review of the record, finds it necessary to summarize briefly its findings of fact as to how the hitching post has been implemented in Alabama's prisons. Such a review is necessary because, as will be shown below, although the DOC has attempted to regulate the use of the hitching post in its institutions, numerous and particularly egregious violations of its policy have resulted in substantial harm to those inmates who have been placed upon the device.

1. Purpose

Each correctional facility regulated by the DOC has a hitching post on its property. Although Regulation 429 is the only state-wide administrative regulation promulgated by the DOC to govern the use of the hitching post, the DOC has issued some institution-specific regulations regarding the device.[113] As stated above, Regulation 429 provides that inmates who refuse to work or are otherwise "disruptive" should be placed on the post. The term "disruptive" is not defined in the text of Regulation 429. However, the regulation states that an "activity log" should be completed for each day an inmate is on

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113. See, e.g., defendant's exhibits 2536 (Standard Operating Procedure 6-019, Hitching Rail Procedure, Holman Prison), and 2552 (Standard Operating Procedure 9-8, Work Related Uncooperative Inmates, Fountain Correctional Facility).

the hitching post.[114] The activity log form issued by the DOC lists, under the section entitled "Reason for Restraint," the following:

> "Refusing to Work
>
> Disruptive to Work Squad (Be Specific)
>
> a. Refusal to Walk in Prescribed Manner
>
> b. Refusal to Carry a Tool to Job Site
> c. Other (Be Specific)"[115]

In addition to refusing to walk in the prescribed manner and refusing to carry a tool, a corrections officer testified that an inmate would be considered "disruptive" and placed on the hitching post for fighting while on work assignment, or attempting to prevent other inmates from working.[116] However, during the evidentiary hearing before the Magistrate Judge, the DOC Commissioner testified that he believed two of the "disruptive" reasons listed on the activity log form, refusal to walk in the prescribed manner and refusal to carry a tool to the work site, should not result in an inmate's placement on the hitching post, but rather should be dealt with by a

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114. Plaintiffs' exhibit, at 2.

115. Id. (Annex A to Regulation 429) ("Activity Log: Inmates Placed on Restraining Bar").

116. Transcript of hearing before the Magistrate Judge, at 1042 (testimony of Officer Mark Pelzer).

disciplinary proceeding with due process.[117] He agreed that the reason neither violation should result in placement on the hitching post was because they were not "emergency situations."[118] The Commissioner also stated that for an inmate to refuse to go out with his work squad in the morning would also not be considered an "emergency situation" to justify the use of the hitching post. The Commissioner attempted to clarify the meaning of "emergency situation" as follows:

> "If just refusing to go out in the morning, you know, not going to work, that would not be an emergency situation. But should an individual just quit work immediately out on the work detail, that could involve an emergency situation."[119]

Notwithstanding the Commissioner's testimony, the Magistrate Judge heard testimony from some inmates that they were placed on the hitching post for these three non-emergency reasons.[120]

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117. Id. at 870 (testimony of the DOC Commissioner). Hopper, who was appointed as Commissioner of the DOC in April of 1996, testified that he had no knowledge prior to the eve of his appearance in court, that inmates could be placed on the hitching post for refusing to walk in the prescribed manner or to carry a tool to the work site. Hopper further testified that he intended to change this regulation. Id.

118. Id. at 872, 886.

119. Id. at 886. The Commissioner also stated that "I can't fathom removing an individual from a secure segregation cell to take them outside and put them on a restraining bar." Id. at 887.

120. Id. at 366-376 (testimony of inmate Michael Askew), and 421-439 (testimony of inmate Jerry Johnston). Michael Askew had been given a "stop-up," or medical excuse to not

(continued...)

Further, the deputy warden of Limestone Correctional Facility testified that inmates who were late for checkout with their work squad and detained in holding cells would be transferred to the hitching post.[121]

Although Regulation 429 attempts to limit the reasons for which inmates are placed upon the hitching post to refusal to work or disrupting a work squad, some institutions used the hitching post for other disciplinary purposes. For example, inmates at the Holman Correctional Facility were, at one time, subject to placement on the hitching post if they committed

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120. (...continued)
perform work, from the prison doctor. However, he was placed on the hitching post at Draper Correctional Facility for approximately five hours when, pursuant to the doctor's instructions, he refused to pick up a hoe for his work duty. At a subsequent disciplinary hearing on his alleged refusal to work, Askew was found not guilty. Id.

