

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>ROBERT LEE HARRIS, JR.,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>DONALD L. ALLEN,</b>	)	
<b>Commissioner of the Department</b>	)	
<b>of Corrections, in his personal</b>	)	
<b>and official capacities, and</b>	)	<b>Civil No. 91-89-B-H</b>
	)	
<b>MARTIN MAGNUSSON,</b>	)	
<b>Warden of the Maine State</b>	)	
<b>Prison, in his personal and</b>	)	
<b>official capacities,</b>	)	
	)	
<b>Defendants</b>	)	

**PROPOSED FINDINGS OF FACT AND  
RECOMMENDED DECISION**

Plaintiff Robert Harris, an inmate at the Maine Correctional Institute in Warren, Maine,<sup>1</sup> seeks damages and equitable relief under 42 U.S.C. 1983 for violations of his constitutional rights. The plaintiff claims *inter alia* that he has been deprived of his rights to due process, equal protection and freedom of religion by the nature and extent of his confinement to administrative segregation (or its equivalent). Pursuant to a referral order (Docket No. 84), an evidentiary hearing was held before me on October 20 and December 16, 1992. I recommend that the following findings of fact be adopted and, for the reasons which follow, that damages and certain injunctive relief be ordered.

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<sup>1</sup> Throughout most of the time relevant to this case, the plaintiff was an inmate at the Maine State Prison in Thomaston, Maine.

## I. PROPOSED FINDINGS OF FACT

### A. Events Prior to Harris's Placement in Segregation

Plaintiff Robert Lee Harris is an African-American. He is currently an inmate at the Maine Correctional Institute ("MCI") in Warren, Maine. Tr. Vol. I at 131; Tr. Vol. II at 33, 45. Defendant Donald Allen is and since March 29, 1990 has been Commissioner of the Maine Department of Corrections ("Department"). Stipulations of Fact ("Stipulations") 1. Allen is responsible for the overall policy and operation of the Department which includes the Maine State Prison ("MSP" or "Prison"). *Id.* Defendant Martin Magnusson is now and since March 29, 1990 has been Warden of the MSP. *Id.* at 2. Magnusson is responsible for the overall operations of the MSP and is responsible for approving all policies and procedures of the Prison. *Id.*

Harris arrived at the MSP for incarceration on March 29, 1990. *Id.* at 3 (First). At the time of his initial incarceration at the Prison, Harris was awaiting trial on state rape charges. Tr. Vol. I at 93, 99, 152-53. Shortly after his arrival, Harris was alerted to the fact that the local papers were going to publish a story describing the charges against him and his prior record. *Id.* at 99. Harris became uncomfortable with the possibility that such a story could arouse the enmity of other prisoners because of his race and the nature of his offense. *Id.* at 99-100; Tr. Vol. II at 6. Sex offenders are looked down on by other inmates and are labelled as "skinnners." Tr. Vol. I at 52. Harris expressed concern for his safety to Colonel Mahoney, one of the senior guard officers. *Id.* at 99; Tr. Vol. II at 6. Mahoney told Harris not to panic or jump the gun because the newspaper article might not turn out the way Harris thought it would. Tr. Vol. I at 101.

African-Americans comprise a very small percentage of the population at the MSP. *Id.* at 52. However, most African-American inmates have never experienced problems at the MSP, and many have enjoyed good relations with caucasian prisoners. *Id.* at 69; Vol. II at 51. Nevertheless,

Harris experienced racial epithets from other inmates from the first day he arrived at the MSP. Tr. Vol. I at 139. This was especially true when Harris ventured into certain areas of the Prison, particularly the dorms. *Id.* at 100. In order to avoid the verbal abuse, Harris transferred from his job in the dorms to a job in the kitchen. *Id.* Other African-American inmates told Harris that derogatory racial comments from the inmate population were "par for the course," and that Harris should try to ignore the remarks. *Id.* at 140.

Following Harris's initial conversation with Mahoney, the newspaper article to which Harris had referred did in fact appear. *Id.* at 102, 140, 145. Harris began to receive harassment and threats (implied and actual) of violence from other inmates. *Id.* at 101-02, 140-42; Tr. Vol. II at 10-11. The remarks were made in such a way that Harris could hear them, but could not identify the particular inmates who made the comments. Tr. Vol. I at 103, 141. Copies of the newspaper article were given to him by inmates, indicating that they were aware of the charges. *Id.* at 102, 145. In the dining area, Harris was told by inmates that he could not sit at their tables because it would be a "problem." *Id.* at 102. The remarks were directed not only to race, but to the fact that Harris was a sex offender. *Id.* at 53, 100-01; Vol. II at 6. Even other African-American prisoners shied away from Harris. Tr. Vol. I at 142.

Due to these events, Harris initiated a series of conversations with Colonel Mahoney. *Id.* at 101; Tr. Vol. II at 6. At one point during their discussions, Mahoney asked Harris if he could elicit assistance from the other black inmates. Tr. Vol. I at 100. Harris responded, "I didn't come to this prison to elicit or have help from any other black, I came to prison by myself, I'll be leaving by myself." *Id.* Harris also told Mahoney that he would "try to walk around the situation, but it's going to come to a point in time to where all the circumventing I can try to do is not going to help." *Id.* at 101.

Harris eventually asked Mahoney for a transfer out of his job in the Prison kitchen because

of the easy accessibility of knives.<sup>2</sup> Mahoney advised Harris to see Captain Hamm, who was in charge of Prison job assignments, and offered to help if Harris needed assistance getting another job. Tr. Vol. II at 7. Mahoney spoke to the kitchen supervisors and told them what was going on and to keep an eye out. *Id.* at 19. Mahoney also advised Harris to do the best he could to avoid problems, and that if he felt he was actually being threatened he should go to Mahoney or a supervisor right away. *Id.* at 8. Harris responded that he would deal directly with any problems, that knives were just as accessible to him as to other inmates and that he would not wait for others to come to him. *Id.* at 8-9.<sup>3</sup> Mahoney related to Harris the story of a previous African-American

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<sup>2</sup> Mahoney claims he suggested the change to Harris, Tr. Vol. II at 7, but the complaint alleges that Harris requested a transfer out of the kitchen to avoid the danger he perceived to himself and the answer admits that statement. Amended Complaint ("Complaint") 15; Answer 15. Harris also testified that he made the request, and his testimony on this point is credible. Tr. Vol. I at 101.

<sup>3</sup> Exactly what Harris was trying to convey to Mahoney is ambiguous. According to Harris, at some point during his conversations with Mahoney he explained his attitude as follows:

Q And I believe you also testified that in regards to racial harassment, you wouldn't walk around it?

A No, I turn around and told him that like I would address it. Let me explain something, what I explained to Captain Mahoney, okay?

Q Sure.

A Initially, in respect to the issue of violence, I went very detailed to explain this to him about issues of violence, violence is initially taking place from a spoken word, once someone turns around and attacks you, an insulting issue, insulting word, right, violence has already begun, the onset of violence has already begun, like I told him.

To address that, you can either do one or two things, you can either turn around and use the same type of negative influence back toward the individual, or you can try to turn it in another direction where you can go ahead and go on about your way. But if you go ahead and address it straight-forward, then you have what you might -- someone might particularly call retaliatory action. But all I'm trying to do is walk away from it because I had a lot to lose where nobody else had anything to lose.

Q Did I have this wrong, I put down that you said you wouldn't walk around it?

A No, I wouldn't walk away from an attack.

Q Racial harassment?

A No, I wouldn't walk away from a physical attack, at that point means I'm not going to run from attack, because running from attack is going to be worse than attack itself.

Tr. Vol. I at 144-45. I find this testimony credible, but that it does not contradict the testimony by Mahoney regarding remarks made by Harris.

inmate who had transferred from the federal system, and who ended up killing an inmate because of racial friction. *Id.* at 9-10.

Mahoney grew more concerned with each conversation he had with Harris. *Id.* at 10. After about their third discussion, Mahoney's perception was that Harris was becoming desperate. *Id.* at 13. By this time Mahoney had described his concerns to Major Jones, the Chief of Security.<sup>4</sup> Mahoney had a bad feeling about what was happening so he wanted his supervisors to be aware of the potential situation. *Id.* at 13, 43. Mahoney told Jones that he was concerned that Harris was going to hurt somebody. *Id.* at 14-15. Mahoney and Jones decided that Jones should interview Harris. *Id.* at 14. At about this same time (May 9, 1990), Mahoney was aware that Harris's lawyer had called the Prison to express Harris's concerns to Prison administration.<sup>5</sup> *Id.* at 24.

