IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

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| MICHAEL A. AUSTIN, RICHARD ELLIOT, OGIE LEE HAYES, CHARLES ORLANDER GUESS, WARREN LEATHERWOOD, and KERVIN GOODWIN, | ) | |
| Plaintiffs, | ) | |
| v. | ) | CIVIL ACTION NO. 95-T-637-N |
| JOE HOPPER, Commissioner of the Alabama Department of Corrections, | ) | |
| Defendant. | ) | |

MEMORANDUM OPINION

In this class-action lawsuit, the plaintiffs, who are inmates in the Alabama prison system, challenged the following four policies and practices employed by the prison system: (1) the use of "chain gangs"; (2) the use of "hitching posts"; (3) the denial of visitation rights to certain inmates; and (4) the failure to provide adequate toilet facilities to inmates on work squads. The plaintiffs claim that these policies and practices violated the first, fifth, eighth, and fourteenth amendments to the United States Constitution, as enforced through 28 U.S.C.A. § 1983. The plaintiffs named the Commissioner of the Department of Corrections (hereinafter "DOC") as defendant. The subject-matter jurisdiction of the court has been properly invoked pursuant to 28 U.S.C.A. §§ 1331, 1343(a)(4).

This lawsuit is now before the court on the recommendation of the United States Magistrate Judge.[1] In it, she recommends the following: (1) the approval of the parties' settlement of the plaintiffs' challenge to the use of chain gangs, including certification of a plaintiff class as to this claim; (2) the approval of the parties' settlement of the plaintiffs' claim that inmates on work release are not provided adequate toilet facilities; (3) the certification of a plaintiff class as to the plaintiffs' remaining two claims, the visitation-privileges claim and the hitching-post claim; (4) a holding that the denial of visitation privileges to certain inmates is constitutionally impermissible; and (5) a holding that the use of the hitching post is constitutionally impermissible.

For the reasons that follow, the court accepts the Magistrate Judge's recommendation to the following extent: (1) the chain-gang settlement is approved and a plaintiff-class certified; (2) plaintiff classes are certified as to the plaintiffs' visitation-privileges claim and their hitching-post claim; and (3) the DOC's use of the hitching post is held to be unconstitutional, albeit only as to the manner in which the hitching post is generally used. The court rejects the Magistrate Judge's recommendation as to following matters: (4)

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1. Recommendation of United States Magistrate Judge Vanzetta Penn McPherson, entered January 28, 1997 (Doc. no. 372) (hereinafter "recommendation of the Magistrate Judge").

the DOC's visitation-privileges policy is not unconstitutional; and (5), at this time, the toilet-facilities settlement is not be approved. The court will, however, enter a supplemental order setting forth the procedures necessary for the court to approve the toilet-facilities agreement.

## I. STANDARD OF REVIEW

The court makes a "de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made." Fed. R. Civ. P. 72(b); 28 U.S.C.A. § 636(b)(1). The court "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Id.; see also United States v. Raddatz, 447 U.S. 667, 673-84, 100 S. Ct. 2406, 2411-16 (1980).

## II. SETTLEMENT OF CHAIN-GANG CLAIM

On May 3, 1995, the DOC Commissioner implemented a "chain gang" prison labor policy.[2] Pursuant to this policy, inmates assigned to a chain gang were shackled by leg irons in groups

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2. Areas of agreement and disagreement between plaintiffs and defendant regarding class certification, filed March 22, 1996 (Doc. no. 80), at 1. The Commissioner at the time of the implementation of the chain gangs was Ronald E. Jones.

of five; they were separated with eight feet of chain between them. The inmates, who were required to wear white uniforms with "CHAIN GANG" printed in black, were then taken to public highways or work sites on DOC property where they performed manual labor in ten-hour shifts.[3] One to two corrections officers supervised 25 to 40 inmates, who remained shackled to each other throughout the day, including during mealtime.[4] The type of work the inmates performed included cutting grass, picking up litter, and breaking apart rocks.

Although unused for the past 30 years, chain gangs have a long, sordid history in the State of Alabama. During the Reconstruction era, chain gangs provided an alternative to rebuilding the penal institutions that were destroyed during the Civil War; they also served as a cheap form of labor. The majority of these chain-gang inmates, who died at enormously high rates due to the brutal conditions, were African-Americans. See Lynn M. Burley, History Repeats Itself in the Resurrection of Prisoner Chain Gangs, 15 Law & Ineq. 127, 129-130 (1997) (discussing history of the use of chain gangs). Chain gangs were later incorporated into the convict-lease

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3. Complaint, filed May 15, 1996 (Doc. no. 1), ¶ 14; plaintiffs' exhibit 16 ("Chain Gang" Schedule).

