IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN RUST, et al.,	)	4:84CV712
	)	
Plaintiffs,	)	
	)	
v.	)	MEMORANDUM AND ORDER ON
	)	DEFENDANT'S MOTION TO
FRANK GUNTER, et al.,	)	TERMINATE THE CONSENT
	)	DECREE
Defendants.	)	
	)	

Now before me is Defendant Fred Britten's motion to terminate the consent decree that was entered in this case in 1986. (See ECF No. 148.) For the following reasons, Britten's motion will be granted, and the consent decree will terminate immediately.

I. BACKGROUND

On October 23, 1984, Plaintiffs John Rust, Charles J. Palmer, Peter Hochstein and Steven Harper filed a complaint against several officials employed by the Nebraska Department of Correctional Services,[1] alleging violations of 42 U.S.C. §§ 1983 and 1985. (See Filing No. 1.) The plaintiffs, who were confined in the

[1] The original complaint named Frank Gunter, Charles Black, Charles Hohenstein, John P. Shaw, Terence B. Campbell, John T. Eggers, and Hasan Muhammad as defendants. (See Filing No. 1.) Mario Peart and Harold W. Clarke were added as defendants on January 16, 1985. (See Supp. Compl., filing 20). A second amended complaint filed on February 24, 1986, added Gary Grammer as a defendant, and Hasan Muhammad's name was removed from the caption. (See Second Am. Supp. Compl., filing 67.)

Nebraska State Penitentiary under sentence of death, claimed that the defendants were violating the plaintiffs' "right to meaningful and effective access to the courts and to assistance of counsel by failing to provide them with meaningful access to legal materials, by depriving them of assistance of persons trained in the law, and by interfering with and restricting effective means of communication with attorneys and the courts in violation of the First, Sixth, and Fourteenth Amendments to the Constitution." (Second Am. Supp. Compl. ¶ 75, filing 67.)

On August 22, 1986, the plaintiffs and defendants moved jointly for the entry of a consent decree. (Filing No. 83.) This motion was granted, and a consent decree was entered on that same date. (Filing No. 85.) In pertinent part, the consent decree states,

> 1. Defendants, in their official capacity as employees and officials of the Department of Correctional Services of the State of Nebraska, shall affirmatively permit . . . Plaintiffs and all other prisoners now confined or hereafter confined under sentence of death (hereinafter collectively called "Death Row Inmates") in the Nebraska State Penitentiary, Lincoln, Nebraska (hereafter "NSP") to have direct physical access to and use of the Law Library at the NSP. At a minimum, said access shall be allowed as follows:
>
> a) Defendants . . . shall allow and permit Plaintiffs and other Death Row Inmates to use said Law Library pursuant to a schedule allowing separate use thereof by all Death Row Inmates. Such schedule shall provide a minimum of Two (2) hours per day on each of at least Five (5) days per each calendar week. Said Two (2) hours shall not include and shall not be diminished by any time necessary to transport Death Row Inmates from their housing unit to the Law Library.

. . . .

2. Defendants . . . shall establish, enforce and maintain a schedule for use of the telephone by Death Row Inmates which shall provide at least One (1) call per day of not less than Ten (10) Minutes duration. Defendants shall establish a schedule allowing at least 65 minutes each day for such calls between the hours of 8:30 a.m. to 3:30 p.m. and at least One Hour after 600 p.m. Upon a showing of need, the Housing Unit Manager shall allow the inmate to place one or more additional telephone calls at other than scheduled times. For the purposes hereof, a showing of need shall include but not be limited to: a pending execution date; a need to contact attorneys or court officials in connection with a hearing, trial or other deadline or due date established by the court or by applicable procedural laws or rules within 14 days after the request; or a need arising from an inability to contact an attorney, court official or public official through the use of the regular telephone call hereunder.

3. Death Row Inmates shall be entitled to request and receive photocopies of their personal legal materials, legal materials from the NSP Law Library or photocopies from any inter-library loan programs or judicial or executive governmental entities upon payment of any standard fee or charge therefor, provided however, that Defendants . . . shall provide Death Row Inmates with photocopies of the following described materials free of charge under the following circumstances:

a) Death Row Inmates may receive free copies of any document which is or may be required to be filed with any clerk of any court of law in a proceeding to which he is a party in a number sufficient to meet the filing requirements and one copy thereof for retention by the inmate.

b) Death Row Inmates, so long as they remain assigned to less than 20 days per month of work within the NSP, may receive free photocopies of such legal materials which are not available at the NSP Law Library, upon request to the

Legal Aide Coordinator which shall set forth (i) that the request is made in connection with a contemplated or pending action in which the Inmate is or will be a party, (ii) that the Inmate is not then represented by counsel in connection therewith, or that the materials are requested for the purpose of preparing a supplemental brief or pro se motion in an action in a court which will accept such filings; and (iii) that the requested materials are reasonably related to the subject matter of the pending or contemplated action as such subject matter has been disclosed by the Inmate.

c) Death Row Inmates shall also be entitled to free photocopies for legal purposes in addition to those described above, if such are otherwise made available to, and upon the same terms as made available to general population inmates at NSP.

4. Defendants . . shall schedule, allow and permit Death Row Inmates access to and use of the exercise yard for Death Row Inmates for a minimum of One (1) one-hour and fifty one (51) minutes per day, seven (7) days per week, provided that this paragraph shall not bind nor estop either Death Row Inmates or Defendants from additional access to and use of the exercise yard provided for Death Row Inmates.

5. Death Row Inmates shall be allowed at least Forty (40) minutes per day of Dayroom time and at least one visitation per week as is presently enjoyed, provided however, that this paragraph shall not bind nor estop ether Plaintiffs from seeking or Defendants from providing additional Dayroom time and visitations.

. . . .

