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United States District Court,
E.D. Missouri, Eastern Division.

Samuel L. MCDONALD, Thomas Battle, and Alan J. Bannister, individually and on behalf of all other persons similarly situated, Plaintiffs,
v.
Michael BOWERSOX, Dora Schriro, George Lombardi, and Mel Carnahan, Defendants.
Samuel L. MCDONALD, Gerald M. Smith, Rayfield Newlon, Thomas Battle, and Alan J. Bannister, individually and on behalf of all other persons similarly situated, Plaintiffs,[1]
v.
Paul DELO, Dick Moore, George Lombardi, and John Ashcroft, Defendants.[2]
No. 89–1086 C(2). | Sept. 18, 1995.

**Attorneys and Law Firms**

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Susan D. Boresi, Attorney General of Missouri, Assistant Attorney General, St. Louis, MO, for defendants.

**Opinion**

***ORDER***

FILIPPINE, J.

***1** In accordance with the memorandum and order filed this date and incorporated herein,

IT IS HEREBY ORDERED that plaintiffs' cause of action is DISMISSED with prejudice.

***MEMORANDUM AND ORDER***

This matter is before the Court on defendants' "motion ... to dismiss this lawsuit" ("motion to vacate")[3] and on plaintiffs' motion to reopen fairness hearing.

Pursuant to this Court's federal question jurisdiction and 42 U.S.C. § 1983, plaintiffs filed a complaint in the United States District Court for the Western District of Missouri ("Western District") seeking declaratory and injunctive relief for conditions and practices of confinement that allegedly violated the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[4] In accordance with the parties' stipulation, the Western District certified a plaintiff class consisting of inmates presently or in the future confined under sentence of death by the Missouri Department of Corrections and Human Resources ("MDCHR"). Defendants, who denied liability and asserted various affirmative defenses in response to plaintiffs' claims, are the Superintendent of the Potosi Correctional Center ("PCC"), the Director of the MDCHR, the Director of the MDCHR's Division of Adult Institutions, and the Governor of the State of Missouri. Plaintiffs' claims were resolved, prior to commencement of trial and without a determination of liability, by the Western District's approval of the parties' May 22, 1986, consent decree ("Original Consent Decree" or "Original Decree").[5] *See* order filed December 15, 1986, and Final Judgment filed January 7, 1987.

When this case was originally filed, plaintiff class members were incarcerated at the Capital Punishment Unit ("CPU")[6] of the Missouri State Penitentiary ("MSP") in Jefferson City, Missouri,[7] which is now known as the Jefferson City Correctional Center. Upon approval by the Western District, in 1989 the CPU was moved to the then newly constructed Potosi Correctional Center in Mineral Point, Missouri. *See* orders filed March 13, 1989, April 6, 1989, and May 10, 1989. By its May 10, 1989, order, the Western District approved modifications to the Original Consent Decree in light of the transfer of the MSP's CPU to the PCC and ordered that the case be transferred to this Court. The United States Court of Appeals for the Eighth Circuit subsequently affirmed the court-ordered modifications. *McDonald v. Armontrout,* 908 F.2d 388, 393 (8th Cir.1990).

Within a few months of the transfer of the CPU to the PCC, plaintiffs filed a motion for contempt challenging specified conditions of their confinement there. After a hearing[8] and before the Court issued a ruling on that contempt motion, officials at the PCC altered the conditions of class members' confinement by "mainstreaming" plaintiff class members with other inmates at the PCC. Therefore, at this time a separate CPU does not exist and death-sentenced inmates at the PCC are now treated the same as other maximum security inmates incarcerated at the PCC.

***2** By their motion to vacate, defendants seek an order dissolving the decree adopted by the May 10, 1989, ruling and terminating the Court's jurisdiction over this case based on (a) the transfer of the CPU from the MSP to the PCC and (b) the subsequent changes in the conditions applicable to inmates subject to capital punishment ("CP

inmates") at the PCC.[9] Defendants urge the purposes of the decree have been fulfilled because the changes in conditions meet or supersede the requirements of the May 10, 1989, decree. Because the purposes and goals of that decree are achieved by the present conditions of plaintiffs' confinement, movants argue, it is proper to vacate the decree. *Board of Educ. of Oklahoma City Pub. Sch. v. Dowell,* 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *Youngblood v. Dalzell,* 925 F.2d 954, 958–59 (6th Cir.1991).