4. Id. Inmates were not removed from the chain gang when they were ill, unless the correction officer determined they needed to return to the institution, nor were inmates removed when the use of force was necessary. Id.; see also recommendation of the Magistrate Judge, at 57 n.66.

system, whose atrocities have been well-documented. See, e.g., C. Vann Woodward, Origins of the New South: 1877-1913 214-215 (1951) ("For the Southern convict-lease system a modern scholar can 'find parallel only in the persecutions of the Middle Ages or in the prison camps of Nazi Germany.'") (citations omitted); Benno Schmidt, Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases, 82 Colum. L. Rev. 646, 651 (1982) ("Alabama Governor Thomas E. Kilby in 1919 declared his state's convict-lease system 'a relic of barbarism ... a form of human slavery.'") (citations omitted). Although the DOC's modern version of the chain gang differs in many respects from these earlier models, the return of chain gangs to Alabama's roadsides has provoked much concern from commentators, as well as jurists, about reviving a practice with such heinous roots. See, e.g., Alabama v. Engler, 85 F.3d 1205, 1210 (6th Cir. 1996) (Jones, J., concurring) (noting that a fugitive from Alabama, whom the Sixth Circuit held should be extradited by the State of Michigan, "will be tossed into a prison system that has adopted the barbaric 'discipline' of the chain gang. This perpetuation of injustice cloaked in the tattered cloth of the Alabama justice system is deplorable.").

The purpose behind the reinstatement of the chain gang was, as stated in a form distributed to the inmates assigned to the chain gang, to send the inmates a message: "If you are

worried about the Chain Gang, then don't violate parole, commit crimes, or come to prison in ALABAMA."[5] However, no uniform policy in the Alabama prison system was used to determine prisoner eligibility for chain-gang placement. Some prisons assigned only repeat offenders and parole violators to the chain gang. Other institutions used the chain gang as a means of punishing inmates who committed disciplinary violations.[6] In addition, Alabama trial judges were permitted to sentence inmates to placement on a chain gang as a part of a split-sentence. These sentences could range from 30 to 180 days.[7] The length of an inmate's assignment to the chain gang, whether it was imposed through sentencing or a DOC classification, could be extended depending on the inmate's behavior during the assignment. The "orientation" form for the Holman Correctional Facility explains the reassignment system as follows:

> "You are now assigned to the Holman Correctional Facility 'Chain Gang.' The institution is a limited privileges work camp. You are expected to work while assigned to this institution. The length of your stay will be no less than 30 days. The average stay is 180 days. Many factors determine how long you stay. The

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5. Plaintiffs' exhibit 15.

6. Defendant's memorandum in support of motion for summary judgment, filed November 15, 1995 (Doc. no. 48), exhibit 9 (affidavit of J.D. White (Deputy Commissioner, Alabama DOC)).

7. Id., exhibit 10 (affidavit of John Jacobs (Administrative Analyst, Alabama DOC)).

> number one factor is attitude and behavior. The number two factor is work performance and following the institution's rules on the job and on all three (3) shifts. Bottom line, a clear record, no negative reports. Depending on the severity of your infractions or breaking rules you can be extended. For instance, you could be extended for: late for work, failure to shave, disrespect to a staff member, arguing with a staff member, not keeping your bed area clean and neat, etc. A disciplinary results in an automatic extension usually. Behave, if you want another job and more privileges and the opportunity for programs. If you don't behave, you could stay here indefinitely."[8]

The plaintiffs' chief claim in their original complaint was that Alabama's use of chain gangs violated the eighth and fourteenth amendments of the United States Constitution. The claim encompassed two distinct sets of allegations: the first set related specifically to the increased risk of exposure to physical harm associated with accidents and inmate violence; the second included more general allegations concerning the physical and psychological harm inflicted by the use of chains that render the practice barbarous and inhumane. As part of the first set of claims, the plaintiffs alleged the following: (1) that the location of the gangs--alongside the highway--placed inmates at risk of being hit by a car, and further, that