7. Defendants . . shall provide to Death Row Inmates training in legal research, analysis and writing on a periodic basis. Such classes shall be offered at least once every Six (6) calendar months and shall be taught

> by person(s) trained in the law, holding a Juris Doctorate Degree or equivalent.
>
> 8. The foregoing Agreement and the terms hereof shall apply to Plaintiffs so long as they remain in special custody status solely by reason of the nature of their sentence.

(Id. at 2-6.) The consent decree also states, "This Decree shall constitute a permanent injunction against Defendants, in their official capacity, and their successors, and the Court shall retain jurisdiction for enforcement thereof by proper proceedings for contempt or otherwise." (Id. at 6-7.)

On February 5, 2010, Eric F. Vela and Jorge A. Galindo, acting pro se, filed a "Motion for Order of Contempt and Injunctive Relief." (See ECF No. 88.) Vela and Galindo stated that they are both death row inmates confined at the Tecumseh State Correctional Institution (TSCI) in Nebraska, and they alleged that they had been denied rights specified in the consent decree. (See id. at 2, 3-4.) On March 1, 2010, I appointed counsel to assist Vela and Galindo, (see ECF No. 91), and on August 2, 2010, counsel filed an "Amended Motion to Enforce Consent Decree" and a supporting brief, (ECF Nos. 95, 96). In their brief, Vela and Galindo stated that they each were placed in "disciplinary segregation" for approximately one month, followed by one year of "administrative segregation." (Br. at 3-4, ECF No. 96; Mot. for Contempt at 2-3, ECF No. 88.) They alleged that during their administrative segregation, they did not receive the law library access, legal research training, yard time, dayroom time, and phone calls specified in the consent decree. (Am. Mot. at 2, ECF No. 95; Br. at 4, ECF No. 96.) They asked that TSCI be found "in contempt of the consent decree as applied to Vela and Galindo," or, in the alternative, that TSCI

be ordered "to file a motion to modify the terms of the Consent Decree under Rule 60(b)" because it "is no longer equitable" to apply the consent decree prospectively "due to a change in circumstances and technology." (Br. at 6, 8, ECF No. 96.)

On August 6, 2010, Fred Britten[2] responded to Vela and Galindo's amended motion to enforce the consent degree by filing "Motions to Terminate Consent Decree and Dismiss Case." (ECF No. 97.) Britten argued that the consent decree must be terminated pursuant to 18 U.S.C. § 3626, and that Vela's and Galindo's motion must be dismissed for failure to state a cause of action. (See generally ECF Nos. 97-98.)

On September 9, 2010, John L. Lotter filed a document that I construed to be a motion to appoint counsel. (ECF No. 103). Among other things, Lotter claimed that "the rest of the Death Row Population" opposed the termination of the consent decree and ought to have its interests represented in this case. (See id. at 1-2.)

On December 6, 2010, I denied Vela's and Galindo's motion to enforce the consent decree, stating, "Vela's and Galindo's motion raises the relatively narrow question of whether the restrictions placed on them during their administrative segregation violate the terms of the 1986 consent decree. Because the consent decree applies only 'so long as [death row inmates] remain in special custody status solely by reason of the nature of their sentence,' Vela and Galindo cannot show that those restrictions violated the decree . . . ." (Mem. & Order at 7, ECF No. 115 (citation omitted).) I appointed counsel to represent Lotter "and all other inmates who

[2] Vela's and Galindo's pro se motion of February 5, 2010, names "Fred Britten, warden of TSCI," as defendant. (Mot. for Contempt, ECF No. 88.)

constitute a class of persons serving a death penalty in the Tecumseh State Correctional Institution," (Order ¶ 1, ECF No. 116), and I elected to reserve ruling on Britten's motion to terminate the consent decree until after the death row inmates had received an opportunity to supplement the record, (Mem. & Order at 7-11, ECF No. 115).

On March 1, 2012, Britten renewed his motion to terminate the consent decree. (ECF No. 148.) The motion is now ripe for resolution..

II. STANDARD OF REVIEW

Britten's motion to terminate the consent decree is made pursuant to the Prison Litigation Reform Act (PLRA). (See Mot. to Terminate, ECF No. 148 (citing 18 U.S.C. 3626(b)(1)).) The PLRA states, "In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(b)(2).[3] See also Hines v. Anderson, 547 F. 3d 915, 917 (8th Cir. 2008). The court cannot terminate prospective relief, however, if it "makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal

[3] The term "prospective relief," as it is used in the PLRA, encompasses consent decrees. See 18 U.S.C. § 3626(g)(7), (9).

right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). "Whether [a] . . . violation exists and whether the decree is narrowly tailored are independent issues," and "[i]f either is lacking, the district court may terminate the decree." Hines, 547 F.3d at 920.

III. ANALYSIS

As I noted in my memorandum dated December 6, 2010, "[t]here appears to be no dispute that the consent decree was entered 'in the absence of a finding by the court that the relief [it affords] is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right.'" (Mem. & Order at 9, ECF No. 115 (quoting 18 U.S.C. § 3626(b)(2)).) Therefore, "the consent decree must terminate immediately unless I make the written findings described in § 3626(b)(3)." (Mem. & Order at 9, ECF No. 115 (quoting 18 U.S.C. § 3626(b)(2)).) See also Tyler v. Murphy, 135 F.3d 594, 597-98 (8th Cir. 1998). After carefully reviewing the record, I am unable to find that the consent decree remains necessary to correct a current and ongoing violation of a federal right. Nor can I find that the consent decree is narrowly drawn.

