UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

HAROLD STAPLETON, et. al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CASE NO. 88-14178-CIV-PAINE
	)	
HARRY K. SINGLETARY, JR., et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In accordance with the Court's Order, plaintiffs submit these proposed Findings of Fact, Conclusions of Law, and Order. The proposed Findings of Fact are based on the admitted and uncontested facts, the evidence adduced at trial, the depositions submitted in lieu of live testimony, the exhibits admitted into evidence, and the pleadings. Attached as Appendix A to the proposed Findings of Fact, Conclusions of Law, and Order, is a chart comparing conditions for protective management inmates and open population inmates at the prisons about which testimony was presented at trial. Filed separately is a courtesy computer disk with this document in WordPerfect 5.1 format.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, including Appendix A, has been furnished to James A. Peters, Esq., Cobb, Cole & Bell, 131 North Gadsden Street, Tallahassee, Florida 32301, Attorney for Defendants, by United States Mail, on the _____ day of January, 1993.

By: Peter M. Siegel, Esq.

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To assist the Court, plaintiffs provide the following index of topic headings for their proposed Findings of Fact, Conclusions of Law and Order:

MEMORANDUM OPINION

This action came on for trial by the Court from December 14, 1992 through December 18, 1992, December 21, 1992 through December 23, 1992, and January 5th and 6th, 1993. In accordance with Rule 52(a), Fed. R. Civ. P., this Court sets forth the following Findings of Fact and Conclusions of Law, which constitute the grounds for its Order.

FINDINGS OF FACT

I. BACKGROUND

A. The Claims

1. This action has been brought under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiffs alleged that the defendants,[1] as past and present administrators of the Florida Department of Corrections (hereinafter, collectively referred to as the "Department"), violated the plaintiffs' rights under the Eighth and Fourteenth Amendments to the United States Constitution. These alleged violations arose from the restrictive living conditions and lack of institutional programs provided to inmates assigned to what, at the time this litigation began, was called protective confinement ("PC") and is now called protective management ("PM").

2. The term protective management was adopted in November, 1990, to replace the term protective confinement. In this Memorandum Opinion, whenever the term protective

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1. The original defendants were Richard L. Dugger, in his official capacity as Secretary of the Florida Department of Corrections, W. F. Rouse, in his official capacity as Superintendent of Martin Correctional Institution, C. P. Worthington, in his official capacity as Superintendent of Sumter Correctional Institution, and Jerry Wade, in his official capacity as Superintendent of Hendry Correctional Institution. Secretary Dugger has been replaced by Secretary Singletary. The other defendants are no longer Superintendents at the respective institutions. There has been no substitution of their successors in office in that this matter involves a question of state-wide policy and practice. The only defendant presently before the Court is Harry K. Singletary, Jr., in his official capacity as Secretary of the Florida Department of Corrections.

confinement or PC is used, it describes conditions prior to November, 1990. Whenever the term protective management or PM is used, it describes conditions subsequent to November, 1990.

3. The Department is a Florida state agency created pursuant to Florida law. Under the terms of the applicable statutes and pursuant to it, the Department is responsible for maintaining and administering all state correctional facilities and institutions, for accepting persons committed to it for care, custody, treatment and rehabilitation, and for developing and maintaining programs of control, rehabilitation and employment for such committed persons. Chapters 944, 945 and 946, Florida Statutes (1991).

4. The Department operates in excess of 40 major institutions. In November, 1988, soon after this action commenced, the Department identified some 543 inmates in protective confinement at 25 prisons.[2] In early January, 1993, the numbers had declined to 278 inmates in protective management at 8 prisons.[3]

5. Protective management, like protective confinement before it, is a status available to an inmate when the inmate fears for his or her safety or when the Superintendent or the Superintendent's designee believes the inmate's safety may be in jeopardy. Rule 33-3.0082, F.A.C. (1990). Typically, inmates needing protection are smaller, weaker individuals,[4] although reasons such as inability to pay prison debts, snitching, former employment as a law enforcement officer, criminal notoriety, and other factors all produce a need or protection.[5]

B. The Parties

6. Plaintiff Harold Stapleton is an inmate who was assigned to protective custody at Martin Correctional Institution at the time this action commenced. He is currently housed in

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2. Pl. Ex. 1313.

3. Tr. V.10, p. 1680, l. 6 to p. 1681, l. 14.

4. Tr. V.6, p. 954, l. 19 - 25.

5. Pl. Ex. 1237, at p. 1.

protective management at Union Correctional Institution. In its Answer, the Department admitted that while he was housed in protective confinement, he was not permitted to watch television (Complaint, ¶ 45), not permitted to use the law library or regular library, although he could make requests for specific books to runners or clerks (Complaint, ¶ 46), not allowed to wear a belt (Complaint, ¶ 47), not permitted to attend religious services at the prison chapel and that the prison chaplain did not conduct separate services for inmates in protective confinement (Complaint, ¶ 48), and was limited to two hours per week out of cell recreation and three showers per week. The Department's Answer admitted that with these exceptions, he was confined to his cell 24 hours per day, seven days per week. Complaint, ¶ 52.

7. Plaintiff Michael W. Wilson is an inmate who was assigned to protective custody at Martin Correctional Institution at the time this action commenced. At the time of the trial, where he served as the class representative, he was housed in administrative confinement at Union Correctional Institution, pending review of his need for protection or for a transfer.[6] In its Answer, the Department admitted that plaintiff Wilson was not offered a work assignment while in protective confinement (Complaint, ¶ 115), was not permitted to watch television (Complaint, ¶ 116), was not permitted to use the law library, having to request specific books from runners or clerks (Complaint, ¶ 117), was not allowed to wear a belt (Complaint, ¶ 118), was not permitted to attend religious services at the prison chapel (Complaint, ¶ 118), and was limited to two hours per week out of cell recreation and three showers per week. The Department's answer admitted that with these exceptions, he was confined to his cell 24 hours per day, seven days per week. Complaint, ¶ 122.

8. The plaintiff class consists all persons who are currently incarcerated at prisons operated by the Florida Department of Corrections or who will be incarcerated at prisons operated by the Florida Department of Corrections in the future and who are or will seek to be placed in

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6. Tr. V.1, p. 24, l. 2 to p. 27, l. 10. During the course of the trial, Mr. Wilson was transferred to Polk Correctional Institution so that he could live in open population.

protective confinement, now protective management, for their own safety. Order on Class Certification, July 10, 1989.

9. The original defendant, Richard L. Dugger, was the Secretary of the Florida Department of Corrections from 1987 until April, 1991, when the current defendant, Harry K. Singletary, Jr., became Secretary. For many years prior to becoming Secretary, Singletary was the Assistant Secretary for Programs of the Department. In that position, his duties included responsibility for protective confinement.[7] As Secretary, Singletary presides over and supervises the total operations of the Department pursuant to the United States Constitution, governing state statutes, and Department rules and regulations. He is responsible for developing, approving and reviewing Department policy and is charged with implementing the statutes and regulations applicable to the Department.

II. PROTECTIVE CONFINEMENT -- RULE VERSUS REALITY

10. Based on the Department's Response to Plaintiffs' First Set of Interrogatories,[8] there were 25 prisons which housed inmates in protective confinement at the time this litigation began. Fifteen of the prisons had ten or more inmates housed in protective confinement and accounted for over 95% of the protective confinement inmates. Two, Martin Correctional Institution and Union Correctional Institution, held 45% of the state's protective confinement population.

11. At the time this action was filed, the Department administered protective confinement pursuant to Chapter 33-3.0082, F.A.C. (1985).[9] It defined protective confinement as "the removal of an inmate from the general population for the protection of the inmate where such confinement is requested by the inmate or is directed by the Senior Correctional Officer." Rule 33-3.0082(1), F.A.C. (1985). Although the rule provided that "[p]rotective confinement is not disciplinary in

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7. Tr. V.6, p. 876, l. 23 to p. 877, l. 2.

8. Pl. Ex. 1313, initially filed in support of Plaintiffs' Motion for Class Certification.

9. Pl. Ex. 1241.

nature and inmates in protective custody are not being punished," Rule 33-3.0082(4), F.A.C. (1985), the undisputed facts belie that self-serving assertion.

12. The assertion that protective confinement was not disciplinary in nature,[10] that inmates in protective custody were not being punished, and that conditions for those in protective confinement were to be as near that of the general population as assignment to protective confinement and the housing area will permit, was a prime example of Orwellian double-speak. If an inmate complained, the usual response was "check-out."[11] Gary Reposa, an inmate sent from Texas to Florida for protection, described what protective confinement was like:[12]

> . . . you are locked in your cage 24 hours a day down here. And you come out every other day for a shower, five minutes every other day, boom, boom, back into the cage. The only time you come out after that would be for a call out for a dental, maybe, if you have one, or some kind of medical or a counselor want to see you. And then Friday you get two hours because that's what the state has to give you. That's all we get is that two hours on Fridays. If you have 30 days already in, you get two hours.
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> But locked in my cell all the time -- I can't even order state library books, when the -- I don't know if you call them warden here -- superintendent has a thing that say I can do this, that PC can check out state library books, you can order them from the state, you know, nice, good books that they don't have here.
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> I want to do that because I like reading, in the cell there is nothing else to do, and the superintendent says I can, or assistant says I can, but the library guy won't let me do it. He says, no, I'm not going to let him do it. So they have a conflict going. But, me, I don't have any books, I don't got no books. I don't know what really happened. So that's the books.

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10. An inmate who grieved the lack of gain time available while in protective confinement was told that he was at fault for needing protection and, therefore, not deserving of gain time. Pl. Ex. 900.

11. Harrelson Deposition, p. 14, l. 21 (Pl. Ex. 1255), Reposa Deposition, p. 18, l. 19 (Pl. Ex. 1261).

12. Reposa Deposition, p. 20, l. 21 to p. 24, l. 19 (Pl. Ex. 1261).

> The shower every other day, in the summer -- in the winter time, you know, that's cool. In the summer time, you're sweating in them cells all day, every other day, then Friday to Monday is your three day one. I don't like that. I mean, the population, they get showers every day.
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> I don't know if you smoke or not, but if you ever have, you know it's a little nerve racking not to be able to smoke. But I don't like that, not be able to smoke. I've never abused that privilege.
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> I don't like not being able to have hot water. I don't know why they don't have it but is probably a reason, like, way back someone threw some hot water on someone. I don't know that it was, but we don't have that.
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> And I don't like having my cell shook down once, twice weekly, if they're not on your case. They tear it apart and they're not doing their job, they don't fold the stuff back. There is a proper way to be shook down, they fold your blankets up and stuff.
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> * * * *
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> And it seems to me that they want to make it where it is not nice down there, so no one want to stay down there. They force you to check out. They forced me to check out two times. This is my third time now, but this time here I'm trying to go home.
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> Q. Anybody said that to you?
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> A. Always.
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> Q. Has anybody ever said, We are trying to make this bad for you?
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> A. No. no. They say, if you don't like it, check out; if you want water, check out and get some; you want to go to the yard, check out and get it.
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> Not the big guys, I'm talking about the officers that work with us. That is, you know, it's common and it upsets me. I'm not down here for disciplinary, and I feel like I'm being punished for disciplinary. I get upset because I've been a disciplinary problem before, you know, and I didn't mind being treated like that because that's a standard thing.

13. Mr. Reposa's experience was not different from most PC inmates. Michael Shell described conditions at Hendry Correctional Institution: "I'm treated like I'm in disciplinary

confinement for one. I don't have the privileges that the compound has for another and I can't earn gain time."[13] Michael Thornton echoed his concerns, explaining that:

> You supposed to be working when you are in PC. I haven't done anything since I been in PC. I would like to work, you know, to motivate. If I got to wash the floors or something instead of being in a room. That room is for some people that can't handle it. It ain't going to -- you got guys back there cutting themselves trying to get out. I got a guy next door to me by the name of Dick. He threw down two, three load of axe just to get out of here. Just to get out, some attention, you know, fake a seizure, this is it. I'm serious. Vomit, fake a seizure just to get out of there just for the two hours to come down here to this hospital over there for a couple of hours to feel some warm feeling, smell some real people, and all to get him a little attention.[14]

14. When an inmate requested protective confinement, and presented a signed written statement alleging that he feared for his safety in open population, or when staff felt that protection was necessary, the Senior Correctional Officer was authorized to immediately place the inmate in protective confinement. Rule 33-3.0082(2) & (3)(a), F.A.C. (1985). The inmate's need for protection was then reviewed by a "Special Review Team," within three working days of the inmate's placement into protective confinement to determine whether the inmate, in fact, required protection.[15] The Team reported to the Superintendent, who made the final decision.[16] Rule 33-3.0082(3)(c), F.A.C. (1985). If the Superintendent determined that protection was necessary, the inmate's continued need for protection was reviewed every week for the first two months and then at least every 30 days thereafter. Rule 33-3.0082(6)(a), F.A.C. (1985).

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13. Shell Deposition, p. 8, l. 22 et seq. (Pl. Ex. 1284).

14. Thornton Deposition, p. 13, l. 10 et seq. (Pl. Ex. 1285).

15. The general approach of the Review Team was to ask the inmate why he just didn't fight back. Inmates who expressed no desire to fight were called "cowards" and other derogatory terms. Rice Deposition, p. 13, l. 5 et seq. (Pl. Ex. 1257).

16. Typically, the Superintendent accepted the Special Review Team recommendation. Dean Deposition, p. 16, l. 22 (Pl. Ex. 1258), Dugger Deposition, p. 15, l. 15 (Pl. Ex. 1262).

15. If the inmate's need for protection was not substantiated, the rule called for returning the inmate to the general population. However, prior to the November, 1990, the acceptance rate for inmates requesting protection approached 100%.[17] Moreover, few, if any inmates, as a result of the periodic reviews, were ordered to leave protective confinement.[18] Today, although the number of inmates in protective management is less than 300, the number placed in administrative confinement pending review of their need for protection, in just a six months period ending November 24, 1992, totalled 4,329.[19]

16. Department rules in effect at the time this litigation was filed provided specific directives with respect to the conditions and programs to be provided to inmates in protective confinement. Among other things, the rules provided that conditions for those in "protective confinement shall be as near that of the general population as assignment to protective confinement and the housing area will permit." Rule 33-3.0082(4), F.A.C. (1985). Furthermore:

> To the extent practicable meaningful and appropriate work opportunities will be available to inmates in protective confinement during the day, evening or night hours if the staff feels the work would not subject the inmate to danger and if adequate staff protection can be

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17. At Baker Correctional Institution, if an inmate requested PC, he went to PC. As the Assistant Superintendent put it, "That's all it takes." Cook Deposition, p. 21, l. 14 (Pl. Ex. 1253). At Charlotte Correctional Institution, 95% were approved. Williams Deposition, p. 9, l. 10 (Pl. Ex. 1259); at Desoto and Tomoka Correctional Institutions, 100%, Dugger Deposition, p. 16, l. 1 - 5 (Pl. Ex. 1262); at Cross City Correctional Institution, 99%, Dalton Deposition, p. 7, l. 20 (Pl. Ex. 1270). At Martin Correctional Institution, basically everyone. Matthews Deposition, p. 6, l. 25 et seq. (Pl. Ex. 1293). At Polk Correctional Institution, "probably 85 or 90 percent are approved, might be higher than that." Perrin Deposition, p. 20, l. 15 - 18 (Pl. Ex. 1298).

18. Cook Deposition, p. 21, l. 18 (Pl. Ex. 1253), Williams Deposition, p. 15, l. 13 (Pl. Ex. 1259), Dugger Deposition, p. 17, l. 19 et seq. (Pl. Ex. 1262). At Martin Correctional Institution, the periodic reviews were not even done. Matthews Deposition, p. 13, l. 12 (Pl. Ex. 1293).

19. Def. Ex. 24.

> provided. If the inmate cannot be taken outside of the security of the cellblock, other approaches to work are encouraged, such as work in the walkway in front of the cell if staff protection can be provided, or in the cell.

Rule 33-3.0082(5), F.A.C. (1985). In a like vein, the rule continued:

> Inmates in protective confinement should be permitted to participate in various self-improvement programs to the extent possible. Such programs may be scheduled in their housing areas, or in separate locations within the institution that conform with the need for security. Such program participation may involve correspondence courses or self-directed study activities.

Rule 33-3.0082(7), F.A.C. (1985). The rule further authorized inmates in protective confinement to "retain [their] personal property" and provided that "clothing for inmates in protective confinement should be the same as that available to the general inmate population except when there is a clear indication of a security problem." Rule 33-3.0082(9)(e), F.A.C. (1985).

17. The term "comparable" means "equivalent" or "equal in value or extent." Webster's Third International Dictionary. A review of protective confinement conditions and programming shows that they were not comparable to those offered the general population despite the mandate of Rule 33-3.0082, F.A.C. (1985). Protective confinement programs were not the "same" as general population programs. In fact, there were virtually no programs and inmates were housed in almost total lockdown status.

18. The Department conceded that conditions for protective confinement inmates and general population inmates were not comparable.[20] It admitted[21] there were a wide range of differences in conditions for those assigned to protective confinement when compared to those in the general population, including:

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20. Tr. V.3, p. 406, l. 9 - 15.

21. Plaintiffs' Requests for Admissions, filed in support of their Motion for Class Certification.

A. Inmates in protective confinement at most prisons were limited to two hours of out of cell recreation time per week.[22]

B. Inmates in protective confinement at most prisons could shower only three times per week[23] while inmates in general population, on the other hand, could shower daily.[24]

C. With minor exceptions, the Department admitted that protective confinement inmates could not visit the law library,[25] or regular library,[26] or in some cases the prison canteen.[27]

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22. Requests for Admissions, Nos. 81-83, 88, 93, 99, 101-103, 108-113. Every prison housing more than 10 inmates in protective confinement imposed this restriction. At most of the other prisons, protective confinement inmates were allowed to exercise five hours per week, but only after 30 days confinement. Request for Admissions, Nos. 84, 87, 89, 91, 94, 96, 98, 100, 105. At Cross City, however, out of cell exercise consisted of two hours in the hallway, in the middle of the night, a practice that had existed for more than a year. Brown Deposition, p. 6, l. 7 to p. 7. l 10 (Pl. Ex. 1267).

23. Requests for Admissions, Nos. 114, 117-118, 121, 123-124, 130-133, 137, 139, 141-142, 146.

24. Requests for Admissions, Nos. 148-181.

25. Requests for Admissions, Nos. 182-215. Even where visits were permitted, an inmate without a Court deadline, such as an inmate who wanted to file a writ of habeas corpus, was told he had the lowest priority. Pl. Ex. 625.

26. Requests for Admissions, Nos. 250-283. At Charlotte Correctional Institution protective confinement inmates were limited to one book per week. Pl. Ex. 1161.

27. Pl. Ex. 118 (Inmates in protective confinement with work assignments at Union Correctional Institution will now be allowed canteen privileges once a week). Even where inmates could make canteen purchases, they were restricted in the items they could purchase. Thus, at Tomoka Correctional Institution, they could not purchase soft drinks or any other types of canned items, Pl. Ex. 341, and could not obtain hot water to make the coffee they could buy from the canteen. Pl. Ex. 368; Pl. Ex. 405.

Nor could they attend religious services.[28] Some protective confinement units even barred smoking.[29] Inmates in general population, of course, could do all these things.

D. Inmates in protective confinement, when compared to inmates in general population, had much less opportunity for visits.[30]

E. Inmates in protective confinement could not watch television. Inmates in general population, of course, had easy access[31]. At several prisons, protective confinement inmates were not even permitted to possess radios.[32]

F. At many prisons, those in protective confinement were housed in the same unit with those in administrative confinement, and sometimes those in disciplinary confinement.[33]

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28. Requests for Admissions, Nos. 318-351.

