subdue him. For this assault, Hope was placed on the hitching post for seven hours in very hot weather.[226] During this time he was only given water twice, and his efforts to obtain more water were denied in a cruel manner described above.[227] This situation differs from the above-cited line of Eleventh Circuit precedent in the following manner: first, unlike the prison officials in Sims, by refusing to provide Hope with water the Commissioner's employees failed to follow the DOC's own procedures for supervising inmates placed on the hitching post (i.e., offering them water in fifteen-minute intervals); second, clear evidence exists in the record that the Commissioner's employees were malicious and sadistic by giving water to the dogs instead of Hope; third, there is simply no evidence in the record that the Commissioner needed to keep Hope in restraints once they had returned to the prison because of exigent circumstances. Thus, the court finds that the plaintiffs have met their burden in meeting the Whitley subjective prong to show an eighth amendment violation.

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226. The court notes that although Hope's actions clearly justified the use of force, placing Hope upon the hitching post for fighting was a clear violation of Regulation 429, as interpreted by the Commissioner, which compels placement on the post only for refusal to work. According to the Commissioner, other disciplinary violations, such as exposure or masturbation, should not result in placement on the hitching post.

227. See notes 167-71 and accompanying text.

d. Conclusion

The court concludes that the plaintiffs have satisfied both the objective and subjective components of their eighth-amendment argument. Although it has found that significant shortcomings both in the policy and practice of the hitching post has led to constitutional violations, the court notes that its holding is limited to the DOC's current policy and evidence of its application, and does not reach the issue of whether the hitching post can be used in a way that does not constitute cruel and unusual punishment. For example, it may well be that placing an inmate on the hitching post for 20 minutes to a half-hour would make the inmate uncomfortable and would coerce this inmate to return to work without depriving the inmate of his right to be free from cruel and unusual punishment. However, the court is concerned as to whether such a policy can ever be implemented in a manner that would safeguard prisoners' rights. In Jackson v. Bishop, then-Judge Blackmun presented several compelling reasons as to why forms of corporal punishment, specifically the use of the strap, would always be fraught with constitutional violations. His reasoning may have application to the DOC's use of the hitching post in Alabama:

> "(1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. The present record discloses misinterpretation and obvious overnarrow

interpretation even of the newly adopted January 1966 rules.

"(2) Rules in this area seem often to go unobserved. Despite the January 1966 requirement that no inmate was to inflict punishment on another, the record is replete with instances where this very thing took place.

"(3) Regulations are easily circumvented. Although it was a long-standing requirement that a whipping was to be administered only when the prisoner was fully clothed, this record discloses instances of whippings upon the bare buttocks, and with consequent injury.
(4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous.

"(5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power.

"(6) There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?

"(7) Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals. This record cries out with testimony to this effect from the expert penologists, from the inmates and from their keepers.

> "(8) Whipping creates other penological problems and makes adjustment to society more difficult.
>
> "(9) Public opinion is obviously adverse. Counsel concede that only two states still permit the use of the strap. Thus almost uniformly has it been abolished. It has been expressly outlawed by statute in a number of states."

Jackson, 404 F.2d at 579-80. This court is not an expert on penological matters and accords the Commissioner great deference in conceiving and implementing policies to control inmate behavior in his institutions. However, it is also the duty of this court to protect prisoners within such institutions from practices that violate their constitutional rights. The manner in which the DOC has used the hitching post does just this.

2. Due-Process Clause

The plaintiffs contend that placing inmates upon the hitching post is a form of punishment and that, by punishing inmates with the hitching post without a hearing, the DOC Commissioner has violated their fourteenth-amendment right to procedural due process.