A. Access to the Courts

The consent decree states that the death row inmates must be given "direct physical access" to the law library at NSP at least two hours per day, five days per week–excluding the time it takes to transport the inmates between their housing units

and the library. (Consent Decree at 2, Filing No. 85.) It establishes a schedule for death row inmates' use of the telephone, and it states that certain legal calls may be made outside of this schedule. (See id. at 3-4.) It states that the death row inmates are entitled to request and receive photocopies of legal materials "upon payment of any standard fee or charge," and it identifies circumstances when copies of legal materials may be obtained without charge (i.e., when the inmate is a party and the document is or may be required to be filed in the case; when the inmate is assigned to fewer than 20 days of work per month, the document is not available in the NSP law library, and a proper request is completed; and whenever free legal copies are otherwise made available to general population inmates at NSP). (See id. at 4-5.) It also states that the death row inmates are entitled to training in legal research, analysis, and writing at least twice per year, with such training to be provided by a person "holding a Juris Doctorate Degree or equivalent." (Id. at 5-6.)

It is clear that the foregoing provisions are meant to protect the death row inmates' right of access to the courts. See Lewis v. Casey, 518 U.S. 343, 350-51 (1996) (noting that inmates have a well-established right of access to the courts); Bounds v. Smith, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."). It is also clear that these provisions must terminate unless the evidence before me supports a finding that the death row inmates' federal right of access to the courts is being violated. See Hines v. Anderson, 547 F.3d 915, 921 (8th Cir. 2008) ("In the absence of evidence supporting a constitutional violation, the district court had no basis on which to make the findings the PLRA requires as a condition precedent to the maintenance of the decree."). To prove such a violation, "a prisoner must establish the state has not

provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury, that is, the hindrance of a nonfrivolous and arguably meritorious underlying legal claim." Williams v. Hobbs, 658 F.3d 842, 851-52 (8th Cir. 2011) (quoting Hartsfield v. Nichols, 511 F.3d 826, 831 (8th Cir. 2008)). It is important to note that prisoners do not have a federal right "to a law library or to legal assistance." Casey, 518 U.S. at 350. "[P]rison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" Id. at 351 (quoting Bounds, 430 U.S. at 825). Thus, "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Id. Instead, "the inmate must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. After carefully reviewing the record, I find that there is no evidence that the death row inmates' right of access to the courts is being violated.

The record includes "a large number of grievances" filed by the death row inmates, and many of these grievances concern the inmates' ability to access the law library, use the telephone, obtain copies, and obtain legal training. (Britten's Br. at 16, ECF No. 147; Inmates' Br. at 3, ECF No. 149. See also Britten's Index, Ex. 5, ECF No. 146-5; Britten's Index, Ex. 6, ECF No. 146-6; Britten's Index, Ex. 7, ECF No. 146-7; Britten's Index, Ex. 10, ECF No. 146-10.) I shall review each of these sets of grievances in turn.

1. Law Library

Between January 2002 and October 2011, the death row inmates submitted approximately forty written grievances that concern the issue of law library access. (See Britten's Br. at 17-22, ECF No. 147; Britten's Index, Ex. 5, ECF No. 146-5.) Of these, the death row inmates emphasize the following examples. (See Inmate's Br. at 4-6, ECF No. 149.)

On December 22, 2009, death row inmate Michael W. Ryan submitted a grievance form stating that "a considerable [number] of legal books," including "Moore's Law Forms," had been available to the death row inmates in the past; that some of these books were said to be available on computers, but the inmates had not "been given classes on how to find things on the computers"; and that a bookcase was needed so that encyclopedias sent from general population could be accessed by the death row inmates. (Britten's Index, Ex. 5 at 6, ECF No. 146-5.) In a response dated December 28, 2009, Ryan was told, "If you want a book that is in the HU 1EF Law Library room, submit an Inmate Interview Request to the unit staff requesting the specific book and staff will get bring [sic] it to the unit at their earliest availability." (Id.) Ryan pursued the grievance, arguing that under the consent decree, the death row inmates were entitled to "full access to the law library." (See id. at 7-8.) On February 2, 2010, he received a "step two" response stating,

> You contend the Department is not complying with the consent decree because it is not providing the death row inmates with a full supply of law books and contend that inmates in general population do have access to these books. Since that decree, the Department has

> stopped supplying law books to the inmates to be used for legal [research]. This applies to all inmates whether on death row or in general population. The Department now provides the inmates access to Westlaw. The Westlaw system includes state court decision[s], federal court decisions, Nebraska statutes, federal statutes, forms and other types of legal resources. You contend this computer access is inadequate because none of the inmates on death row have received training on how to use Westlaw. Arrangements will be made to provide training to those death row inmates who want to learn to use Westlaw to do research. Your request that the books be relocated to the area where you are housed is denied.

(Id. at 9.) Then on August 24, 2010, death row inmate John Lotter submitted an inmate interview request asking that certain legal books, including "Moore's Federal Practice," "be put back into the main law library and made available to all death row inmates upon request." (Id. at 5.) He received a reply stating, "All of the books you mentioned have been pulled off the shelves due to them being out dated. They are currently being updated but are not out yet." (Id.)

The death row inmates argue that the responses to these grievances are "inconsistent" and "confusing," adding, "The State's failure to provide [the death row inmates] an accurate accounting of which materials may be requested from the Circulating Library, or even a straight answer as to whether materials may be requested at all, demonstrates a failure on the part of the State to conform its treatment of [the death row inmates] to its regulations governing requests of the Circulating Library." (Inmates' Br. at 5, ECF No. 149.) They also refer me to a separate grievance, submitted in 2003, that concerns the death row inmates' lack of access to certain books. (See id. at 4 (citing Britten's Index, Ex. 5 at 53-61, ECF No. 146-5).)

The record does show that the death row inmates did not have immediate access to certain books, and I agree that some of the responses to their grievances were confusing. Nevertheless, there is no indication that any death row inmate suffered an "actual injury" due to his inability to obtain a book in a timely fashion. Casey, 518 U.S. at 351; Williams, 658 F.3d at 852. I note in passing that although the prison officials' failure to conform to their own regulations concerning the availability of books is relevant, there is no violation of a federal right of access to the courts unless the "actual injury" standard described in Casey and Williams is satisfied. This standard has not been met.

