5. Duration of an Inmate's Placement on the Hitching Post

The length of time an inmate remains on the hitching post varies.[148] In fact, corrections officers from the same facility could not reach consensus on the average amount of time inmates at that facility spent on the hitching post. One Limestone corrections officer testified that the "majority" of inmates he placed on the hitching post wanted to go back to work after 30 minutes to an hour.[149] The Deputy Warden of Limestone stated that "in ninety percent of the cases [inmates] don't stay on the bar over two hours."[150] However, the back-gate officer at Limestone, who actually supervises the inmates on the hitching post, credibly testified that, on the average, inmates at Limestone spend about six or seven hours handcuffed to the post.[151]

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148. The incident reports submitted by the Commissioner indicates that the duration of an inmate's placement on the hitching post can range from thirty minutes to 12 hours. See appendix to recommendation of the Magistrate Judge. In their joint stipulation of facts, however, the parties stated that "Some inmates remain on the post for up to ten hours during the day." Joint stipulation of facts, filed September 23, 1996 (Doc. no. 337), ¶ 6.

149. Transcript of hearing before the Magistrate Judge, at 1048 (testimony of Officer Mark Pelzer). Pelzer testified that he had placed a dozen inmates on the hitching post.

150. Id. at 1011 (testimony of Deputy Warden Ralph Hooks).

151. Transcript of hearing before the Magistrate Judge, at 1069 (testimony of Officer Keith Gates).

Gauging the average amount of time an inmate spends on the hitching post is further complicated by the contradictory evidence in the record concerning compliance with Regulation 429's provision that "At any time during the day the inmate can tell an officer that he is ready to go to work."[152] However, inmates were not permitted to leave the hitching post after they had informed the officers that they were willing to work, but rather were forced to stay on the hitching post until their squad had returned from the work site.[153] One of the plaintiffs' expert witnesses testified that it was his belief, after interviewing inmates and prison guards, that contrary to the rule set out in Regulation 429, inmates were not permitted to rejoin work squads after being placed on the hitching post:

> "[T]here are sharp disputes between the guards I spoke to and the prisoners on that matter. And I'm inclined to agree with the prisoners, because of the difficulty of arranging for a person to go out to a distant gang on any day and the limited number of guards that are observing people on the--or the guard that is observing the prisoner on the restraining bar, the same guard who is also on the front gate of Limestone. So I

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152. Id.

153. "From once you get sent to the hitching rail, you can't get off the hitching rail and go back to work. You got to be on that hitching rail until the squad come in." Id. at 690 (testimony of inmate Larry Hope).

> find it very hard to believe the sincerity of implementation of that regulation."[154]

There was some indirect evidence offered at trial to support the plaintiffs' contentions that inmates were not permitted to return to work as soon as they informed the officers of their willingness to do so. For example, three sets of incident reports, involving a total of 10 inmates, reveal that corrections officers at the Easterling Correctional Facility placed inmates on the hitching post in the morning after the inmates had failed to report for work duty, but were not removed from the hitching post until their work squad returned at lunchtime, some four to five hours later.[155] During his testimony at the evidentiary hearing, the corrections officer responsible for supervising these particular inmates stated that none of the inmates had refused to work, rather they only failed to appear for their roll call. He also stated that it was his practice to ask the inmates once every hour if they desired to join their work squads, but that "it just so happened" all of the inmates in question decided to rejoin

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154. Transcript of hearing before the Magistrate Judge, at 755 (testimony of Norville Morris).

155. Defendant's exhibits 623 (incident report for inmates Larry Powe, Alonzo Robinson, Timmie Minniefield, dated November 20, 1995); 594 (incident report for inmates Jeremy Logel, Harold Kizziah, dated September 27, 1995); and 583 (incident report for Allen Brazzie, Morris Welch, Herbert Lane, Bobby Monogan, Bruce Wilson, dated September 18, 1995).

their work squads after their squad's lunch break.[156] While the incident reports and the corrections officer's testimony do not provide direct evidence that Regulation 429's directives were violated, the court finds the coinciding times raise an inference that the policy was not followed. The court also notes that Regulation 429 does not regulate the frequency with which the corrections officer guarding the inmates must inquire as to whether they would like to return to their work squads; nor is there a demarcation on the annex form to Regulation 429 for the corrections officer to record the number of times he or she has asked the inmates on the hitching post if they would like to return to their work squad.

It also appears from the record that some institutions have adopted the practice of leaving inmates on the hitching post until their squad returns from the work site, regardless of whether the inmate has indicated that he is ready and willing to work. Another one of the plaintiffs' expert witnesses testified, based on his observation of a training videotape produced by the DOC, that correctional officers are instructed to leave inmates on the hitching post until their work squad returns.[157] It is apparent that the DOC gains a

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156. Transcript of hearing before the Magistrate Judge, at 922-26.