The fourteenth amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has understood the "core" of the concept of due process

to be the protection of the individual against arbitrary action of government. County of Sacramento v. Lewis, __ U.S. __, __ 118 S. Ct. 1708, 1716 (1998). Like other constitutional rights, the right to procedural due process extends to inmates, subject to limitations "justified by the considerations underlying our penal system." Jones v. N.C. Prisoners Labor Union, 433 U.S. 119, 125, 97 S. Ct. 2532, 2537-38 (1977) (citations omitted). Further, in considering the constitutional claims of inmates, federal courts must "afford appropriate deference and flexibility to state officials trying to manage a volatile environment." Sandin v. Conner, __ U.S. __, __, 115 S. Ct. 2293, 2299 (1995) (citations omitted).

With these precepts in mind, the Supreme Court recently stated in Sandin v. Conner that "liberty interests" in the prison setting are "generally limited" to freedom from two types of "restraints," __ U.S. at __, 115 S. Ct. at 2300: first, those restraints that "exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force," id.; and, second, those that "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id.[228]

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228. The Supreme Court stated:

> "Following Wolff, we recognize that States may under certain circumstances create liberty interests which are protected by
>
> (continued...)

However, and unfortunately, it is not apparent from the Court's descriptive wording of these two types of restraints just how they differ. That is, how does a restraint that "exceed[s] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force" differ from one that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"?

Turning to the rest of the Sandin Court's opinion, this court can envision two ways in which the two types of restraints can be distinguished. Prior to the Sandin decision, the Supreme Court had held that state administrative regulations could create federally enforceable liberty interests by establishing "'substantial predicates' to govern

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228. (...continued)
the Due Process Clause. See also Board of Pardons v. Allen, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987). But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, see, e.g., Vitek [v. Jones], 445 U.S. [480,] 493, 100 S.Ct. [1245] 1263-1264 [(1980)] (transfer to mental hospital), and Washington [v. Harper], 494 U.S. [210] 221-222, 110 S.Ct. [1028] 1036-1037 [(1990)] (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

__ U.S. at __, 115 S. Ct. at 2300-01.

official decision-making" and "by mandating the outcome to be reached upon a finding that the relevant criteria have been met." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462, 109 S. Ct. 1904, 1909 (1989); see also Hewitt v. Helms, 459 U.S. 460, 472, 103 S. Ct. 864, 871-72 (1983). The Sandin Court rejected this approach because it "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges," thereby creating "disincentives for states to codify prison management procedures in the interest of uniform treatment" and leading "to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." Sandin, __ U.S. at __, 115 S. Ct. at 2299. By adopting the new standard, the Court endeavored to focus the liberty interest inquiry on the nature of the deprivation, that is, the restraint, experienced by the inmate, rather than upon the language of the institution's regulation. See Beverati v. Smith, 120 F.3d 500, 503, n.3 (4th Cir. 1997).

As examples of restraints that "exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force," the Supreme Court gave two. First, the Court cited Vitek v. Jones, which held that an inmate's transfer to a mental hospital implicated a liberty interest protected by the due process clause itself. 445 U.S.

480, 494, 100 S. Ct. 1254, 1264 (1980).[229] The Vitek Court reasoned that involuntary commitment and treatment in a mental hospital were "qualitatively different from the punishment characteristically suffered by a person convicted of a crime," as well as resulted in "stigmatizing consequences" for the inmate. Id. at 493, 100 S. Ct. at 1264. Second, the Court cited Washington v. Harper, 494 U.S. 210, 221-22, 110 S. Ct. 1028, 1036-37 (1990), which held that an inmate had retained a liberty interest, which was constitutionally protected, from the involuntary administration of psychotropic drugs.[230] It can be inferred from these examples that the type of restraint at issue is one that is essentially outside what would be expected in a prison setting.

It could be further inferred that the second type of restraint--one that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"--is one that is expected in the ordinary prison setting but is still atypical and, of course, also imposes a significant hardship. Thus, with this reading of Sandin, the plaintiffs here could argue that use of the hitching post violated either, or both, of these types of restraints--that is, it is totally outside what would be expected in a prison

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229. See supra note 228.

230. See supra note 228.

setting or it is expected in the ordinary prison setting but is still atypical and, of course, also imposes a significant hardship.