The Court stayed ruling on defendants' motion to vacate so that class members could receive notice of and have the opportunity to respond to the motion. Written comments and/or objections were received from plaintiff class members and their counsel. Additionally, the Court conducted six days of evidentiary hearings to address the issues raised by the motion; and the parties thereafter filed materials in support of their position(s) on those issues. After consideration of the pleadings, the testimony and exhibits introduced at the hearing, the parties' briefs and the applicable law, the Court enters the following memorandum which it adopts as its ruling on the motion to vacate.

In resolving this motion, the Court is mindful that the parties may not acquire, through a consent decree, a continuing injunction requiring "judicial supervision of a government-run facility." *In re Pearson,* 990 F.2d 653, 658 (1st Cir.1993); *accord System Fed'n No. 91, Ry. Employees' Dep't, AFL–CIO v. Wright,* 364 U.S. 642, 651, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961) (stating, in an action under the Railway Labor Act that was resolved by a consent decree, that "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction"). Rather, the Court must both exercise caution to the extent judicial judgment is substituted for that of prison administrators with respect to prison management, *Rhodes v. Chapman,* 452 U.S. 337, 349 n. 14, 351, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Bell v. Wolfish,* 441 U.S. 520, 539, 547–48, 554, 557 n. 38, 562, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and restore control to the relevant local authorities once constitutional violations are remedied, *Freeman v. Pitts,* 503 U.S. 467, 112 S.Ct. 1430, 1445, 118 L.Ed.2d 108 (1992); *see Dowell,* 111 S.Ct. at 637; *accord Kindred v. Duckworth,* 9 F.3d 638, 644 (7th Cir.1993) (noting "[w]hatever may be the life expectancy of federal consent decrees, respect for the principle of separation of powers suggests that decrees imposing obligations upon state institutions normally should be enforceable no longer than the need for them").

Federal Rule of Civil Procedure 60(b), which permits the vacating or modification of judgments and orders, is applicable to consent decrees, such as the decree at issue in this case. *See Rufo v. Inmates of the Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 757, 116 L.Ed.2d 867 (1992). In relevant part, Rule 60(b) states that, upon motion, a Court may relieve a party from a final judgment or order either because "it is no longer equitable that the judgment should have prospective application" or for "any other reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b)(5) and 60(b)(6).

***3** The United States Supreme Court has clarified the circumstances under which federal courts may either fully or partially relinquish supervision over decrees in institutional reform cases when the purpose of the litigation has been achieved to the extent practicable.[10] *Pitts,* 112 S.Ct. at 1444–45 (consent decree in school desegregation case); *Dowell, supra* (court-imposed plan in a school desegregation case); *accord Heath v. DeCourcy,* 992 F.2d 630, 633 (6th Cir.1993) (discussing the standard applicable to a request to dissolve a consent decree in a prison conditions case); *cr. United States v. City of Miami,* 2 F.3d 1497, 1503–06 (11th Cir.1993) (discussing the standard applicable to a request to dissolve a consent decree in an employment discrimination case). The Court must find that the underlying constitutional rights addressed through the decree are ensured through defendants' compliance with the decree's provisions in good faith for a reasonable period of time. *Pitts,* 112 S.Ct. at 1446; *Dowell,* 111 S.Ct. at 637–38. In essence, these elements require a determination that it is unlikely defendants will repeat the earlier violations. *Dowell,* 111 S.Ct. at 637; *Inmates of Suffolk County Jail v. Rufo,* 12 F.3d 286, 292 (1st Cir.1993) (addressing motion to vacate consent decree in a case challenging jail conditions for pretrial detainees and noting the two elements implicitly require a finding "there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted"). Notably, all objections to the dissolution must be considered. *Youngblood,* 925 F.2d at 961.