157. Id. at 317 (testimony of Allen Breed); plaintiffs' exhibit number 86 ("Chain Gang" videotape). The court has (continued...)

substantial derivative benefit from this practice, in that the inmate on the hitching post is in plain view of other inmates returning from the work sites who then taunt and ridicule him as they pass by. One corrections officer credited this type of humiliation with motivating the inmates to adhere to their work duties:

> "They're on that restraining bar when the rest of their squad who did work comes in, or by them to go into the gate and go back in. And the amount of harassment, verbal I mean, from the other inmates does a lot, you know. It really affects them. When they start, well, making fun of them, you know, talking about how stupid they look standing there and all this, that it really affects them."[158]

Indeed, one inmate testified about his experience being on the hitching post when their squad returns from the work site.

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157. (...continued)
viewed that portion of the videotape admitted into evidence by the Magistrate Judge for the purposes of Breed's expert testimony. The videotape depicts an inmate shackled to the hitching post; the inmate's wrists are clearly affixed to the post above his head level. The narrator of the videotape states the following:

> "If it is determined by the medical staff that the inmate is malingering, the officer will issue the inmate a negative report, which will extend the inmate's work time on the chain gang. The inmate will be on the security rail <u>until all work squads have been checked in to the check-in point at the end of the day</u>."

<u>Id</u>. (emphasis added).

158. Transcript of hearing before the Magistrate Judge, at 1061.

Tony Fountain was placed on the hitching post for nine hours at Staton Correctional Facility, and was forced to defecate in his pants when his requests for a bathroom break were ignored. Fountain was not permitted to use the restroom or to change his clothing for four and one-half hours after he had defecated on himself. About 100 inmates returning to the institution from the work site saw him in this condition; they laughed at him and made jokes about him, and continued to refer to him in derogatory terms after the incident.[159] Thus, in addition to whatever physical effects the inmate experiences while placed on the post, the hitching post serves a type of public shaming function as well.

To further compound the problem of noncompliance with Regulation 429, some individual institutions developed their own policies regarding returning inmates to work after they have been placed on the hitching post. The hitching-post policy for the Holman Correctional Facility reads: "The inmate

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159. Id. at 124-129 (testimony of inmate Tony Fountain). The Commissioner has objected to the Magistrate Judge's statement that Fountain's testimony was not refuted by the testimony of a Staton Correctional Facility back gate officer, Leroy Yelder. The court overrules the Commissioner's objections. Yelder testified that he had never seen an inmate defecate in his pants while placed on the restraining bar. He also stated, based on his review of the documentation of Fountain's placement on the hitching post, but not based upon his own personal knowledge, that Fountain was given sufficient bathroom and water breaks. Id. at 1095 (testimony of Leroy Yelder) ("Well, basically I was testifying what was on the back gate log, because back in '94, you know, after I read the log it refreshed my memory a little bit of what happened.").

will be escorted to the hitching rail and secured for the duration of his work shift or four hours which ever is greater. The exception to this rule is inclement weather and darkness both of which result in the inmate being removed from the hitching rail." However, an inmate may return to work after the shift commander determines the "legitimacy of the inmate's request to return to work," and finds the inmate "is ready to work."[160] Thus, although Regulation 429 mandates that any inmate who states he is willing to work be returned to his work squad, at institutions such as Holman, the corrections officer can decide that an inmate's proffered willingness to work is illegitimate and decline to remove him from the hitching post.

6. Conditions of Confinement on the Hitching Post

The hitching post is located outside the institution and, according to the testimony of the inmates who have been placed on it, the hitching post is not shaded from the sun.[161]

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160. Defendant's exhibit 2536.

161. Calvin Nix testified:

> "I couldn't get out of the sun, I was out there all day in it. Because of the way the rail is set up and all, there is no shade, and the way the angle of the rails are, the sun comes up and it follows the rail from sunrise to sunset, and you're exposed to it the whole time. There is no way of getting out of it."

(continued...)

Although they can be placed on the hitching post at any time of the year, including the summer, inmates do not receive sun block protection, nor are they always permitted to wear a hat to shield their faces from the sun.[162] Several of the inmates were placed on the hitching post during the summer months when the temperatures were upwards of 95 degrees Fahrenheit. These inmates experienced dehydration, as well as sunburn and blistering from their unprotected exposure to the sun.[163] As stated above, Regulation 429 requires that inmates be provided with fresh water and given the opportunity to use the bathroom once every hour while on the post.[164] The Magistrate Judge correctly concluded that this policy was not adhered to by the

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161. (...continued)
Transcript of hearing before the Magistrate Judge, at 548-49.