The death row inmates also argue that certain grievances reveal a "blanket policy of denying [the death row inmates' requests for] extra law library time if they do not receive their full allotment due to circumstances allegedly beyond the State employees' control." (Inmates' Br. at 6, ECF No. 149.) They state, "[T]he evidence shows that the State's usual procedure is to reply to [the death row inmates'] complaints that they were deprived of library time with responses that, while occasionally apologetic, take no action to correct whatever problems may have caused [the death row inmates] to lose their library time." (Id. (citing Britten's Index, Ex. 5 at 17-18, 20, 23-24, 49-50, ECF No. 146-5).) The records cited by the death row inmates support their argument: the inmates did not always receive the full allotment of library time specified in the consent decree, and when "unanticipated events" interfered with a death row inmate's library time, he was not "given additional library time to make up for the delay." (Britten's Index, Ex. 5 at 24, ECF No. 146-5.) Even so, there is "no freestanding constitutional right to a particular number of hours in the prison law library." Entzi v. Redmann, 485 F.3d 998, 1005 (8th Cir. 2007). As noted

above, to establish a violation of their federal right of access to the courts, the death row inmates must show that they suffered an actual injury due to their lost library time. No such showing has been made.[4]

The death row inmates argue that the prison officials have failed to address the "common complaint that legal aides are not being made available for the full two hours required by the State's own regulations." (Inmates' Br. at 6, ECF No. 149.) They add that the officials' "typical response is to offer no explanation as to why the legal aid[e] was not provided, summarily dismiss the [death row inmate's] concerns, and provide the [death row inmate] a nonspecific pledge that it is their goal to provide . . . a legal aid[e]." (Id.) In support of this point, the death row inmates refer me to a "Nebraska Department of Correctional Services Tecumseh State Correctional Institution Operational Memorandum" labeled "Inmate Rights: Inmate Law Program." (Inmates' Index, Ex. 11, ECF No. 151-11.) This memorandum states that an inmate legal aide will be provided upon request to assist death row inmates during certain times. (See id. at 6.) Again, however, the record does not show that any death row inmate suffered an actual injury due to the prison officials' failure to provide a legal aide. Moreover, the consent decree is silent on the matter of legal aides. Thus, even if the prison officials' lack of compliance with the Inmate Law Program memorandum amounted to an ongoing violation of the death row inmates' right of

[4] In one of the cited grievances, Lotter supposes that officers are "messing with death-row inmates" in order to provoke a reaction that would lead to "lock down status." (Britten's Index, Ex. 5 at 50, ECF No. 146-5.) He also states, "I have less than 60 days to amend my Federal Complaint. If my time in the law library keeps getting shortened by . . . staff I will not make that deadline." (Id.) There is no evidence that Lotter had any difficulty meeting his deadline, however.

access to the courts, I would be unable to make a finding that the consent decree remains necessary to correct this violation.

2. Legal Phone Calls

Between January 2006 and August 2009, the death row inmates submitted approximately eight separate written grievances about legal phone calls. (See Britten's Br. at 24-25, ECF No. 147; Britten's Index, Ex. 7, ECF No. 146-7.) Generally speaking, the grievances indicate that the death row inmates' ability to make legal calls has been frustrated on a few occasions. Sometimes the failed call attempts were attributed to staff errors. (E.g., Britten's Index, Ex. 7 at 5, 10, 12, ECF No. 146-7.) Other times, the failed attempts were attributed to the absence of proper paperwork. (E.g., id. at 1, 4, 8, 9.) The death row inmates argue that the grievances show that their treatment "falls well short of complete compliance" with the applicable regulations. (Inmates' Br. at 9, ECF No. 149.) After carefully studying all of the grievances, however, I find that there is no evidence that any death row inmate suffered an actual injury, or was denied adequate, effective, and meaningful access to the courts, due to the denial (or delay) of a legal phone call.

3. Photocopies

Between December 2006 and October 2011, the death row inmates submitted approximately eighteen written grievances about photocopies. (See Britten's Br. at 22-24, ECF No. 147; Britten's Index, Ex. 6, ECF No. 146-6.) The death row inmates state that many of these grievances express objections to a prison photocopy

regulation that "limits the free photocopies provided to [the death row inmates] and all other inmates to 'case[s] or statute[s],' and provides the free copies only upon the inmate's submission of a form identifying a 'court rule that requires an inmate to file a copy of a case or statute with a legal document.'" (See Inmate's Br. at 6-7, ECF No. 149 (citing Inmates' Index, Ex. 12, ECF No . 151-12).) They argue that this "new regulation concerning hard c opies of legal m aterials directly conflicts with the Consent Decree," and therefore I "should conclude that the State is not in substantial[] compliance" with the decree. (Id. at 7.)

The copy policy cited by the death ro w inmates does differ from the rule outlined in the consent decree. (Compare Inmates' Index, Ex. 12, ECF No. 151-12 with Consent Decree ¶ 3(b), Filing No. 85.) The issue at hand, however, is not whether the consent decree is being violat ed, but whether there is a current and ongoing violation of the death row inmates' federal right of access to the courts. Cf. Hines v. Anderson, 547 F.3d 915, 921 (8th Cir. 2008) (noting that "the existence of a violation of the decree does not necessa rily amount to a constitutional violation" when the consent decree is b roader than necessary to rem edy Eighth Am endment violations). Because there is n o evidence that the copy policy hindered "a nonfrivolous and arguably m eritorious underlying legal claim " challenging an inmate's sentence or conditions ofconfinement, Williams v. Hobbs, 658 F.3d 851-52 (8th Cir. 2011), I must conclude that the record fails to establish that there has been any violation of the inmates' right of access to the courts.