In conducting its analysis, the Court must "begin by determining the basic purpose of the decree," *City of Miami,* 2 F.3d at 1505, and the specific terms of the decree that is the subject of the dissolution request, *Youngblood,* 925 F.2d at 960. The Eighth Circuit has stated that the purpose of the decree in this case is to provide constitutionally acceptable conditions of confinement for inmates on death row and the decree's provisions constitute "a plan for ensuring that the capital punishment unit complies with constitutional requirements." *McDonald,* 908 F.2d at 391. Importantly, the appellate court concluded that the court-ordered modifications provided constitutional conditions of confinement in the CPU. *Id.* at 391–93. Thus, this Court finds that the basic purpose of the May 10, 1989, decree is to ensure constitutionally acceptable conditions of confinement for the CP inmates at the PCC.

The parties dispute whether that decree includes the terms and provisions of any earlier agreements or rulings in this

case; and, if so, the extent of such inclusion. Defendants contend the only terms and provisions that should guide this Court are those set forth in paragraphs numbered 1 through 20 under section III at pages 7 through 19 of the Western District's May 10, 1989, order. Plaintiffs contend numerous requirements that are not explicitly set forth in that portion of the May 10, 1989, order are actually part of the decree that is now in effect. Specifically, plaintiffs contend provisions of the Original Decree and of the parties' December 3, 1987, Memorandum of Agreement ("Memorandum Agreement") are still in effect. To resolve this dispute, the Court will review the terms of the May 10, 1989, decree, in light of earlier relevant documents.

***4** The Original Consent Decree, which was approved by the Western District after a hearing, generally consists of three sections:[11] Section I is a one sentence statement that the Court had jurisdiction over the lawsuit and litigants; Section II has two subparagraphs in which the litigants are identified, and provision is made for the automatic substitution under Federal Rule of Civil Procedure 25(d) of successors in office for any of the defendants named as litigants; and Section III sets forth the terms of the decree in twenty-eight numbered paragraphs. Those paragraphs address issues encompassed by the titles for the paragraphs: Mutuality, Legal Mail and Materials, Religious Services, Telephone Access, Medical Services, Mental Health Care, Classification, Staffing, Recreation, Facility for Indoor Recreation, Plumbing, Renovation, Shower Renovation, Food Service Ramp, Fire Safety, Visiting, Education, Lighting, Sanitation, Window Screening, Feeding, Equal Access, Inspections, Reports, New Facilities, Implementation, Jurisdiction, and Attorneys' Fees.

In March, 1987, plaintiffs filed a motion for contempt[12] and appointment of a special master, along with copies of plaintiffs' counsel's letters to defendants' counsel regarding various complaints that supported or expanded on the allegations set forth in the motion. Defendants denied each of the bases for the contempt motion; noted it was not clear whether local calls in Jefferson City, Missouri, were required by the Original Decree; noted that they were in compliance with the specialized training requirements of that decree; reported that, without waiving their objections or defenses to the appointment of a special master, they "may agree under certain circumstances to a mediator to discuss and remedy some of the complaints"; and asserted they were in substantial compliance or had made diligent and good faith efforts to comply with all provisions of the Original Consent Decree. Copies of letters provided by defendants[13] indicated that many of the specific issues presented by plaintiffs had been addressed by defendants.

After a two day evidentiary hearing on the motion, the Western District filed a clarifying order on September 10, 1987. This order required that, as part of the daily access to telephones provided by the Original Decree, all CP inmates be "allowed to place and make phone calls in Jefferson City and the Jefferson City area as well as to any state or city within the continental United States, without restriction except as set forth in Paragraphs 4(a) and (b)" of the Original Consent Decree. Additionally, the order stated "[t]his telephone policy shall commence immediately and shall remain in full force and effect until further order of the Court." The Western District there-after appointed Dennis W. Nielson, a United States Probation Officer in Missouri, to resolve "all complaints which arise between the parties regarding the terms and/or implementation of the Consent Judgment, addendums or Memoranda of Agreements" in accordance with guidelines to which the parties had earlier stipulated. *See* Guidelines for Special Probation Officer, filed September 28, 1987.

