> 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

placed on the hitching post on June 7, 1995, following an altercation that he himself admitted involved six corrections officers.[205] The court does not dispute the Magistrate Judge's conclusion that Hope "did not refuse to work nor disrupt the work of other inmates,"[206] but notes and agrees with the Commissioner's argument that such an incident "is a major security concern."[207] The court will therefore use the heightened Whitley standard to evaluate the DOC's use of the hitching post under such exigent circumstances. See Ort, 813 F.2d at 323 (granting great deference to actions of prison officials in applying preventative measures to reduce the threat of dangerous misconduct and to restore order and discipline). The court's use of both standards, however, is especially appropriate because the plaintiffs' claim regarding the use of the hitching post presents overlapping challenges both to their conditions of confinement, which necessitates use of the Farmer standard, as well as the use of excessive force

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205. Id. at 688 (testimony of inmate Larry Hope).

206. Recommendation of the Magistrate Judge, at 43.

207. Defendant's objection to the recommendation of the Magistrate Judge, at 21. Indeed, the Commissioner's and Magistrate Judge's characterizations of the event are not antithetical.

during exigent circumstances, which necessitates use of the Whitley standard.[208]

In applying the two standards to the plaintiffs' claim, the court remains mindful of the considerable deference owed to prison officials, both in formulating their disciplinary policies, as well as in their implementation: "[p]rison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547, 99 S. Ct. 1861, 1877 (1979). As Judge Friendly remarked: "The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom. John v. Johnson, 414 U.S.

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208. The court has had some difficulty in characterizing the plaintiffs' challenge. Courts have generally treated challenges to the use of restraints as claims regarding the appropriate level of force applied by the prison guards. See, e.g., Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991). However, many of the plaintiffs' complaints about the hitching post concern their conditions of confinement, such as their access to food, water, and toilet facilities, and not only the use of restraints.

1033, 94 S. Ct. 462 (1973). However, this deference "does not insulate from review actions taken in bad faith or for no legitimate purpose." Whitley, 475 U.S. at 322, 106 S. Ct. at 1085.

The court notes that, in applying the above standards, it is expressly rejecting the Magistrate Judge's decision to use Turner v. Safley's reasonableness standard, employed supra in the context of the visitation claim, to analyze the plaintiffs' eighth-amendment argument. In so holding, the court again adopts the reasoning of the Ninth Circuit in Jordan v. Gardner, which similarly rejected an application of Turner to an inmate's eighth-amendment argument. The Ninth Circuit reasoned as follows:

> "Turner has been applied only where the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment.... Eighth Amendment rights do not conflict with incarceration; rather, they limit the hardships which may be inflicted upon the incarcerated as 'punishment'.... Perhaps for this reason, the Supreme Court has never applied Turner to an Eighth Amendment case."

986 F.2d at 1530. The court also notes that although the expansive language used in Turner would appear to apply to an eighth-amendment challenge--"when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests,"

482 U.S. at 89, 107 S. Ct. at 2261 (emphasis added)--the Supreme Court's numerous opinions in the development of a specific eighth-amendment jurisprudence perforce compel the court to adopt the above standards.

a. Objective Component: Evolving Standards of Decency

The objective component "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency ...,' " but must be balanced against competing penological goals." Gamble, 429 U.S. at 102, 97 S. Ct. at 290 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir.1968)). In determining whether a punishment is incompatible with "the evolving standards of decency that mark the progress of a maturing society," or involves "the unnecessary or wanton infliction of pain," Estelle, 429 U.S. at 102-03, 97 S. Ct. at 290, in violation of the eighth amendment, the deprivation asserted by the inmate must be "sufficiently serious" in a challenge to prison conditions, Wilson, 501 U.S. at 298, 111 S. Ct. at 2324, but need not rise to the level of "serious injury" in claims involving excessive use of force. Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995 (1992). Further, while the eighth amendment "does not mandate comfortable prisons," id., it does require prison officials to provide "the minimal civilized measure of life's necessities" to the inmates in their custody. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.

