IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ALEXANDER MICKLE, et al.,

Plaintiff,

v.

MICHAEL MOORE, Director of the South Carolina Department of Corrections, et al.,

Defendants.

C.A. No. 2:96-5555-23AJ

ORDER

This matter is before the court upon the magistrate judge's recommendation that the defendants' motion for summary judgment be granted in part and denied in part. The record contains two reports and recommendations of the United States Magistrate made in accordance with 28 U.S.C. § 636 (b)(1)(B). The first report and recommendation, filed on July 1, 1997, pertains to Plaintiffs' Motion for a Preliminary Injunction. The second report and recommendation, filed on July 23, 1997, pertains to Defendants' Motion for Summary Judgment.

I. TIME FOR FILING OBJECTIONS

A party may object, in writing, to a magistrate's report within ten days after being served with a copy of that report. 28 U.S.C. § 636 (b)(1). Three days are added to the ten-day period if the recommendation is mailed rather than personally served. Plaintiffs filed timely objections to the first report and recommendation on July 9, 1997. Plaintiffs filed timely objections to the second report and recommendation on August 5, 1997. Defendants

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filed timely objections to the second report and recommendation on August 11, 1997.

II. REVIEW OF THE MAGISTRATE'S REPORTS

This court must conduct a de novo review of any portion of a magistrate's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendation contained in that report. 28 U.S.C. § 636 (b)(1).

Plaintiffs have filed objections to the magistrate's recommendation that their Motion for a Preliminary Injunction should be denied. The magistrate based his recommendation on the fact that Plaintiffs' motion was based on the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., which has been ruled unconstitutional by the United States Supreme Court. It appears that, prior to the magistrate's issuance of his report and recommendation, Plaintiffs filed an amended brief which included an argument that Defendants' actions violated the First Amendment, as well as a RFRA argument. However, in recommending that Plaintiffs' request for a preliminary injunction be denied, the magistrate considered only Plaintiffs' RFRA argument, and not the First Amendment argument contained in their amended brief.

Plaintiffs have also filed objections to the magistrate's recommendation that Defendants' Motion for Summary Judgment should be granted with respect to Plaintiffs' claims that the higher security classification and segregated custody imposed on the Five Percenters group violates the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Eighth Amendment. Plaintiffs also object to the magistrate's recommendation that Defendants should be entitled to qualified immunity from money damages on all of their claims. Defendants have filed objections to the magistrate's

recommendation that their Motion for Summary Judgment should be denied as to Plaintiffs' claim that Defendants are violating the First Amendment by banning Five Percenters literature entirely from all South Carolina Department of Corrections (SCDC) facilities.

For organizational purposes, this Court will consider Defendants' Motion for Summary Judgment first, and then will proceed to consider Plaintiffs' Motion for a Preliminary Injunction.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A review of the objections and the record indicates that the magistrate's report and recommendation accurately describes the facts of this case and the applicable law. Accordingly, this Court adopts and incorporates the magistrate's report and recommendation into this Order.

A. Summary Judgment Standard

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-124 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by

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summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trail." Celotex, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990)), cert. denied, 116 S. Ct. 190 (1995). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." Celotex, 477 U.S. at 327.

B. Discussion

As an initial matter, it should be noted that the magistrate did not decide the question of whether the Five Percenters constitute a "religion" as a matter of law. The magistrate merely assumed, for the purposes of this motion, that the Five Percenters are a religion, noting that the question of whether a set of beliefs constitutes a religion is ill-suited for resolution on summary judgment. Magistrate's Report and Recommendation, pp. 8-9. In analyzing the parties' objections to the magistrate's Report and Recommendation, this Court will follow his assumption that the Five Percenters are a religion. It is worth noting that the only federal circuit court to consider this issue reversed and remanded a district court determination that the Five Percenters are not a religion, although it did not affirmatively hold that they are a religion. Patrick v. Lefevre, 745 F.2d 153 (2nd Cir. 1984).