Within the confines of the language in Sandin, the two types of restraints can be distinguished in another way as well. As stated, the first type of restraint is described as one that "exceed[s] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force." (Emphasis added.) Thus, such a restraint would encroach upon a liberty interest and violate the due process clause even in the absence of a state law or regulation. The second type on restraint is described as one that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." The words, "give rise to protection by the Due Process Clause of its own force," are conspicuously absent. Thus, it could be concluded that, for the second type of restraint to give rise to a liberty interest, the restraint must be based on some state law or regulation that is mandatory, or otherwise restricts the authority of prison officials to impose the restraint, so as to give rise to a liberty interest (the traditional manner in which the Court has discerned a liberty or property interest, see Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974)) and that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

The Sandin Court's rejection of the inmate's assertion "that any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause even in the absence of any state regulation" supports this latter distinction between the two types of the restraints. __ U.S. at __, 115 S. Ct. at 2300. Moreover, in his dissent, Justice Breyer appears to read the majority opinion as essentially "clarifying," __ U.S. at __, 115 S. Ct. at 2306, or modifying, the traditional approach of determining whether a state law or regulation gives rise to a liberty interest by adding the requirement that the law or regulation must also "impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at __, 115 S. Ct. at 2304-2310. Justice Breyer explains that this additional requirement helps assure that "minor prison matters" are removed from "federal-court scrutiny." Id. at __, 115 S. Ct. at 2306. Nevertheless, it cannot be overlooked that, in applying the second type of restraint, the Sandin Court majority looked principally to whether the restraint (the placement in segregation) was atypical; the Court did not look to whether the state regulation was mandatory. Id. at ___, 115 S.Ct. at 2301. The Court explained that the inmate's placement in disciplinary segregation "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest" because the record

reflected that "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody." Id. at __, 115 S. Ct. at 2293.[231]

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231. It is unclear, but it appears that the Sandin Court applied the test for both types of restraints. The Court wrote:

> "This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence. Although Conner points to dicta in cases implying that solitary confinement automatically triggers due process protection, Wolff, supra, at 571, n. 19, 94 S.Ct., at 2982, n. 19; Baxter v. Palmigiano, 425 U.S. 308, 323, 96 S. Ct. 1551, 1560, 47 L.Ed.2d 810 (1976) (assuming without deciding that freedom from punitive segregation for " 'serious misconduct' " implicates a liberty interest, holding only that the prisoner has no right to counsel) (citation omitted), this Court has not had the opportunity to address in an argued case the question whether disciplinary confinement of inmates itself implicates constitutional liberty interests. We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. The record shows that, at the time of Conner's punishment, disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody."

Sandin, __ U.S. at __, 115 S. Ct. at 2301. The paragraph could be understood to address the first type of restraint with the "dramatic departure" language and the second type of restraint with "atypical" language.

Lower court decisions interpreting Sandin offer little insight to this issue. Some courts have specifically held that an inmate bringing a procedural-due-process claim must point to a state regulation that provides the liberty interest as a basis for the inmate's claim. See, e.g., Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996) ("To prevail, [the inmate] must establish both that the confinement or restraint creates an 'atypical and significant hardship' under Sandin, and that the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint."). Other courts reach the same result by implication. See, e.g., Dominique v. Weld, 73 F.3d 1156, 1161 (1st Cir. 1996) (examining community release agreement and atypicality of removal from work-release program); Whitford v. Boglino, 63 F.3d 527, 531 (7th Cir. 1995) (finding that Illinois' adoption of prison regulation did not create liberty interest where inmate did not suffer "significant hardship."). Still others refer only to the type of deprivation alleged by the inmate to determine whether a liberty interest entitled to due-process protection exists. See, e.g., Pifer v. Marshall, 139 F.3d 907, 1998 WL 81335, at *1 (9th Cir. Feb. 24, 1998) (table) ("After Sandin, only those restraints, whether regulated by mandatory language in prison codes or not, that 'impose [] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison

life' are subject to due process review.") (emphasis added); Beverati v. Smith, 120 F.3d 500, 502-04 (4th Cir. 1997); Knecht v. Collins, 903 F. Supp. 1193 (S.D. Ohio 1995) ("The new framework focuses solely upon the liberty interest lost, rather than upon the regulatory language.").