The death row inm ates also claim that the grievances illustrate "the delays imposed on [the death row inmates] by the regulations requiring them to send all their

photocopy requests through inmate mail." (Inmates' Br. at 7, ECF No. 149 (citing Britten's Index, Ex. 6 at 32-39, ECF No. 146-6).) More specifically, they claim that death row inmates must wait days for copies, while general population inmates can obtain copies immediately from "the Circulating Library." (Id. (citing Britten's Index, Ex. 6 at 32, 35, ECF No. 146-6).) The grievances cited by the death row inmates do indicate that copies requested by Ryan were delayed on more than one occasion. (See Britten's Index, Ex. 6, at 32-39, ECF No. 146-6.) There is no indication that these delays caused any injury, however, which precludes me from making a finding that the death row inmates' right of access to the courts has been violated.

4. Legal Training

Finally, between January 2007 and August 2011, the death row inmates submitted approximately eight grievances concerning the issue of legal training. (See Britten's Br. at 30-31, ECF No. 147; Britten's Index, Ex. 10, ECF No. 146-10.) These grievances and their responses show that the death row inmates did not consistently receive training in legal research, analysis, and writing every six calendar months as required by the consent decree. Thus, I agree with the death row inmates that the prison officials at TSCI have failed to comply with the portion of the consent decree governing legal training, and I find that the officials' failure has been ongoing since approximately 2007. Nevertheless, the death row inmates have no free-standing federal right to legal training, and my task is to determine whether the record establishes a current and ongoing violation of the inmates' right of access to the courts. Cf. Hines v. Anderson, 547 F.3d 915, 921 (8th Cir. 2008); Harvey v. Schoen, 245 F.3d 718, 721 (8th Cir. 2001). The record does not show that the officials' failure

to provide training every six months denied the death row inmates a reasonably adequate opportunity to challenge their sentences or conditions of confinement. In other words, there is no evidence that the death row inmates suffered an actual injury due to the officials' violations of the consent decree.

In summary, although the death row inmates have a federal right of access to the courts, they do not have a federal right to the specific benefits provided in the consent decree or the prison's regulations. Thus, to establish a violation of a federal right, the inmates cannot merely allege that their treatment has not conformed to the terms of the consent decree or certain prison regulations. Instead, they "must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered [their] efforts to pursue a legal claim." Lewis v. Casey, 518 U.S. 343, 351 (1996). Based on the record before me, I must conclude that the death row inmates have failed to make the requisite showing. There is simply no evidence suggesting that the death row inmates have lacked "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. Casey, 518 U.S. at 351.[5]

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[5] On page 10 of their brief, the death row inmates argue that "the State's inability to conform to the Consent Decree and its own regulations" has had a "proven prejudicial impact on [the death row inmates'] federal rights." (Inmates' Br. at 10, ECF No. 149.) They have referred me to no evidence of any prejudicial impact, however. I take the death row inmates' position to be that the prison officials' failure to provide all of the library time, phone calls, free copies, and legal training called for in the consent decree "taken together" has had such an impact that I should presume prejudice. (See id.) I shall not do so. On the contrary, I find that the death row inmates' failure to cite a single example of an actual injury prohibits me from finding that there has been a current and ongoing violation of the inmates' federal right of access to the courts.

B. Exercise Yard Time

The consent decree states that the defendants must allow the death row inmates to use "the exercise yard for Death Row Inmates for a minimum of One (1) one-hour and fifty one (51) minutes per day, seven (7) days per week." (Consent Decree at 5, Filing No. 85.) Neither Britten nor the death row inmates outline the contours of a federal right to exercise while incarcerated. (See generally Britten's Br., ECF No. 147; Inmates' Br., ECF No. 149; Britten's Reply Br., ECF No. 153.) It is well-established, however, that a prisoner may be able to establish an Eighth Amendment violation if he suffers a "sufficiently serious" deprivation of exercise, and prison officials demonstrate "deliberate indifference" to the prisoner's health or safety. See Rahman X v. Morgan, 300 F.3d 970, 974 (8th Cir. 2002) (quoting Simmons v. Cook, 154 F.3d 805, 807 (8th Cir. 1998)). A deprivation is "sufficiently serious" if the prisoner is denied "the minimal civilized measure of life's necessities." Wilson v. Seiter, 501 U.S. 294, 298 (1991). "In considering an alleged deprivation of adequate exercise, courts must consider several factors including: (1) the opportunity to be out of the cell; (2) the availability of recreation within the cell; (3) the size of the cell; and (4) the duration of confinement." Wishon v. Gammon, 978 F.2d 446, 449 (8th Cir. 1992). See also Rahman X, 300 F.3d at 974 ("Although Mr. X was not allowed to go outside to exercise for three months, he was permitted to use a dayroom with exercise equipment for three hours each week during this time. This amount of exercise does not demonstrate deliberate indifference to the plaintiff's health."); Campbell v. Cauthron, 623 F.2d 503, 507 (8th Cir. 1980) (requiring one hour of exercise per day for prisoners confined to cells for more than sixteen hours per day in an overcrowded jail).

The record shows that between January 2003 and December 2008, the death row inmates submitted approximately thirty separate written grievances concerning the exercise yard. (Britten's Br. at 26-29, ECF No. 147; Britten's Index, Ex. 8, ECF No. 146-8.) Most of these grievances state that death row inmates are sometimes not allowed to remain on the exercise yard for the entirety of their allotted time. (E.g., Britten's Index, Ex. 8 at 3, ECF No. 146-8.) Other grievances allege that the yard itself was deficient due to a lack of access to direct sunlight or a lack of sufficient size. (E.g., id. at 1-2, 9, 12, 36-53.) The record does not show that the death row inmates suffered a deprivation of exercise that is sufficiently serious to support a finding of a continuous and ongoing Eighth Amendment violation. Nor does the record establish that prison officials acted with deliberate indifference to the death row inmates' health or safety. Because there is no evidence of a current and ongoing violation of a federal right to exercise, I cannot find that the consent decree remains necessary to correct such a violation.