Ct. 2392, 2399 (1981). As the Third Circuit Court of Appeals explained, "The touchstone is the health of the inmate. While the prison administration may punish, it may not do so in a manner that threatens the physical and mental health of prisoners." Young v. Quinlan, 960 F.2d 351, 364 (3d Cir. 1992). The court may consider the cumulative effect of the adverse conditions of confinement when such conditions have a "mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth, or exercise." Wilson, 501 U.S. at 304, 111 S. Ct. at 2321. Applying these standards to the plaintiffs' mixed prison conditions-excessive force claim, the court agrees with the Magistrate Judge's conclusion that inmates placed upon the hitching post suffered "extreme pain, anguish, humiliation, mental suffering, and resulting physical soreness and depression," and overrules the Commissioner's objection to this finding.[209]

The court first considers the plaintiffs' allegations that the hitching post places inmates in considerable physical pain. Although the Commissioner states that one of the purposes of the hitching post is to subject "the recalcitrant inmates to the same conditions as those inmates who are in the field

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209. Recommendation of the Magistrate Judge, at 106; defendant's objections to the recommendation of the Magistrate Judge, at 66.

working,"[210] the Commissioner's expert witness admitted that use of the hitching post results in some discomfort.[211] In fact, based on the testimony offered at the evidentiary hearing, the court readily concludes that the experience of being placed on the hitching post for an extended period of time results in pain that far exceeds the "discomfort" imagined by the Commissioner's expert.[212] As the record reflects, inmates were forced to stand for several hours at a time in an uncomfortable, stationary position: some inmates had their arms shackled spread-eagled to the hitching post, while others were forced to stand with their arms up above their heads, and still others were placed on the lowest post, forcing them to spend their time on the hitching post in a doubled-over position. The prisoners who had been placed upon the hitching post, as well as one of the plaintiffs' experts who placed himself on the post for two hours, all described the pain they experienced

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

211. Transcript of hearing before the Magistrate Judge, at 1125.

212. The Commissioner's expert's knowledge of the physical effects of the hitching post was extremely limited and appeared to be based solely on his review of Regulation 429 and his examination of a hitching post at one of the DOC's correctional facilities. The expert admitted that he did not review incident reports or activity logs regarding inmate placement on the post, nor did he review the Department of Justice's reports, nor did he speak to any inmates who had been shackled to the hitching post. Id. at 1127, 1131-33.

by being forced to stand in the same position, without the ability to stretch, for an extended period of time: they complained of back aches, of muscle spasms, and of leg pain. The duration of this pain after being removed from the hitching post ranged from several days to two weeks. Further, any attempts made by the inmates secured to the post to stretch or to move so as to ease the pain of their back or legs resulted in considerable chafing and pain on their wrists because the inmate would be forced to pull on his wrist shackles: "if one gives into the gravity then the cuffs are going to be pulled more tightly and that's going to cause more pain."[213] This chafing was exacerbated by the heat of the shackles, which intensified in the direct sunlight in which the hitching post is placed. As a result of the pressure of the shackles on the inmates' wrists, many inmates complained of pain and swelling in their wrists, as well as bleeding, inflammation, and burning. Further, inmates who were placed on the hitching post with existing injuries suffered from aggravation of those injuries.

In addition to wrist, back, and leg pain, inmates also suffered physical pain as a result of exposure on the hitching post. With no sun protection, in the form of either sun block, a hat, or shade, inmates suffered sunburn and blistering, which

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213. Transcript of hearing before the Magistrate Judge, at 402 (testimony of Dr. Frank Rundle).

made them vulnerable to risk of infection. The combination of the heat, the sun, and limited access to water, caused many inmates to become dehydrated or to suffer from heat exhaustion. Medical records documenting these physical effects demonstrate that in more than a few cases the hitching post not only failed to serve its stated purpose--to coerce inmates to return to work--but ultimately rendered inmates unfit for work, as their conditions resulted in a medical "stop-up."

The Commissioner maintains that none of the inmates alleged a "serious injury," and thus the plaintiffs have failed to prove the subjective component of the eighth amendment analysis. In support of this argument, the Commissioner points to the testimony of a nurse at the Easterling and Ventress Correctional Facilities who stated that she had never seen an inmate suffer a "serious injury" as a result of being on the hitching post.[214] The Commissioner's argument lacks merit: the plaintiffs are not required to show that the inmates suffered serious injury. Hudson v. McMillian, 503 U.S. at 5-6, 112 S. Ct. at 998. The court, however, is satisfied that the plaintiffs have shown for the purpose of satisfying the objective component for a Whitley-claim of excessive use of