***5** Then, in December, 1987, the parties filed the Memorandum Agreement to "resolve current conflicts" in plaintiffs' pending motion for contempt and appointment of a special master; to be construed as an addendum to the approved decree; and to be incorporated into the approved decree. This Memorandum Agreement expressly addressed issues regarding: recreation;[14] fire safety;[15] medical services;[16] sanitation;[17] personal property;[18] new arrivals;[19] window screening;[20] new facilities;[21] new construction and modifications;[22] and visiting.[23]

In February, 1989, based on a need for additional space and an assurance of continued compliance with the Original Decree, defendants sought the Western District's approval of a proposed move of the CPU from the MSP to the PCC, "the newly built maximum security prison."[24] In March, 1989, the Western District, in relevant part, granted defendants' motion to move the CPU.[25] After entry of the initial ruling permitting the move, the Western District denied plaintiffs' motion to alter or amend that ruling, conducted at least one conference with counsel, and directed defendants to submit for the Court's approval a plan for the move. *See, e.g.,* order filed April 3, 1989, as amended April 6, 1989; minute sheet of March 14, 1989, telephone conference, filed March 20, 1989.

Defendants then submitted their Plan to Implement the Consent Decree at the PCC ("Plan"). *See* Plan, filed March 28, 1989. In this Plan, defendants reported that sections of the Original Consent Decree and Memorandum Agreement pertaining to the physical conditions at MSP's CPU were mooted by the move; and that privileges afforded to the CP inmates would be changed in light of the new conditions and classification policy at the PCC. Defendants provided the court with a copy of the Standard Operating Procedure ("SOP") for PCC's Capital Punishment Unit.[26] *See* SOP 21–1.5, titled Capital Punishment Unit, attached as Exhibit 2 to defendants' Plan.

Defendants also filed a separate motion for modification seeking, in relevant part, the elimination of the joint personal property committee which was established pursuant to the personal property section of the Memorandum Agreement. *See* defendants' motion for modification of the consent decree and memorandum agreement, filed April 24, 1989. This request was based on defendants' efforts to provide minimum custody CP inmates with the same privileges as PCC's general population inmates and the excessive property demands made by the joint personal property committee, which were contrary to institutional fire safety and security concerns.

While not contesting the re-evaluation of CP inmate privileges in light of changes in the physical conditions and policy pertaining to their confinement at the PCC, plaintiffs challenged various aspects of defendants' Plan and PCC SOP 21–1.5, in light of the terms of the Original Decree.

***6** The Western District subsequently approved a modified version of defendants' Plan, after finding that the court had the power to modify the decree; the modification was necessary in light of the transfer of the CPU to the PCC; and the approved plan would guarantee "fair and humane treatment of plaintiffs," would not thwart the purpose of the parties' consent decree, and incorporated "the goal of providing constitutionally adequate conditions of confinement." *See* order filed May 10, 1989, at pages 3–4, as amended May 16, 1989.[27] The Plan, as modified and approved by the Western District, *see* pages 4–19 of the May 10, 1989, order, is referred to as the "Modified Consent Decree" or "Modified Decree."

The Modified Consent Decree generally consists of three sections coinciding with the three sections of the Original Consent Decree:[28] Section I is a one sentence statement that the Court has jurisdiction over the lawsuit and litigants; Section II has two subparagraphs in which the litigants are identified, and provision is made for the automatic substitution under Federal Rule of Civil Procedure 25(d) of successors in office for any of the defendants named as litigants; and Section III states the terms of the decree in twenty numbered paragraphs. Those paragraphs set forth provisions:

• for the mutuality of the parties' obligations (Section III.1 *Mutuality* );[29]

• prohibiting both the opening of readily identifiable legal mail except in the inmate's presence[30] and the reading during "searches or shakedowns" of legal materials in the inmate's cell (Section III.2(a)-(b) *Legal Mail and Materials* );

• requiring reasonable care to avoid damaging or scattering legal materials (Section III.2(b) *Legal Mail and Materials* );

• directing inmates to notify prison officials in writing when the inmates believe their legal or personal mail has been improperly handled by prison staff (Section III.2(c) *Legal* Mail *and Materials* );

• for the conduct of religious services in privacy rooms of each unit of the CPU,[31] except "the punitive segregation unit,"[32] for two inmates at a time, with the possibility of increasing that number if "security and management considerations" allow such an increase upon defendants' annual review; and permitting minimum custody CP inmates to attend "group religious services for death-sentenced inmates in the chapel" (Section III.3 *Religious Services* );[33]