(1) Plaintiffs' Objections to the Magistrate's Report and Recommendation

Plaintiffs assert that Defendants overreacted to the actions of a few "bad apples" within the Five Percenters group when they classified the Five Percenters as a security threat group and placed them in isolated, high-security custody. Plaintiffs further assert that Defendants' actions violate their rights protected under the First Amendment, Eighth Amendment, and Equal Protection Clause of the Fourteenth Amendment.

(a) First Amendment

As the magistrate noted in his recommendation, Plaintiffs' First Amendment claims are evaluated under the test established by the Supreme Court in Turner v. Safley, 482 U.S. 78 (1987). See also O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that the Turner test applies to claims that prison regulations violate First Amendment right to free exercise of religion). The Turner Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 89. It then articulated four factors relevant to assessing the reasonableness of prison regulations:

> (1) Whether there is a "valid, rational connection" between the regulation and the government interest put forward to justify it;
>
> (2) Whether alternative means of exercising the rights in question remain open to the inmates;
>
> (3) The impact that accommodation of the asserted rights will have on prison guards, other inmates, and the allocation of prison resources;
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> (4) Whether there is an absence of "ready alternatives" available to prison officials by which they may accomplish the goals of the regulation at issue.

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Id. at 89-90.

With regard to the first factor, Defendants assert that the history within SCDC facilities, as well as other prison systems nationwide, demonstrates that the Five Percenters, as a group, constitute a threat to institutional security and safety. The magistrate concluded that the "undisputed evidence" in the record supports Defendants' assertion. Plaintiffs, on the other hand, contend that the evidence in the record is far from undisputed, and that it shows that only a small percentage of Five Percenters have any record of involvement in incidents of violence in SCDC facilities.[1] The operative inquiry under the first prong of Turner, however, is more than a matter of mere percentages -- the issue is whether Defendants, given the full body of information regarding the Five Percenters that was available to them, could rationally conclude that segregating the entire group would advance the legitimate interests of institutional security. In addition to containing evidence of Five Percenter involvement in several prison disturbances at SCDC facilities, the record also demonstrates that Defendants possessed information to the effect that at least one other state (New Jersey) and the United States Bureau of Prisons have designated the Five Percenters as a security threat group. See Defendants' Exhibits 9 and 10. Given this information, the magistrate did not err when he concluded that placing the Five Percenters in a higher security

[1] The exact numbers and percentages of Five Percenters that have been involved in prison disturbances is unclear from the record. By Plaintiffs' own computations, however, it appears that at least eighteen Five Percenters were involved in at least five separate incidents of prison violence in SCDC facilities between August of 1992 and April of 1995. Plaintiffs' computations also demonstrate that, of the 64 inmates still confined in heightened-security segregated custody as Five Percenters, at least eleven (or 17.2%) are documented by Defendants as having been involved in prison disturbances. See Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, pp. 22-23.

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category is rationally and reasonably related to the legitimate penological interest of promoting safety and security in SCDC facilities.

The second Turner factor asks whether alternative means of exercising their rights remain open to Plaintiffs. In this case, it appears from the record that confinement of Five Percenters to heightened-security segregated custody eliminates their ability to gather and to meet in "cyphers" or "universal parliaments," which are dictated by their beliefs. However, the record reflects that the decision to place Plaintiffs in isolated custody was largely based on the rationale that, as described above, further violence could be averted by separating the Five Percenters from the prison population and preventing them from gathering in groups. Therefore, allowing Plaintiffs out of isolated custody to gather for "cyphers" and "universal parliaments" would risk re-creating the security and safety threats that such custody was meant to avoid in the first place. Thus, there is no alternative to this restriction on Plaintiffs' religious practices.