162. One inmate brought a towel with him to cover his face while being placed on the hitching post. A corrections officer ordered that it be taken away from him stating, "You damn red niggers don't need nothing like that." Transcript of hearing before the Magistrate Judge, at 547-48 (testimony of inmate Calvin Nix).

163. Leonard Goltry, who was called by the court as a witness in conjunction with inmate Calvin Nix's testimony, stated that he saw Calvin Nix on the hitching post and that Nix appeared sunburned and to have fever blisters on his bottom lip, although Goltry could not confirm whether such blisters were the result of sun exposure. Transcript of hearing before the Magistrate Judge, at 723; see also id. at 56-57 (testimony of inmate John Spellman) (stating he received "the worse sunburn I've ever had" while on the hitching post).

164. However, the standard operating procedure for the Holman Correctional Facility states that water and access to toilet facilities are to be provided once every two hours. Defendant's exhibit 2536.

DOC Commissioner and his officers. Inmates were not given water while shackled to the hitching post, and were denied access to toilet facilities while shackled to the hitching post. Moreover, certain corrections officers not only ignored or denied inmates' requests for water or access to toilet facilities, but taunted them while they were clearly suffering from dehydration or had been forced to defecate or urinate in their clothes and needed to access to facilities so they could wash themselves.[165] The Magistrate Judge correctly concluded that these actions presented serious health hazards, not only for the inmates, but also for anyone in their immediate vicinity.[166]

One of the most egregious examples of this type of abuse occurred during Larry Hope's placement on the hitching post. Hope was placed on the hitching post on June 7, 1995, for seven hours during very hot weather.[167] The reason for his placement

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165. In addition to the testimony of Tony Fountain, discussed supra, the Magistrate Judge heard testimony from inmate Hadji Hicks, who was similarly forced to defecate on himself when his requests to use the bathroom were ignored. Id. at 645 (testimony of inmate Hadji Hicks). Hicks stated that the other inmates and officers taunted him about this incident. Id. Officer Leroy Yelder confirmed this incident when his testified that he had "heard" that Hicks had defecated in his pants. Id. at 1101 (testimony of Officer Leroy Yelder).

166. Recommendation of the Magistrate Judge, at 108.

167. Transcript of hearing before the Magistrate Judge, at 691 (testimony of inmate Larry Hope). Hope was placed on the hitching post about one month prior to this incident for (continued...)

on the hitching post was his altercation with six corrections officers.[168] Hope had not received water for at least two hours while placed on the hitching post and repeatedly requested water. He made such requests to two corrections officers in charge of the dog truck; one of these officers filled a cooler with ice and water and "watered the dogs" on the dog truck. The officer then placed the cooler on the ground at about three feet from Hope, "took the top off" and "kicked it over" so that the water ran to the ground directly in front of Hope."[169] The Commissioner has conceded that these allegations, if true, would constitute violations of Regulation 429, but contends that there is insufficient evidence to support the

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167. (...continued)
fighting with another inmate. Id. at 681-82. Hope did not receive a disciplinary citation for the incident and the captain eventually concluded that Hope should not have been placed on the hitching post for the fight. Plaintiffs' exhibit 50 (remarks of Captain Wise).

168. The Commissioner has objected to the Magistrate Judge's use of the term "fight" to describe the interaction between Hope and the corrections officers. See recommendation of the Magistrate Judge, at 42; defendant's objections to recommendation of the Magistrate Judge, at 20-21. The plaintiffs contend that based on Hope's testimony, the term "fight" is generous to the Commissioner. Plaintiffs' response to defendant's objections, at 110. The court need not resolve this factual dispute, but notes that an altercation between corrections officers and an inmate no doubt presents a security risk.

169. Transcript of hearing before the Magistrate Judge, at 694-703.

allegations.[170] However, the Commissioner did not present any evidence to refute Hope's allegations. Further, the Commissioner's claims that evidence in the record contradicts Hope's testimony are unfounded. The Commissioner points to plaintiffs' exhibit 50 to show that Hope received water while placed on the hitching post.[171] However, plaintiffs' exhibit 50 documents Hope's May 11, 1995, placement on the hitching post. The only evidence in the record that relates to Hope's June 7, 1995, placement on the hitching post, the date that he contends he was deprived of water, is plaintiffs' exhibit 51, a treatment record for Hope following his altercation with the corrections officers and prior to his placement on the hitching post, as well as plaintiffs' exhibit 20, which is a photograph of Hope receiving a cup of water from an officer. While the photograph demonstrates that Hope received at least one cup of water during his seven-hour placement on the hitching post, the Commissioner has provided no documentation concerning Hope's June 7, 1995, placement on the hitching post to demonstrate that he received water in regular intervals throughout the day as required by Regulation 429.

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170. Defendant's objections to the recommendation of the Magistrate Judge, at 21; see also transcript of hearing before the Magistrate Judge, at 865-66 (testimony of the DOC Commissioner).