• for the availability of telephones for collect calls by minimum custody CP inmates during hours they are released from their cells, seven days a week; for the availability of telephones for collect calls by those CP inmates in close custody, administrative segregation, and disciplinary segregation through arrangements with staff members; and for calls to attorneys lasting an unlimited length of time, calls to others lasting at least twenty minutes, and calls terminated only to accommodate other inmates who want to make calls (Section III.4 *Telephone Access* );[34]

***7** • for weekly doctor's sick call at the PCC clinic, unless an emergency prevents the physician from conducting sick call, in which case the doctor's sick call is to be rescheduled as soon as possible; for continuing sick call by medical assistants Monday through Friday; precluding custody officer and inmate worker access to CP inmates' medical or psychological records (except that a custody officer may carry the relevant file(s) when escorting an inmate to health services); for the dispensing of medications directly to the inmates by the medical assistants, rather than by the custody officers, except "in the event of a security emergency"; for the inmate's submission of a written form when dental or eye clinic care is requested; requiring an escort of the requesting inmate to the appropriate eye or dental clinic within eight working days of receipt of a completed request for such care; and for the dispensing of prescription medication within at most twenty-four hours of the writing of the prescription and thereafter at the intervals required by the prescription (Section III.5 *Medical Services* );[35]

• for the assignment to the CPU of a mental health care provider who has at least a Master's Degree in psychology and one year of professional experience or its equivalent; for conducting an evaluation of newly admitted CP inmates within two weeks; for the psychologist's referral to a psychiatrist whenever psychiatric care is found advisable through evaluation or

classification team meetings; for the psychiatrist's referral of an inmate to a state mental hospital "if appropriate"; for the participation of the psychologist on the CPU classification committee, but that participation may not "necessarily [be] as a voting member" of that committee; for the psychologist's writing and implementation of a treatment program "when appropriate after evaluating each inmate," with a referral to the psychiatrist for evaluation, prior to issuance of the prescription(s), of any inmate for whom medication is a part of the treatment program; for the regular review by the psychiatrist of all prescriptions for psychotropic, antipsychotic, or hypnotic medication; for the training of all caseworkers assigned to the CPU on the detection of mental health problems, and death and dying; for the annual evaluation by the psychologist of all inmates not under treatment; and for the confidentiality of all medical and psychological records (Section III.6 *Mental Health Care* );[36]

• for a classification system[37] applicable to CP inmates consisting of: minimum custody, medium custody,[38] close custody, administrative segregation, disciplinary segregation "for 10 days or less pursuant to Division Regulation IS21–1.4 (212.010)," and no contact status (Section III.7(a) *Classification* );[39]

• for the provision to plaintiffs' counsel of any future modification to the classification system proposed by defendants, with plaintiffs counsel given "at least 7 days in which to comment" prior to the adoption of such modifications; and for prior Court approval, at defendants' request, of "any modifications of the classification system which are inconsistent with the terms and intent of th[e] decree," except when emergency implementation of a modification "is immediately necessary to preserve the security and safety of the inmates or staff," then Court approval must be sought promptly thereafter (Section III.7(b)-(c) *Classification* );[40]

***8** • for the Court's review and deletion or alteration of subsequent classification system modifications to "conform to the terms and intent of" the decree (Section III.7(c) *Classification* );

• for defendants' printing and distribution to plaintiff class members of the classification system and its subsequent modifications (Section III.7(d) *Classification* );

• for administrative segregation training of CPU custody staff within three months of their assignment to death row with such training including instruction on special needs of CP inmates, the appellate and post-conviction process in death penalty cases, and the requirements of the decree (Section III.8 *Staffing* );[41]

• for minimum custody CP inmates to have the same opportunity for indoor and outdoor recreation as PCC's general population inmates; for medium custody CP inmates to have "the opportunity for indoor and outdoor recreation during their day room access"; and for close custody and administrative segregation CP inmates to have "the opportunity for one hour of recreation every other day" (Section III.9 *Recreation* );[42]

• for the evaluation of the CPU and related food preparation areas by the two consultants and their development of a plan "recommending necessary fire safety measures" and "delineating all environmental and sanitary measures"; for the inspection of the PCC by the consultants on one occasion after development of the plan(s) "to ensure the necessary fire safety ... environmental and sanitary measures have been implemented"; for defendants' implementation of all fire safety, environmental, and sanitation measures recommended by the consultants; and directing defendants to make good faith efforts to obtain appropriations from the state legislature for recommended measures that require capital improvements (Section III.10 *Fire Safety* and Section III.14 *Sanitation* );[43]