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8. Plaintiffs' exhibit 15. The Fountain Correctional Center Orientation form listed a third factor in determining an inmate's assignment to a chain gang: "The number three factor is bed space availability at other institutions." Plaintiffs' exhibit 14.

if an automobile accident did occur, the inmates were more likely to be hit or dragged by virtue of being chained together; (2) that the chains increased the likelihood of inmate-on-inmate violence because of the frustration inmates experienced while on the chain gang, and the chains rendered them unable to protect themselves should such violence occur; and (3) that the chains decreased the inmates' ability to protect themselves from workplace accidents, especially at locations such as rock piles. In their second set of allegations, the plaintiffs complained that the shackles inflicted physical pain, by chafing their legs and causing swelling, as well as severe psychological pain.[9] According to the plaintiffs, this psychological pain emanated from the inherent indignity of being chained together, as well as the humiliation of being publicly exposed while working in such chains.[10] In their amended complaint, the plaintiffs raised a claim concerning the lack of adequate toilet facilities for chain gang inmates while they were placed on work sites.[11]

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9. Complaint, filed May 15, 1995 (Doc. no. 1); amended complaint, filed May 17, 1995 (Doc. no. 7); plaintiffs' opposition to defendant's motion for summary judgment, filed June 13, 1996 (Doc. no. 134), at 16-19 (discussing psychological pain claim).

10. Plaintiffs' opposition to defendant's motion for summary judgment, at 18-19.

11. Proposed second amended complaint, filed on September 9, 1995 (Doc. no. 37). This additional claim relating to the (continued...)

The settlement agreement reached by the parties with regard to the chain-gang claim includes the following terms: that the DOC Commissioner, his agents and his successors, had ceased and would not resume the practice of chaining inmates together, but would use individual chains to shackle inmates; that Governor Fob James should be dismissed from the case;[12] that the plaintiffs would waive their right to seek fees and costs incurred in pursuing their claim related to the practice of chaining inmates together; that the plaintiffs' challenge to the practice of chaining inmates together should be dismissed with prejudice; and that in the event the Commissioner or his successors breached the settlement agreement, the plaintiffs may reinstate their challenge to the practice of chaining inmates together, or enforce the agreement as a contract between the parties in State court.[13] During a pretrial conference with the Magistrate Judge, the DOC Commissioner agreed to withdraw his opposition to the plaintiffs' motion for class certification only as it applied to the chain-gang claim

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11. (...continued)
inadequate toilet facilities at the work sites resulted in a second settlement agreement between the parties, which is discussed infra.

12. The court dismissed Governor Fob James in an order entered January 6, 1998 (Doc. no. 397).

13. Stipulation, filed June 19, 1996 (Doc. no. 140).

in order to implement the settlement agreement.[14] One notable aspect of the settlement agreement, immediately seized upon by the inmates who objected to it, as discussed infra, is that the agreement only curtails the DOC's ability to chain inmates together; it does not prevent the DOC from continuing the practice of placing inmates on public highways to perform manual labor in individual chains.

Rule 23(e) of the Federal Rules of Civil Procedure provides, in part, that "[a] class action shall not be dismissed or compromised without the approval of the court." Not only must this court approve of the settlement agreement, it must also determine whether the agreement meets the requirements of the Prison Litigation Reform Act, 18 U.S.C.A. § 3626 ("PLRA"), as well as whether the putative class to which the agreement applies meets the criteria for class certification under Rule 23. These issues will be addressed by the court below.

A. The Prison Litigation Reform Act

Before approving the settlement agreement, the court must determine whether it complies with the PLRA. The PLRA limits

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14. Order of the Magistrate Judge, entered June 25, 1996 (Doc. no. 145), at 2 (granting defendant's oral motion to withdraw, in part, his opposition to class certification). Class certification for the purposes of the settlement agreement will be discussed infra.

the prospective relief a federal court may provide in cases concerning prison conditions. Prospective relief may "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," must be "narrowly drawn," and "is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C.A. § 3626(a)(1)(A). Further, the court may not "order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law" unless the following conditions are met: (1) Federal law permits such relief to be ordered in violation of State or local law; (2) the relief is necessary to correct the violation of a Federal right; and (3) no other relief will correct the violation of the Federal right. § 3626(a)(1)(B). In addition to limiting the type of relief a federal court may grant, the PLRA also curtails the longevity of such relief to two years after the court approves or grants the relief, or one year after the court has entered an order denying termination of relief. § 3626(b)(1).[15]

However, private settlement agreements are not subject to the above restrictions if the terms of such an agreement are

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15. For prospective relief awarded on or before the enactment of the PLRA, the relief is terminated two years after the date of enactment. § 3626(b)(1)(iii).

not subject to court enforcement other than the reinstatement of the civil proceeding. § 3626(c)(2)(A). A "private settlement agreement" is defined in the PLRA as "an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled." § 3626(g)(6). In addition, the PLRA provides that a party to a private settlement agreement claiming that the agreement has been breached is not precluded "from seeking in State court any remedy available under State law." § 3626(c)(2)(B).