29. Pl. Ex. 342; Pl. Ex. 406; Pl. Ex. 902; Pl. Ex. 1161; Pl. Ex. 1203; Pl. Ex. 1204; Pl. Ex. 1209; Pl. Ex. 1227. Correctional staff assigned to the PC Unit, of course, could smoke with impunity while a PC inmate would receive a disciplinary report. Moore Deposition, p. 13, l. 23 to p. 24, l. 4 (Pl. Ex. 1273).

30. For example, at Hendry Correctional Institution, visits were only allowed by special permit, and then only for two hours. Pl. Ex. 84. At Union, they were limited to one hour. Pl. Ex. 845. And, inmates could not even learn in advance whether an extended visit would be granted to an out-of-state visitor. Pl. Ex. 848.

31. Requests for Admissions, Nos. 12-79.

32. Pl. Ex. 118; Pl. Ex. 532; Pl. Ex. 884; Pl. Ex. 902; Pl. Ex. 1161; Pl. Ex. 1203; Pl. Ex. 1219. And this, despite the fact that all radios required earphones and batteries. Pl. Ex. 116.

33. At Avon Park Correctional Institution, protective confinement inmates were housed in the same unit as disciplinary confinement and administrative confinement prisoners. Pl. Ex. 2. The same held true at Broward Correctional Institution (Pl. Ex. 23), the Reception and Medical Center at Lake Butler, now the North Florida Reception Center (Pl. Ex. 130), Sumter Correctional Institution (Pl. Ex. 144), and Okaloosa Correctional Institution. Pl. Ex. 179. More typical was Desoto Correctional Institution, where protective confinement inmates were housed in the same unit as administrative confinement inmates. Pl. Ex. 56. Likewise for Florida Correctional Institution. Pl. Ex. 62. As the cited

(continued...)

G. Finally, despite the mandate of Rule 33-3.0082(5), F.A.C. (1985), only one inmate in protective confinement in the entire state was able to attend an educational or vocational course.[34] Nor were self-betterment programs, such as Alcoholics Anonymous or Narcotics Anonymous, available.[35] At Lake Correctional Institution, the Superintendent's idea of a self-betterment program was permitting the inmate to read in his cell.[36]

19. Protective confinement inmates who wanted to work, and to earn gain time, were unable to do so.[37] Soon after the commencement of this litigation, the Department acknowledged that only

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33. (...continued)
exhibits indicate, at all of these institutions there was at least verbal contact between the protective confinement inmates and the disciplinary and/or administrative confinement inmates, leading to harassment, threats and ridicule.

34. Answer to Interrogatory No. 1.e. Fifteen months later, the number was still one, with an additional two inmates participating in educational programs while in their cells. Pl. Ex. 1163. No inmate at Union Correctional Institution could attend "classes of any type." Pl. Ex. 123. So too, for Tomoka Correctional Institution, Pl. Ex. 149, and Polk Correctional Institution, Pl. Ex. 1222, although at Polk they could attend educational courses -- with general population inmates -- if they were willing to sign a waiver. Pl. Ex. 165. At Desoto Correctional Institution, inmates were dropped from educational courses on entering protective confinement, although they could retain the course materials. Pl. Ex. 55. Apparently, that was in accordance with an agreement between the Florida Department of Corrections and the Correctional Educational School Authority. Pl. Ex. 138; Pl. Ex. 204.

35. Pl. Ex. 2; Pl. Ex. 45; Pl. Ex. 75; Pl. Ex. 170; Pl. Ex. 175; Pl. Ex. 205.

36. Pl. Ex. 218.

37. Pl. Ex. 397; Pl. Ex. 401; Pl.Ex. 424. On the other hand, work was always found for general population inmates. Dean Deposition, p. 31, l. 9 (Pl. Ex. 1258), Cook Deposition, p. 36, l. 8 (Pl. Ex. 1253); Collins Deposition, p. 43, l. 20 (Pl. Ex. 1289).

29.6% of protective confinement inmates had job assignments.[38] Fifteen months later, the number had fallen to 17.5%.[39] The Department further acknowledged that the amount of incentive gain time awarded to protective confinement inmates was substantially less than awarded to general population inmates.[40] As a direct result, inmates who required protection were forced to serve longer sentences.

20. In the Joint Pretrial Stipulation, the parties stipulated that:

A. At the time the complaint was filed, in general, most protective confinement inmates were treated in a manner not significantly different from those inmates in administrative confinement.

B. At the time the complaint was filed, many protective confinement inmates were confined to their cells 24 hours per day, seven days per week, except for limited recreation and shower time.

C. At the time the complaint was filed, many protective confinement inmates were refused transfers until they had spent a substantial period of time, often a year or more, in protective confinement.

D. At the time the complaint was filed, most protective confinement inmates were permitted to return to general population upon request.

E. At the time the complaint was filed, many protective confinement inmates did not have the opportunity for work assignments and, as a result, did not have the opportunity to earn a

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38. Answer to Interrogatory No. 1.a. and 1.b. (Pl. Ex. 1313). Hendry Correctional Institution was the major exception. There, 35 our of 39 protective confinement inmates had a job assignment, 5 on the unit and 30 on a perimeter cleanup squad. Pl. Ex. 84.

39. Pl. Ex. 1163.

40. Answer to Interrogatory No. 1.c. and 1.d. (Pl. Ex. 1312). This situation was true at the time the complaint was filed. It was true three years later. Defendants' Answers to Third Supplemental Interrogatories Numbers 4 and 5. Pl. Ex. 1311. It is still true. See ¶¶ 34, 35, infra.

full measure of incentive gain time, thereby causing them to serve longer sentences. Some protective confinement inmates had refused to work in general population before going to protective confinement.

F. At the time the complaint was filed, most protective confinement inmates did not have the opportunity to participate in vocational, educational or self-betterment programs, other than by enrolling in correspondence courses if they could pay the cost while inmates in general population had the opportunity to participate in a range of vocational, educational and self-betterment programs, and to earn incentive gain time for so doing.[41]

G. At the time the complaint was filed, most protective confinement inmates were not permitted to watch television while inmates in general population had access to television.

H. At the time the complaint was filed, some protective confinement inmates were not permitted to keep personal property of the same type and amount as permitted to inmates in general population.

I. At the time the complaint was filed, many protective confinement inmates received, at most, two hours of out-of-cell recreation per week.

J. At the time the complaint was filed, most protective confinement inmates were limited to three showers per week[42] while inmates in general population had the ability to take showers one or more times each day. However, generally, protective confinement inmates were allowed to shower after work assignments and outdoor recreation.

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41. Correspondence courses did not qualify an inmate for incentive gain time. Dugger Deposition, p. 42, l. 24 et seq. (Pl. Ex. 1262).

42. At Baker Correctional Institution, PC inmates, housed in non-air-conditioned dorms, showered on Monday, Wednesday and Friday. If they had visitors on Sunday, they could not shower before the visit. Cook Deposition, p. 50, l. to p. 51, l. 12 (Pl. Ex. 1253).

K. At the time the complaint was filed, most protective confinement inmates were not permitted to visit the law library. A runner system did, however, provide access to legal materials.[43]

l. At the time the complaint was filed, some protective confinement inmates were not permitted to use typewriters while some inmates in general population had access to typewriters for their legal, and in some cases, personal correspondence.

M. At the time the complaint was filed, most protective confinement inmates were not permitted to visit the regular library. A runner system did, however, provide access to library materials.

N. At the time the complaint was filed, protective confinement inmates at some institutions were not permitted to possess belts.

O. At the time the complaint was filed, protective confinement inmates were generally subjected to strip searches more frequently than inmates in general population.

p. At the time the complaint was filed, many protective confinement inmates, when escorted from their cells to other places in the prison, were handcuffed with their hands behind them.

Q. At the time the complaint was filed, most protective confinement inmates were not permitted to attend religious services or otherwise participate in group religious activities.

R. At the time the complaint was filed, most protective confinement inmates did not have access to hot water taps to make instant coffee, tea or soup while inmates in general population had access to hot water taps.

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43. Of course, a runner system was of no value to an illiterate inmate. Harrelson Deposition, p. 8, line 18 (Pl. Ex. 1255).

S. At the time the complaint was filed, protective confinement inmates were generally not permitted to use the telephone except in emergencies or to contact their attorneys about pending matters while inmates in general population at most prisons had daily access.[44]

21. Because no inmate was authorized to remain in protective confinement, and no inmate is authorized to remain in protective management, unless the Department believes there is an identifiable threat to an inmate's safety in the general population, protective management status, like protective confinement status, is not voluntary. Because the length of time that an inmate can spend in protective management, like the length of time an inmate could spend in protective confinement, can last the entire term of the inmate's sentence, protective management status is not temporary.

22. The provisions of the protective confinement rule in effect prior to November, 1990, on its face, would have led an uniformed outside observer to conclude that the protective confinement system operated in a way not dramatically different from the way in which the current protective management system operates. Yet, as implemented, and as admitted by the Department's own expert witness,[45] the protective confinement system was overly restrictive, punitive, and violative of the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

III. PROTECTIVE MANAGEMENT

A. The Rule

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44. Pl. Ex. 850 (call to mother denied); Pl. Ex. 1198; Pl. Ex. 1229 (call to family denied). An inmate's request to call his mother because he had heard that his grandmother had a stroke and was in the hospital was rejected with the callous comment: "The postal service still works." Pl. Ex. 1199. Another inmate, having not heard from his mother in a while, and learning that she had alzheimer's and epilepsy, had his request to call denied on the grounds that it wasn't an emergency. Moore Deposition, p. 16, l. 2 - 16 (Pl. Ex. 1273).

45. Tr. V.9, p. 1587, l. 2 - 6.

23. The Department's revised rule, adopted in November, 1990, continues to provide that: "Protective management is not disciplinary in nature and inmates in protective custody are not being punished" and adds that protective management inmates "are not in confinement." Chapter 33-3.0082, F.A.C. (1990). As with the prior rule, it provides that the "treatment of inmates in protective management shall be as near that of the general population as the individual inmate's safety and security concerns permit." Rule 33-3.0082, F.A.C. (1990).

24. Although significant steps have been taken, some just prior to or during the course of the trial, the protective management system does not afford comparable opportunities to inmates in protection when compared to inmates in the general population. Many of the disparities are set out in Appendix A to this Memorandum Opinion.

B. The Reality

1. Jobs and Gain Time

25. Elimination of the near total lockdown conditions imposed on inmates requiring protection and the provision of jobs -- and thus the ability to earn gaintime on a basis comparable to that available to the general population -- can fairly be said to be a major goal for this litigation. The lockdown conditions have largely been eliminated.[46] However, the comparable provision of jobs, and equivalent gain time, is a goal yet to be realized.

26. Rule 946 of the Florida Statutes, entitled "Correctional Work Programs," expresses the policy of the State that all able-bodied inmates work.[47] The proper performance of a job is critical to many aspects of prison life.[48] It is the primary way to earn incentive gain time,[49] and thus shorten one's sentence. § 944.275, Florida Statutes (1991)[50]. It provides a basis for a custody reduction, § 944.1905(3)(c) & (d), Florida Statutes (1991).[51] It is an antidote to idleness.[52] The absence of work opportunities makes prisons even more difficult to manage.[53]

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46. Some of the unnecessary lockdown conditions were eliminated during the course of the trial. Tr. V.6, p. 1066, l. 21 to p. 1068, l. 3.

47. The policy of the Department is that all who are medically able to work should get a job within 10 days of arrival at an institution. Tr. V.9, p. 1429, l. 23 to p. 1430, l. 3. To implement this policy, all prisons make sure that all inmates have job assignments. Tr. V.7, p. 1228, l. 14 to p. 1229, l. 3.

48. Tr. V.6, p. 883, l. 1 - 3.

49. Tr. V.6, p. 883, l. 4 - 6.

50. Tr. V.6, p. 883, l. 7 - 8.

51. Tr. V.6, p. 883, l. 12 - 18.

52. Tr. V.6, p. 883, l. 19 - 25.

53. Tr. V.6, p. 884, l. 1 - 11; Tr. V.4, p. 538, l. 2 - 14.

27. Unlike the PC rule, which provided that "[t]o the extent practicable meaningful and appropriate work opportunities will be available to inmates in protective confinement, Rule 33-3.0082(5), F.A.C. (1985), the PM rule is phrased in mandatory terms and provides:

> Work assignments - within 10 days of the protective management determination, work opportunities consistent with medical grades shall be available to inmates in protective management during the day, evening or night hours. . . . Those who accept work assignments shall be subject to awards of gain time pursuant to Rule 33-11.0065 in the same manner as the general population.

Rule 33-3.0082(5), F.A.C. (1990)(emphasis supplied).[54]

28. To meet the mandate of Rule 946, the Department has made jobs available to general population inmates as skilled workers, semi-skilled workers, clerical workers, and general laborers, everything one would expect to find in a small city.[55] An inmate who performs his job in an "outstanding manner" may receive up to sixteen days of incentive gain time per month. Rule 33-11.0065(3)(d)(1), F.A.C. (1992). He may receive another four days for participation in self-betterment programs, for good institutional adjustment, or just for being cooperative in his housing area.[56]

29. Beginning sometime shortly after November, 1990, the Department began to make jobs available to inmates in protection, assigning them to unskilled jobs such as houseman, kitchen trash and clean-up details, outside grounds maintenance and the like. The Department has never made available to protective management inmates any jobs in the skilled categories, such as plumbers or electricians. Likewise, the Department has never made available to protective management inmates any jobs in the prison industries program (PRIDE), any kitchen jobs for Food

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54. The PM rule is consistent with the general policy of the Department, which calls for jobs to be assigned to all inmates within 10 days of their arrival at a prison. Tr. V.7, p. 1228, l. 14 to p. 1229, l. 3; Tr. V.9, p. 1429, l. 23 to p. 1430, l. 3.

55. Tr. V.6, p. 1051, l. 10 - 24.

56. Tr. V.7, p. 1271, l. 18 to p. 1272, l. 13.

Service America, any canteen operator jobs, or any staff barber jobs, the only prison jobs which provide monetary compensation.[57] Without a paying job, the only source of income for a PM inmate is family and friends.[58]

30. When this litigation began, inmates in need of protection at Florida State Prison were assigned to what was then known as the M-Wing program and employed in the PRIDE garment factory. For no logical reason, during the changeover from PC to PM, they all lost their jobs. Since then, little or no effort has been made to return them to paid employment.[59] Instead, many have been assigned to the "gun squad," an outside grounds detail considered punitive by the inmates since in the past only inmates assigned to close management status as the result of disciplinary problems have held such jobs at Florida State Prison.[60] On the surface the rash action of staff at Florida State Prison in ending PRIDE employment for inmates in need of protection could certainly be seen as vindicative and retaliatory.

31. At several prisons, including Martin Correctional Institution and Polk Correctional Institution, Food Service America, pursuant to contract, operates the kitchens, and providing paid employment to inmates. About 10% of a prison's population is so employed.[61] Yet, protective management inmates, who may work in the kitchen at night doing the same kind of work as done by the day workers, have not been deemed a part of the contract. Job opportunities are not comparable.

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57. The defendant stipulated that no protective management inmate, system-wide, held a paying job. Tr. V.2, p. 240, l. 5 - 8.

58. Tr. V.5, p. 862, l. 24; Tr. V.2, p. 233, l. 21 - 25.

59. Tr. V.6, p. 940, l. 20 - 22.

60. Tr. V.2, p. 339, l. 15 - 19; Tr. V.3, p. 456, l. 20 - to p. 458, l. 13. There are no armed work squads for general population inmates. Tr. V.6, p. 1046, l. 3 - 10.

61. Tr. V.6, p. 1054, l. 1 - 3.

32. At most prisons with protective management units, including Florida State Prison, Hendry Correctional Institution, Martin Correctional Institution, Polk Correctional Institution, and Union Correctional Institution, the prison industries program (PRIDE) provides paid employment to inmates. Some 2,500 general population inmates work for PRIDE.[62] No protective management inmates hold PRIDE jobs. Job opportunities are not comparable.

33. The Department's failure to seriously consider the need for paid employment is also evident in the lack of any protective management canteen operators. At Union Correctional Institution, the canteen for protective management inmates is actually housed within the protective management building. Yet, the canteen operator is a general population inmate.[63] At Polk Correctional Institution, there are five separate canteens, each with its own canteen operator. Why not a sixth, for the protective management inmates? Likewise at Martin Correctional Institution, where the Department plans to relocate the PM Unit, but has no plans to create a separate, protective management canteen. Again, job opportunities are not comparable.

34. It is incumbent on the Department to look for ways to provide paying jobs for at least some members of the plaintiffs' class. Should the Department continue to contract for food service, it should make some provision to include the protective management inmates within the

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62. Tr. V.6, p. 884, l. 12 - 14.

63. The canteen serves both protective management and administrative confinement inmates. Assistant Secretary Jones voiced a security concern because canteen operators would have to make deliveries on the administrative confinement wing. Tr. V.6, p. 1049, l. 25 to p. 1050, l. 16. That did not seem a problem in the past, when PC inmates were used as runners on death row and disciplinary confinement. Tr. V.6, p. 1050, l. 17 - 23. And, of course, if there is a security problem, nothing requires the canteen operator, as opposed to the wing runner, to make the actual deliveries.

terms of the contract. Should PRIDE expand, or add an extra shift,[64] an effort to employ some protective management inmates must be made.

35. The lack of a full range of job opportunities is reflected in the lesser amounts of incentive gain time which protective confinement inmates earned and protective management inmates still earn as compared to general population inmates. Statewide, for the month of October, 1988, general population inmates averaged 15.10 days of incentive gain time while protective confinement inmates averaged 6.00 days. The disparity was greatest at the prisons with the larger numbers of inmates in protective confinement. The Chart on the next page reflects the disparity.[65]

64. The PRIDE facilities at Polk sometimes work eleven hour shifts. Tr. V.5, p. 764, l. 14 - 22. The inmates just work overtime, Tr. V.5, p. 765, l. 3 - 4, instead of PRIDE operating a second shift. Tr. V.5, p. 764, l. 23 - 24. This seems unfair to all inmates, given the limited opportunities available for paid employment.

65. Pl. Ex. 1312.

Average Days Incentive Gain Time
October, 1988

Institution	Gain Time Protective Confinement	Gain Time Population Inmates
Apalachee	12.82	14.88
Avon Park	4.64	16.08
Baker	2.69	14.30
Brevard	5.00	14.30
Cross City	4.11	15.63
Dade	12.00	17.97
Desoto	2.29	14.56
Florida State	1.19	16.18
Glades	8.61	17.68
Hendry	4.09	15.29
Lancaster	12.00	12.14
Marion	4.92	14.53
Martin	6.25	13.78
Mayo	17.67	17.01
Okaloosa	6.00	18.23
Putnam	19.00	17.15
Sumter	5.73	15.91
Tomoka	5.39	17.60
Union	6.55	16.46
Zephyrhills	10.50	17.22

36. Nearly three years later, the disparity was less, but still evident at most prisons, particularly those prisons with the larger populations of protective management inmates.[66] Another year later, and almost two years after the Department adopted the protective management system, the disparity still exists, particularly at the institutions with the larger protection populations, as evident from the chart below, based on statistics supplied by the Department.[67]

Average Days Incentive Gain Time
October, 1992

Institution	Gain Time PM Inmates	Gain Time Population
Florida State	6.5	8.2
Hendry	15.3	14.0

66. Pl. Ex. 1311.

67. Pl. Ex. 1405.

Marion	12.6	15.6
Martin	5.5	12.2
Polk	11.9	13.8
Tomoka	7.4	16.1
Union	9.2	13.6

37. The Department also prepared a frequency distribution of the number of days of incentive gain time earned by population and protective management inmates.[68] It shows a disproportionate number of protective management inmates earn no incentive gain time when compared to general population inmates. On the other side, it shows that a disproportionate number of general population inmates earn the maximum number of incentive gain time days when compared to protective management inmates. The chart below shows the disparity.