C. Dayroom and Visitation

The consent decree states that the death row inmates are entitled to spend at least forty minutes per day in the dayroom and to have "at least one visitation per week." (Consent Decree at 5, Filing No. 85.) Neither Britten nor the death row inmates have argued that inmates have a federal right to the specific amount of dayroom access and number of visits stated in the consent decree. (See generally Briten's Br., ECF No. 147; Inmates' Br., ECF No. 149; Britten's Reply Br., ECF No. 153.) I note, however, that visitation restrictions can implicate inmates' rights under the First and Eighth Amendments to the constitution, see generally Overton v.

Bazzetta, 539 U.S. 126 (2003), and dayroom restrictions might implicate the Eighth Amendment if they contribute to a sufficiently serious deprivation of exercise, cf. Wilson v. Seiter, 501 U.S. 294, 304-05 (1991) (suggesting that dayroom access can compensate for a lack of outdoor exercise opportunity); Rahman X v. Morgan, 300 F.3d 970, 974 (8th Cir. 2002) (same).

The record includes approximately five separate written grievances that concern dayroom access and three separate written grievances that concern visitation. (See Britten's Br. at 29-30, 31, ECF No. 147; Britten's Index, Exs. 9, 11, ECF Nos. 146-9, 146-11.) The dayroom grievances, which were submitted between February 2004 and January 2007, include a complaint that prison officials misstated the dayroom schedule on one occasion, (Britten's Index, Ex. 9 at 1); a request for extra dayroom time during the weekends, (id. at 2); a complaint that death row inmates were shorted four minutes of dayroom time, (id. at 3); a question about "room restrictions," (id. at 4); and another request for extra dayroom time, (id. at 5). The visitation grievances were submitted between September 2006 and December 2010. (See Britten's Index, Ex. 11, ECF No. 146-11.) In the most recent of these grievances, Lotter complained that although he had always been allowed three hours for visits on Wednesdays and Sundays, he was now being limited to two and one-half hours on those days. (Id. at 1-2.) In the second grievance, death row inmate Carey D. Moore stated that visitations had been starting thirty minutes late for several weeks, and he asked that a solution be found. (Id. at 3-6.) In the third grievance, death row inmate Jose M. Sandoval stated that when his attorney came to visit him on September 20, 2006, their visitation was held "in the SMU Legal client room" instead of the General Population visiting area. (Id. at 7-8.) He added that "there are speakers and call buttons" in the

SMU room, and therefore "there is no privacy between attorney and client." (Id.) After carefully considering these grievances, I find that the record does not support a finding that the consent decree remains necessary to correct current and ongoing violations of the death row inmates' federal rights to dayroom access or to visits.

D. Equal Protection

The death row inmates argue that "[t]he Consent Decree protects not only [their] right of meaningful access to the courts, but also their right to receive equal treatment respecting other rights, including the rights to meaningful exercise, leisure, and visitation." (Inmates' Br. at 9, ECF No. 149.) More specifically, they argue,

> The State has failed to successfully implement its satellite law library program in a way that provides [the death row inmates] the same degree of access to all of the reference and photocopying resources enjoyed by other inmates. [The death row inmates'] research and filings can be delayed for days while waiting for requests to be shuttled back and forth to the Circulating Library using an inmate mail system that does not conform to the State's regulations. Meanwhile, other inmates may go straight to the source for copies and reference materials. Thus, the State's unjustified differential treatment of [the death row inmates] is aggravated by its failure to provide a fully functional inmate mail system.

(Id. at 10 (citations omitted). See also id. at 11, 12, 13; Inmates' Index, Ex. 14 sections I, IV, ECF No. 151-14.) They add that the library provided to death row inmates includes only one typewriter (which is often unavailable), while other inmates have access to a library with six typewriters. (See Inmates' Br. at 11, 12, ECF No.

149; Inmates' Index, Ex. 15, Hughes Dep. at 9-10, ECF No. 151-15; Inmates' Index, Ex. 16, ECF No. 151-16.) They also argue that the death row inmates are "relegate[d] . . . to a patch of concrete surrounded on three sides by buildings and measuring only 1,400 square feet, merely one-quarter of the size of the 'exercise yard for the Death Row inmates' referenced in the Consent Decree." (Inmates' Br. at 11-12, ECF No 149. See also id. at 12-13; Inmates' Index, Ex. 18 at 4, ECF No. 151-18; Inmates' Index, Ex. 19 sections I(A), X(D), ECF No.151-19.) In short, the death row inmates claim that the consent decree must be maintained in order to protect their federal right to "equal protection." (Inmates' Br. at 10, ECF No. 149.)

"The heart of an equal protection claim is that similarly situated classes of inmates are treated differently, and that this difference in treatment bears no rational relation to any legitimate penal interest." Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (citing Timm v. Gunter, 917 F.2d 1093, 1103 (8th Cir.1990)). See also Hosna v. Groose, 80 F.3d 298, 304 (8th Cir. 1996) (noting that then plaintiffs do not allege that they are members of a suspect class, their equal protection claims are reviewed under a rational basis standard). "Dissimilar treatment of dissimilarly situated persons does not violate equal protection." Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994). "Thus, the first step in an equal protection case is determining whether the plaintiff[s have] demonstrated that [they were] treated differently than others who were similarly situated to [them]." Id. "Absent a threshold showing that [they are]similarly situated to those who allegedly receive favorable treatment, the plaintiff[s do] not have a viable equal protection claim." Id. Furthermore, "[t]he similarly situated inquiry focuses on whether the plaintiffs are similarly situated to another group for the purposes of the challenged

government action." Id. In other words, a group of inmates may be similarly situated to a different group of inmates for certain purposes, but not for others. See Hosna, 80 F.3d at 304 n.8 (citing More v. Farrier, 984 F.2d 269, 271 (8th Cir. 1993)).