By choosing to resolve their chain-gang claim through a private settlement, rather than through a judicially enforceable consent decree, the plaintiffs have attempted to avoid the PLRA's stringent limitations with respect to the type and duration of the relief. The expense of their trade-off is the relinquishment of their right to challenge the constitutionality of the DOC's practice of shackling inmates together. The agreement does not require judicial enforcement of its terms, but rather contemplates enforcement through mechanisms permitted by the PLRA: reinstatement of the action and state-court relief. Thus, the court does not need to decide whether the relief provided in the settlement agreement--complete and permanent cessation of the chain gang practice--comports with the PLRA's prospective relief limitations.

B. Court Approval of the Settlement Agreement

Judicial policy favors voluntary settlement as the means of resolving class-action cases. Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977).[16] However, "the settlement process is more susceptible than the adversarial process to certain types of abuse and, as a result, a court has a heavy, independent duty to ensure that the settlement is 'fair, adequate, and reasonable.'" Paradise v. Wells, 686 F. Supp. 1442, 1444 (M.D. Ala. 1988) (Thompson, J.) (quoting Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1214 (5th Cir. 1978)). This abuse can occur when, for example, "the interests of the class lawyer and the class may diverge, or a majority of the class may wrongfully compromise, betray or 'sell-out' the interests of the minority.'" Id. Besides evaluating the fairness of the settlement agreement, the court also has the duty to make sure that the settlement is not illegal or against public policy. Piambino v. Bailey, 757 F.2d 1112, 1119 (11th Cir. 1985).

Before resolving these concerns, the court must ensure that all interested parties were informed of the settlement and had the opportunity to voice their objections. As required by

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16. In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Rule 23(e) of the Federal Rules of Civil Procedure, the Magistrate Judge ordered the parties to provide notice of the settlement of the chain-gang issue to the putative class of plaintiffs. This court-approved notice was posted on community bulletin boards in every dormitory in every prison, as well as in the law libraries and dining areas of each facility; it was also sent to county jails so as to facilitate notice to state inmates who were potential class members.[17] The notice informed inmates about the nature of the settlement, the advantages and disadvantages of the terms of the agreement, the right to file an objection to the settlement, as well as forms for filing such objections.[18] A fairness hearing was held on August 2, 1996, and a total 154 objections to the agreement were filed by members of the putative class of plaintiffs.

The notice was adequate to inform all the interested parties about the provisions of the settlement of the chain-gang claim. The fairness hearings and opportunity for written objections were adequate to solicit and determine the views of the class members. In sum, the notice and fairness hearings were sufficient under Rule 23(e).

1. Whether the Settlement Is Fair, Adequate, and Reasonable

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17. Order of the Magistrate Judge, entered July 5, 1996 (Doc. no. 160) (copy of approved notice attached).

18. Id.

The factors the court may examine in deciding whether a settlement is fair, adequate, and reasonable are as follows: (1) the views of the class members; (2) the views of the class counsel; (3) the substance and amount of opposition to the settlement; (4) the possible existence of collusion behind the settlement; (5) the stage of the proceedings; (6) the likelihood of success at trial; (7) the complexity, expense, and likely duration of the lawsuit; and (8) the range of possible recovery. Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1548 (M.D. Ala. 1995) (Thompson, J.) (citing Leverso v. SouthTrust Bank of Ala., Nat'l Assoc., 18 F.3d 1527, 1530 n.6 (11th Cir. 1994); Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984)).

a. Views of the Class Members

In determining whether a settlement agreement is fair, adequate, and reasonable, the obvious first place a court should look is to the views of the class itself. Shuford, 897 F. Supp. at 1548. As stated above, notice was given to the class and 154 objections were filed in opposition to the settlement agreement. The Magistrate Judge categorized these objections in the following manner: the responses of 56 inmates did not constitute objections;[19] 50 inmates objected