Percentage of Inmates Earning the Minimum and Maximum Amounts of Incentive Gain Time October, 1992

Institution	General Population		Protective Management	
	0 Days	20 Days	0 Days	20 Days
Florida State	47.8	11.9	50.0	0
Hendry	15.8	58.4	23.5	76.5
Marion	15.1	59.2	35.7	50.0
Martin	18.5	17.0	51.9	11.1
Polk	23.8	61.8	23.5	52.9
Tomoka	11.2	63.1	37.5	1.8
Union	25.1	63.6	40.7	32.2

Statewide, 13.7% of general population inmates received no gain time for the month of October, 1992, while 44.5% of protective management inmates received no gain time. On the other hand, 51.6% of general population inmates received the maximum amount of 20 days while only 20.1% of protective management inmates received a like amount.[69]

68. Pl. Ex. 1426.

69. Pl. Ex. 1407.

38. The Department takes the position that incentive gain time awards are comparable and that the statistics used by the plaintiffs do not fairly represent the award of incentive gain time under the protective management rule. According to the Department, the statistics used by the plaintiffs fail to exclude those ineligible for incentive gain time, whose lack of eligibility is represented by a zero days gain time award.[70] The difficulty is that the Department failed to present any data to show that incentive gain time ineligible inmates are not proportionately represented in the general population and the protective management population. And, the Department has presented no data, or explanation, that can account for the fact that no protective management inmates at Florida State Prison have been able to earn the maximum amount of available incentive gain time while 11.9% of the general population inmates have. Likewise, the Department presented no data, or explanation, that can account for the fact that only 32.2% of the protective management inmates at Union Correctional Institution have been able to earn the maximum amount of available incentive gain time while 63.6% of the general population inmates have.

39. The burden is clearly on the Department to explain why these disparities continue.[71] One explanation, evident from data provided by Florida State Prison as to why protective management indicates earn substantially less gain time than general population inmates, is that protective management inmates have significantly less opportunities to work, as can be seen

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70. Tr. V.9, p. 1489, l. 24 to p. 1490, l. 8; Tr. V.9, p. 1502, l. 22 to p. 1503, l. 12.

71. Defendant's Exhibit 25, which purports to show comparability, is such a narrow sample as to be unpersuasive, particularly since the Department's witness didn't know what jobs were included in the sample, Tr. V.9, p. 1480, l. 4 - 12, didn't know whether the sample included the utility man position at Florida State Prison, Tr. V.9, p. 1480, l. 17 to p. 1481, l. 1, and didn't know the gain time earned by the other 65 or 70 other PM inmates at FSP not in sample. Tr. V.9, p. 1481, l. 2 - 6. He further admitted that job assignment comparability is not relevant to the question whether protective management inmates receive gain time in amounts comparable to that received by general population inmates. Tr. V.9, p. 1504, l. 13 - 21.

in the charts below, with reference to the largest category of protective management workers at that prison, those assigned to the job category, "utility man".[72] The data contained in these charts specifically excludes the Waldrup[73] eligible inmates, as the Department contends is necessary for a proper comparison.[74]

Florida State Prison
Average Incentive Gain Time Earned
Utility Job Category
September, 1992
Source: Pl. Ex. 1402

Protective Management Inmates			General Population Inmates	
Number Of PM Inmates	Average Days Worked	Average Gaintime Awarded	Average Days Worked	Average Gaintime Awarded
Outstanding Job Performance Rating				
15	11.53	9.67	20	16
Above Satisfactory Job Performance Rating				
9	7.56	4	20	8

72. Pl. Ex. 1402; Pl. Ex. 1403.

73. The Department administers two types of gain time awarded for job performance. Those whose crimes were committed between 1978 and 1983 can receive one day of gain time for each day worked plus six additional days per month based on self-betterment activities. Thus, in a 31 day month, they can theoretically receive 37 days of gain time. All other eligible inmates can receive a maximum of 20 days incentive gain time, 16 based on work performance and 4 based on other activities, including self-betterment programs. Tr. V.7, p. 1238, l. 5 - 19.

74. Tr. V.7, p. 1187, l. 11 - 15.

Florida State Prison
Average Incentive Gaintime Earned
Utility Job Category
October, 1992
Source: Pl. Ex. 1403

Protective Management Inmates			General Population Inmates		
Number Of PM Inmates	Average Days Worked	Average Gaintime Awarded	Average Days Worked	Average Gaintime Awarded
October, 1992 Outstanding Job Performance Rating					
26	15.5	14.42	30	16
Above Satisfactory Job Performance Rating					
3	14	7.3	30	8

40. The gain time comparison, utility man by utility man, shows that they lack the opportunity to work full time and, in effect, are punished by receiving less than the full amount of incentive gain time available.[75] Nor can the disparity be attributed to new arrivals, since 26 of 29 utility men stayed from month to month.[76] It is obvious from examination of the data used to compile the charts[77] that gain time was awarded on the basis of days worked, not on the basis of performance ratings.[78] The Department's Assistant Secretary responsible for the protective

75. Tr. V.7, p. 1175, l. 5 to p. 1179, l. 19.

76. Tr. V.7, p. 1180, l. 1 - 4; Pl. Ex. 1402 and Pl. Ex. 1403.

77. Pl. Ex. 1402, Pl. Ex. 1403.

78. Tr. V.7, p. 1180, l. 5 to p. 1181, l. 14. Inmate Arthur Schaffer testified that in recent months he received only 11 and 14 days incentive gain time for months in which he was rated outstanding. When he complained, he was told he didn't work enough days, although he worked every available day. Tr. V.2, p. 359, l. 23 to p. 360, l. 8; Tr. V.2, p. 376, l. 11 - 13; Tr. V.2, p. 376, l. 14 - 22.

management system acknowledged that a number of inmates in protective management at Florida State Prison did not have the opportunity to work full-time and, therefore, did not receive the maximum amount of gain time,[79] whereas general population inmates appeared to have the opportunity.[80] Nor does Department policy require full-time work in order to receive the full amount of incentive gain time. An eligible inmate who performs the work assigned to him in an outstanding manner is entitled to a full measure of incentive gain time, even if he does not work every day.[81] The absence of job opportunities is directly contrary to the Department's own rule. It continues the punitive and unequal treatment afforded those in need of protection.

41. Even the Department's own, limited, state-wide statistics[82] show a continuing disparity, indicating that protective management inmates rated outstanding average 18.9 days per month while general population inmates average 19.3 days per month. And, at Florida State Prison, which holds the largest number of protective management inmates, the disparity is even greater. Conspicuously absent from the statistics are the number of inmates who fall into each category -- thus making it impossible to determine the extent to which protective management inmates actually hold jobs and the extent to which their job performance ratings differ from the ratings given to general population inmates. Absent that information, the statistics offered by the Department are so incomplete as to be useless.

42. The Department offered no information about gain time awarded to Waldrup-eligible inmates and did no analysis or comparison between the gain time received by general population inmates eligible for Waldrup gain time and protective management inmates eligible for

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79. Tr. V.7, p. 1181, l. 15 - 23.

80. Tr. V.7, p. 1181, l. 24 to p. 1182, l. 14.

81. Tr. V.8, p. 1327, l. 8 to p. 1328, l. 2.

82. Def. Ex. 47.

Waldrup gain time.[83] Prior to the November change, some inmates now in protective management were able to earn close to the maximum Waldrup gain time available; since then they have generally earned substantially less.[84] Yet, as conceded by the Department, there are jobs which will let an inmate work nearly every day.[85]

43. The record also indicates that protective management inmates have difficulty earning the additional four days of incentive gain time that may be awarded for participation in self-betterment programs, for good institutional adjustment, or simply because an inmate is cooperative in his housing area. According to Department policy, in the absence of self-betterment programs, overall institutional adjustment, such as conduct, behavior, enrollment in correspondence courses,[86] and the like, can be used for the extra four days.[87] Although the Department claims that there is always a way for an inmate to get the extra four days, even in the absence of work,[88] or the complete

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83. Tr. V.7, p. 1187, l. 21 to p. 1188, l. 2.

84. Tr. V.8, p. 1356, l. 17 to p. 1361, l. 10, Tr. V.8, 1370, l. 8 to p. 1372, l. 21.

85. A runner can work every day. Tr. V.8, p. 1302, l. 11 - 19. A houseman' job enabled Charles Brightwell to earn 27 and 28 days per month while at Glades Correctional Institution. He never got that much gain time while in Protective Management. Tr. V.8, p. 1356, l. 17 to p. 1361, l. 10. Working as a runner while in Close Management enabled Frederick Reinhart to earn 30 and 31 days per month gain time. After entry to Protective Management, he never earned nearly as much. Some months he worked as few as 3 days, some as much as 16 day. Tr. V.8, p. 1370, l. 8 to p. 1372, l. 21.

86. But see footnote 41, supra. At least at some institutions, enrollment in correspondence courses will not enable an inmate to earn gain time.

87. Tr. V.7, p. 1271, l. 18 to p. 1272, l. 13.

88. Tr. V.8, p. 1326, l. 2 - 14.

absence of self-betterment programs,[89] and that the policy applies to all prisons,[90] data from Florida State Prison negates that claim.[91] According to the Department, But they do not, particularly at Florida State Prison.[92]

44. The Court finds that the awards of incentive gain time cannot yet be said to be comparable. In that regard, it notes that Secretary Singletary, in concluding that gain time opportunities were comparable, relied on the information provided to him by Assistant Secretary Jones and that Assistant Secretary Jones relied on the information provided to him by Kurt Hall, who complied the information contained in Plaintiffs' Exhibits 1400 - 1403.[93] Those Exhibits clearly indicate a disparity in gain time awards.[94]

2. <u>Religion</u>

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89. Tr. V.8, p. 1382, l. 23 to p. 1383, l. 11.

90. Tr. V.8, p. 1378, l. 25 to p. 1379, l. 4.

91. Tr. V.8, p. 1305, l. 22 to p. 1307, l. 7; Tr. V.8, p. 1386, l. 21 to p. 1387, l. 19; Tr. V.1, p. 159, l. 3 - 10; Tr. V.2, p. 340, l. 14 - 16. An inmate who attempted to earn the extra four days by going to a Bible Study Course was unsuccessful. Tr. V.2, p. 341, l. 23 to p. 342, l. 2. Likewise, an inmate who volunteered his time in the law library did not qualify for the extra four days. Tr. V.8, p. 1375, l. 5 - 13. See also, Pl. Exs. 1400 - 1403. An inmate who was able to consistently earn the extra four days while in protective management at one prison, could not do so while in protective management at another. Tr. V.8, p. 1386, l. 21 to p. 1387, l. 19.

92.

93. Assistant Secretary Jones, rather then relying on the narrow statistical data prepared by the Department for this trial, relied on the statistical data prepared by his staff. Tr. V.6, p. 1056, l. 20 to p. 1057, l. 13.

94. The Court is also concerned that nobody in the Department has looked in gain time comparability for those inmates who receive Waldrup gain time. Tr. V.6, p. 1062, l. 19 - 22.

45. The PC rule provided that the Chaplain should make a personal visit to each protective confinement inmate weekly, "if possible" and more frequently upon inmate request, "if the Chaplain's schedule permits." Rule 33-3.0082(6)(d)(4), F.A.C. (1985). The PM rule provides:

> Religious activities - a weekly non-denominational service shall be held for protective management inmates in the chapel. This service may be held at the protective management housing unit if security reasons prevent chapel service. The chaplain shall arrange for religious consultations between inmates and outside volunteers, counsel with clergy and the opportunity to receive religious sacraments similar to that afforded to the general population when requested.

Rule 33-3.0082(6)(b), F.A.C. (1990) (emphasis supplied).

46. In the case of general population prisoners, the Department has provided inmates the opportunity for free exercise of religion through a myriad of programs, including communal worship services, classroom religious instruction, and private religious counseling. Many different denominational worship services are available every week at most prisons. These services are generally held in the prison chapel, a building which is supplied with religious symbols, in some cases a piano or organ, and other items generally found in places of religious worship. Through visiting clergy and staff chaplains, the Department has stood ready to meet any inmate's bona fide request for denominational services, religious instruction, and has provided special religious programs for the benefit of the general population.[95]

47. Prior to November, 1990, inmates assigned to protective confinement were not able to participate in weekly communal worship services, Bible classes, or any other type of group religious activity. The only religious programming for protective confinement inmates consisted of occasional clergy visits to the confinement unit.

48. Despite the mandate of the PM Rule, access to religious programming for protective management inmates is significantly inferior in comparison with that offered the general population. Despite the mandate of the rule, group worship services for protective management

95. Tr. V.7, p. 1226, l. 12 - 18; Tr. V.8, p. 1395, l. 18 - 23.

inmates are lacking at several prisons.[96] These deficiencies have denied plaintiffs the opportunity for meaningful free exercise of religion. On the other side of the coin, at least until the time of trial, at Polk Correctional Institution, all protective management inmates were required to attend the weekly communal religious services.[97]

49. The First Amendment to the Constitution guarantees to all persons, including prison inmates, the right to the free exercise of religion. The Chaplaincy Services rule provides that: "It is the policy of the Department to extend to all inmates the greatest amount of freedom and opportunity for pursuing individual religious beliefs and practices consistent with security and good order of the institution." Rule 33-3.014(2)(a), F.A.C (1992). "Programs of the Department and activities of the Chaplains shall be designed to assist inmates in the expansion of their knowledge and understanding of and commitment to the beliefs and principles of their respective religions." Rule 33-3.014(2)(b), F.A.C. (1992). Moreover, "[a]ctivities should be scheduled to allow each inmate an opportunity to participate in religious programs and activities of his choice consistent with the security, order and effective management of the institution." Rule 33-3.014(10), F.A.C. (1992).

50. Communal religious worship, religious instruction, and religious counseling can be essential to a person's free exercise of religion. They are critical elements of all major religious traditions. Such religious programs and services make a vital contribution to an inmate's health, safety and welfare, help his moral and ethical conduct and assist in his rehabilitation.[98] An adequate

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96. The method of meeting the requirement for a weekly non-denominational service, which "shall be held for protective management inmates in the chapel," is detailed in Appendix A to this Memorandum Opinion. At several of the prisons, it consists of nothing more than a movie. The Secretary agreed that more than a movie is contemplated by the PM rule. Tr. V.6, p. 929, l. 17 - 22.

97. Another violation of Department policy, according to the Secretary. Tr. V.6, p. 941, l. 2 - 6; Tr. V.6, p. 984, l. 15 - 20.

98. Tr. V.9, p. 1558, l. 2 - 8.

setting for religious programming, offering symbols and a sense of sanctuary, is also an important part of the free exercise of religion. The Court finds that the absence of religious programming for many protective management inmates is a substantial departure from the concept of comparability and cannot be justified by security or other institutional concerns.

3. Law Library

51. The PC rule provided that "[l]egal materials shall be as accessible to inmates in protective confinement as to inmates in general population as long as security concerns permit." Rule 33-3.0082(9)(d), F.A.C. (1985). Unlike the PC rule, which authorized forcing an inmate to conduct his "legal business by correspondence rather than a personal visit to the law library," the PM rule mandates that "inmates in protective management shall have access to the law library during evening or other hours when general population inmates are not present." Rule 33-3.0082(6)(d), F.A.C. (1990) (emphasis supplied).

52. Prior to November, 1990, access to library services for protective confinement inmates was insufficient to permit meaningful access to the courts. Inmates were not permitted to visit the law library. Instead, they were required to submit written inmate requests to the librarian in order to obtain legal assistance. In order to obtain a case, inmates had to know the case's specific citation. How that was to be accomplished is unclear, given that protective confinement inmates did not have access to digests, treatises, Shepard's, or other types of basic legal research tools which would have permitted them to discover the cases they needed.[99] This runner type system does not pass constitutional muster. Abdul-Akbar v. Watson, 775 F. Supp. 735 (D. Del. 1991).

53. The Constitution guarantees all prison inmates meaningful access to the courts. The starting point is Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), where the Supreme Court invalidated prison regulations which barred inmate writ writers where no alternative source of legal assistance existed. Then, in Younger v. Gilmore, 404 U.S. 15, 92 S.Ct.

99. Pl. Ex. 634.

250, 30 L.Ed.2d 142 (1971), the Supreme Court, per curiam, affirmed a three-judge district court decision holding that California had an affirmative constitutional duty to furnish inmates with some means of meaningful access to courts. Finally, the Supreme Court made it explicit that:

> . . . the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Bounds v. Smith, 430 U.S. 817, 838, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). To meet the Bounds' obligation, inmates must be provided, at the State's choice, with either law libraries or attorneys. Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), cert. denied, 479 U.S. 913, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986); Straub v. Monge, 815 F.2d 1467 (11th Cir.), cert. denied, 484 U.S. 946, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987). The Department's policy, which severely limits actual law library access, fails to make law clerks available at all PM institutions, and provides no meaningful alternative,[100] ignores sound correctional practices[101] and clearly established constitutional rights.

54. An inmate who cannot go to the library cannot have meaningful access to the courts. Hadix v. Johnson, 694 F. Supp. 259, 291 (E.D. Mich. 1988), aff'd in part, vac'd. in part, sub. nom. Knop v. Johnson, 977 F.2d 996 (6th Cir. 1992). While the Department, in the interest of security, may impose some restrictions on inmates in protective management that are not imposed on inmates in general population, the restrictions imposed may not have the effect of denying the fundamental right of access to the courts. Hooks v. Wainwright, 536 F. Supp. 1330 (M.D. Fla. 1982), app. dis'd, 716 F.2d 913 (11th Cir. 1983), found that Florida prisoners did not have meaningful access to the courts. To meet the requirements of the Constitution, and of Bounds and Hooks, the Department has established law libraries, which are found at all those prisons which have protective management units. The Department, however, can not meet its obligation by providing

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100. See Appendix A.

101. Tr. V.9, p. 1556, l. 15 to p. 1557, l. 23.

a limited, fixed library time period, without regard to the actual needs of any particular inmate. Campbell v. Miller, 787 F.2d 217 (7th Cir.), cert. denied, 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986), provides a good example of the accommodation necessary where inmates are not permitted to visit the law library, as necessary. In Campbell, the Court found that the system of access in place for Level 6 inmates, the federal inmates who pose the greatest security risk, adequately accommodated their needs because a satellite library in the confinement area contained basic reference materials. That permitted inmates to identify the specific cases they needed, which were then delivered from the main law library.

55. At least until recently, as detailed in Appendix A, most prisons limited protective management inmates to two hours per week in the law library. Although the Department professed that its policy was to provide additional time as necessary,[102] the testimony of the inmates, which was not challenged at trial, was that requests for additional time were always denied.[103] On the other hand, general population inmate can access the law library on a daily basis. The Department has a choice under Bounds. It can make meaningful assistance available from persons trained in the law or it can provide actual, sufficient physical access to the law library for plaintiffs. Here, the Department has done neither. It has tailored its system to meet the needs of groups, not individuals. But, the right of access is a personal right,[104] dependent on need. An inmate, while pursuing an

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102. Tr. V.6, p. 986, l. 16 - 22.

103. Tr. V.1, p. 132, l. 1 - 6; Tr. V.1, p. 183, l. 14 - 24; Tr. V.5, p. 786, l. 23 - 25; Tr. V.4, p. 666, l. 6 - 14; Tr. V.2, p. 346, l. 2 - 8; Tr. V.2, p. 322, l. 7 - 8; Tr. V.2, p. 330, l. 14 to p. 331, l. 4; Tr. V.2, p. 335, l. 24 to p. 336, l. 8.