It should be noted that this restriction does not totally prevent Plaintiffs from practicing their religion. Indeed, the magistrate correctly noted that numerous other means of practicing their religion are available to Plaintiffs. They may pray, meditate, fast, follow dietary restrictions, and study the Qu'ran, the Bible, and literary materials of the Nation of Islam.[2] It is apparent from the record that, while the restrictions will hinder Plaintiffs'

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[2] Under the measures imposed by Defendants, Plaintiffs are prohibited from possessing certain pieces of Five Percenters literature. However, the magistrate concluded that the literature ban is too restrictive and that Plaintiffs may be allowed access to properly censored Five Percenters literature. As discussed in greater detail infra, this Court finds the magistrate's conclusion with respect to the literature ban to be correct -- therefore, the lifting of the absolute ban on Five Percenters literature provides Plaintiffs with yet another means of practicing their religion.

abilities to practice their religion somewhat, it will not foreclose all, or even most, of Plaintiffs' religious practices.

The third Turner factor concerns the impact that accommodating Plaintiffs' asserted rights would have on prison staff, resources, and other inmates. Plaintiffs assert that those Five Percenters who have been confined in segregated custody solely because of their affiliation with the Five Percenters group should be released into the general population, and that such a measure would have only minimal impact on the rest of the prison. The magistrate, however, noted that a court should be reluctant to second-guess the judgment of prison officials on such a matter. Furthermore, the magistrate stated that, when prison officials have identified members of a group that subscribes to a philosophy of racial hostility, they should not be required to wait for those inmates to act on that philosophy before taking steps to separate them from the rest of the prison population. Plaintiffs object to this conclusion on the grounds that the record fails to establish the requisite racial animus of the Five Percenters, and that the SCDC and several federal courts have recognized that certain other groups with racially-biased beliefs constitute bona fide "religions." Thus, they appear to argue that, whatever racism is inherent in the Five Percenters' beliefs, it does not justify placing all Five Percenters in segregated custody.

In truth, the existence (or non-existence) of a racial element within Plaintiff's belief system is incidental to the analysis required by the third Turner factor. That factor simply asks whether accommodation of Plaintiffs' asserted rights would impact the smooth administration of the prison. In this case, as described above, Defendants possessed competent information displaying a pattern of involvement by Five Percenters in several

violent incidents in SCDC facilities, as well as indicating that the group adhered to certain racially-biased philosophies. From that information, they reasonably concluded that prison security would be improved by segregating the Five Percenters from the rest of the prison population. Accommodating Plaintiffs' asserted rights (which would entail releasing many or all of the Five Percenters back into the general population) would, again, run the risk of creating the very security risk which Defendants intended to alleviate -- thus, it can hardly be said that the impact on prison administration would be "minimal." "When accommodation of an asserted right would have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." Turner, 482 U.S. at 90. Thus, the magistrate did not err in concluding that the third Turner factor weighs in Defendants' favor.

The fourth and final Turner factor requires determining whether there are any "ready alternatives" to Defendants' actions. The existence of obvious, easy alternatives to the restrictions imposed by Defendants (specifically, the placement of the Five Percenters in high-security isolated custody) is evidence that such restrictions are not reasonable. Id. at 90. However, given the close relationship between the third and fourth factors, the magistrate correctly noted that prison officials deserve deference with regard to this issue as well. Id.; O'Lone, 482 U.S. at 349-350, 353. In this case, the "alternative" for which Plaintiffs argue would require releasing the Five Percenters back into the prison population and monitoring them, and presumably waiting until one or more of them become involved in a violent incident before placing them in segregated custody. The magistrate concluded that, given the information on which Defendants based their actions and the strong policy of

deference to prison officials as articulated by the Supreme Court, it would be improper for a court to tell Defendants that they must wait for further incidents of violence to act. Based on the above review, this Court finds no error with that conclusion.

(b) Equal Protection Clause

Plaintiffs argue, as above, that their placement in segregated custody is an exaggerated response to the actions of a few "bad apples" within their group. They further argue that such a response amounts to unconstitutional discrimination, because Defendants have never placed all members of any other religious group in segregated custody because of the acts of a few "bad apples."