19. The Magistrate Judge found that 28 inmates did not (continued...)

on the basis that they were still being chained individually and the lawsuit should have covered that circumstance; three wanted a declaration that the chain gangs were unconstitutional; 14 wanted money damages; eleven wanted further relief not included in the complaint and beyond the court's power (e.g., early release, parole, etc.); 17 inmates thought the settlement should have included other claims, such as the hitching-post and the toilet-facilities claims; and three objections discussed gender and other classification issues.[20]

The Magistrate Judge also conducted a fairness hearing on August 2, 1996, in which named plaintiffs Michael Austin and Ogie Hayes, and putative class members Douglas Crouch, Domineke Taylor, Terrance Roberts, Curtis Boggs, and Lorenzo Johnson, all five of whom had filed objections to the settlement agreement, testified for the plaintiffs. Austin and Hayes both

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19. (...continued)
articulate objections, and that an additional 28 inmate responses did not constitute objections. See recommendation of the Magistrate Judge, at 60. To clarify this distinction, responses in the first category simply did not state any objection on the form. Responses in the latter category did not state an objection to the settlement agreement, but rather to the chain gang practice itself (e.g., "[The use of the chain gangs] should be banned immediately!" (Doc. no. 300), to "I think that [the] chain-gangs should be abolished because they [are] unfit and unsafe for Alabama's Department of Corrections Inmates." (Doc. no. 309)).

20. Recommendation of the Magistrate Judge, at 60-61 (referencing the objections by docket number).

testified that they approved the terms of the settlement agreement, and that they had not received any benefit, reward, or promise of reward in exchange for their approval of the agreement.

Based on a review of the objections and the testimony given at the fairness hearing, it appears that the majority of inmates who objected to the settlement agreement did so based on a misunderstanding of the terms of the agreement, rather than based on unfairness. Hayes testified that although he agreed with the terms of the settlement, many inmates with whom he discussed the lawsuit thought the agreement was a "sell-out" because it failed to encompass the DOC's practice of shackling inmates individually while on work detail. Indeed, 50 inmates based their objections specifically on this perceived deficiency of the settlement. It is entirely understandable that some inmates would object to the settlement agreement or view it as a "sell-out" because of the agreement's failure to cover the DOC's practice of individually shackling inmates while on work detail. After all, under the terms of the agreement the DOC may send inmates to work detail on public highways, and may use chains, albeit on an individual basis, to prevent the inmates from escaping. Assuming the objecting inmates believed this class-action litigation was designed to end the entire practice of chaining inmates while on work detail, whether the chains be used for individual or group

purposes, the terms of the settlement might strike them as a somewhat of a disappointment, or a "sell-out." However, as both Hayes and Austin acknowledged in the fairness hearing, the plaintiffs did not challenge the DOC's use of individual chains for inmates, but rather the specific practice of shackling five men together. Three of the inmates who testified at the fairness hearing and who objected on this basis (Taylor, Roberts, and Buggs) approved the terms of the settlement after the plaintiffs' attorney and the Magistrate Judge informed them that the settlement agreement did not state that the plaintiffs agreed that the DOC could shackle inmates individually, and that the inmates were free to challenge this practice in the future.[21]

Although the court has characterized this objection as a "misunderstanding" of the terms of the settlement agreement and of the underlying claim of the lawsuit, the objecting inmates do raise an important issue regarding the adequacy of the settlement agreement: whether the agreement is adequate with regard to the psychological injury claim raised in the second part of the plaintiffs' eighth- and fourteenth-amendment

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21. The settlement agreement states that "Without being ordered to do so by the Court, the Department of Corrections has ceased the practice of chaining inmates together. It has adopted the practice of individual chains for inmates. It believes that the latter practice allows more productive and efficient management of inmates, with increased safety and security." Stipulation, filed June 19, 1996 (Doc. no. 140).

challenge to the use of chain gangs. Prior to reaching a settlement with the DOC Commissioner, the plaintiffs submitted to this court dozens of affidavits of inmates who had served time on chain gangs in various Alabama penal institutions. These affidavits reported the nature of the physical and psychological pain suffered by inmates placed on the DOC chain gangs. The psychological injuries, particularly those caused by being forced to wear the chains in public, were described as follows:

> "People photographed and waved and honked at me and the other inmates. This was humiliating. Looking down at my feet and seeing the chains around them, I felt like a slave. Wearing the chains publicly was still more humiliating."[22]
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> "The chain gang tore me apart mentally. I was chained up in public view. My family, friends and potential employers could all see me in chains--a fact which hurt and embarrassed me deeply."[23]
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> "The chain gangs have caused me extreme mental anguish. Wearing chains made me feel like an animal. Being paraded along the Alabama highways, moreover, made me feel like I was for sale--for public consumption."[24]

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22. Exhibits in support of plaintiffs' opposition to defendant's motion for summary judgment, exhibit 65 (affidavit of Marvin Hudson, inmate at Donaldson and Staton Correctional Facilities), at 1.