171. Defendant's objections to the recommendation of the Magistrate Judge, at 71.

The most repeated complaint of the hitching post, however, was the strain it produced on inmates' muscles by forcing them to remain in a standing position with their arms raised in a stationary position for a long period of time.[172] In addition to their exposure to sunburn, dehydration, and muscle aches, the inmates are also placed in substantial pain when the sun heats the handcuffs that shackle them to the hitching post, or heats the hitching post itself. Several of the inmates described the way in which the handcuffs burned and chafed their skin during their placement on the post.[173] One of the plaintiffs' experts recreated the conditions of the hitching post and shackled himself to it for about two hours. He stated:

> [I]n the 93 degree weather ... that pipe, the sunlight on the metal bar began to generate a heat that went well beyond the 93 degrees and became hotter and hotter so that my wrists touching that bar became inflamed, and the only way I could avoid the bar would be to hold the chain between the handcuffs above the bar, which meant I had to even get in a higher position. When I did bring the handcuffed arms on the bar itself, then the handcuffs began to get a transmission of heat from the bar, and the handcuffs themselves heated

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172. See, e.g., transcript of hearing before the Magistrate Judge, at 32 (testimony of inmate John Spellman), 130 (testimony of inmate Tony Fountain), 187-88 (testimony of inmate Warren Leatherwood).

173. Id. at 549 (testimony of inmate Calvin Nix) (stating that the steel handcuffs and hitching post became hot to touch in the sun and were extremely painful).

> up. At the end of two hours, Your Honor, I decided that this experience I had was not going to go on any longer ... no one can honestly say that this is not a painful experience. And I'm sure it varies from one inmate to another. I do not know how an inmate would stay on that for eight or ten hours."[174]

The Commissioner attempted to introduce similar evidence regarding their expert's experience on the hitching post. However, the Magistrate Judge sustained the plaintiffs' objections to the admission of this evidence.[175]

7. The Department of Justice's Investigation

In June and July of 1994, the Civil Rights Division of the United States Department of Justice conducted an investigation of Alabama's Easterling Correctional Facility. This investigation included an evaluation of Easterling's use of the hitching post.[176] The Department of Justice concluded that the

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174. Transcript of hearing before the Magistrate Judge, at 298-99 (testimony of Allen Breed).

175. Id. at 1113. The Magistrate Judge excluded the evidence based on a motion in limine to limit the expert's testimony to information the expert received up until the time the plaintiffs deposed the expert. Plaintiffs' motion in limine to limit the testimony of defendant's experts, filed September 20, 1996 (Doc. no. 332). This motion was granted by the Magistrate Judge on October 17, 1996 (Doc. no. 359). By contrast, the Commissioner did not object to the plaintiffs' expert's testimony as to his experiences on a mock hitching post. See transcript of hearing before the Magistrate Judge, at 296-310.

176. The Commissioner did not object to the plaintiffs' (continued...)

hitching post[177] required an improper use of restraints and corporal punishment, that corrections officers did not comply with the minimal safeguards required by state policies, and that inmates with medical conditions were placed on the hitching post without medical clearances, which rendered the use of the hitching post "potentially dangerous from a medical standpoint."[178] The Department of Justice found the DOC's officers had failed to comply with the policy of immediately releasing any inmate from the hitching post who agrees to return to work.[179] The Department of Justice recommended that in order to meet minimum constitutional standards at Easterling, the DOC should cease its use of the hitching post.[180]

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176. (...continued)
proffer of the Department of Justice's report and recommendation, and the Magistrate Judge admitted them into evidence. See plaintiffs' exhibit 25 (letter from Deval Patrick to Governor James, dated March 27, 1995); exhibit 78 (report of James E. Murphy on Easterling Correctional Facility, dated November 28, 1994).

177. The Department of Justice used the term "hitching pole" in their report. Plaintiffs' exhibit 25, at 3.

178. Id.

179. Id.

180. Id. at 4.

The DOC responded to the Department of Justice's report by way of a letter, dated May 15, 1995.[181] In the letter, the DOC stated that it had "determined to maintain the existence of the security bar, noting that its use is not unconstitutional and is necessary to preserve prison security and discipline."[182] The letter continued to explain the DOC's reasons for using the security bar, or hitching post:

> "DOC assures DOJ that the security bar is not used with malice or cruelty but with the intent of maintaining prison security....
>
> "While DOJ raises valid concerns regarding the potential health problems that could develop from use of the security bar, DOC maintains that these have been adequately addressed in the past.... [T]he use of the security bar at Easterling is closely monitored. Inmates are offered water every fifteen minutes and are allowed to use a toilet whenever necessary. Any inmates taking medication with side-effects that could be worsened by exposure to the sun or any medically compromised inmates are given a medical stop-up. DOJ, while raising "potential" concerns, has not cited any actual case where an inmate's medical condition has been caused or exacerbated while being restrained on the security bar. In fact, no such case of an inmate restrained on the security bar requiring medical attention has ever existed at Easterling. As long as the use

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181. Plaintiffs' exhibit 72, exhibit D (excerpt from letter from Charles A. Graddick, counsel for DOC, to Deval L. Patrick, Department of Justice, dated May 15, 1995). The DOC Commissioner did not object to the plaintiffs' proffer of this correspondence.