Plaintiffs are correct in asserting that prisoners do not forfeit their rights to be free from unconstitutional discrimination on the basis of religion. However, courts have recognized that practical concerns of prison administration may weigh on the degree to which a particular religion must be accommodated. For example, while Plaintiffs cite the case of Al-Alamin v. Gramley, 926 F.2d 680 (7th Cir. 1991), for the proposition that all inmates must receive "qualitatively comparable" treatment, the same case acknowledges that "security constraints may require that the needs of inmates adhering to one faith be accommodated differently from those adhering to another." Id. at 686.

While the Fourth Circuit has not conclusively spoken on the issue, the Supreme Court has indicated that the determination of whether Plaintiffs' Equal Protection rights have been violated should follow the same four-factor Turner analysis described above. In Washington v. Harper, 494 U.S. 210 (1990), the Supreme Court noted that the Turner standard applies "when the constitutional right claimed to have been infringed is fundamental, and the State

under other circumstances would have been required to satisfy a more rigorous standard of review." Id. at 223 (holding that lower court erred in not applying Turner "reasonableness" standard to prisoner's claim of due process violations). Moreover, several other circuits, as well as several district courts within this circuit, have determined that the Turner "reasonableness" standard governs prisoners' equal protection claims. See, e.g. Allen v. Cuomo, 100 F.3d 253, 261 (2nd Cir. 1996); Jenkins v. Angelone, 948 F. Supp. 543, 549 (E.D. Va. 1996); Shaheed v. Winston, 885 F. Supp. 861, 868-869 (E.D. Va. 1995); Salaam v. Collins, 830 F. Supp. 853, 855-859 (D. Md. 1993), aff'd, 70 F.3d 1261 (4th Cir. 1995). Therefore, there can be no violation of the Equal Protection Clause if Defendants' actions were "reasonably related to a legitimate penological interest." As described in the above section, the magistrate did not err in concluding that Defendants' placement of Plaintiffs in segregated custody was reasonably related to the legitimate concern of institutional security. Just as that conclusion precluded Plaintiffs' claims of First Amendment violations, it also precludes Plaintiffs' claims under the Equal Protection Clause.

(c) Eighth Amendment

The magistrate correctly noted that, in the Fourth Circuit, a prisoner seeking to assert a claim under the Eighth Amendment must make a prima facie showing of (1) a serious deprivation of a basic human need, and (2) deliberate indifference to prison conditions on the part of prison officials. Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir. 1993). He went on to conclude that Plaintiffs had not presented sufficient evidence of a "serious deprivation" or of "deliberate indifference" by prison officials to support their claim.

In objecting to the magistrate's conclusion, Plaintiffs assert that the "harsh and

restrictive" conditions of confinement in segregated custody, as well as the duration of their confinement, violate the Eighth Amendment. Plaintiffs cite Hutto v. Finney, 437 U.S. 678 (1978), for the proposition that the duration of one's confinement is a relevant factor in determining whether the confinement constitutes cruel and unusual punishment. However, while the duration of one's confinement may be relevant to the issue of whether the punishment violates the Eighth Amendment, it is not controlling. Ross v. Reed, 719 F.2d 689, 697 (4th Cir. 1983); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 861 (4th Cir. 1975). Moreover, the mere existence of harshly restrictive conditions of confinement does not, by itself, constitute an Eighth Amendment violation -- as described above, the prisoner must also produce evidence of a serious "medical and emotional deterioration attributable to the challenged condition." Lopez v. Robinson, 914 F.2d 486, 490 (4th Cir. 1990). Lopez also cites Turner and O'Lone for the proposition that courts should exercise restraint before concluding that prison officials' conduct constitutes deliberate indifference. Id.