104. To paraphrase what this Court said in Lamarca v. Turner, No. 82-8196-CIV-PAINE (S.D. Fla. April 29, 1990) (Findings of Fact and Conclusions of Law, p. 12, n. 5), "In this regard, the court is compelled to note that the Superintendent cannot be afforded the luxury of "averaging" the amounts of time each prisoner spent in [the library]. . . . If one inmate . . . [did have adequate time that] has no impact upon the possible violation of the first inmate's constitutional protection against

(continued...)

appeal, or post conviction relief, may need to devote extensive time to legal research.[105] On the other hand, a prisoner just serving out his sentence may have no need to use the law library. The difficulty with the Department's scheme is that it does not recognize these very real differences.

56. Each law library has one or more inmate law clerks, although they are not always available to protective management inmates.[106] At Florida State Prison, protective management inmates must use a volunteer, unofficial law clerk, who only recently became available. Similarly, at Martin Correctional Institution, an inmate law clerk only became available in November, 1992.[107]

57. Under the protective management system, inmates opportunities for meaningful access to the courts are still not adequate and are still not comparable to those offered to the general population. No provision is made to accommodate those inmates with complex cases, or cases with deadlines, where extensive legal research is necessary. The constitutional right of access to courts is a right individual to each inmate, it is not a group right. Many, perhaps most, protective management inmates will not need or use the law library. But, limited, fixed hours of library usage are unlikely to meet the needs of those who are pursuing legal remedies. Instead, when inmates are engaged in litigation, they must have an opportunity to access the law library consistent with their needs. The Court finds that the Department's PM rule, as implemented, does not satisfy the Bounds access to courts mandate, and does not provide comparable access.

4. Academic, Vocational and Self-Betterment Programs

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104. (...continued)
cruel and unusual punishment."

105. Fred Lewis, a protective management inmate at Polk Correctional Institution testified that he missed a filing deadline as the result of inadequate time in the library. Tr. V.5, p. 864, l. 1 -15.

106. See Appendix A.

107. Tr. V.1, p. 162, l. 5 - 10.

58. The PC rule provided that "[i]nmates in protective confinement should be permitted to participate in various self-improvement programs to the extent possible." Rule 33-3.0082(7), F.A.C. (1985). In practice, that meant no participation. The PM rule provides that:

> Self-improvement programs or leisure activities shall be available in their housing area, or in separate locations within the institution that conform with the need for security. Such program participation may include academic education, vocational training, correspondence courses or self-directed study activities, religious activities, television, quiet activities or letter writing.

Rule 33-3.0082(6)(c), F.A.C. (1990)(emphasis supplied).

59. The absence of educational programs adversely impacts on inmates in protection. Participation in an educational program is one method by which an inmate can earn incentive gain time.[108] Inmates in need of protection lose that source of incentive gain time. See Rule 33-11.0065(3)(d)(1), F.A.C. (1992). Attendance at an educational course is, for purposes of incentive gain time, the same as a job assignment. Because academic achievement, as well as participation in educational programs, is one factor to be considered in determining custody levels,[109] § 944.1905(3)(b), Florida Statutes (1991), PM inmates may not be able to achieve a custody reduction, and thus may be denied the opportunity to participate in a work release or other program requiring minimum custody status. Their ability to achieve parole, or an earlier Controlled Release Date (CRD) may be adversely affected on the grounds that they have failed to participate in self-betterment programs.[110] Parole examiners frequently stress that satisfactory participation in self-improvement programs is necessary for an inmate to earn a recommendation for a reduction in his

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108. Tr. V.6, p. 941, l. 18 to p. 942. l. 11.

109. Tr. V.6, p. 942, l. 12 - 16.

110. Tr. V.6, p. 942, l. 21 - 25; Tr. V.6, p. 943, l. 6 - 8.

presumptive parole release date.[111] The absence of educational, vocational and self-betterment programs thus directly leads to longer prison sentences.

60. The policy of the State is to "make available to those offenders who are capable of rehabilitation the job-training and job-placement assistance they need to build meaningful and productive lives when they return to the community." § 944.012(6)(d), Florida Statutes (1991). Likewise, academic educational programs are called for by § 242.68, Florida Statutes (1991). In furtherance of these policies, the Department is directed to develop a plan for "comprehensive vocational and educational training of, and treatment programs for, offenders . . . based upon the identified needs of the offender and the requirements of the employment market to which he will return upon release." § 944.023, Florida Statutes (1991).

61. In keeping with these policies, the Department has made available to general population inmates a broad range of academic courses. This includes classroom instruction in Adult Basic Education (ABE) and General Educational Development (GED). Similarly, the Department has made available a broad range of vocational courses to general population inmates. Vocational training teaches inmates a job skill to qualify them for jobs within the institution and to prepare them for legitimate employment upon their release.[112]

62. As applied by the Department, the promise of self-improvement programs to include academic or vocational training has proved empty for protective management inmates. Little academic instruction of any type is available. Even fewer vocational programs are available.[113] Where programs are available, they are not comparable. As Appendix A shows,

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111. Program participation is important for achieving an earlier parole date. Tr. V.3, p. 523, l. 19 - 21. Parole Examiners say so explicitly. Tr. V.3, p. 524, l. 2 - 16. That was confirmed by an employee of the Parole Commission. Rudloff Deposition, p. 32, l. 4 - 18.

112. Tr. V.4, p. 538, L. 15 - 23.

113. The Department defended the lack of programs at Polk (continued...)

courses for general population inmates generally take place three or four hours per day, five days per week. On the other hand, courses for protective management inmates may amount to as little as one or two hours per week.

63. Many protective management inmates, unlike general population inmates, cannot participate in programs such as Alcoholic Anonymous or Narcotics Anonymous.[114] The absence of such programs is contrary to the Department's rule on operation of protective management units.[115]

64. Individual cell study is the only option open to inmates in protection. In general, that means correspondence courses if the inmate can afford to pay the tuition.[116]

65. For protective management inmates, the State's policy to "make available to those offenders who are capable of rehabilitation the job-training . . . they need to build meaningful and productive lives when they return to the community" is ignored by the Department. The Court finds that the lack of educational, vocational, and self-betterment programs, given the adverse consequences which can flow from their absence, continues the lack of comparability between those inmates in need of protection and those inmates in the general population.

5. <u>Recreation and Exercise Opportunities</u>

66. The PC rule allowed inmates in protective confinement to exercise in their cells for the first 30 days of confinement. Thereafter, they were to be ensured "a minimum of two hours per week of exercise outside of the cell." Rule 33-3.0082(9)(i), F.A.C. (1985). The PM rule

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113. (...continued)
Correctional Institution on the grounds that prior to last fall, it was designated as a short-term PM unit. The Secretary testified that there should not be any distinction in terms of job opportunities, gain time, or programs, dependent on whether an inmate was housed in a short term or long term protective management unit. Tr. V.6, p. 1030, l. 18 to p. 1031, l. 1.

114. See Appendix A.

115. Tr. V.6, p. 929, l. 23 to p. 930, l.6.

116. Tr. V.2, p. 342, l. 3 - 17.

provides for "a minimum opportunity of two hours per week of exercise out of doors" and mandates that "[s]imilar recreational equipment shall be available as is available for general population inmates for the exercise period provided that such equipment does not compromise the safety or security of the institution." Rule 33-3.0082(6)(a), F.A.C. (1990).

67. General population inmates have access to a wide variety of recreational opportunities. Outdoor recreation is usually available every day. The recreation areas generally have fields for baseball, football and soccer, full-sized basketball courts, and a wide range of weight training and exercise equipment, and other equipment.[117]

68. Before November, 1990, opportunities for out-of-cell recreation for protective confinement inmates was significantly inferior in comparison with those offered to general population inmates. Inmates in protection had virtually no access to recreational facilities and equipment. They could not even engage in leisure activities such as checkers or cards because they were not permitted to use the dayroom. Although scheduled for outdoor recreation only once per week, if weather conditions or staff shortages interfered, no provision was made for makeup times. Nor were any indoor alternatives available. The Department generally did not permit the use of hallways or dayrooms, or other areas in the protective confinement unit, as places for exercise or recreation. The one notable exception to this practice was Florida State Prison, where M-wing inmates had access to the wing floor as well as a dayroom.

69. Although exercise and recreational opportunities are much improved, serious problems remained until just prior to trial. Time was unduly limited at some prisons. Yet, at others, the Department provided substantial amounts of exercise and recreation time. For example, at Florida State Prison, protective management inmates could use the indoor gymnasium six days a week, although they were only allowed two hours per week outside, and that on a very irregular basis. The recreational facilities available, both the amount of space, and type of equipment, is often

117. See Appendix A.

severely deficient -- at Martin Correctional Institution, it is just a chin and dip bar.[118] At Marion Correctional Institution, general population inmates have access to weights, basketball courts, and a large area which can be used for football and the like. Protective management inmates have no such access.[119] At Union, the general population yard, which protective management inmates can access once a week, contains an extensive range of equipment. The protective management yard, available twice a week, is small and contains only a basketball hoop.[120]

70. The opportunity for outdoor exercise and recreation is vital to sound physical and mental health.[121] Although the express language of the Department's PM Rule is deficient,[122] does not reflect sound correctional practices,[123] and is contrary to the Standards of the American Correctional Association,[124] in operation, after the recent changes, the Department appears to be on

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118. Pl. Ex. 1211.

119. In a pattern that is very familiar, it was announced at Marion immediately before plaintiffs' counsel trial preparation visit that protective management inmates would be permitted to use the general population exercise yard, with all of its equipment, on Tuesdays from 8:30 a.m. to 11:00 a.m.

120. See Appendix A.

121. Tr. V.3, p. 483, l. 9 to p. 484, l. 1

122. Tr. V.3, p. 487, l. 24 to p. 488, l. 6.

123. Tr. V.9, p. 1554, l. 7 - 20.

124. Pl. Ex. 1237, p. 41, ACA Standard 3-4258. The commentary to the ACA standard suggests is applies to inmates in segregation and further suggests that outside recreation is to be preferred. Other out of your cell activities do not amount to recreation as envisioned by the ACA standards. Tr. V.4, p. 590, l. 2 - 10. Given that the Florida PM Rule states that protective management inmates "are not in confinement," Rule 33-3.0082, F.A. C. (1990), the ACA standard concerning outdoor recreation for general population inmates may well be the applicable standard. It, like the Federal Bureau of Prisons standard, calls for one hour a day, five days a week. Tr. V.4, p. 544, l. 3 - 21; Tr. V.4, p. 587, l. 14 to p. 588, l. 5. And, contrary to suggestions made by the defendant, a day room is not an alternative under the ACA stan-

(continued...)

the road to providing adequate opportunity for outdoor exercise and recreation, although the amount of time provided cannot be said to be comparable. The Rule should be changed to reflect the current practice and to prevent a return to the prior practice.

6. Visiting

71. The PC rule did not address visiting. The PM rule calls for a schedule to be implemented "to ensure a minimum of two hours a week for inmates to receive visits." Rule 33-3.0082(6)(f), F.A.C. (1990). Individuals who wish to visit general population inmates, assuming they are on the inmate's approved visiting list, Rule 33-5.006, F.A.C. (1992), need only "present themselves at the entrance of a correctional institutional during the regular visiting period for that institution." Rule 33-5.008, F.A.C. (1992).[125] At one prison, at least until trial of this matter, individuals on the approved visiting list of a protective management inmate were required to make advance arrangements, in violation of the Department's own rule.[126]

72. General population inmates may receive visits on weekends and holidays, generally for six hours. Rule 33-3.008(2), F.A.C. (1992). For protective management inmates, the rule suggests visiting before or after general population visiting, or on different days. Rule 33-3.0082(6)(f), F.A.C. (1990). Application of that provision has served to limit the amount of time available for visits.[127] It has also shifted visits to evenings or weekdays, thereby working a hardship of many visitors and resulting in fewer visiting opportunities for protective management inmates.[128]

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124. (...continued)
dards. Tr. V.4, p. 588, l. 7 - 9.

125. Tr. V.6, p. 944, l. 6 - 11.

126. Nothing in PM Rule requires approved visitors to give advance notice of visits. Tr. V.6, p. 944, l. 12 - 15. The Department conceded that the prison imposing the advance notice requirement was wrong. Tr. V.6, p. 944, l. 16 - 19.

127. Pl. Ex. 1216. See also, Appendix A.

128. Tr. V.1, p. 185, l. 10 - 13; Tr. V.1, p. 185, l. 25 to p.
(continued...)

Yet, the policy of the Department is that visiting opportunities should be comparable, consistent with safety and security,[129] and that extended visits should be allowed to those coming from far away.[130] The day and time constraints make it doubtful that the policy has been honored. The visiting opportunities for protective management inmates and general population inmates are not comparable.

7. Other Problems

73. Unlike the former system, inmates in protection now have access to the general library, usually one day per week. General population inmates, on the other hand, can visit daily. At Marion Correctional Institution, the only newspaper vending machine is on the open compound -- until this problem was resolved during the course of the trial, protective management inmates did not have access.[131]

74. Some institutions have hobby craft programs. At Marion Correctional Institution, Martin Correctional Institution, Polk Correctional Institution, and Union Correctional Institution, general population inmates can engage in hobby craft activities; protective management inmates cannot.[132]

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128. (...continued)
186, l. 1; Tr. V.2, p. 349, l. 1 - 7.

129. Tr. V.6, p. 944, l. 22 to p. 945, l. 4.

130. Tr. V.6, p. 986, l. 23 to p. 987, l. 15. The experience of inmate Ronald Weaver, whose visitors had to travel 9½ hours and who were only able to obtain a visit lasting more than 2 hours every three or four months, casts into doubt the application of this policy.

131. The solution was simple, use an open population runner. But, as with some many other common sense solutions, it took the intervention of an Assistant Secretary. Tr. V.6, p. 1066, l. 20 to p. 1068, l. 24.

132. See Appendix A.

75. At Florida State Prison and Martin Correctional Institution,[133] the housing units used for protective management were once used as confinement units. As a result, unlike the general population wings at Florida State Prison, on the protective management wing, there are steel security screens welded over the windows.[134] Some of the screens make it extremely difficult for inmates to open and close their windows and reduce sunlight and air flow,[135] and make inmates continue to feel as if they were still in a confinement unit.[136] At Martin Correctional Institution, fiberglass shields cover the windows, severely restricting airflow and ventilation,[137] and creating very hot conditions in the summer,[138] and adverse psychological effects on inmates in the cells.[139] Although the Department admitted the shields serve no purpose now that the unit was used for protective management, it did not plan to remove them,[140] despite the fact that removal appears to

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133. The Department justifies keeping protective management inmates at Martin in a building designed for confinement on the grounds that it would be poor safety and security practice to house them in a building where the door locks of the individual cells do not work. Tr. V.6, p. 1021, l. 22 - 24. The solicitude expressed by the Department would be more convincing but for the fact that PC inmates would housed in units with defective locks prior to November, 1990.

134. Tr. V.3, p. 455, l. 9 - 14.

135. Tr. V.2, p. 355, l. 14 - to p. 356, l; Tr. V.3, p. 506, l. 16 to p. 507, l. 3. When it rains, the rain comes in. Tr. V.3, p. 507, l. 22 - 24. When it gets cold, the cold comes in. Tr. V.3, p. 507, l. 25 to p. 508, l. 2. Staff come around twice a year, they open the windows in the spring and close them in the winter. Tr. V.3, p. 508, l. 3 - 6.

136. Tr. V.2, p. 355, l. 12 - 13.

137. Tr. V.1, p. 157, L. 4 - 8.

138. Tr. V.2, p. 302, l. 16 - 18.

139. Tr. V. 3, p. 482, l. 5 - 16.

140. Tr. V.6, p. 947, l. 4 - 15; Tr. V.7, p. 1149, l. 24 - 25.

require nothing more than a stepladder and a screwdriver.[141] At Union Correctional Institution, the PM Unit is located in a sealed building,[142] lacking air-conditioning,[143] a building that gets very hot.[144] General population inmates, on the other hand, are housed in air-conditioned buildings[145] with windows that open.[146]

76. At most prisons, general population inmates have access to the prison canteen on a daily basis -- or even several times a day on weekends. Protective management inmates, on the other hand, are generally limited in the number of canteen visits they can make.[147] At Florida State Prison, the canteen workers are all general population inmates; they give preferential treatment to general population inmates.[148] At Union Correctional Institution, canteen and dayroom activities are scheduled at the same time on two of the three canteen days. To participate in one, the inmate must forgo the other.[149] General population inmates, on the other hand, have daily canteen access.[150]

77. At some prisons, protective management inmates were locked in their cells unnecessarily, apparently as a matter of convenience. This was true at Marion Correctional

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141. Tr. V.7, p. 1204, l. 6 - 13.

142. Tr. V.1, p. 108, l. 23.

143. Tr. V.1, p. 108, l. 12 - 14.

144. The testimony of the inmates and the experts who visited the Unit was confirmed by temperature logs. Pl. Ex. 950.

145. Tr. V.1, p. 109, l. 13 - 14.

146. Tr. V.1, p. 210, l. 14 - 17.

147. Appendix A. At some prisons, the number of items that can be purchased each trip is limited, thereby increasing the disparity. Tr. V.3, p. 459, l. 4 - 5. Complaints to staff about the limitations have proved unsuccessful. Tr. V.3, p. 459, l. 9 to p. 460, l. 1.

148. Tr. V.2, p. 350, l. 15 to p. 351, l. 5.

149. Tr. V.1, p. 101, l. 6 - 9; Tr. V.1, p. 192, l. 11 - 20.

150. Tr. V.1, p. 193, l. 6 - 8.

Institution, where protective management inmates were locked in for several hours each morning, and on Sunday evenings if they did not wish to go to the library.[151] General population inmates are not locked down at any time and can stay in their dayroom, watch television, or engage in other activities.[152] And it was also true at Polk Correctional Institution, where protective management inmates completing their morning work assignment were locked down until lunch.[153]

78. Prior to November, 1990, food service for protective confinement inmates was significantly inferior in comparison with that afforded general population inmates. With few exceptions, the Department forced protective confinement inmates to eat in their cells.[154] Food was delivered on carts. Food meant to be served hot was often cold. Food meant to be served cold was often hot. Condiments were frequently lacking. Portion control was a problem. Food was often in an unpalatable condition.[155] Today, protective management inmates eat in a communal setting, usually in the prison dining hall. But problems remain. At Union Correctional Institution, where protective management inmates eat in an activity building, the food is delivered on trays prepared by general population inmates -- and the portions are small.[156] At Florida State Prison, protective

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151. Tr. V.4, p. 661, l. 16 - 24. This practice changed after plaintiff's counsel visit in October, 1992, as part of trial preparation. Inmates were no longer locked in. They could stay in dayroom and watch TV. Tr. V.4, p. 661, l. 24 to p. 662, l. 13. The practice of locking down those inmates who did not wish to go to the library stopped during the course of the trial. Tr. V.6, p. 1066, l. 20 to p. 1068, l. 24.

152. Tr. V.4, p. 662, l. 17 - 20.

153. Tr. V.5, p. 807, l. 15 to p, 808, l. 5.

154. PC inmates at Polk Correctional Institution went to the dining room, either before or after general population inmates, Perrin Deposition, p. 9, l. 1 - 15 (Pl. Ex. 1298), and were permitted to stop at the canteen on the way back to their housing area. Perrin Deposition, p. 10, l. 19 (Pl. Ex. 1298).

155. Howard Deposition, p. 19, l. 21 et seq. (Pl. Ex. 1256).

156. Tr. V.5, p. 755, l. 1 - 2. The food is already on the tray
(continued...)

management inmates eat last. At times, food shortages occur,[157] and at times the inmates on the serving line refuse to give protective management inmates a full portion.[158] At other prisons, protective management inmates are rushed through the dinning room.[159]

79. At Martin and at Union Correctional Institution, the protective management cells lack tables and chairs, unlike general population cells, which have tables and chairs.[160] Other cell differences are detailed in Appendix A.