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214. Id. at 946 (testimony of Linda Shipman). The nurse did admit that prisoners at one of her facilities suffered potential heat exhaustion in the form of nausea, headaches, and dizziness after being removed from the hitching post. Id. at 953-54.

force that inmates placed on the hitching post have suffered "actual injuries." Williams v. Burton, 943 F.2d 1572, 1575 (11th Cir. 1991) (concluding that an inmate's placement in four-point restraints and gag did not rise to the level of an eighth amendment violation because "while [the inmate] experienced some discomfort because of his restraint, no actual injury was inflicted."). [215] Moreover, although the plaintiffs are not required to show that the pain inflicted upon them by the prison officials through use of the hitching post resulted in serious harm, the court finds that the cumulative effects of sunburn, dehydration, and lasting muscular pain, are sufficient to create significant injuries.

The Commissioner also contends that the majority of the inmates placed on the hitching post do not suffer adverse physical effects. In support of this argument, the Commissioner points to approximately 70 exhibits entered into

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215. There can be no doubt that the plaintiffs must assert actual injuries resulting from the DOC's use of the hitching post in order to sustain their eighth amendment challenge. See Lewis v. Casey, __ U.S. __, 116 S. Ct. 2174 (1996) (holding that inmates claiming denial of access to courts failed to show actual injuries stemming from inadequate library facilities). However, the court reiterates that the requirement of actual injury is not equivalent to a showing of serious harm or injury. As a concurring Justice in Hudson explained, "Indeed, were we to hold to the contrary, we might place various kinds of state-sponsored torture and abuse--of the kind ingeniously designed to cause pain but without a telltale 'significant injury'--entirely beyond the pale of the Constitution." Hudson, 503 U.S. at 13-13, 112 S. Ct. at 1002 (Blackmun, J., concurring in the judgment).

evidence purporting to be medical records that demonstrate the lack of injury sustained by inmates placed upon the hitching post. With the exception of the above-mentioned nurse, the Commissioner did not call any witnesses to refute the plaintiffs' allegations concerning physical injury; nor did the Commissioner call any witnesses to explain, clarify, or even to summarize the 70 medical reports. The Commissioner objects to the Magistrate Judge's finding that these records "are difficult if not impossible to decipher. The nurses and physicians' handwriting is often illegible, and the language is replete with medical jargon, symbols, and abbreviations that no witnessed explained."[216] Upon examining these exhibits, the court is inclined to agree with the Magistrate Judge. The DOC Commissioner's proffer of these exhibits without a witness to summarize or explain serves little evidentiary purpose. More importantly, the Commissioner offered nothing to actually refute the testimony of the plaintiffs' witnesses regarding the physical effects of the hitching post.

The court also finds that corrections officers denied prisoners access to basic human needs when they placed them on the hitching post. Specifically, inmates were denied water, were not given sufficient protection from the sun, and most

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216. Recommendation of the Magistrate Judge, at 20 n.30; defendant's objections to the recommendation of the Magistrate Judge, at 11-12.

importantly, were in some cases denied access to toilet facilities. Although Regulation 429 provides that the corrections officer in charge of supervising the inmates verify in 15-minute increments an inmate's need for access to toilet facilities, the court finds that this policy was not followed in all cases and the failure to comply with the policy caused the inmates considerable pain, embarrassment, and humiliation.[217] The victims of this non-compliance, those inmates who could not control their bodily functions for the duration of their placement on the hitching post, were not only placed in a degrading and unsanitary situation, but were also subject to public humiliation and ridicule due to the prominent placement of the hitching post at the back gate--where all inmates traverse upon returning from the work sites. The deprivation of these basic human necessities plainly violates the eighth amendment. See, e.g., Young v. Quinlan, 960 F.2d at 365 (reversing the district court's award of summary judgment to prison officials where an inmate alleged that he was not permitted to leave his cell more than once to urinate or defecate over the period of several days, and was forced to do so in his cell, was not provided with toilet paper, was not

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217. As the court noted above, 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.