In this case, the magistrate correctly noted that only five of the approximately 50 plaintiffs claim to have suffered adverse emotional or psychological effects associated with segregated custody. Plaintiffs, however, cannot point to any evidence that those who required medical treatment did not receive it, nor is there any other evidence that Plaintiffs have been subjected to living conditions that are otherwise substandard, much less unconstitutional. As noted above, long-term isolated custody does not, in and of itself, present a constitutional violation, even if it entails very restrictive conditions which cause some degree of psychological stress. While prolonged isolation and restricted activity can

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be threats to a person's psychological and emotional health, "Eighth Amendment standards are offended by prolonged and indefinite confinement only when basic nutrition, sanitation, and health standards are ignored or when the segregated confinement bears no reasonable relation to the purpose for which a prisoner is committed." Bukhari v. Hutto, 487 F. Supp. 1162, 1170 (E.D. Va. 1980) (citing Hutto v. Finney and Sweet). In this case, since there is no evidence that Plaintiffs suffered a deprivation of "basic human needs" or that prison officials have been "deliberately indifferent" to their well-being, the magistrate was correct in concluding that Defendants are entitled to summary judgment on Plaintiffs' Eighth Amendment claim.

(d) Qualified Immunity

The magistrate concluded that Defendants are entitled to qualified immunity from money damages based on the rationale that a reasonable prison official could have determined that the Five Percenters were nothing more than a prison gang, and not a true religion. Thus, the magistrate reasoned, it follows that a reasonable prison official could determine that imposing restrictions on inmates based on their status as members of the Five Percenters group would not violate any of the inmates' clearly established constitutional rights. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (Officials are shielded from liability for damages unless their conduct violates "clearly established constitutional or statutory rights of which a reasonable person would have known."); Rowland v. Perry, 41 F.3d 167, 172-173 (4th Cir. 1994) (Determining "reasonableness" for qualified immunity purposes requires examining the objective facts as perceived by the public official at the time of the challenged action).

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As in their summary judgment brief, Plaintiffs continue to argue that no reasonable public official could conclude that the Five Percenters are not a religion. However, Plaintiffs can point to no case which has held that the Five Percenters are a religion -- the best that they can do is cite several cases recognizing that the Nation of Islam (to which the Five Percenters bear certain similarities) is a recognized religion. The record indicates that, at the time that Defendants decided to place the Five Percenters in segregated custody, they possessed information regarding involvement of the Five Percenters in several disturbances at SCDC facilities, classification of the Five Percenters as a threat group in at least two other prison systems, and the opinion of the Muslim Chaplain for the SCDC that the Five Percenters were a gang that attempted to align themselves with Muslim teachings to create the appearance of a legitimate religion. See Defendants' Exhibit 7. Given this information, it is clear that a reasonable prison official could conclude that the Five Percenters are a gang, and that restrictive measures of the types imposed by Defendants would directly improve prison security and safety. Accordingly, the magistrate correctly concluded that Defendants are entitled to qualified immunity from money damages.

(2) Defendants' Objections to the Magistrate's Report and Recommendation

Defendants object to the magistrate's recommendation that their Motion for Summary Judgment be denied as to Plaintiff's claim challenging the SCDC's prohibition on inmate possession of Five Percenter literature. In formulating his recommendation, the magistrate correctly noted that this issue is controlled by the four-part Turner "reasonableness" test described in the previous section. As described above, the Supreme Court has applied the Turner test in cases involving prison regulations that implicate the First Amendment right

to free exercise of religion. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). It has also been applied in cases involving regulations that restrict prisoners' access to reading materials. Thornburgh v. Abbott, 490 U.S. 401 (1989).

The magistrate noted that, while some Five Percenter literature may contain racist views, the defendants could point to no pieces of literature which advocated violence or illegal acts.[3] The magistrate then concluded that the Five Percenters' literature could not be banned just because it contained racist views, especially where it has not been shown to advocate violence or illegal acts, or to be so racially inflammatory as to be reasonably likely to cause violence. Further, the magistrate opined that a "ready alternative" to a total ban on the literature would be to censor any materials that are inflammatory or promote violence, while allowing Plaintiffs to have access to other Five Percenter literature. Finally, he noted that, while concluding that the ban imposed by Defendants may be too restrictive, his report should not be construed as recommending that the Five Percenters' literature must be made available to inmates who are not Five Percenters and are not parties to this action.