8. <u>Security Issues</u>

80. There are a range of security concerns evident in the way the Department operates its protective management units. For example, at Florida State Prison, a general population inmate operates the visiting park canteen and general population inmates are present in the hallways and doorway of the visiting park. At Union Correctional Institution, general population inmates hold jobs in the protective management unit.[161] In addition, at Union, the "Movement Center," where general population inmates are usually present, is sometimes used for protective management

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156. (...continued)
when delivered to the protective management unit. Tr. V.5, p. 754, l. 11 - 22. General population inmates, on the other hand, load their trays by going through a serving line. Tr. V.5, p. 755, l. 3 - 7.

157. Pl. Ex. 1245.

158. Tr. V.2, p. 353, l. 9 - 21.

159. The Secretary agreed that it would be wrong to force PM inmates to eat in five, six, seven minutes. Tr. V.6, p. 984, l. 21 - 25. Yet, that appears to be the practice at several institutions based on the testimony of several inmates, and the time schedules submitted to Tallahassee. Tr. V.1, p. 87, l. 8 - 9; Tr. V.4, p. 673, l. 6 - 12.

160. See Appendix A. Tables and chairs are called for by applicable by ACA standards. Tr. V.4, p. 603, l. 6 to p. 604, l. 3.

161. Tr. V.5, p. 738, l. 9 - 15; Tr. V.5, p. 768, l. 6 - to p. 769, l. 3.

visits.[162] At Marion Correctional Institution, and Union Correctional Institution, to attend sick call, a protective management inmate must be escorted across the open compound at a time when general population inmates are present.[163]

81. At Martin Correctional Institution, general population inmates were allowed in the protective management control room. It took the Assistant Secretary of the Department to put a stop to the practice.[164] At Okaloosa Correctional Institution, general population inmates were in the dinning room while protective management inmates worked in an unsecured kitchen. Again, it took the Assistant Secretary to remedy the problem.[165]

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162. Tr. V.5, p. 746, l. 12 - 22; Tr. V.5, p. 747, l. 24 to p. 748, l. 13.

163. Tr. V.1, p. 89, l. 5 to p. 90, l. 18; Tr. V.1, p. 115, l 15 to p. 116, l. 2; Tr. V.4, p. 674, l. 2 - 23.

164. Tr. V.7, p. 1086, l. 24 to p. 1087, l. 23.

165. Tr. V.5, p. 761, l. 9 - 22. A grievance at the local level was denied. Tr. V.5, p. 761, l. 23 to p. 762, l. 12.

C. Threats, Harassment and Ridicule

82. Protective management inmates are frequently the victims of threats, harassment and ridicule, from both other inmates and staff.[166] At some institutions, work assignments bring protective management inmates in close proximity with general population inmates. The result, verbal threats, harassment and ridicule.[167] At other times, staff are the perpetrators of the verbal disrespect.[168] Harassment is against DOC policy[169] and correctional officers have been disciplined for harassing PM inmates.[170] But, the practice appears to be wide-spread and requires even more diligence on the part of senior staff.

83. At Martin Correctional Institution, protective management inmates and administrative confinement inmates (who are seeking admission to protective management, but who have not been approved) are housed in the same unit, exacerbating the threats, harassment and ridicule.[171] The same held true at Florida State Prison, where administrative confinement, disciplinary confinement and close management inmates were housed on the upper floors of V-Wing.[172] It resulted in sexual harassment, throwing food, and the like.[173]

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166. Tr. V.1, p. 89, l. 5 to p. 90, l. 18; Tr. V.1, p. 197, l. 7 - 25; Tr. V.5, p. 752, l. 16 to p. 753, l. 6; Tr. V.5, p. 796, l. 22 - 25; Tr. V.5, p. 797, l. 1 - 5; Tr. V.3, p. 458, l. 14 - 25.

167. This is not a new problem. Pl. Ex. 944. But, it is a continuing problem. Pl. Ex. 1251.

168. Tr. V.2, p. 356, l. 12 - 22; Tr. V.2, p. 261, l. 25 to p. 263, l. 5; Tr. V.2, p. 307, l. 20 to p. 308, l. 5.

169. Tr. V.6, p. 983, l. 22 - 24.

170. Tr. V.6, p. 984, l. 1 - 7.

171. Tr. V.1, p. 154, l. 23 to p. 155, l. 1; Tr. V.2, p. 301, l. 7 - 20.

172. Tr. V.2, p. 228, l. 12 - 20.

173. Tr. V.2, p. 228, l. 25; Tr. V.2, p. 234, l. 14 - 20; Tr. V.2, p. 296, l. 15 - 25.

D. Rule Versus Reality - The Failure to Enforce

84. The Court finds that the Department has made a genuine effort to remedy obviously unconstitutional conditions for those in need of protection. But, as the evidence makes clear, and seemingly as the result of three factors (1) the ambiguities in the protective management rule, (2) uncontrolled local level decision-making, and (3) lack of comprehensive oversight, significant problems remain in the area of jobs, gain time, religious programs, library access, educational, vocational and self-betterment programs, leisure time activities, and staff ridicule. Comparability has not been achieved. The Court finds that the Department's failure to properly supervise its staff and to enforce its written rules can fairly be said to constitute deliberate indifference, especially since the comparability issue is a long-standing deficiency well known to the Secretary.

85. In finding a lack of comparability, this Court does not purport to micro-manage the Department of Corrections. Rather, as articulated by plaintiff's expert, Professor Norval Morris, it believes that differences in treatment which affect an inmates duration of imprisonment and differences in treatment which affect an inmate's access to self-development programs, such as substance abuse and literacy programs, cannot be tolerated.[174] It is incumbent upon the Department to design and implement a plan which will overcome these problems.

IV. SECURITY CONCERNS

A. General Security Problems of Close Security Institutions

86. The ten institutions authorized to house protective management inmates, Florida State Prison, Union Correctional Institution, Martin Correctional Institution, Broward Correctional Institution, Polk Correctional Institution, Hendry Correctional Institution, Marion Correctional Institution, Okaloosa Correctional Institution, Tomoka Correctional Institution, and Florida Correctional Institution, although they vary in the character of offenders housed, all house close

174. Tr. V.3, p. 407, l. 19 to p. 408, l. 5.

custody offenders, who have committed serious crimes and who are serving lengthy sentences, and thus present understandable security concerns.[175]

87. General population prisoners face a day-to-day, unidentified threat to their safety simply from being incarcerated. The Department has employed a range of means for dealing with this threat. First, and most obviously, there are ever-present direct security measures, including the guards, restraint systems, and "shake-down" searches. Second, there is prison intelligence, accumulated primarily through informants. Third, there are institutional management techniques. For example, there are specified periods for inmate movement, a pass system, and frequent counts. These techniques, and others, help minimize the generalized threat to general population inmates, but they cannot eliminate it. The dangers within the institution must be lived with by inmates and staff on a daily basis. The Department cannot stop individual acts of violence. It can only institute reasonable and prudent procedures to contain it.[176]

88. Although general lockdowns would reduce inmate to inmate contact, and thus eliminate some of the danger, and may be appropriate when absolutely necessary to respond to a specific disturbance within the institution or when a general search is called for, they are generally not used because severe restrictions on inmate movement and activity are too degrading and costly.[177] Idleness and isolation tend to create inmate tension and a concentration of violence in the times when inmates are together. Just as security is necessary for successful programming, programming is necessary for security.

89. Once assigned to protective management, inmates must face the general, unidentified threat to their security just as general population inmates do. Even though isolated from the general population, protective management inmates may still face a general unidentified threat

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175. Tr. V.3, p. 421, l. 6 - 10.

176. Tr. V.3, p. 421, l. 12 to p. 422, l. 22.

177. Tr. V.3, p. 422, l. 23 to p. 423, l. 12.

from other protective management inmates. Protective management inmates fight, as general population inmates do, and may be subject to the additional security techniques applied to the general population, such as disciplinary segregation. Protective management is not a guarantee that an inmate will be insulated from the general dangers of life in a maximum security prison.[178] Nevertheless, subsequent to November, 1990, there have been few problems.[179]

B. The Department's Exaggerated Response to the Special Security Concerns of Protective Confinement

90. The purpose of protective confinement is not to eliminate the generalized threats, which apply to all inmates equally, but rather to protect protective confinement inmates from a second level of danger, which is the reason for their placement in protective confinement. Unlike the generalized threat, this second level of danger has been identified or is identifiable and specifically substantiated.[180] The Department knows what the danger is. It is from this danger only that plaintiffs have a right to expect additional protection beyond that afforded general population inmates.

91. Additional security measures are necessary to safeguard plaintiffs from this second level threat. Since the danger ordinarily comes from the general population, the bulk of the concerns can be addressed by limiting protective confinement interaction with the general population.[181] At times, the source of the identified danger may be from an inmate who is himself

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178. Tr. V.3, p. 428, l. 14 to p. 429, l. 12.

179. Tr. V.6, p. 976, l. 1 - 9. According to Secretary Singletary, the protective management system is working, "and we haven't had any big problems with it." Tr. V.6, p. 1008, l. 1 - 8.

180. In fact, it is the presence of an identifiable and substantiated threat that authorizes admission to protective management. Rule 33-3.0081(5), F.A.C. (1990).

181. The confusion of safety concerns was evident in the procedures followed at Union Correctional Institution. A protective confinement work squad was created. The inmates worked commu-
(continued...)

at risk and thus also housed within the protective confinement unit. In such cases, the Department must use institutional management techniques to keep the inmates separated.[182]

92. Otherwise, the techniques the Department uses in the case of general population inmates to address the generalized threat applicable to all inmates can and do work with inmates who need protection. Yet, prior to November, 1990, the Department essentially ignored the focus on the identified threat to a particular inmate and concentrated on the general concerns they had decided they could live with in the case of general population inmates.[183] The Department chose to treat protective confinement inmates with the same extreme security procedures they applied to disciplinary confinement and administrative confinement inmates, who potentially posed a security threat to staff and other inmates, and who generally spent at least 23 hours per day in their cells.[184]

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181. (...continued)
nally five days per week, from 7:30 a.m. to 3:30 p.m., weather permitting. Yet, when they returned to their housing area, they were immediately locked in their cells. Pl. Ex. 115.

182. At Florida State Prison, inmates who could not live on the protective management unit (V-Wing), were placed on Q-Wing. On Q-Wing, they were denied all activities and programs and were treated just a badly as protective confinement inmates were treated prior to the start of this litigation. During the course of the trial, Assistant Secretary Jones first professed no knowledge of this practice and, subsequently, corrected the problem.

183. In general, inmates did not check into PC as a way of getting at other PC inmates, Dalton Deposition, p. 13, l. 23 (Pl. Ex. 1270), Collins Deposition, p. 38, l. 9 (Pl. Ex. 1289), Dean Deposition, p. 27, l. 16 (Pl. Ex. 1258), although "occasionally [PC inmates] get in a fight among themselves, but it's usually over some issue that's occurred down there." Cook Deposition, p. 32, lines 9-14 (Pl. Ex. 1253). PC inmates simply do not pose a danger to each other. Brown Deposition, p. 12, l. 20 - 23 (Pl. Ex. 1267).

184. For example, at Martin Correctional Institution, protective confinement inmates were handcuffed while being taken from their cell to their thrice a week showers, Pl. Ex. 185, initially in back, Pl. Ex. 1223, although eventually only in front unless the escorting officer felt the inmate presented a clear threat to the
(continued...)

The results were punitive conditions, including the elimination of almost all programming for protective confinement.

93. In operating protective confinement as a total segregation unit, the Department reacted in precisely the manner it found unacceptable in the case of general population inmates. That is, rather than accommodate themselves to the realities of institutional life, they severely restricted plaintiffs' movement and access to programs in a manner that, in the case of general population inmates, they considered counterproductive and highly undesirable.[185]

94. Moreover, by applying those measures inconsistently from prison to prison, the Department itself demonstrated that such extreme measures were neither appropriate nor necessary to address the second-level threat applicable to those in need of protection. Remarkably, the prison housing the most dangerous offenders, Florida State Prison, permitted the most group interaction. Where was the logic?

95. At most prisons the plaintiffs could not go singularly or as a group to the chapel, the library, or any other prison facility. Nevertheless, the Department did allow groups of protective confinement inmates to go to the recreation yard.[186] Particularly given the nature of yard activity, it clearly was not more dangerous to allow them to go to the library together than to go to the recreation yard together. Similarly, at Florida State Prison, on M-Wing, protective confinement inmates were housed with and mingled with carefully screened general population inmates. No

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184. (...continued)
security of the institution. Pl. Ex. 186.

185. Correctional Officer Brown, in charge of the PC unit at Cross City Correctional Institution, pointed out the fallacy of the Department's focus on security, noting that: "There's some rules that I don't really . . . I just don't see a reason for, like having two officers to open a cell door in a P.C. man. He's put himself there, I don't see any -- he not going to attack me if I open his door because he don't want out." Brown Deposition, p. 12, l. 7 - 14 (Pl. Ex. 1267).

186. Reposa Deposition, p. 31, l. 22 (Pl. Ex. 1261).

special security measures were taken. Yet, at other prisons, protective confinement inmates were not even permitted to mingle among themselves.

96. When the focus is shifted from the generalized threat, which all inmates must face, to the identified threats, which are the true reason for placing an inmate in protection, the inferior conditions and programming the Department imposed upon protective confinement inmates, and still imposes on protective management inmates, can no longer be explained or justified. As discussed in the following sections, the Department has a multitude of options for providing programs in a manner consistent with meeting the legitimate safety concerns of the protective management inmates while still providing them with comparable conditions and programs. Many of these options present little or no security concerns of their own. Moreover, the Department, time and time again has demonstrated the ability to overcome security and operational concerns when it chooses to do so, as was evident from the M-wing program at Florida State Prison and the open-dorm housing arrangement at Polk Correctional Institution.

97. Finally, in light of these facts, it is apparent that the inferior access of plaintiffs to jobs and gain time, to educational and self-betterment programs, to religious programs, and to the law library, as well as the substantial disparity in other programs and activities for protective management inmates as compared with programs and activities for general population inmates, stems not from a misperception of the purpose of protective management, but from a lack of desire or affirmative neglect on the part of the Department.

C. Programming Options for Protective Management

98. The Department had a large number of options for providing comparable conditions and programming to plaintiffs without jeopardizing the security concerns that are properly applied to protective management. These options can be divided into two general groups.

99. First, the Department could provide programming to plaintiffs in their own housing areas. A variety of usable space is available. At Florida State Prison, there is a large dayroom, as well as a large, open ground floor area on the wing. At Union Correctional Institution,

there is an entirely separate activity building. At Martin Correctional Institution there is a large common area on each wing as well as two small rooms at the back of unit, sometimes used for clothing issue, sometime used as hearing rooms, and sometimes used for medical sick call.[187] Other prisons have similarly available resources.

100. Second, correctional staff could escort protective management inmates to various activity areas. Particularly through the creative use of scheduling, contact with general population inmates could be prevented or severely restricted during such movement. For example, at most prisons protective management inmates are escorted to the dinning room for meals at times when general population inmates are confined to their housing areas for count. Similar techniques could be employed to escort protective management inmates to educational and other programs at times when general population inmates were not about. To lessen the need for escorting officers, and decrease any potential threat, fences and gates could be put in place to create safe walkways from the protective management unit to other facilities. The Department has already demonstrated its ability to move protective management inmates at time when general population inmates are not present. Every day, it escorts plaintiffs to dining rooms and feeds them at a time separate from the general population inmates. It does the same thing, but much less often, when it escorts inmates to the library, to recreation areas, and to other facilities.

101. The Department has at several options available to give plaintiffs meaningful access to the law library. By way of example only:

a) First, the protective management unit could be scheduled for the library late on several evenings, in the same manner that work assignments are scheduled late in the evenings.

b) Second, the Department could set up a satellite law library for each protective management unit using, for example, an empty cell, the hearing or interview room, or the dayroom. The satellite law library would consist of basic reference works, such as selected portions of the

187. Tr. V.6, p. 1055, l. 16 - 23.

Federal and State Digests, treatises, Shepard's, and other types of basic legal research tools. It would enable plaintiffs to discover the citations of cases they should read prior to visiting the law library. Limited law library time could, therefore, be more effectively utilized. And, satellite law libraries would also create opportunities for additional work assignments for protective management inmates.

102. The Department has various options to provide vocational and educational training to plaintiffs. As an example, the Department could make available in the protective management units educational classes and light vocational training, consistent with that available to the general population. Such academic and vocational classes could be held in almost any area, including the dining room in the evening, with plaintiffs being escorted there after the general population is locked in for the night. Or, if fenced walkways were constructed, the plaintiffs could use the educational or vocational building after the normal workday.

103. The Department has numerous options to provide a wider range of jobs, some paying, to plaintiffs. Plaintiffs could be assigned to jobs in the prison industries (PRIDE) on a shift separate from the general population inmates, as was done at Florida State Prison on M-Wing. Since plaintiffs visit the canteen at times when general population inmates are not present, nothing prevents protective management inmates from holding canteen jobs. At prisons with large protective management populations, separate canteens could be established. Those who are qualified to act as law clerks should be allowed to do so. Job diversity could be furthered if plaintiffs could hold all the jobs actually performed in the protective management units.

104. Other prison systems have implemented options of the type here suggested, most notably in Illinois.[188] Gary Reposa described conditions for Texas prisoners requiring

188. Professor Morris and Mr. Mahoney, who acted as Master and Monitor in implementing a model protective custody program at Statesville Prison in Illinois, described their experience in promptly and easily implementing the Order entered in Williams v. Lane, 851 F.2d 867 (7th Cir. 1988), cert. denied, 488 U.S. 1047 (1989). The American Correctional Association publication, Protective Custody Management in Adult Correctional Facilities
(continued...)

protection.[189] William Aponte, a PC inmate at Martin Correctional Institution, compared his Florida experience with his Nevada experience, at a prison with 25 or 30 PC inmates out of a total population of 850 or 900. The PC inmates occupied a separate wing, with its own outside area. They were not locked in their cells all day. They could do anything general population inmates could do. Education programs were available. The unit was like a prison within a prison, separated from other units by fences.

> Well, it wasn't like a punishment thing like this place [Martin Correctional Institution] is. . . . Well, first I have to clarify that the whole prison is different in the first place. Like in the prison there on open pop., you can have stuff in your cell, like rugs, fans or a radio plugged in, TV, whatever. So quite naturally in PC, you can have all that stuff, too. When you're there, you just don't lay there. You work. They made it like open pop.[190]

D. The Department's Ability To Provide Protective Management Programming

105. Despite the multitude of options, the Department having gone part of the way in November, 1990, refuses to fully remedy the inequities visited upon those who need protection. It is difficult to understand why. Yet, the Department simply ignores or neglects options that are

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188. (...continued)
(1991) (Pl. Ex. 1237), is largely drawn from the Illinois experience.

189. Reposa Deposition, (Pl. Ex. 1261).

190. Aponte Deposition, p. 13, l. 15 to p. to p. 16, l. 7 (Pl. Ex. 1291).

readily apparent, options which would provide comparable conditions and programming to protective management inmates.

106. There are really no "security" concerns which prevent achieving comparability. No security concerns prevent the awarding of comparable gain time. No security concerns prevent the establishment of satellite law libraries or the offering of ABE and GED classes in the protective management units. Security concerns likewise do not prevent religious services in the protective management unit or in some other secure area. When motivated to do so, the Department has readily overcome any professed "security concerns." In November, 1990, the Department made significant improvements in response to the compulsion of this lawsuit.[191] The Department's solution was one that had long been available to it. But, it took this lawsuit to prompt the Department to meet its constitutional and statutory responsibilities.