23. Id., exhibit 56 (affidavit of Dickie Garner, inmate at Easterling and Staton Correctional Facilities), at 1.

24. Id., exhibit 66 (affidavit of Victor Vintson, inmate (continued...)

> "My chain gang sentence has caused me extreme mental anguish. Being forced to wear chains was humiliating. The experience also reminded me of the slavery that my ancestors had to endure.... Although I have been out of chains for months, I cannot stop their image from running through my mind. I dream about the chains frequently. I often wake up two or three times in the night screaming and in a cold sweat. Every time I see my ankles, I picture the chains around them."[25]

Based on these statements, it is arguable that the inmates' alleged psychological injuries were not solely derived from the DOC's practice of chaining inmates together, but from the mere fact of being chained throughout the day and placed in public view. The settlement agreement, which states that the DOC will adopt the practice of individually shacking inmates, leaves the DOC with plenty of room to continue practices that have allegedly inflicted psychological harm on the inmates. This drawback, however, must be balanced with the substantial benefits the plaintiff class derives from the settlement agreement, along with the fact that the agreement does not preclude future challenges to the DOC's use of chains on individual inmates on work detail.

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24. (...continued)
at Ventress and Limestone Correctional Facilities), at 1.

25. Id., exhibit 63 (affidavit of Rosevelt Simmons, inmate at Elmore and Limestone Correctional Facilities), at 1.

The second area involving a misunderstanding of the terms of the settlement agreement concerned the lack of award of monetary damages. Crouch's testimony at the fairness hearing typified this objection: Crouch stated that he wanted a clarification on the monetary and punitive damages, and wanted to know why the putative class of plaintiffs had not received these damages in the lawsuit. However, after the plaintiffs' attorney and the Magistrate Judge explained to Crouch that the plaintiffs did not seek damages in their lawsuit and individual inmates would be able to pursue claims for monetary damages in addition to the settlement, Crouch stated that he approved the terms of the settlement. Again, this set of objections must be balanced against the substantial benefits the plaintiffs will derive from the settlement agreement, as well as with the fact that inmates such as Crouch and the other 13 objectors are permitted to file or maintain their actions for monetary damages stemming from injuries while serving time on the chain gangs.

These two sets of objections together constitute 64 of the 98 objections filed with the court that actually stated an objection to the settlement agreement, or 65% of such objections. Of the remaining objections, only those concerning the constitutionality of the chain gangs warrant this court's attention in an examination of the fairness and adequacy of the

settlement agreement.[26] One of the trade-offs the plaintiffs have made in settling their chain-gang claim is to forgo the possibility that this court would find the practice of shackling inmates together cruel and unusual punishment in violation of the eighth and fourteenth amendments. Although such a holding would arguably have limited duration, given the relevant provisions of the PLRA discussed above, such a decision would also have precedential value if future challenges to the practice were brought. On the other hand, by settling the chain-gang claim, the plaintiffs have avoided the significant risk of losing their constitutional challenge to the chain-gang practice. These considerations all must be included in the court's appraisal of the agreement.

b. Views of Class Counsel

The judgment of class counsel is also important in addressing the fairness, adequacy, and reasonableness of a settlement agreement. Pettway, 576 F.2d at 1215. Class counsel for the plaintiffs are experienced civil rights lawyers who have shown to the court, through their participation and continued monitoring in this case, an enduring commitment to protecting the rights of the plaintiff class. Further, class

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26. The Magistrate Judge correctly noted that the remaining objections requested relief outside the scope of the court's authority. See Recommendation of the Magistrate Judge, at 61.