### **B. The Decision to Place Harris in Segregation**

On May 10, 1990 Mahoney brought Harris to Jones's office. Harris said that he was experiencing problems with racial slurs and indirect threats from the white Prison population. Tr. Vol. I at 103; Vol. II at 44. The accounts of the exact words spoken after the initial discussion vary. Jones testified that Harris stated he had enough of racial slurs, and that "the next inmate that made

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<sup>4</sup> The plaintiff proposes that the court find as a matter of fact that Mahoney offered no help to Harris and took no action to prevent harassment of Harris. Plaintiff's Proposed Findings of Fact 8. I do not recommend that the court so find. As cataloged above, Mahoney listened to Harris's comments, gave advice he felt appropriate in the circumstances and eventually reported the situation to his superior. That Mahoney did not warn the general Prison population that they were not to harass black prisoners is understandable. Mahoney testified, consistent with Harris's own testimony, that Harris would not or could not indicate who was causing his problems. Tr. Vol. II at 36-37. Mahoney testified that it was impossible for him to instruct the general Prison population to stop making racial comments without inflaming the situation. *Id.* at 37. He testified that if he "had started calling inmates in, questioning them about racial statements or problems that Mr. Harris was having, there would have been a direct retaliation against Mr. Harris and would have inflamed, in my opinion, the situation Mr. Harris was facing." *Id.* at 38. I find this testimony credible and persuasive, especially given that Harris himself characterized the MSP as a "racial powder keg." Tr. Vol. I at 146. Thus, Mahoney concluded that the only real option was to place Harris in administrative segregation status. Tr. Vol. II at 13.

<sup>5</sup> The record does not reflect to whom in the Prison administration Harris's lawyer spoke.

a statement to him in that way, he would kill him." Tr. Vol. II at 44. Harris testified that he told Jones that he was circumventing problems by not carrying a weapon, and walking the other way when comments were made. Tr. Vol. I at 103-04. However, according to Harris's own testimony, Harris then volunteered to Jones that:

I would defend myself by any means necessary because I wanted to make -- I wanted to make it clear to him that I would defend myself, I'm not going to run away, I kept telling him I'm not going to run away from anything because if you start running, you're going to keep constantly running. Next thing you know you're in protective custody, I didn't come from a prison like such as Lewisburg to come to Maine State Prison and start running, I mean.

Tr. Vol. I at 104. According to Harris, Jones asked him to what extremes he would go to defend himself. Harris testified that he told him "by any means necessary, to that extent." *Id.* at 105. He also stated: "I didn't give any specifics, I never said I was going to kill anybody."<sup>6</sup> *Id.* Following this exchange, Jones had Harris placed in handcuffs and taken directly to the North Side segregation unit. *Id.* at 106. Jones testified that the basis for his decision to place Harris in administrative segregation status was the threat Harris posed toward the inmate population. Tr. Vol. II at 44-45.

<sup>6</sup> Harris also testified that he had said "I would defend myself by any means I deem necessary to the situation." Tr. Vol. I at 146. When asked on cross-examination what that might entail, Harris responded:

A What might it entail? It might entail that I would just defend myself according to the situation.

Q Would that possibly entail using a weapon if it was necessary?

A No, it would entail defending myself.

Q With a weapon?

A Not necessarily a weapon.

Q Possibly a weapon?

A No, not unless somebody came at me with a weapon, then I'd turn around and try to either take it away from them or try to address it to the situation where like it would put me in safety. In other words, I'm not initiating the violence, all I'm doing is defending it.

Q And you mentioned just a few minutes ago that you considered racial or verbal harassment to be violence?

A Yes, it is violence.

Q Did you indicate to Mahoney or Jones that you might respond violently to such verbal racial harassment?

A No. But he made a point of telling me about a racial issue that took place in the prison before.

*Id.* at 146-47.

I find credible the testimony of Harris regarding exactly what was said at the interview. Harris understood that he had federal good time credits to lose, so it is unlikely that he would have baldly stated that he would kill someone. However, I also find believable that Jones interpreted what Harris said to mean that the continued presence of Harris in the general Prison population posed a threat to Harris and others.<sup>7</sup>

### C. Conditions of the Segregation Unit

The segregation unit at the Prison houses prisoners in what is referred to as administrative segregation and disciplinary segregation. Tr. Vol. I at 23; Tr. Vol. II at 30-31. Although there is a significant difference in the reason for confinement in administrative versus disciplinary segregation, the treatment is roughly the same. Tr. Vol. II at 30. Administrative segregation is not intended to be punitive, as is disciplinary segregation. Tr. Vol. I at 7. A prisoner might never violate a rule but still be placed in administrative segregation. *Id.* at 8-9.

Prior to his confinement in segregation, Harris had been in the general population of the Prison. *Id.* at 95. In that status he had been permitted to leave his cell daily for meals in the dining hall, for his Prison job, for recreation<sup>8</sup> and to use the law library. *Id.* at 95-98. In all, Harris had been allowed to spend well over six hours per day outside his cell. *Id.* at 98. He had also been permitted to have a variety of personal possessions in his cell including clothing, a TV, radio, books, pictures, writing materials and legal materials. *Id.* at 109; Pl. Exh. 14. He had also been permitted to purchase anything sold at the Prison canteen and to have those items in his cell. *Id.*

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<sup>7</sup> In his report to the administrative segregation review panel, Jones stated that "Harris made it exceedingly clear that he was ready to hurt or kill other inmates due to the 'kid's games' they were playing with him. . . . I have no question in my mind that should Harris be returned to the population, there would be a conflict with deadly results." Pl. Exh. 11, May 14, 1990 minute sheet.

<sup>8</sup> Recreation (including, for example, lifting weights and spending time in the prison yard) was allowed during the day depending upon Harris's work schedule, and an additional recreation period was permitted in the evening. Tr. Vol. I at 96, 110-11.

The conditions in the segregation unit are very different from those in general population. The segregation unit consists of four corridors of cells, including the so-called "South Side" and "North Side." Tr. Vol. I at 8, 60-61; *See generally* Pl. Exh. 12. Prisoners are confined to individual cells measuring approximately 6' by 7' in size for twenty three hours a day. Tr. Vol. I at 25; Pl. Exh. 12. The cells are constructed so that a prisoner has no visual contact with anyone except persons in the corridor who walk directly in front of his cell door, although prisoners can converse with or holler to other inmates on the corridor. Tr. Vol. I at 25. The corridor consists of bare walls and a floor with a shower at one end. Pl. Exh. 12. The corridor on South Side is larger and brighter than the corridor on North Side. Tr. Vol. I at 24. South Side has large windows that look out onto the prison yard. Pl. Exh. 12. The windows on North Side emit light only. *Id.* The North Side corridor is darker and much narrower. *Id.* Also, the ceiling on North Side is covered with an asbestos material. *Id.* at 113; Tr. Vol. II at 118, 150-52.

Prisoners are permitted outside the cell for only one hour each day for a total of seven hours a week. Tr. Vol. I at 31-32, 107-08. During four of those weekly hours the prisoner is confined to the corridor in front of the segregation cells. *Id.* at 32. During three of the weekly hours outside the cells the prisoners in the segregation unit, which includes prisoners in administrative segregation, are permitted to use an outdoor "recreation area." *Id.* That recreation area measures approximately 50' by 100' and consists of a fenced off enclosure in a corner of the Prison yard. *Id.* at 32. This is the only area with exercise equipment available. During their daily hour outside the cell prisoners have their only opportunity to make phone calls, exercise or take showers. *Id.* at 32, 107-08, 111, 129; Tr. Vol. II at 57.

Prisoners in segregation are significantly limited in the activities in which they can participate and in personal possessions that they can have in their cells while in segregation. They are not allowed to have televisions, radios and personal clothing and are only permitted to purchase a limited number of items from the canteen. Tr. Vol. I at 11, 110; Pl. Exh. 16 & 17. Further,

prisoners in segregation are not permitted to participate in Prison jobs, recreation, athletics, the industry program or group therapy; to visit the law library (although materials are brought to the cells); to participate in Prison education programs (except G.E.D. courses); or to have the same telephone privileges that prisoners have in general population. Tr. Vol. I at 11-12; Tr. Vol. II at 113-14. Also, prisoners in administrative segregation status are not permitted to earn the same amount of good time credits as are prisoners in general population. Tr. Vol. I at 11-12; Tr. Vol. II at 114.