The Eleventh Circuit has not directly addressed this issue. In Williams v. Fountain, 77 F.3d 372 (11th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 367 (1996), the court "assume[d]" without looking to specific prison regulations that the prisoner had "suffered a liberty deprivation and was entitled to due process," because his sanction of a full year in solitary confinement was "substantially more 'atypical and [of a] significant hardship'" than that of the inmate in Sandin. Id. at 374 n.3. The Eleventh Circuit ultimately concluded that Williams had received the procedural due process protection to which he was entitled. Id. at 375-76.

More recently, in Rodgers v. Singletary, 142 F.3d 1252 (11th Cir. 1998), the court summarized the holding in Sandin as follows:

> "[An] inmate can only claim a due process violation if he can show deprivation of a protected liberty interest, and that such interests are generally limited to (a) those actions that unexpectedly alter the inmate's term of imprisonment; and (b) those actions that impose an atypical and significant hardship in relation to the ordinary incidents of prison life."

Id. at 1253 n.1. Thus, unlike the Second Circuit, it does not appear that the Eleventh Circuit has interpreted Sandin to require an inmate to point to a specific regulation for the creation of the protected liberty interest.

Here, the court need not resolve--at least not yet--how the types of restraints discussed in Sandin should be distinguished. A procedural-due-process violation would merely necessitate the imposition of some measure of process (e.g., a hearing) before the restraint could be imposed. The plaintiffs maintain, and the evidence supports the conclusion, that the restraint at issue, that is, the hitching post, as it has been used through trial, may not be imposed at all. However, if the hitching post can be imposed in a manner that does not violate the eighth amendment, the court would then have to reach the question of whether, under Sandin, some measure of process is required before it may be imposed. The plaintiffs' procedural-due-process argument is therefore premature.

The court notes, however, the current record is void of much evidence as to whether the hitching post presents an "atypical and significant hardship" upon the inmates when compared to their normal conditions. Although the DOC Commissioner argued that placement on the hitching post was "normally expected" by the prisoners, this expectancy sheds no light on the type of conditions in the Alabama penal system absent the use of the hitching post. Should the court have to

reach the plaintiffs' procedural-due-process argument, the plaintiffs may then have to offer proof of the existence of other prison regulations or statutes to support their claim. In her recommendation, the Magistrate Judge concluded that the DOC's Administrative Regulation 403 provides the plaintiffs with a state-created liberty interest in the type of punishment that may be imposed for refusal to work, as well as the process needed to impose such a punishment.[232] As the court has already noted, Administrative Regulation 414 permits the DOC to punish inmates, without a hearing, for "minor rules violations," such as malingering, feigning illness, unsatisfactory work, disorderly conduct, and intentionally creating a security, safety or health hazard."[233] Thus, on the record before it, it is not clear to the court whether Administrative Regulation 403 provides the plaintiffs with such a state-created liberty interest.

Finally, the court considers the Commissioner's objection to the Magistrate Judge's determination that the hitching post violated the substantive-due-process right of the plaintiffs.[234] The Supreme Court has indicated that a substantive-due-process claim asserted in conjunction with an eighth-amendment claim

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232. Recommendation of the Magistrate Judge, at 88-89.

233. See supra notes 138-39 and accompanying text.

234. See recommendation of the Magistrate Judge, at 92-93.

for the unnecessary and wanton infliction of pain in a penal institution is duplicative:

> "It would indeed be surprising if, in the context of forceful prison security measures, 'conduct that shocks the conscience' or 'afford[s] brutality the cloak of law,' and so violates the Fourteenth Amendment ... were not also punishment 'inconsistent with contemporary standards of decency' and repugnant to the conscience of mankind ... in violation of the Eighth."