provided with water, and was not permitted to bathe for several days; the Third Circuit found that if proven true, such conditions would "demonstrate a violation of the basic concepts of humanity and decency that are at the core of the protections afforded by the Eighth Amendment."). Further, the corrections officers' refusal to provide inmates who had urinated or defecated upon themselves with means to clean their bodies constituted a further violation of the inmates' eighth amendment rights. See Chandler v. Baird, 926 F.2d 1057, 1065 (11th Cir. 1991) (denial of personal hygiene items can give rise to eighth amendment violation). The adverse conditions of the hitching post, including its placement in the direct sunlight, causing inmates to suffer symptoms of heat exhaustion and sunburn, also violated the minimum standards required by the eighth amendment. The Eleventh Circuit has recognized that extreme temperatures in inmate's place of confinement can give rise to an eighth-amendment claim if it is sufficient to cause the inmate "severe discomfort." Chandler, 926 F.2d at 1065-66. This court concludes that inmates placed upon the hitching post are subject to conditions--to wit, intense heat and sunlight--that cause them "severe discomfort" in violation of the eighth amendment. See Gordon v. Faber, 973 F.2d 686, 687-88 (8th Cir. 1992) (affirming district court's conclusion that prison officials violated the eighth amendment by sending inmates

outside in sub-freezing weather without hats and gloves for a period of one hour to one hour and forty-five minutes).

Finally, because there is no "static 'test'" for determining whether the conditions of confinement are cruel and unusual, the court must consider all of the above conditions in the context of the "evolving standards of decency that mark the progress of a maturing society." Rhodes, 452 U.S. at 346, 101 S. Ct. at 2399. In order to determine whether the use of the hitching post, both in compliance with and in deviation from the DOC's own guidelines, violates contemporary standards of decency, the court relies upon the following sources: precedent, statutory provisions regarding corporal punishment, comparable practices in other prison systems, and the opinions of both the defendant's and plaintiffs' experts.

In Gates v. Collier, the former Fifth Circuit held that "handcuffing inmates to the fence and to cells for long periods of time ... and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods," constituted methods of corporal punishment that ran afoul of the eighth amendment. 501 F.2d 1291, 1306 (1974). Thus, for over 20 years, institutional practices that impose pain on inmates in ways similar to the hitching post have been deemed to "offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." Id. See also Jackson v. Bishop, 404 F.2d 571 (8th

Cir. 1968) (finding the use of the strap for whipping in penal institutions to violate the eighth amendment). Given the evidence that the hitching post inflicts significant pain on inmates placed upon it for an extensive period of time, the court agrees with the opinion of one of the plaintiffs' experts that the hitching post is a form of corporal punishment whose history can be traced to the pillory and the stocks:

> "[T]he pillory is almost identical to the stocks, which is identical to the restraining bar. If anything, the pillory, as it was designed, was probably more comfortable because in most cases the prisoner sat on the ground and had his feet and his hands put through a stock. In this case we're perhaps more barbarous because what we're doing is stretching an inmate out in the hot sun so he's uncomfortable and can't move."[218]

As a form of corporal punishment, use of the hitching post violates contemporary standards of decency as enunciated in Gates. The court declines to find that society's standards have so devolved since the holding in Gates over two decades ago that use of an instrument like the hitching post would be deemed permissible. The court finds evidence in support of its conclusion in the actions of Alabama's legislature, which has placed severe limits on the use of corporal punishment in Alabama prisons: "No cruel or excessive punishment shall be inflicted on any convict, no corporal punishment of any kind

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218. Transcript of hearing before the Magistrate Judge, at 303.

shall be inflicted except as it shall have been previously prescribed by the rules of the Board of Corrections and of which the convict shall have been notified and such punishment shall be inflicted only by the party authorized by the board to inflict it." 1975 Ala. Code § 14-3-52 (emphasis added).[219] The statute reflects the Alabama legislature's appreciation for the severity of such punishment; the court has no doubt that the ad-hoc use of a corporal-punishment instrument such as the hitching post is in violation of this statute, as well as the contemporary standards of decency.

The fact that no other state or federal prison uses a device similar to the hitching post also weighs in favor of a finding that use of the hitching post should be condemned. Moreover, the standards promulgated by organizations such as the American Correctional Association[220] and the American Bar

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219. The statute also creates record-keeping requirements for such punishments, as well as mandatory monthly inspections for such punishments.