The death row inmates' equal protection argument is based on an assumption that the death row inmates are similarly situated to general population inmates for the purposes of photocopying procedures, library typewriter availability, and exercise amenities. Their brief gives almost no attention to this issue, however. Apart from asserting, in conclusory fashion, that they are similarly situated to the general population inmates, (see Inmates' Br. at 11, 12, 13, 16, ECF No. 149), the death row inmates state only as follows:

> Thus, where [the death row inmates'] circumstances are identical to those of other inmates in the State's custody save the nature of their sentence, the Consent Decree requires the State to provide [the death row inmates] not only the same level of access [to] the courts . . . guaranteed under Bounds v. Smith, 430 U.S. 817 (1977), but the same level of access to other rights provided to the rest of the inmates. As acknowledged by the State, it was the "conditions of confinement on death row" specifically, not the conditions of confinement applied to all similarly situated inmates, that resulted in this Court's entry of its August 22, 1986 Consent Decree.

(Id. at 2-3 (citations omitted) (emphasis added).)

The death row inmates have not shown that they are similarly situated to the general population inmates for any relevant purpose. Instead, they imply that the "nature of their sentence" is irrelevant and make an unsupported claim that their

"circumstances are identical to those of other inmates."[6] Because they have failed to make the threshold showing that they are similarly situated to the general population inmates for any purpose, the death row inmates' equal protection claim necessarily fails.

Furthermore, even if I were to conclude that the death row inmates are similarly situated to the general population inmates for all relevant purposes, the death row inmates have not shown that the consent decree remains necessary to correct any equal protection violation.

Preliminarily, I note that the death row inmates' equal protection claim is based upon the notion that the consent decree requires the prison officials to provide the death row inmates with the "same level of access" to various rights that the general population inmates at NSP received. (See Inmates' Br. at 2, ECF No. 149.) It seems to me, however, that the consent decree grants unique rights–not equal rights–to death row inmates at NSP. Thus, as a general matter, it is difficult to construe the consent decree as a vehicle for obtaining equal protection for the death row inmates.[7]

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[6] I note in passing that the consent decree states that death row inmates are "in special custody status." (Consent Decree at 6, Filing No. 85.) (See also Britten's Index, Ex. 1-F, ECF No. 146-1 (describing death row as a "segregated confinement" unit at TSCI).)

[7] The only reference that the consent decree makes to the treatment of general population inmates appears in paragraph 3, which states that the death row inmates are entitled to copies "upon payment of any standard fee or charge therefor," and to free copies "upon the same terms as made available to general population inmates"–in addition to the special terms afforded only to death row inmates under the consent decree. (Consent Decree at 4-5, Filing No. 85.) The

A review of the consent decree's provisions concerning the specific rights cited by the death row inmates further undermines their equal protection argument. First, with respect to copies, the death row inmates claim that their treatment differs from that of the general population inmates because the latter group need not use the inmate mail system to request copies, which spares them delays. (Inmates' Br. at 10-13, ECF No. 149.) I note, however, that the death row inmates' argument is based upon a comparison of the procedures used by general population inmates for obtaining paid copies with those used by death row inmates for obtaining free copies. (See id. at 11 (citing Inmates' Index, Ex. 14 sections I, IV).) In other words, although they are treated differently, it is not clear that the death row inmates are treated unfavorably when compared with the general population. Setting this problem aside, I fail to see how maintaining the consent decree would eliminate the requirement that the death row inmates submit requests for free copies through the inmate mail. Indeed, the consent decree is silent as to the procedure for requesting copies, except insofar as it requires the death row inmates to submit certain requests for free copies to the "Legal Aide Coordinator" at NSP. (See Consent Decree at 4-5, Filing No. 85.) Thus, the enforcement of the consent decree would not remedy the alleged equal protection violation.

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consent decree also grants the death row inmates access to "the Law Library at NSP," which I infer to be the library used by the general population inmates–but the consent decree states that death row inmates are to be given "separate use" of the library, and there is no evidence that the death row inmates and general population inmates were allowed to use the library on the same terms (e.g., for the same number of hours each week). Thus, the terms of the consent decree do not support the death row inmates' claim that the decree must be maintained in order to protect their federal right to equal protection.

Similarly, the consent decree does not state that the death row inmates are entitled to use a particular number of typewriters while in the law library. Nor does it state that the exercise yard used by the death row inmates must be the same as–or even similar to–the exercise yard used by the general population at NSP. Therefore, even if I were to conclude that the death row inmates were suffering current and ongoing violations of their equal protection rights, there has been no showing that the consent decree remains necessary to correct those violations. See 18 U.S.C. § 3626(b)(3).

Citing Turner v. Safley, 482 U.S. 78, 89 (1987), the death row inmates argue at length that the State has not "introduced any evidence showing that its disparate treatment of [the death row inmates] 'is reasonably related to legitimate penological interests.'" (Inmates' Br. at 13, ECF No. 149. See also id. at 13-17.) As noted above, the standard of review that typically applies to inmates' constitutional claims is "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives." Turner, 482 U.S. at 87. See also Weiler, 137 F.3d at 1051 ("The heart of an equal protection claim is that similarly situated classes of inmates are treated differently, and that this difference in treatment bears no rational relation to any legitimate penal interest."). Moreover, it seems that Britten has not offered evidence showing that any differences in the treatment of death row inmates and general population inmates at TSCI is reasonably related to legitimate penal interests. I find, however, that because the death row inmates have failed to show that they are similarly situated to the general population inmates or that maintaining the consent decree will correct any differences in treatment between the

groups, there is no need to inquire whether certain prison regulations are reasonably related to legitimate penological objectives.