Whitley v. Albers, 475 U.S. 312, 327, 106 S. Ct. 1078, 1088 (1986). The Court concluded that in cases challenging deliberate use of force as excessive and unjustified, "the Due Process Clause affords [an inmate] no greater protection than does the Cruel and Unusual Punishment Clause." Id.[235] Moreover, the Court reaffirmed its prior holding that where "a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." County of Sacramento v. Lewis, __ U.S. __, __, 118 S. Ct. 1708, 1714 (1998) (citing Graham v.

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235. See also Williams v. Benjamin, 77 F.3d 756, 768 (4th Cir. 1996) ("[I]t is now well established that the Eighth Amendment 'serves as the primary source of substantive protection to convicted prisoners,' and the Due Process Clause affords a prisoner no greater substantive protection 'than does the Cruel and Unusual Punishments Clause.'" (quoting Whitley, 475 U.S. at 327, 106 S. Ct. at 1088)).

Connor, 490 U.S. 386, 395, __ S. Ct. __, __ (1989).[236] The court concludes that given the eighth-amendment analysis conducted above, it would be redundant to examine the plaintiffs' hitching-post claim under a substantive-due-process analysis. The court will therefore not adopt that portion of the Magistrate Judge's recommendation dealing with the plaintiffs' substantive-due-process right.[237]

VII. RES JUDICATA AND COLLATERAL ESTOPPEL

The DOC Commissioner argues that the doctrine of res judicata bars the plaintiffs from asserting their hitching-post claim. In support of this argument, the Commissioner has submitted six unpublished recommendations from various magistrate judges in the Northern and Middle Districts of Alabama.[238] As explained more fully below, the court concludes that the plaintiffs' claim is not barred.

Although neither the Commissioner nor the plaintiffs have raised it as an issue, the court must first determine whether

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236. Further, in United States v. Lanier, 520 U.S. __, __ n.7, __ S. Ct. __ n.7 (1997), the Court held that "Graham simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."

237. See supra note 110.

238. See defendant's objection to the recommendation of the Magistrate Judge, exhibits 1-6.

federal law or Alabama law applies. Unfortunately, as the Eleventh Circuit Court of Appeals recently noted, there is conflicting precedent in the Eleventh Circuit on this issue. *See Pleming v. Universal-Rundle Corp.*, *142 F.3d 1354, 1356 n.1* (11th Cir. 1998) ("Our precedents on this question appear to lead in two different directions. Compare Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1503 (11th Cir. 1984) (a federal court reviewing the preclusive effect of a prior federal judgment applies federal common law) with NAACP v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990) ("Federal courts apply the law of the state in which they sit with respect to the doctrine of res judicata.")." Because the applicable state and federal principles were identical in Pleming, the Eleventh Circuit did not resolve the problem. Id. Examining the conflicting precedent, this court has concluded that "the better reading of Eleventh Circuit precedent is that a federal court applies federal preclusion principles when considering the effect of a prior federal court judgment." Kachler v. Tayler, 849 F. Supp. 1503, 1516 (M.D. Ala. 1994) (Thompson, J.). Here, the DOC Commissioner has offered six unpublished recommendations authored by United States Magistrate Judges as support for his res judicata argument. Accordingly, the court will apply federal law to this issue.