107. The history of events bears out this conclusion. The Department made its original decision to treat protective confinement inmates as if they were in administrative or disciplinary confinement not for security reasons, but because it was an "easy" way to handle protective confinement inmates. Over the years, the Department made very few changes in conditions and provided essentially no programming for protective confinement inmates. Yet, M-Wing at Florida State Prison, and Polk Correctional Institution between 1984 and 1986, proved that confinement status was unnecessary. The Department ignored these success stories.

108. This lawsuit was filed in September, 1988. In response, the Department aggressively defended its system for more than two years. Then, when it apparently became clear that its position was not supportable, it made selected improvements to the conditions and programs in an attempt to moot this lawsuit. Almost before the ink was dry, on February 14, 1991, the Department filed a Motion for Summary Judgment, alleging that it had corrected all the problems which gave rise to this litigation and, therefore, was entitled to summary judgment on the grounds

191. Joint Pretrial Stipulation, ¶5.G.

of mootness. After a review of operations at several of the Department's facilities, the Department withdrew its motion in the face of overwhelming evidence of lack of compliance with its PM Rule. The Department did the same thing six months later, filing another Motion for Summary Judgment on August 12, 1991. After further discovery, it withdrew that motion on October 9, 1991.

109. The Department attributes lack of programming to lack of staff and other resources. At least at the prisons designated for long term protective management, there is no substance to this contention. The large numbers of protective management inmates at Martin Correctional Institution, Union Correctional Institution and Florida State Prison certainly justify both classroom and communal religious activities. The reduction in the number of institutions housing inmates in need of protection, from 25 at the time this litigation began to 7 at the time of trial, coupled with a more than 50% reduction in the number of inmates in protective status, belies the claim that additional staff is necessary to provide comparable programs and activities. And, in that regard, the Court notes that where the Department wants to do something, it finds a way, as with its speedy resumption of the educational program after an unexpected budget cut.[192]

V. INJURY TO PLAINTIFFS

110. The Department's denial of comparable conditions and programming to plaintiffs without justification has harmed and continues to harm plaintiffs. For years prior to November, 1990, the Department continuously presented inmates who needed protection with a Hobson's choice: either give up most programming and normal prison conditions, and serve a longer sentence as the price of obtaining protection; or give up protection as the price of retaining access to the full

192. Unexpectedly, the CESA education budget was cut by $ 4 million on July 1, 1992. Tr. V.6, p. 967, L. 3 - 9. The Department was able to cover the shortfall in 45 days, Tr. V.6, p. 967, L. 10 - 22, by putting CESA employees on its own payroll. Tr. V.6, p. 1028, L. 2 - 4. The gap in education lasted only about 45 days. Tr. V.6, p. 1028, L. 8 - 14. The programs resumed, Tr. V.6, p. 1027, L. 23 to p. 1028, l. 1, without much disruption. Tr. V.6, p. 967, L. 23 to p. 968, l. 4.

spectrum of prison programs and conditions, including sentence-reducing gain time.[193] The very need to make such a "no win" election causes inmates mental anguish, pain and suffering.

111. The conditions imposed on those needing protection prior to November, 1990, were harmful to the mental health of the inmates in need of protection.[194] The Court credits the testimony of Doctor Seymour Halleck, a psychiatrist with extensive prison experience, that prolonged lock-down conditions create "unpleasant emotions, anxiety, fear, anger, depression, lack of sleep, feelings of fatigue, feelings of hopelessness, suicidal thinking, anger, and rage.[195] It is likely to aggravate preexisting mental health conditions -- and be particularly hard on those already depressed,[196] and it makes people much less capable of being rehabilitated.[197]

112. The continuing lack of comparability continues the psychological harm to inmates in protective status. The inmate perceives himself as receiving, without justification, much less than other inmates. In addition to being unpleasant, and inconvenient, it is stigmatizing, and

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193. When asked why some inmates voluntarily left protection, a Classification Officer opined that "Some of them, you know, just decide that not having access to the yard is worse than, you know, taking a chance on the other inmates." Dalton Deposition, p. 10, l. 15 - 17 (Pl. Ex. 1270). Another when asked what tools existed to encourage inmates to leave PC noted that: "Well, I think the main thing would be the differences you're discovered between how PC inmates are treated and other inmates are treated, the opportunity for programs and full-time work, longer visits, canteen privileges every day." Long Deposition, p. 17, l. 20- 24 (Pl. Ex. 1306).

194. Tr. V.3, p. 474, l. 24 to p. 475, l. 1.

195. Tr. V.3, p. 475, l. 10 - 13.

196. Tr. V.3, p. 476, l. 10 - 13.

197. Tr. V.3, p. 476, l. 3 - 7.

demoralizing.[198] Other factors, the screens at Martin,[199] lack of religious services,[200] lack of rehabilitative efforts, have a direct, deleterious impact on mental health.[201]

113. The Department's employees repeatedly demonstrate an attitude of hostility and disdain for inmates needing protection. That attitude is reflected in response to an informal appeal filed by an inmate at Hendry Correctional Institution seeking to continue the Alcoholics Anonymous Program. He was told, "A.A. is no longer available to inmates in P.M. -- too bad."[202]

114. Programs and activities provide a means for inmates to work toward their own rehabilitation. Because protective management inmates are given only limited opportunities to participate in self-betterment programs, they are less likely to rehabilitate themselves and thus are likely to suffer the psychological effects of continued failure and despair and the more tangible

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198. Tr. V.3, p. 481, l. 6 - 11.

199. Dr. Halleck could not see what purpose the window screens served other than to make conditions of confinement more punitive. Tr. V.3, p. 482, l. 5 - 11. Assistant Secretary Jones agreed that the window shields were not necessary for the PM inmates. Tr. V.7, p. 1149, l. 24 - 25. They have a significant psychological effect. In addition to making the quality of life much worse, the inmate would also perceive himself as being singled out for unusual and unnecessary punishment. Tr. V.3, p. 482, l. 12 - 17. The screens also interfere with ventilation and increase the temperature in the unit. Tr. V.3, p. 497, l. 1 - 11; Tr. V.3, p. 499, l. 8 - 12. It defies understanding why they have not been removed. Tr. V.3, p. 497, l. 21 - 24. Cloid Schuler, defendant's expert, agreed that the screens served no legitimate penological purpose. Tr. V.9, p. 1566, l. to p. 1567, l. 7.

200. Access to communal religious services is important. Tr. V.4, p. 562, l. 22 to p. 563, l. 4. There is no justifiable penological purpose for not offering communal religious services in a manner comparable to that offered to general population inmates. Tr. V.4, p. 563, l. 5 - 12.

201. Tr. V.3, p. 481, l. 12 - 17.

202. Pl. Ex. 1231.

effects of recidivism.[203] The absence of comparable religious, educational,[204] vocational,[205] employment and recreational opportunities is likely to cause inmates mental anguish and to have long-term effects because of the unavailability of this important factor to an inmate's rehabilitation.

115. The lack of law library access may cause them to serve longer sentences.

116. An inmates participation in institutional programs also directly affects his chances for earlier parole or controlled release. The Rules of Florida Parole Commission provide that the factors looked to when determining whether to grant or deny parole encompass a variety of items relating to institutional programs, including work assignments, gain time, completion of high school, college, or other academic courses of study, completion of training programs designed to provide vocational skills and success with counseling. Rule 23-21.013(2), F.A.C. (1992) (parole); Rule 23-21.010, F.A.C. (1992) (controlled release). The Parole Commission obviously cannot consider any of the factors enumerated above or give a protective management inmate credit if he does not have the opportunity to participate or have contact with those factors. Protective Management inmates, like protective confinement inmates before them,[206] are denied the opportunity to partake in the activities which will enable them to be paroled.

CONCLUSIONS OF LAW

1. Plaintiffs advance two independent, although closely related theories for a finding that the Department's conduct under color of state law gives rise to liability:

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203. Tr. V.4, p. 538, l. 24 to p. 539, l. 6.

204. Tr. V.4, p. 538, l. 15 - 17.

205. Tr. V.4, p. 538, l. 18 - 23.

206. Indeed, the Parole Examiners, who look for program participation as proof of rehabilitation efforts, have looked with disfavor on inmates in protection. Pl. Ex. 1200. The recommendation contained in Pl. Ex. 1200 is, apparently, not unusual. Rudloff Deposition, p. 31, l. 14 to p. 33, l. 17. The inmate must earn a reduction in his parole release date, one way to earn the reduction is by program participation. Rudloff Deposition, p. 37, l. 24 to p. 38, l. 22.

A. The Department's conduct (i) in conditioning plaintiffs' rights to safety and security on a forfeiture of other rights and privileges, including the denial of plaintiffs' right of free exercise of religion, and denial of meaningful access to the courts, and (ii) in subjecting plaintiffs to conditions that of themselves are cruel and unusual, independently or taken together, violates plaintiffs' rights under the Eighth Amendment; and

B. The Department's denial of comparable opportunities for jobs, gain time, housing, programs, rehabilitation and parole violates plaintiffs' rights of due process and of equal protection under the Fourteenth Amendment.

I. THE DEPARTMENT HAS SUBJECTED PLAINTIFFS TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

2. The Eighth Amendment entitles plaintiffs to be free from cruel and unusual punishment. Inherent in this constitutional guarantee is the right to be free from bodily harm and unreasonable threats to safety and security. Conduct by the Department that unnecessarily burdens plaintiffs' exercise of this right violates the Eighth Amendment. Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979); Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977). Wojtczak v. Cuyler, 480 F. Supp. 1288, 1303 (E.D. Pa. 1979).

3. In addition, the conditions of confinement themselves may be cruel and unusual. Plaintiffs, as prison inmates, may not be subjected to punishment that: (1) is of such character as to shock the general conscience; (2) is repugnant to fundamental fairness; (3) is greatly disproportionate to the offense for which it is imposed; or (4) goes beyond what is necessary to achieve a penal aim or to maintain orderly administration of a prison. Hutto v. Finney, 437 U.S. 678, 685, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 252 (1976); Rhodes v. Chapman, 452 U.S. 337, 345, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); Bono v. Saxbe, 620 F.2d 609, 615 (7th Cir. 1980).

4. Since the purpose of the Eighth Amendment is to safeguard prisoners from an environment where self-improvement and rehabilitation are unlikely, it does not permit conditions that inflict needless suffering and humiliation. For this reason, the indirect punishment that arises from conditions falling beyond the limits of contemporary standards of civility also violates constitutional mandates. Finally, because the essence of an Eighth Amendment violation arises from the totality of the conditions of confinement, the effect of each these conditions must be viewed in a context in which all conditions are taken together. Rhodes, supra, 452 U.S. at 362-63 (Brennan, J. concurring); Hutto, supra, 437 U.S. at 687; Godinez v. Lane, 733 F.2d 1250, 1260 (7th Cir. 1984); Smith v. Fairman, 690 F.2d 122, 125 (7th Cir. 1982), cert. denied, 461 U.S. 946, 103 S.Ct. 2125, 77 L.Ed.2d 1304 (1983); Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981).

5. In prison conditions litigation alleging cruel and unusual punishment, "inquiry into a prison officials's state of mind" is required. Wilson v. Seiter, ___ U.S. ___, 111 S.Ct. 2321, 2324, 115 L.Ed.2d 271 (1991). Liability exists where the officials act with deliberate indifference. That is a well-established standard. Ancata v. Prison Health Services, 769 F.2d 700 (11th Cir. 1986); Carswell v. Bay County, 854 F.2d 454 (11th Cir. 1988). According to the Supreme Court, "we see no significant distinction between claims alleging inadequate medical care and those alleging 'inadequate conditions of confinement.' Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates." 111 S.Ct. at 2326-27.

6. The Supreme Court initially defined deliberate indifference in terms of what it is not. In Estelle v. Gamble, supra, it held that deliberate indifference to prisoners' serious medical needs constitutes cruel and unusual punishment, but that malpractice, negligence, or inadvertent failure to provide adequate care do not. Later, it distinguished deliberate indifference from actions taken "maliciously and sadistically for the very purpose of causing harm," Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the standard applied in prison disturbance cases.

Estelle and Whitley thus established that deliberate indifference occupies a middle ground between negligence and malice or intentional misconduct.

7. As the standard is applied in the district and circuit courts, deliberate indifference is generally established by examining the facts of prison officials' behavior rather than actual evidence of their state of mind -- the smoking gun which is rarely, if ever, available. Where injunctive relief has been sought, deliberate indifference has been construed to include collective defaults of state and local governments, including the failure to provide adequate staffing and funding, with no requirement that personal fault be traced to a particular wrong-headed perpetrator. The Supreme Court, for the first and only time, gave some affirmative content to the phrase in Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), a jail suicide case. In upholding liability based on failure to train, the Court observed that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 389-90.

8. The parallel is evident in many lower court decisions applying the deliberate indifference standard. Thus, in a recent inmate-inmate assault case, which Seiter cites as an example of the standard (111 S.Ct. at 2327), a circuit court held that deliberate indifference is shown "if there is an obvious unreasonable risk of violent harm to a prisoner or a group of prisoners which is known to be present or should have been known, and [the defendants] were outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm. . . " Morgan v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987); accord, Berry v. City of Muskogee, 900 F.2d 1489, 1496 (10th Cir. 1990) (deliberate indifference occurs when a defendant "disregards a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights."). Indeed, the mere filing of litigation may be enough to put officials on notice. See Duckworth v. Franzen, 780 F.2d 645, 655-56 (7th Cir. 1985), cert. denied, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986).

9. Deliberate indifference, if not admitted, can only be proved by conduct and circumstances. It can be shown by "systematic or gross deficiencies in staffing, facilities, equipment or procedures." French v. Owens, 777 F.2d 1250, 1254 (7th Cir. 1985), cert. denied, 479 U.S. 817, 107 S.Ct. 77, 93 L.Ed.2d 32 (1989). Generally, when it is clear from the facts that the defendant has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position, liability exits. For example, in Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 68, 102 L.Ed.2d 45 (1988), another inmate assault case cited with approval in Seiter, (111 S.Ct. at 2327), the court upheld a jury verdict against the Puerto Rico Director of Penal Institutions and its Corrections Administrator for transferring a psychotic prisoner to a grossly overcrowded general population facility that provided no mental health care; the prisoner was murdered by other inmates. The prison superintendent was also held liable for failing to have the prisoner's file reviewed promptly by professional staff to determine whether he needed to be segregated. The court held that the jury could have "inferred" or "found" deliberate indifference based on these objective facts, without reference to any evidence directly addressing the officials' mental state. 842 F.2d at 559-60. Similarly, in prison medical care cases, the lower courts have rarely focussed on actual evidence of state of mind; instead they have examined the conduct of medical personnel in delaying or refusing care, of correctional line staff in interfering with treatment, and of administrator staff in failing to see that adequate facilities and trained personnel were accessible and that medical orders were carried out. LaFaut v. Smith, 834 F.2d 389, 393-94 (4th Cir. 1987), cited with approval in Seiter, 111 S.Ct. at 2327. See also, Miltier v. Beorn, 896 F.2d 848, 852-54 (4th Cir. 1990); Bass v. Lewis & Wallenstein, 769 F.2d 1173, 1184-86 (7th Cir. 1985); Powell v. Lemmon, 914 F.2d 1459 (11th Cir. 1990). These, and many others cases, support the unremarkable conclusion that knowledge of the inmate's need, coupled with failure to act, supports a finding of deliberate indifference.

10. The Department asserts that programmatic limitations are the result of limited and diminished funding, and not the result of any deliberate indifference. Seiter does not validate such

a defense, the Court noting a "cost" defense was not before it and that where such a defense had been raised in the lower courts, it was unavailing. 111 S.Ct. at 2326. In any case, injunctive cases are not subject to a cost defense. The defendant is sued in his official capacity. Such an action is treated as one against the State itself. Accordingly, it is a commonplace in injunctive actions that lack of funds is not a defense to claims of constitutional deprivation. Ancata v. Prison Health Services, Inc., supra, 769 F.2d at 705-06. See also, Gates v. Collier, 501 F.2d 1291, 1319 (5th Cir. 1974); Battle v. Anderson, 564 F.2d 388, 396 (10th Cir. 1977); Smith v. Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980); Ramos v. Lamm, 639 F.2d 559, 573, n. 19 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981); Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983), cert. denied, 468 U.S. 1217, 104 S.Ct. 3587, 82 L.Ed.2d 885 (1984); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 336-37 (3d Cir.), cert. denied, 486 U.S. 1066, 108 S.Ct. 1731, 100 L.Ed.2d (1987). And, assuming a cost defense to be permissible, this Court finds it hard to understand how, after reducing the number of prisons with units housing inmates in need of protection from twenty-five to seven, and decreasing the number of inmates by more than half, the Department would need additional staff to achieve a comparable system.

11. The systematic deficiencies, which the Department claims to have remedied, continue. Although the Court accepts the sincerity of Secretary Singletary and Assistant Secretary Jones, that sincerity cannot excuse the "systematic deficiencies and neglect, reflecting an institutional failure" on the part of the Department. See Fisher v. Koehler, 692 F. Supp. 1519, 1562 (S.D. N.Y. 1988), aff'd, 902 F.2d 2 (2d Cir. 1990). The Department's conduct has violated the Eighth Amendment standards. It has improperly burdened plaintiffs' exercise of their Eighth Amendment right to a reasonably safe environment by forcing them to relinquish other rights and privileges as the price of having their lives protected from identifiable threats. By knowingly and unnecessarily forcing plaintiffs to make this choice between their constitutional rights to a safe and secure environment and the rights and opportunities available to other prisoners, the Department has violated and is continuing to violate plaintiffs' Eighth Amendment rights. Rudolph, supra, 594 F.2d at 1078; Sweet

v. South Carolina Dept. of Corrections, 529 F.2d 854, 868 (4th Cir. 1975) (special concurrence); Wojtczak, supra, 480 F. Supp. at 1303, 1306; Stickney v. List, 519 F. Supp. 617, 620 (D. Nev. 1981); M.C.I. Concord Advisory Bd. v. Hall, 447 F. Supp. 398, 401 (D. Mass. 1978).

12. Prior to November, 1990, the Department violated the Eighth Amendment by permitting and maintaining specific conditions in protective confinement that of themselves constitute cruel or unusual punishment in that most protective confinement inmates were (1) limited to two hours of out of cell recreation time per week, (2) limited to three showers per week, (3) prohibited from visiting the law library or regular library, or in some cases the prison canteen, (4) prohibited from attending religious services, (5) prohibited from smoking, (6) prohibited from having, or had severely limited visitation, (7) prohibited from watching of television and is some cases, listening to radios, (8) housed in some prisons with inmates in administrative confinement or disciplinary confinement, (9) provided no educational, vocational, or other types of self-improvement programs, (10) provided extremely limited job opportunities, and consequently, extremely limited opportunities for incentive gain time, (11) refused transfers until after they had spent a substantial period of time, often a year or more, in protective confinement, (12) prohibited from possessing personal property of a same type and amount permitted to inmates in general population, (13) subjected to strip and other searches more frequently than inmates in general population, (14) handcuffed, sometime in front and sometime in back, at some prisons whenever they were taken from their cells, (15) prohibited from using the telephone use, and (16) confined, in many cases, to their cells 24 hours per day, seven days per week, except for two hours of recreation and three showers per week. These conditions, separately or considered in their totality, are grievously debilitating and violated plaintiffs' Eighth Amendment rights. Dawson v. Kendrick, 527 F. Supp. 1252, 1288-89 (S.D. W.Va. 1981); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979); Doe v. District of Columbia, 697 F.2d 1115, 1124 (D.C. Cir. 1983); Bono, supra, 620 F.2d at 615.