220. See plaintiffs' exhibit 1, American Correctional Association, Standards for Adult Correctional Institutions (3rd ed.), at 60 ("Written policy, procedure, and practice provide that instruments of restraint, such as handcuffs, irons, and straight jackets, are never applied as punishment and are applied only with the approval of the warden/superintendent or designee."). The comment to this standard, which is not mandatory, states that "Instruments of restraint should be used only as a precaution against escape during transfer, for medical reasons, by direction of the medical officer, or to prevent self-injury to others, or property damage. Restraints should not be applied for more time than is absolutely necessary." Id. See also plaintiffs' exhibit 3: American

(continued...)

Association[221] urge against the use of restraints in the prolonged, non-emergency manner as the hitching post is used in Alabama's prisons.[222] While these standards are by no means

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220. (...continued)
Correctional Association, Manual of Correctional Standards (3rd ed.), at 417 ("Corporal punishment should never be used under any circumstances. This includes such practices as ... exposure to extremes of heat or cold ... confinement in the stocks or in cramped sweatboxes, handcuffing to cell doors or posts, shackling so as to enforce cramped position or to cut off circulation, standing for excessive periods 'on the line' or barrel-heads, painted circles, etc...").

221. See Plaintiffs' exhibit 2, American Bar Association, Standards for Criminal Justice (2d ed.), at 23-121 ("Personal restraints like handcuffs, irons, and straitjackets are to be used only if necessary to prevent individual prisoners from escaping during transfers or injuring themselves or others.").

222. The standards promulgated by the United Nations also urge against the use of restraints in the prolonged, non-emergency manner as the hitching post is used in Alabama's prisons. See Plaintiffs' exhibit 5, United Nations, Standard Minimum Rules for the Treatment of Prisoners (1984), at 6-7 ("Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment.... [Handcuffs and strait-jackets] shall not be used except in the following circumstances: (a) As a precaution against escape during a transfer ... (b) On medical grounds by direction of the medical officer, (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.").

Although these Rules are considered "the most important international document in the area of prisons," Kurt Neudek, The United Nations, in Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions 704, 705 (Dirk van Zyl Smith and Frieder Dünkel eds., 1991), this court is wary of relying upon them as indicia of American evolving standards of decency. The Supreme Court has cautioned that federal courts should not rely on international standards in determining evolving standards of (continued...)

222. (...continued)
decency:

> "In determining what standards have 'evolved,' however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole....
>
> "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention ... that the sentencing practices of other countries are relevant. While '[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well' ... they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people."

Stanford v. Kentucky, 492 U.S. 361, 369-370 & n.1, 109 S. Ct. 2969, 2975 & n.1 (1989) (citations omitted) (holding that the imposition of capital punishment for individual who committed crime at 16 or 17 years of age does not violate eighth amendment).

Further, although the United States has ratified certain international agreements whose terms would appear to apply to the treatment of prisoners, the United States has attached reservations that limit the enforcement of higher international standards. See, e.g., International Covenant on Civil and Political Rights (ICCPR), opened for signature Dec. 9, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; adopted by the United States Sept. 8, 1992). Article 7 of the ICCPR states in part: "No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment." However, the United States ratified the ICCPR with the reservation that "Art. 7 protections shall not extend beyond protections of the 5th, 8th and 14th Amendments of the U.S. Constitution." Senate
(continued...)

binding on the court,[223] they do serve as powerful indicia of society's understanding of those practices that serve no penological value and result in harm to inmates.

Weighing all of the above factors, the court concludes that the common and routine, and not just isolated, use of the hitching post has involved "the unnecessary or wanton infliction of pain," and violated "the evolving standards of decency that mark the progress of a maturing society." The court finds that the plaintiffs have thus satisfied the objective component of the eighth amendment analysis by showing that the hitching post inflicts actual, significant pain on inmates, that prison officials have denied inmates access to basic human needs while shackled to the hitching post, such as

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222. (...continued)
Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 102nd Cong., 2d Sess. (1992), reprinted in 31 I.L.M. 645, 646 (1992). Thus, although international jurisprudence interpreting and applying the ICCPR would appear to assist this court, two sources preclude reliance on such precedent: the Supreme Court's directive in Stanford v. Kentucky; and the reservations attached to the ICCPR. The court will therefore rest its analysis entirely on American sources to determine whether the hitching post violates evolving standards of decency.