The doctrine of res judicata, or claim preclusion, forecloses relitigation of matters actually or potentially

litigated in an earlier lawsuit. See S.E.L. Maduro, Inc. v. M/V Antonio de Gastaneta, 833 F.2d 1477, 1481 (11th Cir. 1987). "The application of res judicata requires that: (1) the issue contested in both proceedings be identical; (2) the parties to the subsequent proceeding are the same as, or are in privity with, the parties to the earlier proceeding; and (3) the earlier proceeding resulted in a final judgment on the merits." Baptiste v. Commissioner of Internal Revenue, 29 F.3d 1533, 1539 (11th Cir. 1994). There are, however, limits on the application of the doctrine. "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Martin v. Wilks, 490 U.S. 755, 762, 109 S. Ct., 2180, 2184 (1989). This principle stems from the "'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)." Id. at 761-62, 109 S. Ct. at 2184. In Richards v. Jefferson County, Ala., __ U.S. __, 116 S. Ct. 1761 (1996), the Supreme Court explained that in order for a prior litigation to have binding effect on future litigants, the prior litigation "would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.'" Id. at __, 116 S. Ct. at 1767 (quoting

Hansberry v. Lee, 311 U.S. 32, 43, 61 S. Ct. 115, 119 (1940)). In Richards, the Court found that the parties seeking to litigate claims that had previously been litigated in the Alabama courts were not precluded by res judicata where the first set of litigants "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any non-parties; and the judgment they received did not purport to bind any county taxpayers who were non-parties." Id. The Court therefore concluded that "there is no reason to suppose that the [prior] court took care to protect the interests of petitioners in the manner suggested by Hansberry." Id. at __, 116 S. Ct. at 1768.

The court finds that the Supreme Court's reasoning applies with equal force to the present situation. Even a cursory examination of the opinions submitted by the Commissioner reveals that the cases were litigated by pro se prisoner-plaintiffs, some of whom did not even present evidence to the court in support of their claims, and who were seeking damages for alleged injuries, rather than class-wide, injunctive relief. Furthermore, the facts presented by the cases vary dramatically from the factual record before the court in the present litigation.[239] Under these circumstances, the court

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239. In Williamson v. Anderson, 92-H-675-N (M.D. Ala. Aug. 18, 1993), Magistrate Judge Carroll granted the defendant's motion for summary judgment and dismissed the inmate's claim (continued...)

concludes that the plaintiffs' hitching-post claim is not barred by the cases cited by the Commissioner. Moreover, the Commissioner has made no representation to this court as to whether the recommendations were adopted by the district court

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239. (...continued)
that handcuffing him to fence for refusing to work violated his constitutional rights. The Magistrate Judge noted that the inmate was given "unlimited water and access to restroom facilities." Id. at 2. In Vinson v. Thompson, 94-A-268-N (M.D. Ala. Dec. 9, 1994), Magistrate Judge McPherson granted the defendants' motion for summary judgment on the inmate's claim that his constitutional rights were violated when he was placed on a restraining bar. In so holding, the Magistrate Judge stated that the inmate had "offered no evidence to support his claims other than his allegations that he was subjected to cruel and unusual punishment." Id. at 5. Similarly, in Hollis v. Folsom, 94-T-0052-N (M.D. Ala. Nov. 4, 1994), Magistrate Judge McPherson concluded that the plaintiff provided no evidence to support his claim that being handcuffed to a fence for two hours violated his eighth amendment rights. Id. at 9-10. In Kimble v. Hightower, 95-B-1328-S (N.D. Ala. April 5, 1996), Magistrate Judge Greene found that the inmate's placement upon the restraining bar did not violate the inmate's eighth amendment rights. However, the court specifically stated, "It is important to note that plaintiff was given food, water, and the opportunity to use toilet facilities while he was on the restraining bar and that he was examined by a nurse after each restraint." Id. at 6. In Ashby v. Dees, 94-U-0605-NE (N.D. Ala. Dec. 27, 1994), Magistrate Judge Putnam granted summary judgment in favor of the defendants and found that they did not act sadistically or maliciously when they chained the inmate to a fence for 45 minutes and kept him in the sally port for an additional 45 minutes. The Magistrate Judge stated "Handcuffing lasted only as long as he refused to work and then for only 45 minutes." Id. at 8. Finally in Lane v. Findley, 93-C-1741-S (N.D. Ala. Aug. 24, 1994), Magistrate Judge Greene found that an inmate's placement on the hitching post for five hours did not violate the inmate's eighth amendment rights. Again, the Magistrate Judge noted that the inmate "was given food, water, and the opportunity to use toilet facilities while he was held in the sally port and that he was examined by a nurse during and after the restraint." Id. at 9.

judges to whom the cases were assigned. Thus, the court finds that the opinions have no preclusive effect.