While in administrative segregation status, Harris was subject to these general conditions.<sup>9</sup> Tr. Vol. I at 106-12. There is no evidence to suggest that Harris was subjected to conditions any different from those of other inmates placed in administrative segregation, with the following exception. Harris testified that at one point he was one of four inmates who were placed, on separate occasions, in a different segregation cell that had been covered with feces by an emotionally disturbed inmate.<sup>10</sup> *Id.* at 117-18. Harris had to clean the cell himself with soap and water, and it was not until after a week that he was provided with disinfectant cleaner. *Id.* at 119. Harris complained in writing to the Deputy Warden, and was allowed to swap his mattress during this time, but the smell in the cell was initially revolting and flies swarmed in and out. *Id.*; Pl. Exh. 25. Harris eventually spent about thirty days in the cell. Tr. Vol I at 117. I find Harris's testimony regarding this incident credible.<sup>11</sup> However, there is no evidence in the record that either

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<sup>9</sup> Mrs. Harris wrote to Magnusson on June 28, 1991 to complain about the conditions of confinement to which her husband was subjected. Pl. Exh. 19.

<sup>10</sup> This testimony conflicts with the letter that Harris sent to Deputy Warden Kiskila on July 26, 1991. Pl. Exh. 25. In that letter, Harris claims to have been the only inmate transferred to a cell previously occupied by the disturbed inmate. I find Harris's testimony under oath more credible on this point.

Harris had been moved from his previous cell because he refused to clean the bars of his cell and the corridor outside his cell. Tr. Vol. I at 116-117; Pl. Exh. 25. At that time, all the inmates on South Side segregation refused to clean the corridor. Eventually, all the inmates on South Side were moved from their cells in response to the incident. Harris was unaware of that action at the time he wrote his letter to the Deputy Warden. Pl. Exh. 20.

Magnusson or Allen was ever aware of this incident.

#### **D. Policies and Procedures Governing Administrative Segregation**

Policies pertaining to the MSP and governing the administrative segregation program are contained in Plaintiff's Exhibit 1A. At the reopened evidentiary hearing on December 16, 1992, the defendants offered Defendants' Exhibit 1, the so-called "Classification Manual" for the Maine State Prison, which they claimed updated and superseded the policies and procedures governing administrative segregation contained in Plaintiff's Exhibit 1A. The defendants, however, were unable to lay a proper foundation for the admission of Defendants' Exhibit 1 at that time. I nevertheless provisionally admitted the exhibit subject to the defendants providing an affidavit by December 23, 1992 attesting to the authenticity of the exhibit as identified in court.<sup>12</sup> The defendants were unable to produce the affidavit and by letter from the defendants' counsel dated December 22, 1992 withdrew Defendants' Exhibit 1. Accordingly, I am constrained to find on this record that the procedures contained in Plaintiff's Exhibit 1A were the only procedures in force regarding administrative segregation at the Prison throughout the period of Harris's incarceration.<sup>13</sup>

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<sup>11</sup> Inmate Michael Scott provided additional details regarding this incident. Scott was confined to North Side at the time and was located three cells away. Tr. Vol. I at 79-80. According to Scott, shortly after being placed in the unclean cell Harris asked the guards to move him. *Id.* at 84. While the guards were walking away from Harris and past Scott's cell (approximately 40 feet from Harris), Scott heard the guards laughing and saying (apparently to themselves) "the nigger gets nothing." *Id.* at 85. Other cells on the North Side were vacant at this time. *Id.* However, Scott never heard the guards respond to Harris's requests to be placed in a different cell. *Id.* at 87.

<sup>12</sup> Realizing the importance of having before the court the correct set of policies governing administrative segregation at the Prison, I provided the defendants every reasonable opportunity to place in evidence what they assert are the relevant procedures. This notwithstanding, the defendants failed to establish the authenticity of any set of procedures contradicting those contained in Plaintiff's Exhibit 1A.

<sup>13</sup> Notwithstanding this fact, I recognize that Magnusson testified on the basis of his belief that many of the procedures set forth in Plaintiff's Exh. 1A relating to administrative segregation have been superseded by a subsequently adopted document. Tr. Vol. II at 81, 95, 104.

At the time of Harris's assignment to administrative segregation, Policy 10.1 permitted such a placement ``only in response to the recommendation of an administrative segregation panel,<sup>14</sup> or as an emergency placement when there exists a clear and present danger that the security of the facility or the safety of the inmate or others will be threatened unless such action is taken . . . ."<sup>15</sup> Pl. Exh. 1A at 345, 353. Based upon Harris's own testimony, and the testimony of Mahoney, I find that at the point Mahoney and Jones interviewed Harris, Jones was justified in concluding that there existed in the general Prison population a clear and present danger, and at least a substantial threat, to the safety of Harris, and that Harris presented a like threat to the safety of other inmates. It is true that Harris had not yet broken any disciplinary rules and had been willing to remove himself from situations in the dorm and the kitchen which were potentially hostile. But Harris clearly indicated that he had been threatened, that a time was coming when he could no longer ``circumvent" trouble, that he would not walk away from future threats and harassment and that he would use as much force as he deemed necessary. His comments in this regard are somewhat contradictory, due in part to his own confusion regarding how he might act or to an attempt to conceal or soften his basically aggressive stance. Nonetheless, the evidence is sufficient to prove that there existed a clear and present danger to Harris and to other inmates sufficient to justify Harris's assignment to administrative segregation.

#### **E. Events After Harris Was Placed On Administrative Segregation**

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<sup>14</sup> The panel is also referred to as the security housing panel. Tr. Vol. II at 114. Hereinafter I refer to it as the ``Panel."

<sup>15</sup> Policy 10.1 also describes the causes for administrative segregation as follows:

An inmate may be placed in administrative segregation at his own request and may be placed in administrative segregation when there exists a high likelihood that the inmate's residence in less restrictive areas would constitute an escape risk, a clear and present danger to the security of the prison or a substantial threat to the physical safety of the inmate or of others.

Pl. Exh. 1A at 349.

Following his placement in administrative segregation, Harris remained continuously in the segregation unit or in an administrative segregation status at the Prison for approximately the next eighteen months. Tr. Vol. II at 25. In December 1991 Harris was transferred, without prior notice or opportunity for a hearing, to the Rhode Island Adult Correctional Institute. Tr. Vol. I at 126; Tr. Vol. II at 25-26; Stipulation 3 (Second). He was subsequently returned to the Prison in August 1992 pursuant to a preliminary injunction issued by this court.<sup>16</sup> Recommended Disposition (Docket No. 70); Order Affirming Recommended Disposition (Docket No. 73); Tr. Vol. II at 25. Upon his return to the Prison Harris was again placed directly in administrative segregation where he was to remain until his transfer to MCI in the second week of October 1992. Tr. Vol. I at 49, 131-32; Vol. II at 26. Except for the period of his transfer to Rhode Island, Harris spent twenty-two consecutive months in administrative segregation at the Prison. Stipulations 3 (Second). At MCI Harris is in a similar twenty-three hour a day confinement. Tr. Vol. II at 56-57. In the last ten years only two other prisoners have been confined in administrative segregation for a period of eighteen months or longer.<sup>17</sup> Stipulations 14.

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<sup>16</sup> The court found, on the basis of documents produced in response to discovery requests and affidavits, a likelihood that the plaintiff would prevail on his claim that his transfer to Rhode Island was improper and illegal.

<sup>17</sup> Upon reviewing the records of these two other inmates, it is apparent that the only significant difference between them and Harris is that the two inmates were both actually involved in physical violence. Pl. Exh. 5 & 6. This is exactly what the defendants were trying to prevent in Harris's case. In fact, the prisoner's statement from the August 24, 1989 minute sheet shows that the defendants had good reason based on past experience with a different inmate for placing Harris in administrative segregation:

"I shouldn't be up here.....I had no choice but to fight.....he took a swing at me and I defended myself.....Metcalf saw me push him and when he told me to leave, I did. It was not an assault. Just a stupid argument over soda cans..... I've never had a fight in here.....I don't hate this guy..... This guy decides he wants to fight me, I had no choice." He states he is angry because he lost "everything," but that he does not want revenge, or to continue with any trouble. "I understand them putting me up here; I was up here last time for a serious offense, I understand that, but its not right for me to be here and not him." He states it was not an assault, just an argument. He tried to avoid it but could not. "The guy's unstable. I don't mind him, but I try to keep away from him."

Policy 10.1 sets a specific timetable for post-assignment notice and hearings, as well as a series of other regulations designed to govern operation of the administrative segregation program.<sup>18</sup> Section V(A)(4)(a) provides that "[u]nless waived in writing by the inmate, the Panel shall interview the inmate and review his case at least bi-weekly after the date of placement in administrative segregation." Pl. Exh. 1A at 353. Harris never waived this process, but the bi-weekly reviews were never conducted. Complaint 30; Answer 30.