The Commissioner maintains that Askew did not have a "stop-up," but rather a "limited duty slip," which did not entitle him to stop working. Defendant's objections to Magistrate Judge's recommendation, at 16. This assertion is belied by the ultimate finding at the disciplinary hearing. Moreover, the Commissioner concedes that "if the officer failed to check for a medical stop up it was a violation of Regulation 429." Id.

Additional instances are found in the appendix attached to the Magistrate Judge's recommendation. There, the Magistrate Judge summarized and categorized the Commissioner's exhibits, including incident reports for those inmates placed on the hitching post. Many of the triggering events for placement on the hitching post included refusal to carry a tool or to walk in the prescribed manner. See appendix to the recommendation of the Magistrate Judge.

121. Transcript of hearing before the Magistrate Judge, at 1006 (testimony of Ralph Hooks).

indecent exposure. Holman's "Hitching Rail Procedure" plainly states, "Any inmate identified as a violator of Rule 38 Indecent Exposure/Exhibitionism may be secured to the hitching rail to prevent the continued negative behavior."[122] For such a violation, the inmate is kept on the hitching post "until the end of the shift the violation occurred or dusk dark which ever is longer."[123] The Commissioner has conceded that the Holman policy violated Regulation 429.[124]

2. Physical Description

Regulation 429 describes the hitching post or restraining bar as a horizontal bar, "made of sturdy, nonflexible material," placed at 57 inches and 45 inches from the ground so as to accommodate inmates of varying heights.[125] Inmates are handcuffed to the hitching post in a standing position and remain standing the entire time they are placed on the post. Although corrections officers are instructed to handcuff the

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122. Defendant's exhibit 2536 (Standard Operating Procedure 6-019, Hitching Rail Procedure, Holman Prison).

123. Id.

124. Transcript of hearing before the Magistrate Judge, at 864-66 (testimony of the DOC Commissioner) (referring to the placement of inmates on the hitching post for masturbating in public as "summary punishment by correctional officers").

125. Plaintiffs' exhibit 12.

inmates to the post at "mid-chest level,"[126] the plaintiffs presented evidence that some inmates were handcuffed such that they were forced to stand with their arms above their heads, while others were handcuffed such that they could not stand upright while handcuffed to the post.[127] Most inmates are shackled to the hitching post with their two hands relatively close together, however some inmates were handcuffed so that their arms were spread apart and their hands shackled

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126. Transcript of hearing before the Magistrate Judge, at 1041-42 (testimony of Officer Mark Pelzer).

127. Recommendation of the Magistrate Judge, at 20, 23, 26, and 32 (discussing testimony of inmates John Spellman, Tony Fountain, Warren Leatherwood, and Jerry Johnston). The Magistrate Judge admitted into evidence three photographs, two offered by the plaintiffs, and one offered by the Commissioner, purporting to show the actual height of the hitching post. Plaintiffs' exhibits 20 and 22, defendant's exhibit 2596. The plaintiffs' exhibits depict two inmates shackled to the hitching post: one inmate's hands appear to be shackled at chin level, the other's appear to be at or above his head. The Commissioner's exhibit does not depict an inmate shackled to a hitching post; rather, it shows a man standing next to the lower of the two hitching posts, with what appears to be a meter stick by his side. The court finds that none of these three exhibits are particularly useful in determining the height at which inmates are shackled to the hitching post. For example, the inmate shackled to the hitching post in exhibit 20 testified at the hearing that at the time the picture was taken he was not standing upright, but was "swinging" from the post. See transcript of hearing before the Magistrate Judge, at 691 (testimony of Larry Hope). Rather, the court will rely on the testimony of the inmates placed on the post, as well as the testimony of the corrections officers who were responsible for placing the inmates on the post, to determine where and how inmates are shackled to the post.

independently.[128] Some facilities also shackle the inmates' ankles together when the inmates are on the post.[129]

Inmates eat their lunches while standing and with both hands shackled to the post. At one point in time, officers at the Limestone Correctional Facility permitted inmates to eat with one hand unshackled. However, this practice was discontinued because it was said to require too much time in order to secure additional officers to back up the officer who was unshackling the inmate.[130] Inmates are not permitted breaks to flex or stretch their muscles while they are on the post. As further explained below, many inmates reported being in mild to severe pain during and after their placement on the hitching post because of the strain on their muscles.