The death row inmates also argue that "[d]irect physical access to TSCI's Circulating Library, one that contains six typewriters, will correct the delays and impediments to [the death row inmates'] court access caused by sharing the single typewriter available in their current library" and "will provide [the death row inmates] the same 'primary' access to photocopying services enjoyed by other inmates." (Inmates' Br. at 19, ECF No. 149.) They also claim that this "direct physical access" will allow them to "avoid the delays and impediments caused by using the inmate mail system" by submitting copy requests "directly to the Legal Aid Coordinator in the Circulating Library." (Id.) In addition, the death row inmates argue that "enforcement of the Consent Decree will invalidate the discriminatory regulations that relegate [the death row inmates] to a yard measuring only 1,400 square feed because the exercise yard referred to in the Consent Decree measured 5,425 square feet." (Id.) As explained above, however, the consent decree simply does not require that the death row inmates be given direct physical access to TSCI's Circulating Library, that the prison use a particular procedure for processing free copy requests, or that the death row inmates be given access to a 5,425 square-foot yard at TSCI. Indeed, the death row inmates seem to acknowledge, at least tacitly, that their arguments depend upon inferences about how a consent decree that addresses conditions at NSP in the mid-1980s should be applied today at TSCI. In other words, the death row inmates do not argue that the consent decree should be applied literally (i.e., that they must be given access to the library and yard at NSP); rather, they claim that the consent decree must be interpreted in such a way that it remains relevant despite significant changes

in circumstances. (See, e.g., Inmates' Br. at 19, ECF No. 149 ("[I]t may be inferred that the parties and this Court intended that [the death row inmates] have access to a yard of a size that is at least comparable to one measuring 5,425 square feet." (emphasis added)).)[8]

"[S]ua sponte modification is not an alternative under the PLRA" for preserving a consent decree when the findings required under § 3626(b)(3) cannot be made. Hines v. Anderson, 547 F.3d 915, 922 (8th Cir. 2008). Put differently, I cannot rewrite the consent decree in order to make a finding that the decree remains necessary to address a current and ongoing violation of a federal right.

In short, I cannot conclude that the consent decree remains necessary to correct current and ongoing violations of the death row inmates' equal protection rights.

E. Narrow Tailoring

I am also unable to find that the consent decree "extends no further than necessary to correct the violation of the Federal right, and . . . is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). Thus,

[8] I note in passing that in their brief in support of their motion to enforce the consent decree, Vela and Galindo argued, "The existing Consent Decree does not reflect the current conditions in TSCI, including the law library. In many respects, it makes little sense for the Court to enforce a Consent Decree that has been rendered factually obsolete by virtue of the new location of 'Death Row' as well as by the advancement in technology in the legal system." (Br. at 6, ECF No. 96.)

even if the death row inmates had established a current and ongoing violation of a federal right, the consent decree must be terminated. See Hines, 547 F.3d at 920, 921.

The consent decree states that the death row inmates must be provided with very specific amounts of access to specific resources in order to preserve their right of access to the courts. It also provides them with specific numbers of minutes of exercise, dayroom, and visitation time. As noted in the preceding sections of this memorandum, this highly particularized "oversight" of all aspects of court access, exercise, and socialization for death row inmates is "broader than necessary to assure protection" of the death row inmates' federal rights. Hines, 547 F.3d at 922. Moreover, to the extent that the consent decree addressed particular federal violations that existed at the time of its adoption (e.g., the death row inmates were not given access to an adequate law library at NSP prior to the adoption of the decree), significant changes in circumstances prevent me from concluding that the consent decree remains the least intrusive means of correcting that violation.

The death row inmates argue that the consent decree is narrowly tailored because it is limited in scope, applying only to death row inmates "so long as they remain in special custody status solely by reason of the nature of their sentence." (Inmates' Br. at 21, ECF No. 149 (quoting Consent Decree at 6, Filing No. 85).) They claim that it is "minimally intrusive because it does not involve this Court in the minutiae of prison operations, but merely provides minimum standards for [the death row inmates'] access to legal programs and a small, finite number of other privileges." (Id.) Finally, they note that because "the State played a primary role in developing the

Consent Decree," they likely would have refused to agree to its terms if it extended further than necessary. (Id.)

I do not agree that the consent decree is minimally intrusive. As noted above, it potentially involves the federal court in such matters as the precise number of minutes of library, exercise, telephone, and dayroom time that must be provided to death row inmates, along with the frequency of their legal training and visits. It is true, however, that the state's participation in the development of the decree and the limited number of inmates that fall within its scope weigh in favor of the death row inmates' position. Nevertheless, I am not persuaded that the consent decree "extends no further than necessary to correct the violation of the Federal right, and . . . is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).

In summary, after thoroughly reviewing the record, I cannot find that the consent decree remains necessary to correct current and ongoing violations of the death row inmates' rights to access the courts, to exercise, to visit, or to use a dayroom. Nor can I find that the consent decree remains necessary to correct equal protection violations. Thus, the consent decree must terminate immediately. See 18 U.S.C. § 3626(b)(2)-(3).

IT IS ORDERED that Britten's motion to terminate the consent decree, ECF No. 148, is granted, and the consent decree entered on August 22, 1986, Filing No. 85, is terminated.

IT IS FURTHER ORDERED that Britten's prev iously-filed motion to terminate the consent decree, ECF No. 97, is denied as moot.

Dated May 2, 2012

BY THE COURT

s/ Warren K. Urbom
United States Senior District Judge