Section V(A)(4)(c) provides that "[i]f an inmate is confined in administrative segregation longer than 30 days, he shall be given notice of the reasons for his continual confinement and a due process hearing . . . every 30 days thereafter." Pl. Exh. 1A at 354. Magnusson, however, believed that post-transfer due process hearings were only required every sixty days, Tr. Vol. II at 78-81, and thus the thirty-day schedule was not followed. The initial hearing regarding Harris's placement was held on May 14, 1990. Pl. Exh. 11. Subsequent hearings were held on June 21, 1990; August 17, 1990; September 17, 1990; November 14, 1990; January 14, 1991; March 11, 1991; May 9, 1991; July 5, 1991; August 29, 1991; and October 4, 1991. *Id.* In violation of section V(A)(3)(a)(5), Harris was not allowed to appeal the decisions of the Panel to the Warden. Answer 30; Pl. Exh. 1A at 352-53.

Section IV(F) requires that "[a] psychological assessment, including a personal interview, shall be conducted whenever an inmate remains in administrative segregation for twenty days (20)

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Repeats he wants no more trouble.

Pl. Exh. 6 at 1. Harris himself had said a time was coming when he could no longer avoid his problems and would have to defend himself.

<sup>18</sup> Harris complains that he was not provided *advance* written notice of the reasons for his placement in administrative segregation. Complaint 30. Defendants concede this point. Answer 30. However, section V(A)(3)(a)(7) requires that a prisoner placed in administrative segregation pursuant to emergency procedures be given written notice of the reasons for that placement on the *next* regular business day. Pl. Exh. 1A at 353. Harris presented no evidence indicating that he received no such written notice.

or longer. . . . Following the initial psychological assessment, segregated inmates shall be interviewed, and a report written by a qualified psychologist or psychiatrist at the end of each 30-day period." Pl. Exh. 1A at 348. This schedule of psychological exams was not followed for Harris, although Harris testified that he was visited by a psychologist on four occasions. Tr. Vol. I at 154.

Section V(A)(4)(d) requires a physician or medical staff member to visit and examine inmates in administrative segregation every day. Pl. Exh. 1A at 354. There is no evidence in the record to suggest that this requirement was violated. In fact, Harris testified that a nurse visited the segregation unit four times a day to deliver medication. Tr. Vol. I at 168-69.

Section IV(D)(4) provides that "[c]ells in administrative segregation shall be equipped and furnished in a manner substantially similar to cells in the general population." Pl. Exh. 1A at 348. The plaintiff argues that this section was violated because cells in the segregation unit are designed and constructed differently from those housing prisoners in the general population, and because prisoners in the segregation unit are not allowed to have televisions or radios in their cells. However, on its face the regulation does not purport to control design and construction of cells, nor the stocking of items provided by the inmates themselves. Harris has presented no evidence indicating that with respect to items such as sinks, toilets and beds, the segregation unit cells are equipped or furnished by the Prison any differently than are general population cells.

Section V(A)(1) provides that administrative segregation placement "shall deprive the inmate only of privileges, facilities and activities available to the general prison population which are necessarily lost because of the physical location of the segregation unit . . . ." *Id.* at 349. This policy goes on to state that the convenience of prison administration shall not be a controlling criterion for such loss of privileges. *Id.* Section IV(C) states that "[i]nmates housed in administrative segregation shall be afforded the same general privileges given inmates in the general population consistent with existing resources available and the security needs of the unit."

*Id.* at 346. As I previously outlined, Harris was ineligible for most of the Prison's full programs once he was placed in administrative segregation. Lars Henrickson, chair of the Panel, testified that access to these programs was limited or terminated due to the physical fact of confinement to administrative segregation. Tr. Vol. I at 11. Harris has produced no evidence that administrative convenience, rather than location, security or limited resources, was the controlling criterion for his loss of privileges while in administrative segregation.

Section V(A)(4)(b) provides that "[t]he usual length of confinement in administrative segregation is presumed to be 14 days." Pl. Exh. 1A at 354. Section V(A)(1) states that "re-entry into the general prison population shall be encouraged and effected, in stages, if appropriate and practicable, at the earliest possible time." *Id.* at 349. The basic standard for return to the general population, however, is expressed in section V(A)(4)(a): "An inmate placed in administrative segregation shall be returned to the general prison population whenever in the judgment of the Panel the reasons for placement in administrative segregation no longer exist." *Id.* at 353.

At least through December 1991 the Panel and Magnusson continued to believe that the reasons for Harris's placement in administrative segregation still existed. This was based upon the initial report submitted by Jones when he placed Harris in administrative segregation, and on the Panel's series of interviews with Harris approximately every sixty days. Tr. Vol. I at 30, 35-42, 53-54, 66-67, 74-75; Pl's Exh. 11. Harris told the Panel that he had been the subject of many racial comments. Tr. Vol. I at 53. In the judgment of Henrickson, as long as Harris "represented a lightning rod for the collective or individual wrath of other people, he had to be protected in segregation." *Id.* at 41. Henrickson explained that:

The prison's response to the man's being under threat was also to consider his capabilities for dealing with this threat and negotiating some kind of modus vivendi, some kind of means of surviving in that situation. It was our judgment that he represented a continuing threat to the peace and good order of the prison by virtue of his hostile intentions and aggressive potentials.

*Id.* at 53-54. None of the favorable performance reports Harris received while in administrative segregation were brought to the attention of the Panel, although Magnusson did review them. Tr. Vol. II at 119-20; Pl. Exh. 7, 8, 10.

As previously noted, during the second week of December 1991 Harris was transferred without notice and hearing to the Rhode Island Adult Correctional Institute. The transfer occurred shortly after Harris filed a motion and his counsel appeared in the present lawsuit.<sup>19</sup> Tr. Vol. I at 126-27. At that time the Panel felt that given Harris's refusal to retract his statements or modify his stance, the only prospect for releasing him from administrative segregation was to transfer him to a different prison population. Tr. Vol. I at 48, 63-64. Harris had in fact, on one of the few occasions he spoke directly to Magnusson,<sup>20</sup> asked to be transferred back to Ohio or a federal system prison. *Id.* at 122, 127; Vol. II at 83. Magnusson believed it was in Harris's best interest to be transferred. Tr. Vol. II at 83-84. Magnusson suggested that he tried to accommodate Harris's wish to be transferred to Ohio, but that Ohio refused to take him. *Id.* However, since Rhode Island was willing to take Harris in order to reciprocate the assistance Maine had recently lent that state, Harris was transferred to Rhode Island. *Id.* The strategy was successful because Harris adjusted very well to the general prison population in Rhode Island. Tr. Vol. I at 127-28. Magnusson intimated that he did not know at the time of the transfer that Harris had an action pending in federal court, and insisted that the transfer had nothing to do with the court action. Tr. Vol. II at 84, 152. Magnusson explained:

[W]ith all the lawsuits that we've got at the prison that I have against me, I do not follow them that closely. Again, if we transferred every one out, we would be transferring over the course of time hundreds

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<sup>19</sup> Magnusson testified that unless it is an "absolute emergency," it generally takes at least a month to arrange an inmate transfer to another state. Tr. Vol. II at 152-53.

<sup>20</sup> Harris testified that Magnusson visited and talked with him while he was in administrative segregation. Tr. Vol. I at 122. Aside from discussing release from administrative segregation and transfer to another prison, there is no evidence that Harris mentioned to Magnusson any of his other complaints, such as being denied the right to appeal decisions of the Panel. *Id.*

of people out. I don't recall knowing that [Harris] filed on those days. I did it for the reasons that I outlined, and I requested the Department to do it. It was not punitive in any way. I really believed that Mr. Harris would hurt somebody or get hurt at the prison, and I really believed that we were reaching a situation with him that he was not going to be able to go out in the population. And rather than have him confined twenty-three hours a day, I thought it was better to put him in a facility where he might be able to make it. But my primary concern was for the safety of other inmates than Mr. Harris, but I also did think that he might have a better chance of making it in another facility.

*Id.* at 142-43.

I find Magnusson's testimony concerning Harris's transfer to be credible, and that the transfer was initiated as a legitimate attempt to find what Magnusson perceived to be a safe way to release Harris from administrative segregation at the MSP. A letter from John Hines, Interstate Compact Administrator for the Maine Department of Corrections, does not contradict this finding. Pl. Exh. 23. The first paragraph of the letter reflects the Prison's motivation behind the transfer: "We feel that [Harris] would be more comfortable and fit in better to a more integrated prison population such as Rhode Island's." The letter also goes on to say that "Mr. Harris has a lawsuit pending in the State of Maine that might well be answered by him being transferred to another state." But seen in context, this latter statement is not retaliatory. The authorities were not transferring Harris because of the lawsuit, but because a transfer was considered the best way to solve the underlying problem that in part prompted the lawsuit.