• directing defendants to "make every effort" to permit CP inmates in administrative or disciplinary segregation to have non-contact, and other CP inmates to have contact, visits with attorneys who have given defendants forty-eight hour advance notice; requiring that all attorney visits with CP inmates having execution dates be contact visits; providing minimum custody CP inmates with four contact visits per month, each lasting four hours with up to four visitors; providing medium custody CP inmates with two "medium contact" visits per month, with each visit lasting an unspecified amount of time with up to two visitors; providing close custody and administrative segregation CP inmates with one no-contact visit per month, each lasting one hour with one visitor; providing that close custody CP inmates and those CP inmates on disciplinary segregation may have contact visitation only in the discretion of the PCC superintendent; and requiring all visitation days to be set by PCC staff (Section III.11 *Visiting* );[44]

***9** • directing defendants to provide inmates "with an education program for G.E.D." (Section III.12 *Education* );[45]

• directing defendants to supply CP inmates with light bulbs "sufficient to provide 20 footcandles of light at the bed and desk level" (Section III.13 *Lighting* );[46]

• directing defendants to make good faith efforts to provide meals to CP inmates on the same schedule as the feeding of general population inmates (Section III.15 *Feeding* );[47]

• giving all CP inmates equal access to the rights and privileges conferred by this decree upon persons within the relevant classification status and to other programs

and facilities in accordance with their classification and security status (Section III.16 *Equal Access* );[48]

• granting plaintiffs' attorneys access to the CPU and recreation areas upon twenty-four hour advance notice to defendants' attorneys, "[u]ntil such time as the Court determines that full compliance has been achieved with all provisions of this decree" (Section III.17 *Inspections* );[49]

• requiring defendants to submit to the Court and plaintiffs' counsel "[f]or at least six months from the date o[f] final approval of this decree" a quarterly report "detailing the state of their compliance" with the decree's provisions (Section III.18 *Reports* );[50]

• directing plaintiffs' counsel to notify defendants' counsel of "any complaints of non-compliance" and defendants' counsel to notify plaintiffs' counsel of "any proposed modification of the rights and privileges accorded plaintiffs by th[e] decree"; requiring the parties to attempt in good faith to resolve all disputes regarding alleged non-compliance or proposed modifications prior to seeking Court action regarding any such non-compliance or modification; and giving plaintiffs the opportunity to seek other relief necessary to eliminate "the conditions which th[e] decree seeks to remedy" if defendants are unable to implement fully the terms of the decree (Section III.19 *Implementation* );[51] and

• specifying that the court transfers jurisdiction of the case to this Court "to insure compliance with the [decree's] provisions until such time as all provisions of this decree have been fully implemented" (Section III.20 *Jurisdiction* ).[52] Provisions in the Original Consent Decree pertaining to physical improvements in the MSP's CPU and related facilities were not included in the Modified Consent Decree.[53] Thus, in addition to omissions noted in the above summary of the Modified Consent Decree's terms, sections in the Original Decree regarding the facility for indoor recreation, plumbing, renovation, shower renovation, the food service ramp, window screening, and new facilities are not included in the Modified Decree.

Plaintiffs urge that the following statements made by the Western District in its May 10, 1989, ruling indicate that earlier rulings remain in effect as part of the Modified Consent Decree:

> ***10** Portions of the Consent Decree and Memorandum Agreement concern the physical conditions of confinement of the [CPU] as it existed at MSP and are mooted by the move to PCC. By mutual agreement of the parties, some portions of the Consent Decree and Memorandum Agreement remain in full force and effect at PCC.

*See* page 3 of the May 10, 1989, ruling. This Court is not persuaded by this argument.

Those statements are part of the introductory portion of the ruling, in particular the portion of the ruling discussing whether the court had the authority to modify the consent decree and whether changed circumstances supported a modification of the decree. Upon concluding that it had the legal authority and factual basis for modifying the decree, the court set forth in a subsequent section the actual terms of the Modified Consent Decree. *See* pages 4 through 19 of the May 10, 1989, ruling. This latter section does not expressly or implicitly incorporate any earlier rulings or agreements, or provisions thereof. Instead, each provision of the Modified Consent Decree is fully set forth, with each provision presented in the same order as the similar provisions were set forth in the Original Decree. More-over, a review of the terms of the Modified Consent Decree and the Original Consent Decree establishes that, in approving modifications, the Western District did more than simply omit provisions in the Original Decree that pertained to the physical facility.