VIII. RELIEF

As stated earlier, any relief ordered by this court to remedy the constitutional violations created by the hitching post must comply with the PLRA. With respect to prospective relief regarding prison conditions, the PLRA provides:

> "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."[240]

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240. The statute further provides:

> "(B) The court shall 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--
>
> (i) Federal law requires such relief to be ordered in violation of State or local law;
> (ii) the relief is necessary to

(continued...)

§ 3626(a)(1)(A). Thus in the case before it, the court must consider whether the relief it imposes: (1) extends no further than necessary to correct the Commissioner's violations of the plaintiffs' eighth and fourteenth amendment rights; (2) is narrowly drawn; (3) is the least intrusive means to remedy the above violations; and (4) does not create an adverse impact on the DOC's resources. The PLRA states that prospective relief regarding prison conditions is terminable two years after the date the court granted or approved such relief. 18 U.S.C.A. § 3626(b)(1)(A)(i). However, the statute also states that prospective relief "shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and is the least intrusive means to correct the violation." § 3626(b)(3).

However, the question precedent to the issue of <u>how</u> the court should frame any prospective injunctive relief is <u>whether</u> the court should issue such relief. In <u>Farmer v. Brennan</u>, the

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240. (...continued)
correct the violation of a Federal right; and
(iii) no other relief will correct the violation of the Federal right."

Supreme Court set out the method by which a court should determine the appropriate relief when plaintiff-prisoners seek an injunction to prevent a substantial risk of serious injury from ripening into actual harm. 511 U.S. at 845, 114 S. Ct. at 1983. As explained earlier, the court is to examine the prison authorities' "current attitudes and conduct" at the time the lawsuit is brought, as well as throughout the litigation. Id. That is, prison authorities may prevent the issuance of an injunction by proving that, "during the litigation, ... they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation." Id. at 846 n.9, 114 S. Ct. at 1983 n.9. If the court is satisfied that the objective and subjective components of the eighth-amendment analysis are met, the court may grant appropriate injunctive relief.

Here, the DOC Commissioner has received explicit notice from two sources that his use of the hitching post resulted in sufficiently substantial danger to its inmates: first, from its correspondence with the Department of Justice in 1994 and 1995; and more recently, from the Magistrate Judge's recommendation in 1997. And, of course, with this memorandum opinion, the Commissioner has received additional notice. Pursuant to Farmer, the court will conduct a hearing to determine the following, among other things: first, whether the hitching post

can be used in a constitutionally permissible manner; second, if so, what progress, if any, the Commissioner has made in addressing the unconstitutional manner in which the post has been used; and, third, the likelihood that the Commissioner will cease using the post altogether, or in an unconstitutional manner, in the future. If the post can be used in a constitutional manner and if the Commissioner is willing to commit to its use in this manner, the court will also address whether, under Sandin v. Conner, certain due-process measures must precede its use.

The more difficult question for the court is whether it should order temporary, provisional relief pending the outcome of the supplemental hearing. To be sure, the Commissioner's use of the hitching post in Alabama prisons has resulted in serious harm to inmates. Nevertheless, if the Commissioner will assure the court that he will suspend the use of the post, at least until the parties have had an opportunity to update the court on whether the post is still being used in an unconstitutional manner and whether the post can be used in a constitutional manner, the court will not issue any prospective injunctive relief and will, instead, limit the relief to a declaration of unconstitutionality.

An appropriate judgment will be entered.

DONE, this the 10th day of August, 1998.

UNITED STATES DISTRICT JUDGE