13. The Department continues to punish those inmates who need protection, even after November, 1990. It has raised the custody classification of an inmate requiring protection, thereby

interfering with his ability to obtain favorable consideration for parole, controlled release, work release, and other transfers which require lower custody status.[207] It has reported to the Parole Commission that an inmate who sought protection, and who was ultimately transferred to eliminate his need for protection, had an unsatisfactory institutional adjustment, thereby causing that inmate to lose his controlled release date.[208] It still does not provide gain time in a manner equivalent to that which can be earned by general population inmates. Visiting is unduly restricted, both in terms of days and time. Educational, vocational and self-betterment programs are still severely limited when compared to the general population. Transfers which would eliminate the need for protection are still refused.[209] The Department, despite its efforts, has yet to eliminate all the punitive aspects of the protective management system.

14. Prison inmates retain those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological objectives of the prison system. Among the rights that prison inmates retain is the First Amendment right to the free exercise of religion. This includes a reasonable opportunity to exercise their religious beliefs. Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964).

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207. Pl. Ex. 1213.

208. Pl. Ex. 1413.

209. Pl. Ex. 1416. The purpose of the revised policy was to reverse the prior policy which, at least at some prisons, called for a year in PC before transfer consideration. Pl. Ex. 426; Pl. Ex. 432. Inmates were also told they must return to the general population if they wanted a transfer. Pl. Ex. 1202. And, despite the conditions for those in protective confinement, that they must demonstrate a need for a transfer. Pl. Ex. 1224. At other prisons, if the inmate's protection needs couldn't be solved in four or five months, and if the protective confinement unit was full, the transfer process would begin. Cook Deposition, p. 6, l. 18 et seq. Pl. Ex. 1253.

15. Communal prayer, religious instruction and private religious counseling are an essential part of the right to the free exercise of religion. Each is central to a meaningful opportunity to the practice of religious faith. Prison officials may not deny these rights without legitimate penological interests grounded in institutional security, or other legitimate penological objections. O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987).

16. In this case, the Department, despite its rule that communal religious services shall be available, knowingly restricted plaintiffs' right to the free exercise of their religion by failing to provide them with an opportunity to pray communally, by denying them the opportunity to participate in the rituals of their faith and by depriving them of religious counseling and instruction. There is no reason that the Department cannot provide communal services and religious instruction to protective confinement inmates. Even if security concerns prevent protective management inmates from attending services in the prison chapel, nothing prevents outside volunteers from conducting religious services for those who wish to participate in the protective management unit dayroom, or in some other facility.[210] In addition, since November, 1990, the Department has unnecessarily restricted the worship opportunities afforded to plaintiffs by offering only non-denominational worship services. And at Polk, the Department has violated the Establishment Clause by requiring protective management inmates to attend services, whether they wish to or not.

17. The Department has not shown that the restrictions on religious activities serve a legitimate penological objective. In most cases, the restrictions served no interest at all, other than the Chaplain's convenience and inertia. In every case, options are available to the Department to provide religious programming consistent with legitimate security concerns and comparable to that available to the general population. Under such circumstances, the Department has violated and is continuing to violate plaintiffs' First Amendment rights. Plaintiffs are entitled to relief.

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210. Chaplains are expected to obtain citizen volunteers for faith-specific religious activities. Tr. V.7, p. 1226, l. 12 - 18. They have not done so for protective management inmates.

18. Plaintiffs also have a fundamental constitutional right of access to the courts protected by the Fourteenth Amendment. Such access must be adequate, effective and meaningful. This fundamental right requires the Department to provide plaintiffs with meaningful access to adequate law libraries or adequate assistance from persons trained in the law. Bounds v Smith, supra, Hooks v. Wainwright, supra.

19. In this case, the Department knowingly deprived plaintiffs of meaningful access to the courts by denying them adequate opportunities to use the law library. In light of the readily available options, the Department's decision to limit the time protective management inmates can use the law library does not provide an opportunity equivalent to that afforded to general population inmates, who are permitted daily access to the library. The opportunities afforded protective management inmates, while certainly superior to the opportunities afforded their predecessors, still fall far short of adequate and comparable access. Wojtczak v. Cuyler, supra, 480 F. Supp. at 1300-01; Battle v. Anderson, 376 F. Supp. 402, 426-27 (E.D. Okla. 1974). The Department, at a minimum, should be able to provide protective management inmates with a day for their exclusive use to browse within the law library. There is no reason why such a program cannot be run, particularly since many of the prison law libraries are not ordinarily in use on weekends.

II. THE DEPARTMENT HAS VIOLATED PLAINTIFFS' RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT

20. The Due Process Clause of the Fourteenth Amendment protects plaintiffs against the loss of life, liberty, or property interest without due process of law. An arbitrary or unreasonable denial of such an interest violates this constitutional guarantee. Similarly, the Equal Protection Clause of the Fourteenth Amendment prohibits the making of classifications without sufficient justification. Prisoners are entitled to the benefit of that clause. See Turner v. Safley, 482 U.S. 78, 85, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64; Williams v. Lane, supra, 851 at 881, ("Prisoners do not surrender their rights to equal protection at the prison gate").

21. Even if a classification affects fundamental rights, such as the rights to the free exercise of religion, to meaningful access to the courts and to the liberty interests embodied in parole and release from incarceration, it will be upheld if it bears some rational relationship to a legitimate penological objective. Thornton v. Hunt, 852 F.2d 526 (11th Cir. 1988). Those cases in which protective custody inmates have alleged that their living conditions and access to programs were unequal to those in the general population have all been analyzed under the rational basis standard. See Williams v. Lane, supra, 851 F.2d at 881 ("Unequal treatment among inmates, however is justified if it bears a rational relation to legitimate penal interest.").

22. "To withstand equal protection review, legislation that distinguishes between [one group] and others must be rationally related to a legitimate governmental purpose." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446, 105 S.Ct. 3249, 3285, 87 L.Ed.2d 313 (1985). But the test is not a toothless tiger. The "rational basis test [is applied] more stringently than in the past. Under the Cleburne . . . there is no place for judicial imagination or hypothesizing about possible legislative purposes." Coburn By and Through Coburn v. Agustin, 627 F. Supp. 983, 990 (D. Kan. 1985). "The mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975).

23. There is no rational basis, grounded in legitimate penological objectives, for the limitations imposed on work assignments, gain time, vocational, educational and self-improvement programs, religious activities, law library access, and the myriad of other privileges, activities and programs which are provided to general population inmates but not to protective management inmates. When this action commenced, inmates needing protection were harshly treated, indeed. Some of those harsh conditions continue. There is no legitimate explanation, reasonably related to legitimate penological objectives, to justify them. Prison restrictions which are not reasonably related to legitimate penological interests violate the Fourteenth Amendment. Turner v. Safley, supra, 107 S.Ct. at 2261; O'Lone v. Estate of Shabazz, supra. In determining whether the punitive

conditions imposed on inmates requiring protection violates the Equal Protection of the Laws, the Court must examine the following four factors:

> (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, (2) whether there are alternative means of exercising the right that remains open to prison inmates, (3) the impact accommodation of the asserted constitutional right will have on guards, other inmates, and on the allocation of prison resources, and (4) the presence or absence of ready alternatives that fully accommodate the prisoner's rights at de minimis costs to valid penological interests.

Turner v. Safley, supra, 107 S.Ct. at 2262. In applying these factors, it is clear that the punitive conditions imposed on inmates requiring protection cannot pass constitutional muster.

A. No Valid, Rational Connection to Support Punishing Those Who Need Protection

24. Prison authorities have a constitutional duty[211] to protect inmates in their custody from harm at the hands of other inmates. Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987). Security is, indeed, a primary function of prison officials. But, there is certainly no rational connection between meeting that duty and treating those for whom the duty must be met as somehow at fault and, therefore, subject to punitive conditions.

25. It has long been accepted that "government may not penalize exercise of a right by withholding an otherwise discretionary benefit." Tribe, American Constitutional Law, § 11-5, p. 782 (2d ed. 1988)(emphasis in original). See also, Adams v. James, 784 F.2d 1077 (11th Cir. 1986). That, however, is precisely what the Department has done in its treatment of those inmates needing protection. The plaintiffs' access to jobs, to gain time, to educational and self-betterment programs, to the prison law library, to legal assistance from trained law clerks, to religious services and programs, and to a myriad of other prison programs and activities is significantly less than that of inmates in the general population. Yet, prisoners have a constitutional right of access to law

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211. As well as a common law duty. Department of Health & Rehabilitative Services v. Whaley, 574 So.2d 100 (Fla. 1991).

libraries or to persons trained in the law.[212] Likewise, prison officials must permit inmates a reasonable opportunity for the exercise religious freedom.[213] Yet, all these rights, and others, are infringed solely because the inmate needs protection. These restrictions serve no legitimate security concern. Instead, they just serve to punish.

B. Availability of Alternatives

26. Under the second factor, this Court must consider whether there are alternatives available to those inmates who need protection. There are none. Plaintiffs cannot leave. They must depend on defendants for their security. Many inmates spend substantial periods of time in protective management.[214] To force them to sacrifice their personal safety in order to have even the limited rights and privileges which are available to general population prisoners is not an alternative.

C. Impact on Correctional Staff, Other Inmates and the Prison

27. Under this factor, the Court must consider the impact of the requested accommodation on staff, other inmates and the prison. It is clear that removing the punitive aspects of protection has a positive, not a negative impact on staff, other inmates, and the prison. Removal of the punitive refusal to authorize transfers, and adoption of a sounder gate-keeping function, has reduced the number of inmates requiring protection in half. Because those in protection are treated in a more normal fashion (at least normal for prison life), it is far easier for staff and inmates to go about their daily activities. No legally recognizable harm befalls general population inmates if protective management inmates have the opportunity to participate in prison programs and activities.

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212. See ¶¶ 18 and 19, supra.

213. See ¶¶ 14 - 17, supra.

214. Def. Ex. 22. Arthur Schaffer has been in protective management at Florida State Prison for 23 months. Tr. V.2, p. 337, l. 7 - 13. Frederick Reinhart has been in either protective confinement of protective management most of the time since September, 1985. Tr. V.3, p. 500, l. 12 - 18. Randy Wheeler first requested protection in 1984. Tr. V.2, p. 218, l. 15.

28. A non-punitive protective management system, operated on the basis of need, has only a positive impact on the system. That is evident from the drop in the total number of inmates in protection as well as a drop in the number of prisons housing inmates in need of protection.

D. Existence of Alternatives With No Cost to Valid Penological Interests

29. The final factor for the Court to review is whether there are ready alternatives to satisfy Plaintiffs' requirements at de minimis cost to valid penological interests. In fact, the implementation of a non-punitive protective management system has reduced the cost of operations by reducing the number of prisons with protective management units and by reducing the number of inmates requiring protection, at no cost to valid penological interests. That was certainly also true at Statesville Prison in Illinois,[215] where implementation of a constitutional system of protection did not produce an increase in the number of inmates in protection,[216] despite the fears of prison administrators that if comparability were achieved, the protection population would swell dramatically.[217] And it did not cost a lot of dollars[218]. It just required creative management and scheduling, minor physical arrangements, like fences, and minor physical renovations -- and did not increase staffing.[219] Nor did comparability cause resentment or conflict between open population and protection inmates.[220]

III. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

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215. See Williams v. Lane, supra.

216. Tr. V.4, p. 703, l. 22 - 23.

217. Tr. V.4, p. 703, l. 24 to p. 704, l. 9. In Florida, of course, the population has declined by half. Both gate keeping, Tr. V.4, p. 704, l. 10 - 16 and the stigma attached to being in protection, Tr. V.4, p. 704, l. 17 - 20, serve to keep the numbers down.

218. Tr. V.4, p. 704, l. 21 - 24.

219. Tr. V.4, p. 704, l. 24 to p. 705, l. 12.

220. Tr. V.4, p. 705, l. 13 to p. 706, l. 9.

30. As a class of inmates who have been or will be assigned to protective management, plaintiffs have been and continue to be proximately harmed by the Department's violations of the Constitution. Since a violation of plaintiffs' Eighth and Fourteenth Amendment rights constitutes per se irreparable harm, plaintiffs are entitled to an injunction against the Department's continuing conduct. Westchester Legal Services, Inc. v. Westchester County, 607 F. Supp. 1379, 1384-85 (S.D. N.Y. 1985); Lee v. McManus, 543 F. Supp. 386, 392 (D. Kan. 1982); Northern Penna. Legal Services, Inc. v. Lackawanna County, 513 F. Supp. 678, 685 (M.D. Pa. 1981).

31. The Court agrees with defendant that it must determine whether or not there is an adequate management or monitoring program in effect, not only whether the protective management rule, on its face, is adequate.[221] Even though the Department has altered its conduct and provided improved conditions and programming, an injunction is appropriate. Problems remain. Perhaps, some subordinates are unaware of the Secretary's policies. The Department has not lived up to its own rule. The management and monitoring system did not ferret out or correct a wide range of problems. Inmates assigned to protective management still lack comparable work opportunities. They still earn less gain time than general population inmates -- and are still forced to choose between safety and earlier release. Religious services are not generally available. Other programs and activities, including educational and vocational programs, and substance abuse programs, are only sporadically available.

32. The Department admits it made changes because of the pressure of this case. Indeed, it continued to make changes all the way to the last day of the trial. With the end of this litigation, there would be nothing in place to ensure that the Department continues its efforts to treat those in need of protection fairly unless an injunction is entered for this purpose. It is the lack of procedures

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221. Tr. V.4, p. 700, l. 4 - 9. That the Department was forced to survey its own institutions to find out how those in need of protection were being treated, speaks volumes to the oversight exercised by those in charge. See Plaintiffs' Exhibits 2, 4, 19, 23, 30, 45, 56, 62, 72, 75, 84, 130, 135, 139, 144, 150, 151, 161, 170, 175, 184, 197, 200, 205, 218.

that distinguishes this matter from the Costello[222] situation. That case, a twenty year saga of prison reform litigation, primarily concerned with overcrowding and medical care, may be about to end. If it is dismissed, after many years of monitoring, law to prevent overcrowding and an independent Correctional Medical Authority [§ 945.601 - .6035, Florida Statutes (1991)] will be left in place to insure that the Department of Corrections lives up to its promises. Here, if the case is dismissed, nothing will be left in place to insure that conditions for those needing protection reach comparability and do not revert to their pre-litigation condition.

33. Article III, section 2 of the United States Constitution limits the exercise of judicial power to actual cases and controversies.

> A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome of the litigation, such as where there is no reasonable expectation that the violation will occur again or where interim relief or events have eradicated the effects of the alleged violation.

Saladin v. City of Milledgeville, 812 F.2d 687, 693 (11th Cir. 1987), citing Los Angeles County v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). As a general rule, voluntary cessation of illegal conduct does not render a case moot. See United States v. W. T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed.2d 1303 (1953). A case will not be dismissed as moot if "[t]he defendant is free to return to his old ways." Id. Nevertheless, a case may become moot if the defendant demonstrates that "there is no reasonable expectation that the wrong will be repeated." Id., 345 U.S. at 633, 73 S.Ct. at 897.

34. "The burden of demonstrating mootness is a heavy one." Los Angeles County v. Davis, supra, 440 U.S. at 631, 99 S.Ct. at 1383). The defendant must demonstrate that it is "absolutely clear" that the allegedly wrongful behavior could not reasonably be expected to recur. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 66, 108 S.Ct. 376, 386, 98 L.Ed.2d 306 (1987) (emphasis added), citing U. S. v. Concentrated Phosphate Export Ass'n., 393

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222. Def. Ex. 5.

U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968). Whereas voluntary cessation of challenged activity does not, by itself, render a suit moot, it is, however, "one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." Id. In Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), cert. dis'd, sub nom, Ledbetter v. Jones, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), the plaintiffs challenged the conditions in the Jackson County Jail in Mississippi. During the pendency of the suit, the defendants alleged that the need for an injunction had been eliminated by the construction of a new jail facility. The court held that the changes made by the defendants did not "remove the necessity for injunctive relief, for practices may be reinstated as swiftly as they were suspended." 636 F.2d at 1375.

35. Similarly, in National Advertising Co. v. City of Fort Lauderdale, 934 F.2d 283 (11th Cir. 1991), the City's amendment of its sign ordinance did not render moot the plaintiff's action for declaratory and injunctive relief. In rejecting the mootness claim, the court held:

> The City presently possesses the power and authority to amend the sign code. It remains uncertain whether the City would return the sign code to its original form if it managed to defeat jurisdiction in this case. Neither the City nor the district court has established that the likelihood of further violations is sufficiently remote to dismiss National's claims.

934 F.2d at 286. In Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir.), cert. denied, 490 U.S. 1090, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989), individuals challenged a school's custom of delivering an invocation before high school football games. The school principal adopted an alternative ritual. The court rejected the mootness argument because the change was "not a formal policy adopted by the School District or the Douglas County Board of Education, and the defendants never promised not to resume their prior practice." 862 F.2d at 833-34.

36. In Secretary of Labor v. Burger King, 955 F.2d 681 (11th Cir. 1992) the Eleventh Circuit recently reviewed the standards for determining whether a case should be dismissed as moot. There the Department of Labor sought a permanent injunction against Burger King, alleging violations of

the Fair Labor Standards Act with reference to employment of minors. Burger King submitted a new policy wherein it discharged all employees younger than 16 years of age, prohibited the subsequent employment of minors, and argued that its actions rendered the suit moot. Reversing the district court's mootness dismissal, the Eleventh Circuit reiterated the rule from W.T. Grant that voluntary cessation of allegedly illegal conduct does not render a case moot. Thus:

> Because of the possibility that the Defendant could merely return to his old ways, "[t]he test for mootness in cases such as this is a stringent one... A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. Greenwood Utilities Com'n. v. Hodel, 764 F.2d 1459, 1462-63 (11th Cir. 1985), quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, & n. 10, 102 S.Ct. 1070, 1074, & n. 10. (1982). As the Supreme Court has noted, "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption. United States v. Oregon State Medical Society, 343 U.S. 326, 333, 72 S.Ct. 690, 695 (1952) [quoted in Grant.]

955 F.2d at 684. In reaching its decision, the Eleventh Circuit found the following factual elements to be relevant: Burger King's five year history of violations; the timing of Burger King's "promise" which came on the eve of trial; and the inability of Burger King management to control the actions of individual restaurants. 955 F.2d at 684-685. The concerns expressed by the Eleventh Circuit in Burger King are present in the instant case.

37. In the instant matter, there is a long history of mistreatment of inmates in need of protection. The Department contends that its current practice, governed by a new rule on protective management, insures that the prior practices cannot be repeated. However, nothing prevents the Department from again amending Chapter 33-3.0082. And, as the record demonstrates, like Burger King, the Department's management seems unable to control the actions of individual prison officials.[223] Moreover, Chapter 33-3.0082 contains a great many ambiguous and qualifying

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223. The Department has shown an inability to uniformly implement the new protective management rule at individual institutions. Both Secretary Singletary and Assistant Secretary Jones
(continued...)

statements, which have been used to limit the programs and activities available to protective management inmates, both in the past and now, and which are of great concern to the Court in light of the fact that shortages of supervisory staff, and other factors, could easily become a common occurrence in large institutions operating on tight budgets.

38. Even now, as before, Department staff interpret provisions in the rules that are phrased in terms of minimums as maximums.[224] Published schedules mean very little, and change frequently. At Martin Correctional Institution new schedules went up the day before plaintiffs' counsel's planned visit on October 29, 1992. Educational programs were re-established, a "Psychology and Coping Skills" course was placed on the schedule, although the inmates had never heard of it, canteen visits were increased from one to four, and religious services were said to be available in the visiting park, although that was news to the inmates.