Upon Harris's return to the Prison in August 1991, the Panel reviewed his Rhode Island prison experience. Tr. Vol. I at 72. Harris had been in the general population in Rhode Island and during his stay there worked in the graphics, print and metal shops and in the law library. *Id.* at 72, 127-28. During this time he incurred only minor disciplinary infractions. *Id.* at 72. Henrickson "felt that if he had made it in population there, we should give him the benefit of the doubt and give him a shot at population again." *Id.* This was because Harris "wasn't as manifestly aggressive,

he was, you know, a little remote, but that's all right. I felt that we'd like to see what he could do." *Id.* at 73. Accordingly, the Panel recommended that Harris be returned to general population, but the recommendation was rejected by Magnusson because he disagreed with the Panel's rationale. Tr. Vol. II at 86. Harris was therefore again placed in administrative segregation upon his return to the Prison. *Id.* at 25-26.

Magnusson's decision to retain Harris in administrative segregation throughout this entire period was based upon the administrative segregation papers, the recommendations of the Panel and Magnusson's discussions with staff that had direct contact with Harris. *Id.* at 68-69, 71, 125. Based upon these sources, Magnusson considered Harris to be a dangerous inmate.<sup>21</sup> *Id.* at 71. Magnusson was also aware that Harris had received favorable performance reports while in administrative segregation. *Id.* at 119-20. But Magnusson did not consider those reports relevant to whether Harris could return safely to the Prison population, because he did not consider behavior while segregated to be an indicator of behavior while in population. *Id.* at 119-125. In fact, Magnusson testified that in his judgment, if Harris was currently at the Prison, rather than at MCI, Harris would still be in administrative segregation. *Id.* at 118-19.

In order to be released from administrative segregation and returned to the general Prison population, Harris needed to convince the Panel that he could adjust to the population so as not to present a threat to other inmates. Tr. Vol. I at 37-38. Unless Harris recanted his statements regarding the use of force, there was little else he could do to get out of segregation. *Id.* at 30, 47-48, 65. Although the Panel did not tell Harris what he needed to do to get out of segregation, the Panel informed him of the reasons why he was in administrative segregation. *Id.* at 28-29, 35-36, 40-42, 64, 123-24. Harris discussed with Mahoney what he would have to show to get out of administrative segregation. Tr. Vol. II at 15-16. Harris also discussed with other inmates what he needed to prove to the Panel. Tr. Vol. I at 163. Based on this information, Harris made a half-

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<sup>21</sup> Magnusson did not view this as a possibility, or a probability, but as a present fact. Tr. Vol. II at 136-38.

hearted attempt to persuade a security guard that he was no longer hostile: "I even told them that like don't worry about anything, no problems, no problems whatsoever, don't worry about anything, I told that to Captain Hamm . . . ." *Id.* at 124, 163. Despite protesting that he did not know what the Panel was actually looking for, Harris admitted that he would have had to lie in order to convince the Panel to release him. *Id.* at 164. I find that Harris understood perfectly well what he needed to show in order to be released to the general Prison population. But from the time that he was placed in administrative segregation to the time of trial, Harris maintained an aggressive attitude and a belief that he was entitled and determined to use whatever means he deemed necessary to protect himself while in the general Prison population.<sup>22</sup> *Id.*

The defendants transferred Harris to MCI in October 1992. Tr. Vol. II at 45. This facility is classified as a maximum security prison. *Id.* There is no separate segregation status at MCI, *id.* at 48-49; Pl. Exh. 29, but the treatment accorded to Harris is similar to the treatment he received while in administrative segregation at the Maine State Prison. He is confined to his cell twenty-three hours a day.<sup>23</sup> Tr. Vol. II at 56. Prisoners at MCI are allowed to have only limited reading materials in their cells. *Id.* at 61. They are prohibited from participating in any prison programs except those that are brought to the cells. *See, e.g., id.* at 62-63. Whenever Harris is outside his cell for any purpose other than for his one hour a day of exercise, he is placed in shackles. *Id.* at 56.

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<sup>22</sup> At the hearing, the following exchange took place between the Assistant Attorney General and Harris:

Q You haven't changed your attitude or your impression that you were going to take whatever means necessary to protect yourself, you still have that, I suspect you still have that today?

A Yes, I would have that today, I had it in Rhode Island, I spoke to the warden in Rhode Island, I would take whatever means necessary to defend myself in Rhode Island, and the warden told me you're conducting yourself like a gentlemen [sic], I wouldn't expect you to do anything other than that.

Tr. Vol. I at 164.

<sup>23</sup> Starting in December 1993, approved inmates -- including Harris -- are to be let out for exercise periods of an hour and a half, in addition to any time spent out of the cell for cleaning assignments. Tr. Vol. II at 56.

However, prisoners in MCI are permitted to have a television or radio in their cells.<sup>24</sup> *Id.* at 60-61. But for all practical purposes Harris is currently treated at MCI in the same fashion as if he were in administrative segregation at the Maine State Prison.

#### **F. Other Incidents Not Exclusively Related to Administrative Segregation**

When Harris was transferred to MSP from Lewisburg Federal Penitentiary, he carried with him a Koran, a prayer mat, a kufiyeh and legal materials. Tr. Vol. I at 120. When he arrived at the MSP, the prayer mat and the kufiyeh were taken away from him because they were not allowable cell items. Tr. Vol. I at 120-21; Vol. II at 60, 129-31; Pl. Exhs. 14 & 26. While in general population, the Prison allowed Muslims access to their prayer mats for use in a designated program area. Tr. Vol. II at 129. Prayer mats were not on the allowable cell item list due to Prison concerns that the mats could be used to conceal items or tunnels. *Id.* at 129. As a substitute for use in his cell, Harris was provided with a towel.<sup>25</sup> Tr. Vol. I at 121.

After approximately a year, Harris was allowed to keep a prayer mat in his segregation cell at the MSP, but he could not have it laying on the floor at any time other than during prayer. Tr. Vol. I at 121, 161. Soon after Harris was transferred to the Warren facility he was also allowed to keep his prayer mat in his cell there. Tr. Vol. II at 58, 65-66. Magnusson explained that in light of discussions growing out of his deposition in this case, the Prison was changing its policy concerning whether prayer mats should be considered allowable cell items. Tr. Vol. II at 130-32, 144. Magnusson conceded that security concerns have never justified prohibiting prayer mats from being kept in cells by inmates confined to segregation or MCI and that the Prison should have been

<sup>24</sup> Since the television cable company servicing Warren, Maine had not provided cable service to MCI as of December 16, 1992, prison staff had been loaning movies to the inmates so that they would have something to watch in their cells. Tr. Vol. II at 61.

<sup>25</sup> I find that Harris has a sincere belief in the Muslim faith and that he considers use of a prayer mat, as opposed to a towel, to be an important aspect of practicing his religion. Tr. Vol. I at 120-21, 136, 160-61; Tr. Vol. II at 60.

allowing it all along. Tr. Vol. II at 144-46. However, Magnusson maintained that if prayer mats were allowed in all cells throughout the Prison they would pose a security problem because monitoring and controlling the mats would be difficult. *Id.* at 145.

Maine Department of Corrections Policy 13.4 deals with provision of mental and health care services to the general prison population at all adult correctional facilities. Section IV states that "[i]nmates shall be provided access to a comprehensive mental health program increasing their probability of functioning within normal limits of socially acceptable behavior." Pl. Exh. 1A at 417. No such program has existed at the Prison since Harris's arrival in March 1990. Stipulation

8. Section V(C)(2) requires that psychological testing be administered to each newly arrived inmate on the Thursday of his first full week of confinement and that psychological intake evaluations be sent to the Classification Committee by the third week of incarceration. Pl. Exh. 1A at 420. This psychological intake evaluation was never performed for Harris. Stipulations 4. Section V(C)(3) requires Prison social workers to complete a social diagnostic profile on each inmate to be based in part on the psychological evaluation. Pl. Exh. 1A at 421. No such profile was ever prepared for Harris. Stipulations 5.