3. The Policy: Placement Procedures as Outlined in Regulation 429

Once an officer has determined that an inmate has refused to work or is disruptive to a work squad, the officer may place the inmate on the hitching post, using force if necessary.[131] No disciplinary hearing or other type of due process procedure

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128. Id. at 526 (inmate Calvin Nix, testifying that he was shackled to the hitching post in this manner, as were other inmates at Holman Prison).

129. Id. at 431 (testimony of Jerry Johnston).

130. Id. at 1066-67 (testimony of Keith Gates).

131. Plaintiffs' exhibit 12.

is provided to the inmate.[132] According to Regulation 429, if force is used, the corrections officer should contact a nurse to "check the inmate's condition." Regardless of whether force is used, Regulation 429 specifies that the corrections officer must contact the health care unit "to ensure that [the inmate] does not have a medical stop-up restricting him from work." Regulation 429 states that if no medical attention is warranted, then, at "the end of the day the inmate will be carried to the health care unit for a body chart." The regulation does not specify whether "end of the day" means the completion of the inmate's time on the hitching post if the inmate returns to work and serves less than a full day on the post, or it only applies if the inmate does not return to work and remains on the post until the conclusion of the work day. In either case, as discussed infra, the DOC Commissioner and his officers failed to observe this portion of the regulation.

Regulation 429 also provides that "[f]resh water will be available to the inmate" and that the inmate "will be given the opportunity to go to the bathroom once each hour." The activity log form, attached to Regulation 429 as Annex A, instructs the corrections officer to record whether the inmate has accepted or rejected water and bathroom breaks in 15-minute

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132. Id.; Joint Stipulation of Facts, filed September 23, 1996 (Doc. no. 337), ¶ 2.

increments.[133] Most importantly, the regulation states: "At any time during the day the inmate can tell an officer that he is ready to go to work. He will be allowed to join his assigned squad for that day and begin work." However, if the inmate remains on the hitching post the entire day, "he will be checked back into the institution after the last squad is checked in." Regulation 429 also states that "The inmate will be written a disciplinary for refusal to work," but does not specify whether the inmate receives such a citation in all cases or only in those cases where the inmate, after being placed on the hitching post, maintains his refusal to work.[134] Further, Regulation 429 does not specify the number of days an inmate is to be placed on the hitching post for refusal to work; nor does the regulation set a maximum number of hours or days for which an inmate can be placed on the post.

The result of the "disciplinary," referred to in Regulation 429 as being issued to an inmate who is placed on the hitching post, depends on what type of rule or regulation the corrections officer contends the inmate violated. There are two types of disciplinary proceedings in Alabama's prison

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133. To clarify, the form does not instruct the officer to ask the inmate whether he needs water or restroom breaks every fifteen minutes, but rather provides entry lines for the officer to record the responses or observations in fifteen minute increments. Plaintiffs' exhibit 12.

134. Id.

system. Administrative Regulation Number 403 "Disciplinary Hearing Procedures for Major Rule Violations" (hereinafter "Regulation 403") governs the procedure for "major rule violations."[135] Among the major rule violations is Rule 54: "Refusing to work/failing to check out for work/encouraging or causing others to stop work."[136] The sanctions for a violation of a major rule violation such as Rule 54 include "segregation, forfeiture of earned good time, and placement on the chain gang."[137] Thus, the majority of inmates who are placed on the hitching post will be charged with a major rule violation and, after a due process hearing as set out in Regulation 403, can suffer the consequences listed above. The alternative procedure is found in Administrative Regulation Number 414: "Behavior Citation Procedures for Informal Disciplinary Actions."[138] The result of receiving a behavior citation can include "removal from good time earning status" and/or "assignment to institutional chain gang for up to 15 days," but does not result in a forfeiture of good time. Some examples of the minor rules violations include Rule 81: feigning illness; Rule 55: unsatisfactory work; Rule 87: malingering. A due

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135. Plaintiffs' exhibit 84.

136. Id. (Annex A).

137. Id. at 1.

138. Plaintiffs' exhibit 85.

process hearing is not required for the imposition of a punishment for a minor rules violation.[139]

Thus, because the inmate who refuses to work receives a formal sanction as a result of his violating a major and minor rule, the Commissioner argues that placing the inmate on the hitching post is not a punishment, as such, but merely a means by which prison guards can coerce the inmate to return to work.[140] This argument will be discussed in greater length below.