In objecting to the magistrate's recommendation, Defendants argue that, while much of the Five Percenters' literature may not promote racial animosity or violence, the ban is nonetheless a reasonable and necessary measure to prevent the growth of the Five Percenter group, which has been deemed a security threat. Indeed, the magistrate agreed that the

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[3] In the memorandum accompanying their Motion for Summary Judgment, Defendants allude to one Five Percenter "lesson" which advocates the killing of four "devils," which Defendants interpret to mean white men. Defendants, however, have presented no actual piece of Five Percenter literature that overtly encourages the killing of whites, and the proper interpretation of this lesson is unclear under the current record. Needless to say, Plaintiffs dispute Defendants' interpretation of this lesson.

characterization of the Five Percenters as a security threat was reasonable and justifiable. However, this does not necessarily render the magistrate's recommendation incorrect.

The magistrate noted that the literature could be censored to remove any passages promoting violence or racial hostility, and that such a measure could provide a reasonable, "ready alternative" to an outright ban. More important, however, is the fact that it would create only a minimal impact on prison guards and the rest of the prison population, because the literature need not be made available to those who are not members of the Five Percenters group and who are not parties to this action. Defendants' concern that the availability of the literature within the general prison population might contribute to the growth of a security threat group is not an illegitimate one. Indeed, the Supreme Court has recognized that sometimes, literature may create the potential for discord by virtue of its very presence and circulation within a prison population, even if it does not directly advocate violence, and that prison officials should have discretion to address such threats. Thornburgh, 490 U.S. at 412-413. In this case, however, the magistrate's recommendation carefully indicated that Defendants would be required to make the literature available only to those inmates who are Five Percenters and who have been placed in isolation, and not to the general prison population. In short, the magistrate did not conclude that prison officials may not place any restrictions on the availability of Five Percenters literature -- in fact, his recommendation allows for a wide range of restrictions. The magistrate simply concluded that a total, outright ban was too restrictive -- a conclusion with which this Court does not find error.

Defendants also argue that the magistrate based his conclusion, at least in part, on

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legal authority that is no longer controlling. The magistrate cited the cases of Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976), and Long v. Parker, 390 F.2d 816 (3rd Cir. 1968), for the proposition that prisons may not ban literature simply because it adopts racist views. Defendants correctly note that both of these cases, which pre-date Turner and its progeny, apply standards that are more rigorous than Turner's "reasonableness" standard. However, two circumstances support the magistrate's ultimate conclusion in this case. First, although the Fourth Circuit has not yet spoken on the issue, several other circuits have concluded in the years following Turner, O'Lone, and Thornburgh that literature may not be banned in prisons solely because it adopts racist views, so long as it does not promote or create a reasonable likelihood of violence. See Williams v. Brimeyer, 116 F.3d 351, 354 (8th Cir. 1997) (Acknowledging Turner as controlling authority and holding that literature may not be banned solely because it expresses racist and separatist views); Stefanow v. McFadden, 103 F.3d 1466, 1472-1473 (9th Cir. 1996) (Racist literature may be banned only if so inflammatory as to create threat of violence); McCabe v. Arave, 827 F.2d 634, 637-638 (9th Cir. 1987) (Recognizing Turner and O'Lone as controlling authority and holding that literature may not be banned just because it advocates racial purity).[4]

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[4] The magistrate cited McCabe as support for his recommendation. Defendants attempt to distinguish it on grounds that it did not deal with restrictions aimed at curbing the growth of a security threat group, and that it was decided before Thornburgh. The latter attempt to distinguish McCabe accomplishes nothing, because even though McCabe preceded Thornburgh, the Ninth Circuit correctly recognized Turner as controlling authority and applied its "reasonableness" test, as Thornburgh would have directed. Likewise, the former argument for distinguishing McCabe does not support Defendants' position. As stated supra, the magistrate clearly indicated that the Five Percenters' literature may be censored and need not be made available to the general prison population, a measure which would alleviate Defendants' concern about the group's growth.