Policy 14.1(IV)(E) provides that "[i]nmates who are segregated shall have reasonable access to legal advice, access to materials from the library, and the same mail privileges as other inmates." Pl. Exh. 1B at 508. Harris presented no evidence suggesting that he had unreasonable access to legal advice or that his mail privileges were infringed. Furthermore, even though Harris was not allowed to *visit* the law library while he was in administrative segregation, he was provided *access* to legal materials by having them delivered to his cell upon request. Tr. Vol. I at 107, 112, 150-52; Tr. Vol. II at 65. Policy 24.1 mandates that a variety of social service programs be available to all inmates. Pl. Exh. 1B at 735. The Prison has failed to implement these programs as well. Tr. Vol. II at 116.

Upon his return from Rhode Island to the Maine State Prison, Harris discovered that a

number of his personal items were missing.<sup>26</sup> Tr. Vol. I at 133. Although Harris filed grievances in both Maine and Rhode Island for the return of the property, he has not yet had any response from Maine officials. *Id.* at 133-34. Additionally, a number of items were taken from Harris by Maine officials because they were not on the allowable cell list. *Id.* at 134. Among the items removed were religious pamphlets. *Id.*

Based on the evidence in the record, I find that defendant Allen had no personal knowledge of any of the events related to Harris.

## II. CONCLUSIONS OF LAW

To prevail under 42 U.S.C. 1983, Harris must prove that (1) the defendants acted under color of state law, (2) he was deprived of rights secured under the United States Constitution or federal statutes and (3) the defendants caused the deprivation. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 559 (1st Cir. 1989). No one disputes that Allen and Magnusson acted under color of state law. Harris contends, and the defendants dispute, that his constitutional rights were violated and that the defendants are legally responsible. The plaintiff has sued Allen and Magnusson in both their personal and official capacities.<sup>27</sup>

### A. Due Process Clause

The due process analysis begins by asking whether there exists a liberty or property interest which has been interfered with by the state, and whether the procedures attending that deprivation were constitutionally sufficient. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460

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<sup>26</sup> The items include a headphone set, gym shoes, objects obtained from the canteen, a gold necklace, a ring cut off Harris's finger by officials in Rhode Island, a TV converter and clothing. Tr. Vol. I at 133.

<sup>27</sup> The plaintiff demands judgment against the defendants in their personal capacities for compensatory and punitive damages. He demands judgment against the defendants in their official capacities for injunctive and declaratory relief.

(1989). A prisoner has no right under the Constitution itself "to remain in the general prison population or to be free from administrative segregation." *Rodi v. Ventetuolo*, 941 F.2d 22, 25 (1st Cir. 1991); *see also Hewitt v. Helms*, 459 U.S. 460, 468 (1983). However, a state creates a liberty interest in remaining in the general prison population by establishing substantive predicates to govern official discretion, and mandating particular outcomes. *Thompson*, 490 U.S. at 462; *Hewitt*, 459 U.S. 471-72; *Rodi*, 941 F.2d at 25.

The procedures promulgated in Department of Corrections Policy 10.1 establish substantive predicates to placement and continuance in administrative segregation, and mandate particular outcomes. The procedures specify that an inmate can only be placed in administrative segregation in response to the recommendation of the administrative segregation panel or as an emergency placement when there exists a clear and present danger. Section IV(A). The procedures require that notice, hearings and rights of appeal and review must be provided according to a specified timetable. Section V(A)(3) & (4)(a, c). The procedures also mandate return of the inmate to the general Prison population whenever the Panel finds that the reasons for placement in administrative segregation no longer exist. Section V(A)(4)(a). Thus, the procedures contained in Policy 10.1 are sufficient to give Harris a constitutional liberty interest in remaining in the general population at the MSP.<sup>28</sup>

The plaintiff argues that by failing to adhere to the established Department of Corrections policies regarding assignment to administrative segregation, the defendants denied him his rightful due process. The plaintiff's attack can be separated into two prongs. First, he argues that the defendants incorrectly applied the substantive predicates established for assignment to and continuance in administrative segregation. Second, he contends that by failing to follow certain

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<sup>28</sup> As to the constitutional sufficiency of the procedures themselves, it is "beyond serious question that the procedures . . . are facially adequate to satisfy the relatively minimal due process requirements which must attend the transfer of a prisoner to administrative segregation." *Rodi*, 941 F.2d at 29; *see also Hewitt*, 459 U.S. at 472-77.

procedural requirements the defendants violated his right to due process. I will address each argument in turn.

### **1. Substantive Predicates**

The plaintiff argues that he was initially placed in administrative segregation not because he presented a clear and present danger, as required by Policy 10.1, but on the speculation that he might pose a threat to other inmates or that other inmates might pose a threat to him. However, nothing in Policy 10.1 obligates Prison officials to wait for an incident to happen in order to conclude that a clear and present danger exists. Moreover, the Court has made clear that a prison's internal security is normally left to the discretion of prison administrators:

In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents.

*Hewitt*, 459 U.S. at 474.

In this case, the discretionary decision of Jones to place Harris in administrative segregation was based upon a solid body of evidence. Harris had related the nature of the threats and harassment he had received, as well as his own attitude, to Mahoney. Mahoney relayed his own bad feeling about the situation to Jones. Jones interviewed Harris and heard for himself how Harris proposed to use whatever force he deemed necessary to handle the situations he felt were increasingly impossible to circumvent. Although Harris had shown a willingness in the past to avoid or leave hostile situations, Harris himself indicated that he no longer planned to run from his problems. Mahoney felt that making any attempt to counsel white prisoners not to harass African-

American prisoners would only exacerbate the situation. Given all of this information, Jones was justified in concluding that Harris posed a clear and present danger to other inmates, that Harris himself was in danger and that assigning Harris to administrative segregation was appropriate.

The plaintiff argues that assuming there was a clear and present danger in May 1990 warranting his original placement in administrative segregation, the defendants had no evidence to conclude that he continued to constitute a clear and present danger during the entire period of his segregated confinement. The plaintiff contends that Magnusson, Mahoney and Jones had barely spoken to him since May 1990 and had no information that he continued to constitute such a danger. The plaintiff points out that in fact all reports on his behavior while in administrative segregation were favorable. He further argues that Henrickson, who as chair of the Panel recommended his retention in administrative segregation throughout most of the period,<sup>29</sup> had no facts before him other than the original placement report filed by Jones.

I disagree with the plaintiff's assertion that the substance<sup>30</sup> of the continuing review conducted by Prison officials was inadequate to justify his continued retention in administrative segregation. In conducting a periodic informal evidentiary review, decisionmakers need only review the charges and the available evidence against the prisoner. *Hewitt*, 459 U.S. at 476-77.

Of course, administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates. This review will not necessarily require that prison officials permit the submission of any additional evidence or statements. The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner -- which will have been ascertained when determining to confine the inmate to administrative segregation -- and on the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for ``proof'' in any highly structured manner.

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<sup>29</sup> Upon Harris's return from Rhode Island, Henrickson did recommend that Harris be returned to the general Prison population.

<sup>30</sup> I deal with the procedural aspects of the review in the next section.

*Id.* at 477 n.9.

The periodic hearings conducted by the administrative segregation review panel, and the reports thereof reviewed by Magnusson, satisfy this substantive standard. At each meeting, the Panel reviewed Jones' original report. The Panel also heard from Harris, or at least gave Harris an opportunity to speak to them.<sup>31</sup> The Panel did not detect any change in Harris's aggressive attitude, nor, as evident from their belief that transfer to another prison was the best chance for Harris to be released from administrative segregation, did it detect any change in the general population at the Maine State Prison. The record supports the Panel and Magnusson on both points.<sup>32</sup> Harris also demonstrated through his testimony at the trial that his basic attitude had not changed from the time he was interviewed in Jones' office. The Panel and Magnusson were justified in concluding that Harris continued to represent a clear and present danger and in retaining Harris in administrative segregation.

The plaintiff argues that the conditions for release imposed by the Panel were inconsistent with Policy 10.1. He maintains that the Panel repeatedly stated in its reviews that Harris would only be released from administrative segregation upon a showing of an absence of a threat (as opposed to an absence of a clear and present danger) to others and himself. In so doing, the plaintiff claims the Panel set a standard for his release that was more demanding than that established in Policy 10.1.

Policy 10.1 requires the return of an inmate to the general prison population ``whenever in the judgment of the Panel the reasons for placement in administrative segregation no longer exist."

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<sup>31</sup> The fact that the Panel did not consider Harris's favorable performance reports while in administrative segregation is not problematic because those reports have no bearing on an inmate's ability to adjust to the general Prison population.