182. Id. at 9.

> of the security bar is closely monitored, actual related medical problems should be continued to be avoided."[183]

The DOC supported its argument that the hitching post was a valid means of maintaining security by citing Whitley v. Abers, 475 U.S. 312, 106 S. Ct. 1078 (1986).[184] However, the Department of Justice disagreed with the DOC's interpretation of Whitley. In a letter dated June 27, 1995, the Department of Justice responded to the DOC's letter as follows:

> "We remain deeply concerned about your unwillingness to take any corrective action regarding the 'rail' or 'hitching post.' We have reviewed your legal analysis and must differ with your reading of Whitley. Although an emergency situation may warrant drastic action by corrections staff, our experts found that the 'rail' is being used systematically as an improper punishment for relatively trivial offenses. Therefore, we have concluded that the use of the 'rail' is without penological justification."[185]

The Department of Justice report was raised in a wardens and directors' meeting held on November 15, 1995. According to the minutes of the meeting, the wardens and general counsel for the DOC concluded: "[W]e feel the Admin Reg we have in place right now covers [the need for protocol]. Just emphasize to your

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183. Id. at 7, 12.

184. Id. at 7.

185. Plaintiffs' exhibit 72, exhibit B (letter from Christopher N. Cheng, Department of Justice, to Charles A. Graddick, counsel for DOC, dated June 27, 1995).

employees that they follow our regulation specifically, and make sure they keep any and all logs they are supposed to and that it is properly applied."[186]

8. Use of the Hitching Post in Other Prison Systems

According to the plaintiffs' and the DOC Commissioner's experts, no other prison system, state or federal, uses a device similar to Alabama's hitching post. One of the plaintiffs' experts testified that he believed that Texas had utilized a similar device, but that its use was abolished in the 1970's.[187] Another one of the plaintiffs' experts stated that in his opinion the only analogous device would be one used in South African prisons in the 1950s on black prisoners.[188] The DOC Commissioner did not dispute the representations made by the plaintiffs' experts concerning the use of the hitching post or devices similar to it in other jurisdictions, and the DOC Commissioner's expert witness testified that he was not aware of any other prison system that used a hitching post on inmates who refused to work.[189]

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186. Defendant's exhibit 2453 (minutes of wardens'/directors' meeting, dated November 15, 1995).

187. Transcript of hearing before the Magistrate Judge, at 307, 309 (testimony of Allen Breed).

188. Id. at 748 (testimony of Norville Morris).

189. Id. at 1150 (testimony of Gary DeLand).

B. Constitutional Arguments

The plaintiffs assert two constitutional arguments in support of their challenge to the DOC Commissioner's use of the hitching post. The plaintiffs maintain, first, that the use of the hitching post violates the eighth-amendment right of the inmates placed upon the post to be free from cruel and unusual punishment, and, second, that the use of the hitching post violates their fourteenth-amendment procedural--due-process right. The court will address each argument in turn.

1. Eighth-Amendment

The Supreme Court has interpreted the eighth amendment's cruel-and-unusual-punishment clause to prohibit "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society' ... or which 'involve the unnecessary and wanton infliction of pain.'" Estelle v. Gamble, 429 U.S. 97, 102-03, 97 S. Ct. 285, 290 (1976) (citations omitted).[190] Unless the inmate alleges an eighth-amendment violation stemming from the official or formal punishment itself, an evaluation of the inmate's claims necessarily requires an objective component ("Was the deprivation sufficiently serious?"), and subjective component

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190. The eighth amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8.

("Did the officials act with a sufficiently culpable state of mind?"). Wilson v. Seiter, 501 U.S. 294, 298-300, 111 S. Ct. 2321, 2324-25 (1991). "If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." Id. (emphasis in original); see also Sims v. Mashburn, 25 F.3d 980, 983 (11th Cir. 1994).