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The second relevant circumstance is that the magistrate's recommendation, taken as a whole, was not based solely on Aikens and Long. Indeed, the vast bulk of his analysis of this issue concerns application of the Turner test, as required by O'Lone and Thornburgh. As such, the magistrate's recommendation cannot be said to be based on "bad law."

Lastly, Defendants argue that some of the Five Percenters' publications contravene any conclusion that the group is an actual religion. However, Plaintiffs' status as a "religious" or "non-religious" group does not affect the applicable standard which governs this Court's examination of the literature ban. That standard is established by Turner, and under Thornburgh, restrictions on non-religious publications are to be evaluated under the Turner test as well. Therefore, even if the Five Percenters are not a religion, Turner still supplies the appropriate framework for evaluating a ban on their literature. As stated supra, the magistrate correctly applied the Turner test in concluding that a total, outright ban on Five Percenters' literature is too restrictive.

IV. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

As stated in Section II, supra, of this Order, Plaintiffs originally filed a motion and brief seeking a preliminary injunction based on the Religious Freedom and Restoration Act (RFRA). After the RFRA was struck down by the United States Supreme Court, but before the magistrate issued his report and recommendation, Plaintiffs filed an amended brief containing an argument based on the First Amendment. Defendants filed a response in which the addressed both Plaintiffs' RFRA and First Amendment arguments. However, when he issued his report and recommendation, the magistrate did not address the First Amendment argument presented by Plaintiffs in their amended brief. Plaintiffs have

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objected to the magistrate's report and recommendation on the grounds that they are entitled to a preliminary injunction under their First Amendment argument.

Given the above resolution of Defendants' Motion for Summary Judgment, Plaintiffs' Motion for a Preliminary Injunction is mooted except as to Plaintiffs' claim that the total ban on inmate possession of Five Percenters literature violates the First Amendment. With respect to that single claim, this Court now considers the First Amendment argument advanced by Plaintiffs in their amended brief and in their objections to the magistrate's report and recommendation.

A. Standard for Granting a Preliminary Injunction

In the Fourth Circuit, four factors are relevant to determining whether a litigant is entitled to a preliminary injunction:

(1) The likelihood of irreparable harm to the plaintiff if the injunction is denied;

(2) The likelihood of harm to the defendant if the injunction is granted;

(3) The likelihood that the plaintiff will eventually succeed on the merits; and

(4) The public interest.

Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 192, 194-196 (4th Cir. 1977). The first two factors, which determine the "balance of hardships," represent the most important determination, as they dictate how strong a likelihood of eventual success on the merits a plaintiff must show. Hughes Network System, Inc. v. Interdigital Communications Corp., 17 F.3d 691, 693 (4th Cir. 1994) (citing Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991)). If the balance of hardships tips decidedly in the favor of the plaintiff, the injunction will be granted if the plaintiff "has raised questions

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going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 813 (4th Cir. 1991) (citing Rum Creek, 926 F.2d at 359). However, "as the balance tips away from the plaintiff, a stronger showing on the merits is required." Id. Moreover, the Fourth Circuit has cautioned that, before a preliminary injunction may be granted in any case, the party seeking it must show that it will suffer a type of harm that is irreparable. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Hughes Network Systems, 17 F.3d at 694 (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)).