<sup>32</sup> I recognize that Harris was able to be released and function appropriately in the general prison population in Rhode Island. However, the record does not reflect whether this is attributable to the prevalence of good race relations in the general prison population in Rhode Island, to a lack of knowledge among the Rhode Island prisoners concerning Harris's background or to some change in attitude and behavior on the part of Harris.

This means, in Harris's case, that the Panel was obligated to return Harris to the Prison population if they concluded that such return no longer posed a clear and present danger to the safety of other inmates and himself. As discussed above, the Panel never reached this conclusion. The fact that the Panel summarized its decision by checking a box on the review form indicating that the condition of release was an "absence of threat" does not mean the wrong standard was applied. Henrickson effectively stated that Harris merely needed to convince the Panel that his presence in the general Prison population no longer presented a clear and present danger to himself or others, and I have found as a matter of fact that Harris knew what he must show in order to be released.<sup>33</sup> The Panel did not violate Harris's substantive due process rights by arbitrarily imposing an absolutist standard which required him to prove a negative.

## 2. Procedural Requirements

The plaintiff argues that the defendants violated a variety of procedural safeguards required by Policy 10.1 when they assigned him to, and continued his retention in, administrative segregation. The plaintiff asserts that the defendants' disregard for their own rules denied him his right to due process. Indeed, the First Circuit has held that "where a State sets a specific timetable for a post-transfer hearing as part of a series of regulations sufficient to give rise to a liberty interest, mere tardiness in providing such a hearing can constitute a violation of a convict's due process rights." *Rodi*, 941 F.2d at 29 (citations omitted). The rationale for this rule is that failure to comply with such time limits impacts the liberty interest itself, rather than having a merely procedural impact. *Id.*; see also *Smith v. Massachusetts Dept. of Correction*, 936 F.2d 1390, 1397 n.11 (1st Cir. 1991). Such a failure amounts to the arbitrary withholding of state-created process rights. See *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 828 (1st Cir. 1987).

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<sup>33</sup> Harris needed to make this showing because the information the Panel otherwise relied upon justified his continued confinement in administrative segregation, and there is no indication that anything had changed.

The defendants' failure to ensure compliance with Policy 10.1 requirements for conducting bi-weekly reviews, monthly post-transfer hearings (with the ability to appeal) and monthly psychological evaluations poses serious constitutional problems. I find that all these requirements fall within the *Rodi* stricture to conduct post-transfer hearings on schedule. The bi-weekly reviews are a limited form of hearing inasmuch as evidence is reviewed; conceivably something discovered during a bi-weekly review could affect the timing of the inmate's release from administrative segregation. Bi-weekly reviews of Harris's record were not conducted. Post-transfer hearings were conducted approximately every sixty days, although they were required to be held every thirty days. The right of appeal is an integral component of the post-transfer hearings and certainly could affect the inmate's liberty interest. Harris was denied the right to appeal the decisions of the Panel. Psychological assessments can also be considered a form of post-transfer hearing in that they could affect the timing of an inmate's release from administrative segregation. These assessments were required every thirty days; during his confinement to administrative segregation Harris was visited by a psychologist on only four occasions. Thus, by failing to abide by the specific timetable for post-transfer reviews, hearings and assessments, Harris's constitutional rights to due process were violated.<sup>34</sup>

### **3. Violation of Other Policies and Procedures**

The plaintiff lists numerous other policies and procedures allegedly violated by the defendants. Plaintiff's Post-Trial Memorandum at 13-14. However, I have previously found on the facts that there was no violation of Policies 10.1((V)(A)(1) (deprivation of benefits due to physical location of segregation unit), 10.1(IV)(D)(4) (equipping and furnishing cells) and 14.1(IV)(E)

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<sup>34</sup> My conclusion does not apply to Harris's stay at MCI. While at MCI, Harris is not in administrative segregation, although the treatment he receives is similar. Nevertheless, the procedures in Policy 10.1 do not apply to Harris's confinement at MCI. Aside from equating Harris's routine at MCI with administrative segregation at the MSP, the plaintiff has not (indeed cannot) attack his transfer to MCI. *See Meachum v. Fano*, 427 U.S. 215, 224-25 (1976).

(access to legal materials).

Maine law requires that any person residing in a correctional facility have a right to "[a] reasonable opportunity for physical exercise." 34-A M.R.S.A. 3031(5). I conclude that allowing prisoners in administrative segregation to exercise one hour daily outside of their cells satisfies this requirement, even though prisoners may also choose to shower or make phone calls during this time.

Maine law also provides that any person residing in a correctional facility has a right to "[p]rotection against any physical or psychological abuse." 34-A M.R.S.A. 3031(6). The record is devoid of any evidence of physical or psychological abuse. The plaintiff relies on the duration of his confinement in administrative segregation, but I have previously found that his continued confinement was justified and thus it cannot constitute psychological abuse.<sup>35</sup>

Each of the other policies cited by the plaintiff deals with some aspect of the day-to-day administration of the Prison.<sup>36</sup> The Supreme Court has steadfastly refused to elevate to constitutional stature the mere failure to comply with policies governing the daily administration of a prison system. "[W]e have never held that statutes and regulations governing daily operation of a prison system conferred any liberty interest in and of themselves." *Hewitt*, 459 U.S. at 469. Accordingly, I find that the defendants have committed no constitutional violation by failing to comply with regulations governing the daily administration of the Prison.

#### **4. Liability for the Due Process Violations**

Allen and Magnusson are both supervisors. Supervisors in a section 1983 case may be held

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<sup>35</sup> Furthermore, the plaintiff failed to present any evidence of psychological damage resulting from the duration of his confinement in administrative segregation.

<sup>36</sup> The policies include 13.4(V)(C)(1) (psychological intake evaluations), 13.4(V)(C)(3) (social diagnostic profile) and 13.4(IV) (access to comprehensive mental health program).

liable for damages only on the basis of their own acts or omissions. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d at 562. Thus, for liability to attach it must be shown that the supervisor's conduct or inaction amounted to a reckless or callous indifference to the constitutional rights of others, and that there is an affirmative link between the "street level" misconduct and the action or inaction of the supervisor. *Id.* Since there is no evidence that Allen knew of any of the events surrounding Harris's incarceration at the MSP or MCI, I recommend that judgment be entered in favor of Allen on all claims for damages.

Magnusson was responsible for reviewing the administrative segregation recommendations of the Panel and had final authority to decide whether Harris should be retained in administrative segregation. As a result of his reviews, Magnusson was aware of the fact that post-transfer hearings were being held only every sixty days. The plaintiff, however, produced no evidence to show that Magnusson was aware that he was not being allowed to appeal decisions of the Panel. In fact, the documents Magnusson reviewed indicated that Harris had been given a right to appeal. Since according to section V(A)(5)(a) of Policy 10.1 failure to take an appeal constitutes waiver, Magnusson would not necessarily have had any reason to suspect that the right to appeal was being denied. Furthermore, Magnusson spoke to Harris directly while Harris was in administrative segregation. But there is no evidence to indicate that Harris ever mentioned to Magnusson the fact that he was being denied the right to appeal Panel decisions. Similarly, the plaintiff failed to produce any evidence that Magnusson was aware that the bi-weekly reviews were not being conducted or that he was not receiving his monthly psychological assessments. Thus, Magnusson can only be held liable for failing to ensure that Harris's post-transfer hearings were held every thirty days as required by Policy 10.1.

Magnusson responds that he believed the timetables established in Policy 10.1 had been superseded by another departmental document which required that post-transfer hearings be held only every sixty days. Henrickson, as chair of the administrative segregation review panel, was also

of this belief. I have recommended that the court find that Magnusson actually believed that the Prison procedures required a post-transfer hearing every sixty days. To the extent that this belief was erroneous,<sup>37</sup> I conclude that, while probably negligent, it does not rise to the level of reckless or callous indifference to Harris's constitutional rights. I hold, therefore, that Magnusson cannot be held personally liable in damages for the violations to Harris's due process rights.

### **B. Equal Protection Clause**

The plaintiff claims that his rights to equal protection of the law were violated. As grounds for his claims, he advances several theories. First, he asserts that he was discriminated against because inmates in administrative segregation do not receive the same benefits as inmates in the general population. Second, the plaintiff asserts that he was treated differently from other inmates in administrative segregation because he was not allowed to practice his religion freely. Third, the plaintiff claims that he was the victim of racial discrimination. None of these claims have merit.