223. In Bell v. Wolfish, the Supreme Court stated that the standards promulgated by such organizations "do not establish the constitutional minima." 441 U.S. 520, 543-44 n. 27, 99 S. Ct. 1861, 1876 n.27 (1979). The court notes that it has only found these standards and the testimony of the parties' experts to be informative; as explained more fully above, it has not relied exclusively on these sources for its determination that the hitching post violates contemporary standards of decency.

access to shelter, water, and toilet facilities, and that the hitching post as an instrument of corporal punishment violates contemporary standards of decency.

b. Subjective Component: the "Deliberate Indifference" Standard

The court begins its analysis of the subjective component of the plaintiffs' eighth-amendment argument by relying on the "deliberate indifference" standard for determining wantonness. In Farmer v. Brennan, the Supreme Court defined the deliberate indifference test in the following manner: "a prison official may be liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." 511 U.S. 825, 847, 114 S. Ct. 1970, 1984 (1994). It is important to emphasize that the required knowledge is of the "risk," not necessarily of an injury itself. Id. at 842, 114 S.Ct. at 1981 ("Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."). Nevertheless, prison officials will not be held liable if "they prove they were unaware of even an obvious risk" or if "they

responded reasonably to a known risk, even if the harm ultimately was not averted." Id. at 844, 114 S. Ct. at 1982.

According to the Farmer Court, a court may determine that the prison official had knowledge of the risk of harm from inferences from circumstantial evidence. Id. at 842, 114 S. Ct. at 1981. The Commissioner has not disputed the plaintiffs' contention that it had knowledge of the risk of serious harm. Indeed, the Commissioner could not sustain such an argument when there is evidence to support a finding that the Commissioner had actual knowledge of the risk of serious harm to inmates. The 1994-1995 correspondence between the DOC and the Department of Justice demonstrates that the DOC had knowledge of the allegations of serious harm being inflicted by prison officers upon inmates by means of the hitching post. One of the findings made by the Department of Justice was that corrections officers were not complying with the DOC's policies, and that use of the hitching post was "potentially dangerous from a medical standpoint." Moreover, given the obvious physical effects of the hitching post, as well as the DOC's own documentation of these physical effects, the court finds it difficult if not impossible to conclude that the Commissioner did not know of these risks. As the Farmer court stated, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that it was obvious." Id. at 842, 114 S. Ct. at 1981. See also id. at 842-43. 114

S.Ct. at 1981-82 ("For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was 'longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.'") (citation omitted).[224]

Nor can the court conclude that the DOC's response was "reasonable" to the serious risk of harm presented by the inmate complaints and the Department of Justice investigation. The Commissioner asserts that Regulation 429 itself constitutes a reasonable response because, if administered correctly, the regulation would prevent the serious risks alleged by the plaintiffs. However, this regulation was not administered properly and the DOC had knowledge of such abuses by means of the Department of Justice investigation. The DOC's response to

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224. In Farmer, the Court also wrote that a prison official "would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." 511 U.S. at 843 n.8, 114 S. Ct. at 1982 n.8. Here, the DOC Commissioner also declined to confirm inferences of the risk posed by how the hitching post was being used--in particular, from those established by the report from the Department of Justice.

these allegations cannot be considered reasonable given the severity of the harm alleged. The DOC did not conduct an independent investigation of these allegations. Rather, it merely reiterated its commitment to use of the hitching post by means of a letter to the Department of Justice. The only steps the DOC took to ensure that the constitutional rights of inmates placed upon the post were not being violated was to instruct its wardens to follow Regulation 429. There is no evidence in the record to show that after its receipt of the Department of Justice's letters the DOC interviewed or monitored officers at individual institutions to determine whether violations of Regulation 429 were taking place. Further, even when the DOC had knowledge that its employees were abusing its policy, such as the Holman institution's use of the hitching post to punish those inmates who had committed indecent exposure, it did not take steps to correct the situation. The DOC Commissioner testified at the evidentiary hearing that he did not discipline the warden at Holman for violating Regulation 429, nor could he identify any correction officers who had been disciplined for violating Regulation 429.[225] Any investigation of a prisoner's complaint regarding placement on the hitching post was conducted in a disciplinary hearing that occurred after the fact. Although these

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225. Transcript of hearing before the Magistrate Judge, at 865 (testimony of the DOC Commissioner).

proceedings resolved pending charges against the inmate usually in the inmate's favor, such proceedings did little, if anything, to rectify abuses at the hitching post. The court concludes that the Commissioner was deliberately indifferent to the risk of serious harm facing inmates on the hitching post. The DOC was not merely negligent by failing to investigate adequately the charges made by the Department of Justice, by failing to protect the inmates placed in its care from the unnecessarily painful, and oftentimes humiliating, conditions of the hitching post; rather, the DOC recklessly, even willfully, ignored the substantial risk that inmates were suffering serious harm and being denied the humane conditions required by the eighth amendment.