The Court is also not persuaded by plaintiffs' specific contention that the terms of the December, 1987, Memorandum Agreement regarding personal property were incorporated into and remain part of the Modified Consent Decree. No provision of the Modified Consent Decree expressly addresses personal property issues. While defendants expressly excluded such issues from their Plan for the move of the CPU to the PCC, such issues were clearly the subject of an April, 1989, motion for modification filed by defendants prior to the Western District's May 10, 1989, ruling. In part, that motion sought the elimination of the property committee because the inmate members had submitted "an unbelievable set of demands for property," which exceeded the privileges of the inmates not in the CPU;[54] the committee infringed "too much upon the discretion of the men and women who run the" CPU; and the committee is "no longer warranted in light of the new prison and fire safety considerations." Defendants further noted that (a) they had agreed to the establishment of the committee in part "to compensate for the conditions of confinement as they existed at the" MSP, and such conditions do not exist at the PCC; and (b) the fire safety consultants had "stated that inmates should have no more combustible property than can fit in their two footlockers."

Although the Western District did not expressly enter a written ruling resolving the April, 1989, motion for modification, the terms of the Modified Consent Decree clearly address another matter raised in that motion. In addition to the property issues, that motion asked the

court to limit the consultants "to providing defendants with one [fire safety, environmental and sanitation] report and one follow-up review." This suggestion, which differed from the required consultants' reports and reviews under the terms of the Original Consent Decree and was not otherwise part of defendants' Plan, was fully incorporated in the Modified Consent Decree at Sections III.10 and III.14. Thus, it is clear the Western District approved the motion to that extent. Because the motion also sought the elimination of the property committee, and the Modified Consent Decree does not contain provisions for the continuation or establishment of such a committee, the Court construes the Modified Consent Decree as having granted that portion of the April 24, 1989, motion as well. *Accord* Defendants' Quarterly Compliance Reports for PCC, filed March 29, 1990, and May 30, 1990, which do not contain sections regarding CP inmates' property. Thus, the personal property committee and personal property issues are not part of the Modified Consent Decree approved by the Western District.[55]

***11** Based on the foregoing, the Court construes the Modified Consent Decree as consisting of only those provisions set forth at pages 4 through 19 of the May 10, 1989, ruling. Accordingly, any objections based on provisions in effect prior to that date will not be further discussed by the Court.[56]

Having clarified what constitutes the provisions of the Modified Consent Decree, the Court will address the extent of defendants' compliance with those terms and the constitutionality of the circumstances relevant to those terms in light of plaintiffs' objections to the proposed vacating of the decree.[57] Notably, there are no objections to the mutuality, mental health care, staffing, fire safety, sanitation, inspections, reports, implementation, and jurisdiction sections of the Modified Consent Decree. The record reflects that defendants have complied with these terms, albeit belatedly in some instances; for example, in the filing of quarterly compliance reports. There is no indication that any delay in compliance resulted from bad faith. Moreover, the record does not support a finding any unconstitutional conditions exist with respect to these elements of the Modified Consent Decree. Under the circumstances, the Court finds no basis for denying the motion to vacate with respect to these sections of the Modified Decree.

With respect to the prohibition against opening readily identifiable legal mail except in the inmate's presence, there is no indication of record that defendants have failed to comply with this provision and plaintiffs do not contend there has been non-compliance with this provision.[58] Such a policy is constitutional. *Wolff v. McDonnell,* 418 U.S. 539, 574–77, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *McMaster v. Pung,* 984 F.2d 948, 953 (8th Cir.1993). Accordingly, under the circumstances, the Court may consider granting the motion to vacate with respect to this provision of the Modified Consent Decree.