39. The Department suggests that a variety of procedures in place serve to insure the faithful implementation of the November, 1090, protective management rule and thus negate the necessity for intervention by this Court. Among them, the Department suggests that placing an Assistant Secretary in charge, and having him work through Regional Directors and Superintendents,[225] with the Regional Directors responsible for on-site monitoring to insure compliance with the rule,[226] will help to assure compliance. It further suggests that relief is unnecessary because inmates can use the

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223. (...continued)
spent much of their time on the stand confessing to error and advising the Court of corrective actions being taken in response to testimony in this case.

224. Pl. Ex. 1232.

225. Tr. V.6, p. 977, l. 16 - 20.

226. Tr. V.6, p. 970, l. 7 - 11. The Department offered no evidence at trial of any monitoring or corrective action taken by a Regional Director. To the contrary, the only item of evidence (Pl. Ex. 1416) concerning a Regional Office indicated the Regional Office was acting contrary to the PM Rule. Tr. V.10, p. 1694. l. 16 to p. 1696, l. 2.

recently certified inmate grievance process to correct any problems which might occur in the future. The Court finds that a hollow suggestion. As the record shows, prior to and during this litigation, many inmates tried to use the grievance process. Their efforts were uniformly unsuccessful.[227] Each restriction grieved, even those apparently in direct contravention of Rule 33-3.0082, F.A.C. (1985),[228] and even those which called for relatively minor policy changes,[229] were upheld at all levels of the system. The Department has been unable to present even a single grievance[230] wherein it granted relief to an inmate in protection complaining about restrictions on activities and programs.[231] Moreover, those with overall responsibility for implementation of the protective management rule do not necessarily see the grievances.[232] Nor does the grievance process track

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227. Pl. Ex. 1233; Pl. Ex. 1234. An inmate who grieved the lack of privileges for protective confinement inmates to Tallahassee was told that "protective confinement privileges are at the discretion of the Superintendent in charge." Pl. Ex. 894.

228. Pl. Ex. 778; Pl. Ex. 1221; Pl. Ex. 1228.

229. Pl. Ex. 1207 (smoking); Pl. Ex. 1205 (radio). At the prison level, a grievance asking for permission to take a GED test in the Hearing Room which is part of the unit where protective confinement inmates were housed was marked "granted". The inmate was told he could take the GED test if he signed himself out of the protective confinement unit. Pl. Ex. 1210.

230. The Department's grievance statistics are disturbing. The percentage of grievances granted is very low, the percentage of grievances rejected for lack of compliance with the grievance procedure rules is very high. Def. Exs. 7 - 10.

231. Sometimes, having your grievance granted, doesn't mean much. At one prison, inmates who submitted grievances asking for jobs, and incentive gain time, were told that their grievances were granted -- a task force would study the issues. No job, no gain time. Appeals to Tallahassee were denied. Pl. Ex. 1206; Pl. Ex. 1208. The same fate met attempts to get a radio. Pl. Ex. 1205. Other inmates simply received the runaround. Pl. Ex. 1246; Pl. Ex. 1247.

232. Tr. V.6, p. 941, l. 12 - 13. It is a decision left to the discretion of the grievance administrator. Tr. V.6, p. 1065, l. 4 - 22.

complaints about PM conditions, such as those concerning religious services, visits, etc., or program participation grievances.[233] A grievance process is simply not adequate to insure compliance with a new operational program.[234]

40. The Department further suggests that its critical incident system,[235] management information system,[236] complaint letter logging system,[237] and its Inspector General's office able to investigate complaints,[238] will also serve to insure compliance. While all are undoubtedly valuable, the record in this case suggests that something more is necessary.

41. The Department officials who have the principal responsibility for implementing and enforcing the new protective management rule, Secretary Singletary and Assistant Secretary for Operations Ronald Jones, are the same officials who were responsible for, and defended, the protective confinement rule which led to the initiation of this litigation. Although Secretary Singletary asserts that the Department will never return to the practices which led to this litigation, the Court is concerned given his failure to pursue change when given the opportunity. In 1985, the Department's General Counsel advised now Secretary Singletary, then the Assistant Secretary for Operations, that the "cases evidence a trend toward requiring 'equal' treatment for inmates requiring placement in a protective custody unit."[239] The defendant did nothing. In September, 1989, a year

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233. Tr. V.6, p. 930, l. 21 - 25; Tr. V.6, p. 1032, l. 20 - 25. It only tracks admission to PM and transfer grievances. Tr. V.6, p. 930, l. 7 - 15.

234. Tr. V.4, p. 696, l. 22 to P 697, l. 7.

235. Tr. V.6, p. 979, l. 1 - 6.

236. Tr. V.6, p. 979, l. 6 - 9.

237. Tr. V.6, p. 979, l. 9 - 12.

238. Tr. V.6, p. 979, l. 12 - 13. However, the Inspector General has never done an investigation directed primarily at conditions for inmates in PM. Tr. V.6, p. 882, l. 13 - 16.

239. Pl. Ex. 1217.

after this litigation was filed, the Department's General Counsel presented Assistant Secretary Singletary with a draft of relatively minor amendments to Chapter 33-3.0082. The defendant did not seize the opportunity to suggest the type of sweeping changes that he now suggests demonstrate a commitment to permanent change.[240] Instead, he reaffirmed that the intent of the Department was to treat inmates in protective confinement in the same way it treated inmates in administrative confinement.[241] These factors, combined with the Department's history of violating the Constitutional rights of this class of inmates, indicate the defendants have not met their "heavy burden" of showing that there is no reasonable expectation that these violations will recur.

42. In this case, the Department's conduct has violated and continues to violate both the Eighth Amendment's prohibition of Cruel and Unusual Punishments as well as the Due Process and Equal Protection Clauses in several independent ways. First, the Department's denial to plaintiffs of the opportunity for communal religious services, for meaningful access to legal services, for comparable jobs and gain time, for educational and vocational opportunities, and for self-betterment programs, improperly forces plaintiffs to forfeit their right to participate in prison programs and activities in order to preserve their right to personal safety, impairs their fundamental rights by restricting the free exercise of religion, by impeding their access to the courts and by reducing their chances for rehabilitation and parole. Since the Department has not shown that these denials served

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240. Pl. Ex. 160.

241. Pl. Ex. 287. Inmates can be placed in administrative confinement for a variety of reasons, including (1) pending disciplinary or outside criminal charges, (2) for investigation, (3) to allow time to properly classify a new arrival, and (4) for any other reason grounded in safety or security concerns. Rule 33-3.0081(1), F.A.C. (1992). Like the former PC rule, Rule 33-3.0081(2), F.A.C. (1992), provides that "[a]dministrative confinement is not disciplinary in nature and inmates in administrative confinement are not being punished." The only purpose of this provision would seem to be an effort to avoid the due process mandates of Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), given that while in administrative confinement, inmates have no opportunity to participate in any prison activities.

a legitimate penological interest, the Court finds that is has violated and continues to violate the Eight Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection and due process.

43. Second, the Department has refused to provide plaintiffs with housing and programmatic conditions comparable to those given to general population inmates. It has done so despite the mandate of its own Rule that the "treatment of inmates in protective management shall be as near that of the general population as the individual inmate's safety and security concerns permit." Rule 33-3.0082, F.A.C (1990). That state law guarantee, embodied in the Department's official rules, gives rise to a liberty interest that the Department' has denied arbitrarily within the meaning of the Due Process Clause. Moreover, the Department's rule demonstrates, along with other evidence in this case, that the Department cannot show any rational relationship between its conduct and a legitimate penological interest. Its conduct is, therefore, inconsistent with equal protection standards as well.

44. Finally, although the Department concedes that plaintiffs were the catalyst for the November changes, the Department refuses to concede that the protective confinement system violated the constitutional rights of the plaintiffs.[242] In not admitting wrongdoing, the Department leaves the Court no choice but to grant injunctive relief to the plaintiffs.

45. The Court finds that Chapter 33-3.0082, F.A.C. (1990), governing protective management, provides an adequate framework for the implementation of a protective management system that would provide comparability to inmates in need of protection. But, the Court agrees

242. Cloid Schuler, a former official of the Indiana Prison, system who testified on behalf of the Department, agreed that the PC system was violative of the constitution. Tr. V.9, p. 1587, l. 2 - 6.

with Professor Morris that programs, not rules, create comparability.[243] The critical issue is not what is written,[244] the critical issue is what is done.

46. Implementation of a protective management system which will provide comparable opportunities to all inmates needs somebody watching it all the time, it needs hands-on-management.[245] Unfortunately, the mea culpa's offered by the Department at trial demonstrate the

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243. Tr. V.3, p. 445, l. 20 - 23.

244. As Michael Mahoney, who has served as a Court Monitor in numerous cases testified, in monitoring,

> I rarely find fault with policies, stated procedures or rules.
>
> Where the breakdown usually falls is in the implementation process. In order to move for implementation of a new rule, new policy, or new direction, it takes a number of things. It takes commitment from the top of the department to exercise in the spirit and letter of the new policy that this is going to be the policy, and we are going to move full scale ahead.
>
> The second thing it takes is training, and at all levels particularly when you have a variety of institutions operating a policy system wide for ongoing training, technical assistance from central office, and another that can help, a monitoring system that could provide ongoing monitoring as to compliance issues. There are other kinds of mechanics, training, technical assistance, central office oversight, and supervision, and grievance, and other management systems can be put into place, but clearly successful implementation of a new direction whether it be by court order policy directive needs ongoing monitoring to insure compliance over time. We are talking about in this case with protective management a new approach, and a new responsibility to a difficult problem that has been around for awhile, and calling for some creativity and commitment over time.

Tr. V.4, p. 695, l. 11 to p. 696, l. 21.

245. Tr. V.3, p. 441, l. 23 to p. 442, l. 9.

absence of the necessary hands on management. Accordingly, the Court finds it necessary to enter the attached remedial order.

47. As prevailing parties, plaintiffs' counsel are entitled to their costs, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988, for their representation of plaintiffs in this action.

ORDER

This action came on for trial by the Court from December 14, 1992 through December 18, 1992, December 21, 1992 through December 23, 1992, and January 5, and 6, 1993, and the Court having heard all the evidence and the arguments of the parties, being fully advised in the premises, and finding for the reasons set forth in the foregoing Findings of Fact and Conclusions of Law that the Department has violated and, unless enjoined, will continue to violate the rights of plaintiffs under the First, Eighth and Fourteenth Amendments to the United States Constitution,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That Harry K. Singletary, Jr., as Secretary of the Florida Department of Corrections, as well as his agents, servants, employees, attorneys, representatives and all other persons in active concert or participation with any or all of them (collectively the "Department") is hereby permanently enjoined and restrained from any and all conduct that has violated, violates, or will violate the rights of Plaintiffs under the Eighth or Fourteenth Amendments to the United States Constitution.

2. That the Department shall submit to the Court and to counsel for the Plaintiffs within 30 days of the date of this Order a comprehensive plan of compliance ("Plan") that shall provide for implementation not more than 120 days from the date of this Order of at least the following programs and housing conditions for inmates in protective management in Florida's prisons:

A. Religious Programming. The Plan shall ensure that, on an ongoing basis, each inmate in protective management has opportunities commensurate with those afforded to general population inmates at his or her respective prison to attend a denominational communal religious

worship service at least weekly, to participate in classroom religious instruction apart from worship service, and to receive private religious counseling with clergy. The Plan shall ensure that, on an ongoing basis, facilities of appropriate dignity, capacity and utility are provided for the meaningful provision of such worship, instruction and counseling opportunities to protective management inmates and that sufficient precautions are taken to ensure reasonable control of the identifiable security threats to the protective management inmates participating in such religious programming.

To ensure that the religious needs and bona fide denominational preferences of protective management inmates are reasonably met, the Plan shall provide for procedures (a) to survey each inmate promptly upon his admission to protective management and periodically thereafter to ascertain any bona fide denominational religious worship, instruction and counseling preferences of the inmate, (b) to ensure that the Chaplaincy Department makes good faith efforts promptly to find qualified clergy or lay persons to minister to each such bona fide denominational preference, and (c) to keep protective management inmates informed on an ongoing basis of the availability of denominational communal worship services, classroom religious instruction programs and private religious counseling with clergy.

B. Library. The Plan shall ensure that each inmate in protective management has access to a general library, a law library, legal materials and competent legal assistance commensurate with that available to the general population inmates at the inmate's respective prison. The Plan shall provide a means for protective management inmates to have open access to general and law library materials for browsing and research and to competent legal assistance from inmate law clerks. Among the means the Plan should consider are (a) reserving the library one full day per week for the exclusive use of protective management inmates, (b) establishing one or more satellite law libraries, appropriately staffed with competent inmate law clerks, within or near the protective management units, and (c) the circulation of current lists of books in the general and law library. The Plan shall further provide for a means to make available to protective management inmates

special programs and services similar to any such special programs and services offered to general population inmates.

C. <u>Vocational, Educational and Self-Betterment Programming</u>. The Plan shall provide that opportunities in vocational training be available to protective management inmates, in a manner consistent with the vocational training opportunities made available to general population inmates at the respective prisons. Among the means for the provision of vocational training programs for protective management inmates that the Plan should consider are (a) institution of programs, such as typing, computer programming, tailoring, shoe repair, clerk and paralegal training, that can be offered within the protective management unit and (b) use of the existing vocational training and prison industries areas at each prison at times or under conditions that are consistent with reasonable control of the identifiable security threats to the protective management inmates participating in such programs.

The Plan shall also provide that opportunities for academic education in classroom settings be available to protective management inmates in a manner comparable to that available to general population inmates. GED and ABE course shall be provided to protective management inmates using the same manner of instruction as used for general population inmates. The Plan shall further provide for surveys of protective management inmates at reasonable intervals to determine interest in and qualification for academic courses, including degree granting programs if available to general population inmates, in order that a reasonable number of academic courses shall be made available to protective management inmates. The Plan should consider coordination of the academic education courses offered to protective management inmates with those offered to general population inmates so that, should an inmate in protective management enrolled in any such course leave protective management or vice versa, that inmate would be able to continue with such course work.

The Plan shall ensure that, on an ongoing basis, facilities and equipment appropriate for vocational training programs and for classroom academic teaching are provided and that sufficient precautions are taken to ensure reasonable control of the identifiable security threats to the protective management inmates participating in such programming.

The Plan shall also ensure that self-betterment programs, such as Alcoholics Anonymous, Narcotics Anonymous, and other programs shall be provided to protective management inmates in the same manner as offered to general population inmates. The Plan shall further provide for surveys of protective management inmates at reasonable intervals to determine interest in and need for such programs.

D. Jobs. The Plan shall provide that opportunities for jobs be available to all protective management inmates and shall ensure that good faith efforts will be made to have available to qualified protective management inmates jobs at the higher skill levels as well as jobs which carry compensation.

E. Gain Time. The Plan shall provide a mechanism to insure that gain time awards to protective management inmates are made in a manner equivalent to awards made to general population inmates.

F. Conditions.

i. Recreation. The Plan shall provide that opportunities for indoor and outdoor recreation be available to protective management inmates commensurate with that available to general population inmates at the respective prisons. The Plan shall ensure that, on an ongoing basis, recreational facilities and equipment comparable to that provided the general population inmates are provided to the protective management inmates.

ii. Food Service. The Plan shall provide for procedures that will ensure that the food served to the protective management inmates is the same as that served to the general population inmates and that protective management inmates are afforded sufficient time to eat.

iii. Visiting. The Plan shall provide that opportunities for visiting available to protective management inmates be commensurate with that available to general population inmates at the respective prisons, including the days of the week on which visits take place, the time of the day of the visits, and the hours of visiting time provided.

iv. Cells. The Plan shall provide that cell furnishings and equipment available to protective management inmates be comparable to that furnished to general population inmates.

v. Habitability. The plan shall provide for the prompt removal of the window screening at Florida State Prison and the window shields at Martin Correctional Institution, or the relocation of the protective management units. It shall also provide for the improvement of the ventilation system at Union Correctional Institution so as to achieve reasonable comparability in temperature throughout the year between the protective management unit and the general population units.

G. Protective Management Status. The Plan shall provide for procedures for holding apart from inmates in protective management (a) inmates who have requested protective management status, but for whom the prison administration has yet to substantiate that protective

management is needed and (b) inmates for whom the prison administration has determined that protective management is either not or no longer needed and has ordered returned to the general population. No inmate shall be permitted to remain in such holding status more than 30 days, unless it is the result of the pendency of a grievance filed by the inmate.

3. That an Advisory Panel is created to review the Plan and advise the Court on its feasibility and compliance with the purposes and requirements of this Memorandum Opinion and Order. The Advisory Panel shall also assist the Court in monitoring the Department's compliance with the Plan ultimately accepted by the Court.

4. The Advisory Panel shall consist of (1) a corrections professional selected by The Department, (2) one counsel for the Department, (3) one counsel for Plaintiffs, (4) a corrections professional selected by counsel for Plaintiffs, and (5) a corrections professional selected by the Court. The reasonable expenses incurred by the members of the Advisory Panel, including the normal fees of the counsel for Plaintiffs, of the corrections professional selected by counsel for Plaintiffs and of the corrections professional selected by the Court shall be paid by the Department. The parties shall make and report their selections to the Court within 30 days of the date of this Order.

5. The Advisory Panel shall review the Plan within 60 days of its submission to plaintiffs' counsel and the Court and shall advise the Court whether the Plan appears to adequately comply with this Order. If the Advisory Panel approves the Plan, the Court expects that the Department will fully and effectively take all steps necessary to implement the Plan.

6. The Department shall report to the Court and the Advisory Panel quarterly on its compliance with the Plan for a period of three (3) years from the date of implementation of the Plan, unless the Court extends or shortens the period. The Advisory Panel shall dissolve upon the submission of The Department's final compliance report due under this Order if the Court finds, upon the advice of the Advisory Panel and such other showing as the Court deems appropriate, that The Department has been in compliance with this Order for at least the immediately preceding 12

months. Otherwise, the Advisory Panel shall continue until The Department has established to the satisfaction of the Court that they have been in compliance with this Order for at least the 12 months immediately preceding the determination. The Department's obligations under this Order shall survive the dissolution of the Advisory Panel.

7. The Advisory Panel, beginning immediately after the Department's submission of its first quarterly report, and for the period set forth in this Order, shall evaluate the Department's implementation of and compliance with the Plan. Defendant shall, in his official capacity, pay the fees and expenses of the Advisory Panel necessary to carry out the Panel's duties.

8. The Advisory Panel shall have unlimited access, with reasonable notice, to all prisons, to all inmates, to all public or client records, and to all files and papers maintained by the Department with reference to protective management.

9. The Advisory Panel shall be authorized to conduct interviews with any inmate or any staff member or employee of the Department concerning matters relevant to protective management at any time. The plaintiffs' representatives on the Advisory Panel shall be permitted to meet with inmates privately.

10. Before any alleged violation of the Plan, or this Memorandum Opinion and Order, is brought before this Court, the parties shall attempt to resolve the problem among themselves by good faith, face-to-face negotiations. Failing that, the Advisory Panel, or Plaintiffs' Counsel may thereafter at any time petition the Court for enforcement of the Plan, or other relief, and may present all relevant evidence to prove that the Department is not complying with the terms of the Plan or the Court's order.

11. Plaintiffs' counsel are awarded costs of suit, including their reasonable attorneys, fees, as Plaintiffs are the prevailing parties in this action. The Court allows the parties a period of sixty days from the date of this Order to resolve the question of the amount of fees and costs. If the parties are unable to do so, they shall advise the Court at the end of the sixty day period and, within thirty days thereafter, plaintiffs' counsel move for an award of fees and costs in accordance with 42 U.S.C. § 1988, 28 U.S.C. § 1821 and 28 U.S.C. § 1920.

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James C. Paine
SeniorJudge
United States District Court

APPENDIX

APPENDIX A
PROGRAM COMPARISON CHARTS