4. The Practice: Actual Placement Procedures

The testimony given at the evidentiary hearing before the Magistrate Judge revealed that the procedures set out in Regulation 429 for determining whether to place an inmate on the hitching post were not followed, or were followed and resulted in substantial physical harm to inmates. The most compelling examples of this deficiency were in cases in which the corrections officers ignored inmates' protestations that they were not physically capable of working. The corrections officers, whose medical background and training are disputed by the parties, often interpreted inmates' complaints as indicia

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139. However, the Warden or his designee has final approval of these sanctions. Id.

140. See defendant's objections to the Magistrate Judge's recommendation, at 61.

that they were malingering or refusing to work, and placed them on the hitching post. Placement on the hitching post oftentimes exacerbated the inmates' poor physical condition.

For example, on May 2, 1994, inmate Tony Fountain was placed on the hitching post at Staton Correctional Facility because he could not keep up with the rest of the inmates in his squad on their route to the work site. Fountain had previously received a "stop-up" order from the prison physician for his back and leg conditions, which, on the date he was placed on the hitching post, were causing him severe pain and discomfort.[141] Although Fountain did not refuse to work, he was taken back to the institution and placed on the hitching post at about 7:00 a.m. He was shackled to the lower of two bars, which forced him to bend over the entire time he was placed on the post. Fountain spent nine hours on the post in this bent position.[142] During this time, he was not given food, water, or access to toilet facilities, although he made such requests repeatedly.[143] Although Regulation 429 mandates that an inmate

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141. Transcript of hearing before the Magistrate Judge, at 114-117 (testimony of inmate Tony Fountain).

142. Id. at 122-23.

143. Id. at 125-30. The Commissioner contends that Fountain was given access to food, water, and toilet facilities. The Commissioner bases this assertion on the testimony of Officer Leroy Yelder, who reviewed a back gate (continued...)

receive a "body chart" examination following his placement on the hitching post, Fountain had to request such an examination from the prison's health care unit. Fountain was unable to walk in an upright position for two weeks after his placement on the hitching post; he received a work stop-up order from the health care unit for 30 days due to the fact that he was dehydrated after his placement on the post and could not stand upright.[144]

Another example can be found in the case of inmate Gerald Ware, who in the summer of 1995 was assigned to the Draper Correctional Facility segregation unit and chain gang. After injuring his shoulder while working, Ware was scheduled to receive an x-ray examination at the Kilby institution on July 6, 1995. On July 5, 1995, before his squad was checking out for work duties, Ware informed the back-gate officer that he

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143. (...continued)
entry log for the date Tony Fountain was placed on the hitching post. Id. at 1085-87, 1095. This entry log was neither provided to the plaintiffs in discovery, although it clearly came within the ambit of the plaintiffs' discovery requests, nor was the log admitted into evidence by the Magistrate Judge. Id. Unfortunately, this entry log appears to be the only documentation the DOC maintained for Fountain's placement on the hitching post; although they have always been required by Regulation 429, the use of activity logs to document water, food, and bathroom breaks did not begin at Staton Correctional Facility until after Fountain was placed on the hitching post. Id. at 1097 (representations made by Commissioner's counsel).

144. Id. at 122-23. The Commissioner did not refute Fountain's testimony as to the consequences of the hitching post.

needed to see the nurse because he was scheduled to have the x-rays performed. The officer refused to permit Ware to see the nurse and told him that he had to report for work duties. When Ware resisted, the officer summoned his supervisor, who placed Ware on the hitching post for refusing to work. Neither officer contacted the health care unit to verify Ware's claims. Ware remained on the hitching post from 8:30 a.m. to 1:00 p.m., when an officer asked him if he could "just stand up" and "fake it for awhile" at the work site. The officer was concerned that, if Ware remained on the hitching post, he "could have a heat stroke."[145] Ware described the experience of being placed on the hitching post as "very painful ... humiliating ... [and] real frustrating, dehumanizing."[146] Following a formal charge of violating Rule 54 (Refusing to Work) and a disciplinary hearing, Ware was found not guilty. The hearing officer determined that "Inmate Ware was scheduled for X-Rays [sic] and did in fact go to Kilby on July 6, 1995. Inmate Ware should have been stopped up until the x-rays were done."[147]

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145. Id. at 230-40 (testimony of inmate Gerald Ware).

146. Id. at 237-38.

147. Plaintiffs' exhibit 61.