The state of mind required to sustain an eighth-amendment challenge is one of wantonness. Wilson, 501 U.S. at 302, 111 S. Ct. at 2326 ("[O]ur cases say that the offending conduct must be wanton.") (emphasis in original). That is to say, mere negligence is insufficient to support a claim of cruel and unusual punishment. See Estelle, 429 U.S. at 106-07, 97 S. Ct. at 292-93. The Supreme Court has created two standards for determining whether such wantonness has been established; these standards vary according to the nature of the alleged constitutional violation. Hudson v. McMillian, 503 U.S. 1, 5, 112 S. Ct. 995, 998 (1992). An inmate's challenge to the conditions of his confinement requires a court to consider whether prison officials were "deliberately indifferent" to his health or safety. Farmer v. Brennan, 511 U.S. 825, 835, 114 S. Ct. 1970, 1977 (1994); Wilson, 501 U.S. at 304, 111 S. Ct. at 2327. However, when the court is considering actions taken by prison officials in the course of responding to a prison disturbance, where such actions are taken "in haste, under

pressure, and frequently without the luxury of a second chance," the proper inquiry in determining the subjective component is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320-21, 106 S. Ct. 1078, 1084 (1986). Therefore, there are two standards that are used to determine whether the prison officials have acted with a sufficiently culpable mind: the Farmer standard of deliberate indifference, which is applied in challenges to prison conditions; and the Whitley standard of malicious and sadistic use of force, which is applied in challenges to the use of force under exigent circumstances.

The first observation the court makes in determining the appropriate standard to evaluate the plaintiffs' claim is that the use of the hitching post cannot be viewed as a "punishment" imposed by statute or sentencing judge; therefore, the plaintiffs must show that the prison officials acted wantonly, or with a sufficiently culpable state of mind, in order to prevail on their eighth-amendment argument.[191] The Commissioner

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191. The court literally interprets the Supreme Court's use of the terms "statute" and "sentencing judge" in Wilson. Although Regulation 429 arguably creates a "punishment" for those inmates who refuse to work by mandating their placement on the hitching post, an avoidance of the subjective component cannot be justified; the punishment is not imposed by statute or sentencing judge, nor is it imposed by prison officials to (continued...)

has steadfastly maintained that the Whitley subjective test, the higher standard of culpability, should govern this case because the hitching post is used as a "measured response" to the "conduct of inmates that disrupts the orderly administration of the prison facility."[192] That is, the Commissioner contends, because the hitching post is designed to be used, as the Commissioner stated, in "emergency situations," Whitley should govern the disposition of the claim. The plaintiffs admit that the use of the hitching post "does not fit neatly into either category" of cases, but argue that they can prevail under either standard.[193]

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191. (...continued)
supplement the inmate's sentence as a punishment for the convicted crime. See Ingraham v. Wright, 430 U.S. 651, 664-68, 97 S. Ct. 1401, 1408-11 (1977) (discussing history of the eighth amendment and noting "The primary purpose of the [Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes...."); (citations omitted); cf. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment and 'cruel and unusual' because the Supreme Court has interpreted the term to forbid unauthorized and disproportionate, as well as barbarous, punishments.... But if the guard accidently stepped on the prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, 1868, or 1985.") (citing Ingraham, supra), cert. denied, 479 U.S. 816, 107 S. Ct. 71 (1986).

192. Defendant's objections to the Magistrate Judge's recommendation, at 61.

193. Plaintiffs' response to defendant's objections, at 48.

The Eleventh Circuit has consistently used the heightened Whitley standard to evaluate prisoner claims regarding disciplinary actions taken to restore official control or in response to a security threat. See, e.g., Sims v. Mashburn, 25 F.3d 980, 984 (11th Cir. 1994); Williams v. Burton, 943 F.2d 1572, 1575 (11th Cir. 1991), cert. denied, 505 U.S. 1208, 112 S. Ct. 3002 (1992); Ort v. White, 813 F.3d 318, 325 (11th Cir. 1987). However, in such cases, the court was confronted with the efforts of corrections officers to subdue or control an individual prisoner who was clearly creating a security disturbance. In Sims, in response to an inmate's repeated obstruction of the guards' view to his cell and the inmate's belligerent behavior, which included threats to kill the prison guards, the prison guards "stripped" the inmate's cell for about 29 hours. Likewise, in Williams, prison guards responded to an inmate's belligerent behavior, which included cursing, threatening to kill the prison guards, throwing bodily fluids at the guards, and causing other inmates to join in a general disturbance, by placing him in four-point restraints in his cell and gagging him for over 28 hours.[194] And again, in Ort, the prison guard denied an inmate water while on work detail when the inmate had refused to carry the water to the work site

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194. The inmate-plaintiffs in both Sims and Williams were confined to segregation units reserved for "the most difficult, unruly, and unmanageable members of the prison population." Sims, 25 F.3d at 984 n.10.

or work with the other inmates, and the other inmates at the work site threatened to refuse to work or to assault the inmate if the guard permitted him to drink the water. In all three situations, the court was faced with prison guards dealing with an immediate security risk, and potentially volatile situation.