counsel have agreed to waive attorneys' fees with regard to the chain-gang claim, thus alleviating any doubts about their dedication to the plaintiff class. Id. (court should be sensitive to potential conflict between class and its attorneys, particularly where large attorneys' fees may also be at stake). Class counsel have argued that the proposed settlement is fair, adequate and reasonable, and have thoroughly explained the benefits the settlement agreement provides, specifically in terms of the longevity of the agreement, and the court gives considerable weight to their views.

c. Substance and Amount of Opposition to the Settlement Agreement

It is difficult for the court to gauge the size of the putative class of plaintiffs involved in this litigation. The Magistrate Judge has estimated the class size at different times as numbering 2,000 or 4,000.[27] The Magistrate Judge also noted that because "the population of state inmates is ever-changing, and the function of the institutions involved suggest[s] a perpetual life," the class of plaintiffs involved in the chain-gang claim is potentially infinite.[28] In their amended motion for class certification, the plaintiffs sought

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27. Recommendation of the Magistrate Judge, at 60, 66.

28. Id. at 55 n.63.

to certify two classes for purposes of the litigation, the first consisting of "all present and future Alabama inmates who have been or may be assigned to work in chain gangs."[29] According to the plaintiffs, at the time of the filing of their motion, there were 700 inmates on Alabama chain gangs, and approximately 2,000 inmates had completed sentences on the chain gang. The DOC Commissioner has not contested the plaintiffs' allegations concerning the number of inmates who have been, are, or will be assigned to the chain gang.[30]

Even with these difficulties in estimation, the court can say with reasonable certainty that the 154 objections filed by the members of the putative class represent a small percentage of the class as a whole.[31] In resolving objections within the class to a settlement agreement, this court has previously noted that "where the settlement provides for structural changes with each class member's interest in the adequacy of the change being substantially the same, and where there are no conflicts of interests among class members or among definable

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29. Plaintiffs' amended motion for class certification, filed March 11, 1996 (Doc. no. 74), at 1.

30. See areas of agreement and disagreement between plaintiffs and defendant regarding class certification, filed March 22, 1996 (Doc. no. 80), at 2.

31. Based on the parties' representations of the number of inmates who have served or were serving time on chain gangs when the lawsuit was filed, a conservative estimate would place the class size at 2,700 inmates. The 154 filed objections therefore represent only 5.7% of the class.

groups within the class, then the decision to approve the settlement 'may appropriately be described as an intrinsically "class" decision in which majority sentiments should be given great weight.'" Paradise v. Wells, 686 F. Supp. at 1445 (quoting Pettway, 576 F.2d at 1217). Here, where the number of objections to the settlement agreement is relatively small, and where the concerns voiced in those objections, particularly the concerns related to monetary damages and challenges to the DOC's practice of individually shackling inmates on work detail, are capable of being remedied outside or in addition to the settlement agreement, the court is confident in giving credence to the class majority's approval of the agreement.

This conclusion does not imply, however, that the court has interpreted the silence of the remaining class members to represent agreement with the settlement. As the court previously noted in Reynolds v. King, "the court must look beyond the numbers to the total reality of the circumstances presented and from those circumstances attempt to extrapolate some picture of the true support for the proposed decree." 790 F. Supp. 1101, 1109 (M.D. Ala. 1990) (Thompson, J.) (declining to approve consent decree despite the overwhelming majority of class members who did not file objections to the decree). The court is especially wary of such silence in the context of prison litigation where the members of the class are likely to have lower literacy levels, as well as limited access to

materials to enable them to file an objections. See generally Johnson v. Avery, 393 U.S. 483, 487, 89 S. Ct. 747, 750 (1969) ("Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."). The court has therefore taken pains to examine the objections that were raised to determine whether the agreement is fair, adequate, and reasonable.

d. Existence of Collusion

There has been no charge that the agreement was the product of collusion between the parties. There is no evidence that counsel or the named plaintiffs will benefit from the agreement at the expense of members of the class or sub-class: the settlement agreement specifically states that the plaintiffs have waived their right to fees and costs related to their chain-gang claim, and Austin and Hayes both testified that they had received no reward or promise of reward in exchange for agreeing to settle their claim. Further, there is no evidence that the parties' negotiations were anything other than at arms length.

e. Other Factors

The four remaining factors are interrelated: the stage of the proceedings; the likelihood of success at trial; the

complexity, expense, and likely duration of the lawsuit; and the range of possible recovery. The issues presented in these two claims are particularly complex and would have required a contentious trial with considerable expense. Indeed, the parties and the Magistrate Judge estimated that trial on the chain-gang and toilet-facilities claims would have doubled the length of the trial, as well as created a much more voluminous record requiring the court to expend an even greater time considering the claims.