B. Discussion

This Court's first task is to consider the degree to which the balance of hardships tips, if at all, in favor of Plaintiffs. The first step in such an analysis is to determine whether Plaintiffs stand to suffer irreparable harm if no injunction is granted. Plaintiffs have produced sufficient evidence to survive a motion for summary judgment regarding their claim that Defendants' total ban on Five Percenters literature violates their First Amendment rights. The Fourth Circuit has acknowledged that "a constitutional or federal statutory violation creates a special harm." Rum Creek, 926 F.3d at 361. Moreover, it has also noted that a deprivation of one's First Amendment rights, even for a short time, may constitute an irreparable injury. Id. at 362 n.12 (citing Elrod v. Burns, 427 U.S. 347 (1976)). Finally, since Defendants have been granted qualified immunity from money damages, Plaintiffs have no means of receiving compensation for any deprivations of their rights that may have

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occurred. Thus, there exists a substantial likelihood that Plaintiffs will suffer an irreparable harm arising from an ongoing violation of their constitutional rights if no injunction is issued.

On the other side of the coin, the hardship to Defendants that would result from the issuance of a preliminary injunction is not great. As discussed in greater detail supra, Defendants would still be able to place significant restrictions on Five Percenters literature in SCDC facilities. Defendants would be allowed to censor the materials to remove any passages that may encourage violence or that would be so inflammatory as to pose a security threat. Moreover, as described in the magistrate's report and recommendation regarding Defendants' Motion for Summary Judgment, Defendants would not be required to allow the general prison population to have access to Five Percenters literature. Only those inmates who are Five Percenters and who are confined in segregated custody would be allowed access to the properly censored literature. The administrative burdens of making such an accommodation seem minimal, particularly when one considers that such an accommodation would not pose any of the security risks with which Defendants are concerned.

Given the fact that the balance of hardships appears to tip in Plaintiffs' favor, it is not necessary for them to show a strong likelihood of success on the merits -- instead, they only need to show that they have raised questions regarding the merits serious enough to make the issue "fair ground" for litigation. Rum Creek, 926 F.2d at 359. As described supra, Plaintiffs have raised enough factual and legal questions regarding the reasonableness of Defendants' ban on Five Percenters literature to survive a summary judgment motion. In doing so, they have shown that the issue is at least "fair ground" for litigation -- indeed, their

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argument that Defendants' ban is too restrictive appears persuasive. Thus, the third Blackwelder factor weighs in Plaintiffs' favor as well.

The fourth and final factor concerns how the decision to grant or deny a preliminary injunction would impact the public interest. In this case, the interest at stake is presumably the public's interest in safe, efficient administration of its correctional facilities. As described above, the interests of prison safety and security would not be implicated by simply allowing those inmates who are Five Percenters and who are confined in segregated custody to have access to properly censored Five Percenters literature. Therefore, the fourth element of the Blackwelder test represents, at most, a neutral factor.

Taking all of the above factors into account, it appears that Plaintiffs are entitled to a preliminary injunction requiring Defendants to allow them to have access to properly censored Five Percenters literature.

V. CONCLUSION

It is, therefore,

ORDERED, for the reasons articulated above, that Defendants' Motion for Summary Judgment is:

(1) **GRANTED** as to Plaintiffs' Eighth Amendment claim;

(2) **GRANTED** as to Plaintiffs' Equal Protection claim;

(3) **GRANTED** as to Plaintiffs' claim that placement of the Five Percenters in heightened-security segregated custody violates their First Amendment rights;

(4) **DENIED** as to Plaintiffs' claim that Defendants' total ban on inmate possession of Five Percenters literature violates their First Amendment rights; and

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(5) **GRANTED** as to Defendants' claim that they are entitled to qualified immunity.

It is further,

ORDERED, for the reasons articulated above, that Plaintiffs' Motion for a Preliminary Injunction is **GRANTED** as to Plaintiffs' claim that Defendants' ban on Five Percenters' literature violates their First Amendment rights, and **DENIED** as to all other claims.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY

UNITED STATES DISTRICT JUDGE

Charleston, South Carolina

December 2, 1997

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