Here, based on the evidence presented at the evidentiary hearing before the Magistrate Judge, the court cannot conclude that a security risk, disturbance, or other type of situation requiring an immediately necessarily coercive measure, was present in every instance, or even in most instances, in which the hitching post was used on inmates. For example, on August 23, 1995, inmate John Spellman was taken from his administrative segregation cell to the hitching post, where he remained for over six hours. He did not refuse to work, but rather told the guards that he did not have the proper work boots to work.[195] There is no evidence that Spellman was behaving in a belligerent manner, threatening the prison guards or other inmates, or otherwise disturbing or threatening to disturb prison security.[196] Nor did Spellman's "refusal" to

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195. Transcript of hearing before the Magistrate Judge, at 28-33.

196. The Commissioner objects to the Magistrate Judge's finding that his counsel "did not call any witnesses to refute Spellman's testimony as reported in [her] findings," and argues that the testimony of Officer Federal Blakely refuted (continued...)

work cause other inmates nearby him to rebel or to disobey orders. Similarly, the testimony of inmate Gerald Ware supports the conclusion that inmates were not always placed on the hitching post during emergency or threatening situations. As described above, Ware was placed on the hitching post after a corrections officer interpreted his statement that he was scheduled for an x-ray examination as a refusal to work.[197] This incident occurred at the back gate of the Draper Correctional Facility, on the institution's grounds and not at the work site. Again, the Commissioner neither alleged nor presented evidence that Ware's protestations created or threatened to create a prison disturbance. Inmate Michael Askew also "refused to work" while at the back gate and was placed on the hitching post, because the prison doctor had instructed him not to lift objects weighing more than 10 pounds.[198] And, like John Spellman, inmate Calvin Nix was

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196. (...continued)
Spellman's testimony concerning whether he could be removed from the hitching post if he stated his willingness to work. Defendant's objections to the Magistrate Judge's recommendation, at 11. The court does not need to resolve this objection because it is irrelevant to the court's critical finding that Spellman was removed from his cell to be placed on the hitching post. The Commissioner's contention that "[m]any other defense witnesses refuted Spellman's testimony generally," id., is too vague to be addressed by the court.

197. Transcript of hearing before the Magistrate Judge, at 229-30.

198. Id. at 366-68.

physically removed from his segregation cell and placed on the hitching post.[199] The Commissioner offered no evidence that either Askew's or Nix's behavior created or threatened to create a disturbance in the prison.[200]

The absence of evidence, or even allegations, that these inmates' refusal to work created a disturbance or threat of disturbance in the prison precludes the court's sole reliance on the heightened Whitley standard to analyze the plaintiffs' eighth-amendment argument. The court will therefore adopt the lower-level Farmer standard to evaluate the inmate's eighth-amendment argument. In reaching this conclusion, the court has not substituted its own judgment for the experience and expertise of DOC officials, nor has the court second-guessed the DOC by relying on the testimony of the plaintiffs' expert witnesses, who stated that the removal of an inmate from his cell to place him on the hitching post is counterintuitive to

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199. Id. at 533-38.

200. Reviewing the evidence submitted by the Commissioner, the Magistrate Judge concluded that "There is a paucity of evidence in the record that placement of inmates on the hitching post routinely or even frequently occurs in an atmosphere of violence or under circumstances that can be characterized as emergency situations." Recommendation of the Magistrate Judge, at 110. The Commissioner did not directly object to this finding by the Magistrate Judge. The only evidence provided by the Commissioner to the contrary is the testimony of his expert witness, Gary DeLand. See infra note 203.

prison security.[201] Rather, the court has reached this conclusion by deferring to the policies and practices articulated by the Commissioner himself. In his testimony, the Commissioner stated that inmates who refuse to work while at the institution should not be placed on the hitching post because such a situation would not be considered an emergency:

> "[J]ust refusing to go out in the morning, you know, not going to work, that would not be an emergency situation ... I can't fathom removing an individual from a secure segregation cell to take them outside and out them on a restraining bar. I can't fathom that happening, and I don't see the reason for it."[202]

The court gives considerable credit to this testimony, despite the fact that the Commissioner's expert witness testified to the contrary.[203]

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201. One of the plaintiffs' expert witnesses testified as follows:

> "It almost violates the very basic principles to begin with of good custody. If an inmate is on the inside of the institution, and he says I'm not going to work today, you don't take him outside the security fence to lock him up on the restraining bar or anything else, you keep him inside the institution. If he's inside the institution, you have him under control."

Transcript of hearing before the Magistrate Judge, at 301-02 (testimony of Allen Breed).