In light of the above considerations, the court has independently evaluated the fairness, adequacy, and reasonableness of the proposed settlement. Here, the plaintiffs have traded the risk of losing a protracted litigation, combined with the limited duration of any success under the PLRA, with the assurance that the DOC will cease the practice the plaintiffs contested in their original complaint. A major drawback to the agreement, as recognized by the court and the objecting inmates, is that the DOC will be able to maintain a "chain gang" policy by shackling inmates on an individual basis. However, there is no evidence provided to the court that the named plaintiffs and their counsel have failed to pursue their claim as consideration for the DOC's agreement to cease the practice of shackling inmates together. Indeed, the named plaintiffs did not even include the individual-chain practice in their complaint or any of their

amended complaints. Further, the court is satisfied that should an inmate wish to challenge the DOC's practice with regard to the use of individual chains at work sites, the settlement agreement does not preclude such an inmate from doing so. A settlement implicitly means settling for less than all that is sought; it is "a reasoned choice of a certainty over a gamble, the certainty being the settlement and the gamble being the risk that comes with going to trial." Paradise, 686 F. Supp. at 1446. Here, the settlement agreement gives the plaintiffs more relief than they could have obtained by pursuing their claims in court in terms of longevity, and leaves open the possibility for future challenges to the DOC's use of individual chains. With one exception, discussed below, the court approves the terms of the settlement agreement.

The settlement agreement provides that the plaintiffs' eighth-amendment challenge will be dismissed with prejudice. As the Magistrate Judge correctly noted, this provision substantially curtails one of the agreement's stated remedies for breach: that the plaintiffs may reinstate their challenge in federal court. "[A] stipulation of dismissal with prejudice ... at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action." Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1501-02 (11th Cir. 1990) (citation omitted). So as to fully protect the rights of members of the

putative class to enforce this agreement, the court will approve the settlement with the modification that the chain-gang claim be dismissed without prejudice.[32]

2. Whether the Agreement Is Legal and Good Public Policy

The court has already discussed whether the settlement agreement complies with the PLRA, and has concluded that it does. None of the interested parties has contested the legality of the settlement agreement and, with the exception of the provision dismissing the case with prejudice, the court does not find any cause to contest the agreement's legality.

The court also finds that the agreement is good public policy. The putative class of plaintiffs articulated legitimate safety concerns relating to the DOC's practice of chaining inmates together, and the agreement, if enforced, will obviate the vast majority of those concerns. What the agreement does not eliminate, particularly the risk of psychological injury, it also does not preclude from resolution. Thus, the court is satisfied that any deficiencies contained in the settlement agreement can be remedied in the

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32. In her recommendation, the Magistrate Judge stated "should the court approve the parties' settlement of the chain gang claims, dismissal should be without prejudice. The parties have already stipulated that the plaintiffs' claims regarding toilet facilities should be dismissed without prejudiced." Recommendation of the Magistrate Judge, at 69. Neither the Commissioner nor the plaintiffs objected to the Magistrate Judge's conclusion.

future, if necessary, through future challenges. With the modification discussed above, the court therefore approves the settlement agreement between the parties.

3. Class Certification

In settling the chain-gang claim, the DOC Commissioner agreed to withdraw his opposition to the plaintiffs' motion for class certification only as it pertained to the chain-gang claim. Accordingly, this court has continually referred to the plaintiffs as a putative class when discussing the fairness of the settlement agreement. However, the Supreme Court has indicated, in somewhat different circumstances, that in approving a settlement agreement in a class-action litigation, a federal court must also ensure that the settling class meets the class-certification criteria of Rule 23 of the Federal Rules of Civil Procedure. Amchem Prods, Inc. v. Windsor, __ U.S. __, __, 117 S. Ct. 2231, 2248 (1997). As the Court noted in Amchem, the "proposed settlement classes sometimes warrant more, not less caution on the question of certification." __ U.S. at __ n.16, 117 S. Ct. at 2249 n.16. Although the Supreme Court in Amchem was dealing with a settlement class "opting-out" of litigation, the Court's statement, that "Federal courts ... lack authority to substitute for Rule 23's certification criteria a standard never adopted--that if a settlement is 'fair,' then certification is proper," applies to the facts at