The court is therefore firmly convinced that the DOC Commissioner and his predecessors had actual knowledge of the substantial risk of harm created by common and routine use of the hitching post and recklessly and consciously ignored this risk to the grave detriment of the inmates in their care. In any event, even in the absence of this compelling evidence of prior knowledge, any assertion by the DOC Commissioner that he himself was unaware of the risk of substantial harm would not necessarily foreclose the court's finding that the plaintiffs met both the subjective and objective requirements of their eighth-amendment challenge to the extent the plaintiffs seek injunctive relief. In Farmer, the Supreme Court stated that

"If ... the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware could claim to be subjectively blameless for purposes of the Eighth Amendment, and in deciding whether an inmate has established a continuing constitutional violation a district court may take such developments into account." 511 U.S. at 846 n.9, 114 S. Ct. at 1983 n.9 (emphasis added). "'It would,' indeed," the Court explained, "'be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them,'" id. at 845, 114 S.Ct. at 1983 (citation omitted)--or, more to the point here, nothing yet had not happened again and thus had not been brought to the attention of the DOC Commissioner. In other words, "a subjective approach to deliberate indifference does not require a prisoner seeking 'a remedy for unsafe conditions [to] await a tragic event ... before obtaining relief.'" Id. (citation omitted).

Indeed, as will be explained in more detail infra, because "to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future," id. at 846,

114 S. Ct. at 1983, the court will set this case for a supplemental hearing to determine whether the DOC Commissioner has continued, and seemingly will continue in the future, to disregard the risk to inmate safety and health posed by the manner in which the hitching post is used in Alabama prisons.

c. Subjective Component: the Whitley Standard

As stated above, the court finds it necessary to analyze the plaintiffs' claim under the heightened Whitley standard for those instances in which the hitching post is used on inmates in emergency or exigent situations. The Whitley standard requires the plaintiffs to show that the prison officials' actions were taken "maliciously and sadistically for the very purpose of causing harm." 475 U.S. 312, 320-21, 106 S. Ct. 1078, 1084. In the Eleventh Circuit, an inmate bears a heavy burden in proving that a prison guard acted maliciously and sadistically under exigent circumstances. In Ort v. White, 813 F.2d 318 (11th Cir. 1987), the court found that an inmate had not met this burden where he alleged that he was denied water on four or five occasions while assigned to farm squad work duty. The salient facts of Ort are as follows: the inmate, Anthony Ort, was frequently assigned to a "late squad" because he "'refused to do any work and [] was basically insubordinate against all authority.'" Id. at 320 (quoting the Magistrate Judge's findings of fact). One of the responsibilities of the

work squad members was to carry a five-gallon water keg with them to the work site. Ort not only refused to work, but he also refused to assist his fellow squad members in carrying the water keg; often, Ort refused to carry his own work tools, and his fellow squad members were forced to carry his tools for him. Id. Ort's behavior angered the other squad members who "displayed an attitude of open hostility toward Ort." Id. While on the work site, and away from the prison, they informed the prison guard supervising them that if Ort could refuse to work and still drink the water from the keg, that they would do the same. One member of the squad "threatened to knock Ort in the head with a shovel if the guard allowed Ort to drink from the water keg, which he had not helped to carry." Id. at 321. Under these circumstances, the guard denied Ort the water until he began to work. The guard testified that he believed this action was "the minimal amount of force necessary to protect Ort and himself from possible retaliation by the other inmates." Id. at 320. There is no mention in the Eleventh Circuit's opinion of any ill effect suffered by Ort as a result of being denied water during his time on the work squad. In determining the appropriate standard to be applied, the Eleventh Circuit distinguished between "punishment after the fact and immediate coercive measures necessary to restore order or security." The Ort court continued as follows:

> "Prison officials step over the line of constitutionally permissible conduct if they use more force than is reasonably necessary in an existing situation or if they summarily and maliciously inflict harm in retaliation for past conduct. Prison officers must, however, have the authority to use that amount of force or those coercive measures reasonably necessary to enforce an inmate's compliance with valid prison rules and to protect themselves and the other inmates. Thus, where such immediate coercive action is necessary, the conduct of a prison official does not constitute cruel and unusual punishment within the meaning of the eighth amendment if it was undertaken not maliciously or sadistically, but in a good faith effort to restore order or prevent a disturbance, and if the force used was reasonable in relation to the threat of harm or disorder apparent at the time."