In *Lovell v. Brennan*, 566 F. Supp. 672, 692-93 (D. Me. 1983), *aff'd*, 728 F.2d 560 (1st Cir. 1984), this court reviewed the then prevailing conditions of the segregation unit at the Prison. In many respects the conditions rehearsed in *Lovell* are not significantly different from those surveyed in the facts of this case. In *Lovell*, albeit in the context of a discussion generally regarding the Eight Amendment, the court noted: "Plaintiffs complain that they are unreasonably deprived of privileges, facilities and activities available to the general prison population. But the limited access of these plaintiffs to prison programs and activities is a necessary incident of segregated confinement." *Id.* at 693. This basic finding is similarly dispositive of the equal protection inquiry. Since the unequal treatment of inmates in administrative segregation is justified by a legitimate penal purpose, there is no violation of Harris's right to equal protection deriving from the fact of his confinement there.

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<sup>37</sup> Of course, it is possible that Magnusson correctly believed that the procedures in effect required a post-transfer hearing every sixty days rather than every thirty. If so, the defendants' failure to introduce those procedures at hearing, *see supra* at 12-13, is inexcusable.

“Allegations that members of one religion are not allowed opportunities to practice their religion comparable to those [opportunities] afforded similarly situated fellow inmates who adhere to different recognized religious precepts state a claim under the First and Fourteenth Amendments.” *Street v. Maloney*, No. 90-1280, 1990 U.S. App. LEXIS 22996 at \*9 (1st Cir. Dec. 28, 1990). However, the plaintiff has produced no evidence bearing on the claim that, within the segregation unit, his right to freely practice his religion was treated any differently than the right of other inmates to do the same. His claim concerning freedom of religion is appropriately examined under First Amendment standards. The plaintiff establishes no basis on which to find an equal protection violation.

Finally, the plaintiff claims that he was the victim of racial discrimination by Prison officials. “Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race.” *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). To support his claim, the plaintiff invokes the duration of his confinement in administrative segregation, the assertion that Prison officials knew of the racial harassment visited on him by caucasian inmates but did nothing about it, the “nigger gets nothing” comment of an unnamed guard and the fact that Harris at one point was housed in an unsanitary cell. None of these asserted grounds for an equal protection violation stands up under examination.

I have already found that retention of the plaintiff in administrative segregation throughout the challenged period was justified. This represented legitimate action on the part of Prison officials to protect the plaintiff (and others) from the effects of harassment and threats of violence. That Prison officials never counselled white inmates is credibly explained by the fact that the plaintiff never identified individual white inmates who had harassed or threatened him, and Prison officials were unwilling to inflame the situation by addressing caucasian inmates collectively. “[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and

jails33, 334 (1968) (concurring opinion). The single biased comment of an unnamed Prison guard does not make a case for racial discrimination against the defendants. Lastly, as grounds for an equal protection violation the plaintiff indirectly refers to the incident wherein he was placed in a cell that had not yet been cleaned of the results of a prior inmate's defecation. But the plaintiff was one of four inmates who were subjected to that treatment. And all the South Side inmates -- not just Harris or the four to which he refers -- were moved from their cells in response to their lack of cooperation in cleaning the corridor outside their cells. There is no evidence in the record to suggest that the plaintiff was singled out or treated differently because of his race.

### **C. Contempt**

The plaintiff claims that the defendants should be held in contempt for violating the requirements of the 1973 Consent Decree set forth in *Lovell v. Brennan*. The plaintiff argues that the record is devoid of evidence that the Consent Decree has been reversed, modified or vacated. However, I take judicial notice of previous decisions docketed in this court. In 1985, this court accepted without qualification the magistrate's clearly stated recommendation that continuing jurisdiction over the 1973 Consent Decree be terminated. *Inmates v. Oliver*, No. 11-187 (D. Me. May 8, 1985). This is sufficient to terminate the consent decree. *See Consumer Advisory Bd. v. Glover*, 989 F.2d 65, 67 (1st Cir. 1993). As a result, the defendants cannot now be held in contempt of a consent decree that has no continuing vitality.

### **D. Retaliation**

The plaintiff claims that the defendants transferred him to Rhode Island in retaliation for actively pursuing this lawsuit. In order to establish a constitutional violation, an inmate must prove that he would not have been transferred "but for" the exercise of a constitutional right. *See McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979). As the record reflects, Harris's transfer occurred

virtually simultaneously with the appearance of his counsel in this case and the filing of an amended complaint. However, the discussions and preparation for transfer transpired before these occurrences and were instigated in part by Harris's own request. Furthermore, I have determined, on the basis of the full record, including Magnusson's testimony, that Harris was transferred in a good faith attempt to find a means to release him from administrative segregation at the Maine State Prison. Hence, Harris has failed to carry his burden of proving that he would not have been transferred but for the exercise of a constitutional right.

### **E. Freedom of Religion**

The plaintiff claims that the defendants denied him the right to freely exercise his sincerely held religious beliefs by preventing him from keeping a prayer mat in his cell for approximately one year. An inmate's right to practice religion is relative and must yield to prison regulations reasonably related to legitimate penological interests. *Street v. Maloney*, 1990 U.S. App. LEXIS 22996 at \*5. ``The four factors relevant to the reasonableness inquiry are: 1) whether there is a valid, rational connection between the regulation or policy and the legitimate and neutral governmental interest asserted; 2) whether available alternative means to exercise the right in question exist; 3) what impact the accommodation of the asserted constitutional right would have on others within the prison system; and 4) whether obvious alternatives exist which accommodate the inmate's asserted right and satisfy the penal interest at stake." *Id.* n.4.

Magnusson testified that prayer mats were not allowed in cells anywhere in the Prison in order to reduce the possibility of inmates concealing objects or tunnels. However, Magnusson conceded that in the limited context of Prison segregation cells or even cells at MCI, there was no legitimate security reason to prevent Muslim prisoners from keeping prayer mats in their cells. Since there was no legitimate prison interest at stake, Harris's First Amendment right to freedom of religion was violated for the amount of time he was confined to administrative segregation but was

denied use of a prayer mat in his cell.

Magnusson had personal knowledge that Harris was being denied the use of a prayer rug in his administrative segregation cell. As warden, Magnusson also had the power to change the Prison's policy regarding prayer mats. And while Magnusson claimed that he initially believed security concerns justified the prohibition, and that it was routine for the Prison administration to allow the cell allowable item list to evolve iawyers, he conceded that, in fact, there had never been any legitimate rationale for the policy. This unwillingness or disinclination to react reasonably promptly in response to Harris's demand reflects a callous indifference toward Harris's constitutional right. Magnusson may be held personally liable in damages for the First Amendment violation. Furthermore, since the standard for awarding punitive damages in a section 1983 case is virtually the same as that for awarding compensatory damages, *Germany v. Vance*, 868 F.2d 9, 20 (1st Cir. 1989), Magnusson may also be held liable for punitive damages.

#### **F. Relief**

In light of my proposed findings of fact and conclusions of law, and in order to address the constitutional violations which have occurred in this case, I recommend that the court enter judgment for the plaintiff on the due process and freedom of religion claims, and enjoin the defendants as follows:

1. If Harris is returned to administrative segregation at the MSP, the defendants shall ensure that he receives evidentiary reviews, post-transfer hearings (with the ability to appeal) and psychological evaluations in compliance with duly adopted and operative policy requirements.

2. Harris shall be permitted to maintain and use a prayer mat in his cell at MCI or in administrative segregation at the MSP. Reasonable guidelines may be imposed for storing and inspecting the mat (such as not leaving the mat on the floor between prayer sessions) consistent with prison security, but which do not unreasonably interfere with Harris's use of the mat in

connection with the practice of his religion.

Harris is also entitled to compensatory and punitive damages for the violation of his First Amendment right to freedom of religion. Fixing legal damages in a case where there are essentially no indicators of economic loss is a matter of discretion for the fact finder. *See Nydam v. Lennerton*, 948 F.2d 808, 811 (1st Cir. 1991). Harris was deprived of the use of a prayer mat in his administrative segregation cell for approximately one year. This deprivation goes to an aspect of his Muslim faith; the record is devoid of any indication that he was otherwise denied his constitutional right to the free exercise of his religion. I recommend that the court order Magnusson to pay compensatory and punitive damages totalling \$5,000. Dollars cannot adequately compensate for this kind of unconstitutional deprivation. However, in light of the state's continuing budget crisis and the pressure on all agencies of state government to spend allocated revenues wisely, I trust that a levy of even this modest amount will, in addition to providing Harris reasonable compensation, serve the purpose of encouraging prison officials to become more vigilant about their obligation to respect the constitutional rights of inmates.

In all other respects I recommend that judgment be entered for the defendants.

#### ***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 22nd day of June, 1993.***

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***David M. Cohen***  
***United States Magistrate Judge***