202. Id. at 886-87.

203. The Commissioner's expert witness stated that he (continued...)

203. (...continued)
believed a refusal to work could be considered an emergency because it was insubordination and might encourage other inmates to do the same thing. Transcript of hearing before the Magistrate Judge, at 1140-41 (testimony of Gary DeLand). The expert also stated that he would consider it an emergency situation that justified use of the hitching post if an inmate refused to work while still in his cell. The expert provided the following explanation to the court:

> "In Alabama you have an unpopular work program, and there needs to be some means by which you can coerce prisoners to accept that work program if the program is going to be deemed to be constitutional, is going to be allowed. To allow prisoners to simply say no, they're willing to accept the limited range of things that may occur in an inmate disciplinary action, it is not unreasonable, in my judgment, to have some means which is somewhat more coercive, time limited, something that the inmate has the key to. Something that the prisoner can walk away from within a reasonable period of time after changing his mind.
>
> That's why I would deem it as an exigent circumstance. It's something that needs to be resolved in the short-term. Discipline of prisoners is more long-term. They have the twenty-four hour wait before they have to have a hearing, they have to be scheduled for a hearing, and the punishments are not intended to be punishments you can walk away from, they're intended to be sanction for misconduct where[as] this is an opportunity for a prisoner to rethink, I'm not going to go out today. And that's why I believe it's reasonable, because it's something that gives an opportunity for a prisoner to change his mind then to walk away from it."

(continued...)

Moreover, the court's decision to use the deliberate-indifference standard to evaluate the plaintiffs' claim is reaffirmed by the fact that the corrections officers' actions in the above instances of use of the hitching post were dictated by Regulation 429, a policy adopted by the DOC with consideration and forethought, rather than an individual officer's reaction to an emergency situation. Support for this reasoning is found in Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993), in which the Ninth Circuit considered an eighth-amendment challenge to a prison's policy of permitting cross-gender clothed body searches. The court conducted its review of the policy under the deliberate-indifference standard for similar reasons:

> "Unlike judgement in the excessive force context, our task is not to critique in hindsight the exercise of judgment of a particular officer on a specific occasion. The cross-gender clothed body search policy was developed over time, with ample opportunity for reflection. Moreover, unlike incidents of excessive force, the cross-gender clothed body search policy

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203. (...continued)
Id. at 1160-61. Notwithstanding the Commissioner's contradictory testimony, the court does not find the testimony of this expert to be persuasive. First, the expert later clarified that he did not believe there was a "security justification" for using the hitching post. Id. at 1165. Second, the expert's reasoning as to the effect of the hitching post as an immediate coercive device that would enable the inmate to escape sanctions by rethinking his refusal to work is flawed. Regulation 429 plainly states that the prison guard will issue a "written disciplinary" to those inmates placed on the hitching post. Plaintiffs' exhibit 12.

> does not inflict pain on a one-time basis; instead, as with substandard conditions of confinement, the policy will continue to inflict pain upon the inmates indefinitely."

Id. at 1528.[204] The distinction drawn by the Ninth Circuit between the systematic infliction of pain on inmates pursuant to a premeditated policy and a single occurrence of force has been amplified in the Supreme Court's recent pronouncement on the fourteenth-amendment right to substantive due process. Drawing an analogy to its eighth-amendment jurisprudence, the Court stated the following:

> "To recognize a substantive due process violation in these circumstances when only mid-level fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large

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204. See also Madrid v. Gomez, 889 F. Supp. 1146, 1251 (N.D. Cal. 1995) ("Thus, Jordan teaches that where the prison practice at issue (a) lacks a legitimate security justification, (b) will inflict pain on a routine basis, and (c) was not developed under time constraints, plaintiffs need not show that prison policy makers acted with the very purpose of causing harm. Rather a showing of deliberate indifference will suffice."), mandamus denied, 103 F.3d 828 (1996), cert. denied, __ U.S. __ 117 S. Ct. 1823 (1997).

> concerns of the governors and the governed.'"

County of Sacramento v. Lewis, __ U.S. __, __, 118 S. Ct. 1708, 1720 (1998) (citation omitted) (emphasis added). Because numerous incidents leading to placement on the hitching post were not, by the Commissioner's own admission, unpredictable, unforeseen, or volatile situations, and because the actions of the corrections officers were taken pursuant to the hitching-post policy, Regulation 429, which was designed to address these specific non-emergency situations, the court declines to rely solely on the heightened Whitley standard to determine the wantonness of the prison officials' actions. See also Hickey v. Reeder, 12 F.3d 754, 758 (8th Cir. 1994) (concluding that prison guards violated the eighth amendment by applying stun gun to force him to comply with housekeeping regulations: "We have not found, and hope never to find, a case upholding the use of this type of force on a non-violent inmate to enforce a housekeeping order.").

Although the court has chosen to adopt the deliberate-indifference standard for the purpose of evaluating the plaintiffs' eighth-amendment argument in circumstances, such as the ones described above, where there is no disturbance or threat of disturbance to prison security, it acknowledges that the hitching post has been used on at least one occasion in a potentially volatile prison disturbance. Inmate Larry Hope was