Id. at 324-25 (emphasis added). Applying this standard, the court first determined that the prison guard's actions constituted "necessary, coercive measures undertaken to obtain compliance with a reasonable prison rule," and could not be considered punishment in the strict sense. Id. at 325. The court next examined whether the prison guard's actions were necessary and taken in good faith; in light of the potentially dangerous situation, including the fact that the guard was in the field and away from other guards and the prison, the court answered these questions in the affirmative. Id. Finally, the court determined that the guard's actions were reasonable in relation to the threat apparent to him at the time. In concluding that the guard's actions did not constitute cruel

and unusual punishment, the Ort court stated, "We acknowledge that we might have reached a different decision if later, once back at the prison, officials had decided to deny [Ort] water as punishment for his refusal to work." Id. at 326.

In Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991), the court concluded that an inmate had failed to show that prison officials acted maliciously and sadistically when, after the inmate, Michael D. Williams, had yelled, screamed, spit, threw his bodily fluid at officers, threatened to kill prison officers, and threatened to incite a riot, the officers placed him in four-point restraints and a gag for a little over 28 hours. At the time, Williams was placed in a segregation unit at the St. Clair facility, which is reserved for "the most difficult, unruly, and unmanageable members of the prison population." Id. at 1575. According to the Eleventh Circuit's opinion, Williams was placed in "some discomfort" because of the restraints, but "no actual injury was inflicted." During his period of restraint, Williams was given the opportunity to eat, exercise, and go to the bathroom. Id. at 1574. The court concluded that the prison guards' actions did not violate the eighth amendment because they were faced with a volatile situation, and needed to take action to prevent further spreading of the disturbance. The court also found that the guards had taken adequate precautions to monitor Williams's physical condition while placed in the restraints.

The Williams court devoted a large portion of its discussion to the length of time Williams was placed in restraints, and whether the restraints were used beyond the need for such measures. The court noted that problem in reviewing the prison guards' decision:

> "Once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation.... [T]he courts give great deference to the actions of prison officials in applying prophylactic or preventative measures intended to reduce the incidents of riots and other breaches of prison discipline."

Id. at 1576 (citations omitted). Finding that the prison officials had performed continuous observation of Williams and, being familiar with his history of disobedience, the court concluded that the officials were justified in keeping Williams in restraints for the entire 28-hour period.

Following its precedent, particularly Williams, the Eleventh Circuit held in Sims v. Mashburn, 25 F.3d 980 (11th Cir. 1994), that the inmate, Hardie Vertrain Sims, who like Williams was housed in St. Clair's segregation cell, had not shown that prison officials acted sadistically or maliciously

when they stripped his cell of everything except the undershorts he was wearing and turned off the water to his toilet. Sims was left in this condition for about 29 hours. According to prison officials, these actions were taken after Sims obstructed the view to his cell, attempted to flood his cell, and yelled at the prison guards. Id. at 981-82. Determining that the case "boil[ed] down to a subjective judgment relative to when Sims had demonstrated such a period of stable behavior and a subjective judgment relative to the intervals at which that question should be reevaluated," the court deferred to the evaluations made by the prison officials and upheld their actions. Id. at 985. The court stated, "we accept [their] judgment unless there is evidence justifying its rejection." Id. The court found that the evidence in the record supported the prison officials' actions in that the officials had complied with their internal policies regarding stripping inmate cells. Id.

As explained above, the court has rejected the Commissioner's argument that every instance in which an inmate refuses to work creates exigent circumstances requiring use of the hitching post. Rather, the court finds only one instance in the record in which an inmate's behavior created an emergency situation justifying the use of force. Inmate Larry Hope and a corrections officer became involved in a physical altercation that required at least six corrections officers to