With respect to the provisions requiring reasonable care to avoid damaging or scattering legal materials and prohibiting the reading of legal materials during cell searches, there is no indication that PCC officials made it a policy or practice to conduct cell searches so as to damage, destroy or read CP inmates' legal materials. There has been no showing that any CP inmates' legal materials were read, as opposed to reviewed for contraband, during cell searches. Rather, the focus of plaintiffs' objections to the vacating of this provision is on the scattering of legal materials during cell searches. There is evidence that some legal materials have been scattered during searches; however, the Court is not persuaded that any such scattering is done in bad faith.

The undisputed PCC policy is to take reasonable care in handling all of an inmate's property during cell searches,[59] which are conducted periodically without prior announcement in all areas of the PCC. SOP 20–1.3(III). Staff are regularly trained in search techniques, with guidelines including recommendations that (a) the search begin in one place and move around the cell from that point, and (b) property reviewed for contraband be placed on the bed when it is necessary to move it. While all materials in the cell, including legal materials, are searched for contraband, there is no requirement that the property be returned to its original place.

***12** In and of itself, the fact that CP inmates may have to spend time re-organizing legal materials after a search does not persuade the Court that defendants have failed to comply with this provision of the Modified Consent Decree. There is no credible evidence that any scattering of legal materials during searches of class members' cells has occurred for improper purpose, rather than as the result of time limitations, security concerns, and other conditions applicable to the search. Moreover, there is no federal constitutional prohibition against the handling of property during cell searches, *see Hudson v. Palmer,* 468 U.S. 517, 522–30 and 528 n. 8, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (finding the Fourth Amendment does not prohibit searches and seizures of property from prison cells), except perhaps to the extent either the searches are retaliatory in nature, *Scher v. Engelke,* 943 F.2d 921 (8th Cir.1991), *cert. denied,* 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992), or any interference with legal materials infringes on the inmates' constitutional right of access to the courts, *see Tyler v. "Ron" Deputy Sheriff,* 574 F.2d 427 (8th Cir.1978) (per curiam) (claim regarding temporary confiscation of legal material). Here, there is no indication that mishandling of class members' legal materials during cell searches resulted from retaliatory conduct by the searching officials[60] or actually interfered with the inmates' access to the courts. Accordingly, under the circumstances, the Court may consider granting the

motion to vacate with respect to this provision of the Modified Consent Decree.[61]

With respect to the religious services provision, plaintiffs contend that they are permitted religious services twice a week and there is only one chaplain who reportedly makes the chapel more available to Caucasian inmates than to African American inmates. Plaintiffs also contend that the quiet room on each unit provided under the Modified Consent Decree for the conduct of religious services is used for other activities. While not disputing that numerous activities take place in the quiet rooms, defendants respond that access to each housing unit's quiet room is limited to inmates in that unit. Defendants also report that the prison's chaplain conducts nondenominational services for those of the Protestant faith, while other services are conducted by volunteers or inmate members of the faith. Based upon security concerns, PCC's policy requires that all group religious services be conducted under supervision. Affidavits filed of record indicate that, on occasions when personnel were not available to supervise a group's service, the location of the service has been changed to permit the conducting of the meeting or the meeting has been cancelled.

Reasonable limitations on participation in group religious services based on security concerns are constitutional, particularly where the free exercise of religion is not totally abridged and is reasonably accommodated. *See, e.g., Garza v. Carlson,* 877 F.2d 14 (8th Cir.1989); *Butler–Bey v. Frey,* 811 F.2d 449, 451–52 (8th Cir.1987); *Otey v. Best,* 680 F.2d 1231 (8th Cir.1982). The unequal use of a prison's chapel by various religious faiths in and of itself does not constitute either a free exercise violation or improper discrimination. *Thompson v. Kentucky,* 712 F.2d 1078, 1080–82 (6th Cir.1983).

***13** The available record does not disclose any impermissible limitations on the conduct of religious services to be attended by more than one plaintiff class member, either in violation of the Modified Consent Decree or as a federal constitutional violation.[62] There is no indication that CP inmates have been precluded from attending available religious services in the chapel, in the "quiet" rooms, or in other PCC facilities. The Modified Decree does not limit use of the "quiet rooms" to religious services only. Nor does that decree specify how often religious services are to be held or how many religious leaders must be available for class members. Accordingly, the record demonstrates that the Court may consider granting the motion to vacate with respect to the religious services provision.

With respect to the provisions requiring the availability of telephones for collect personal calls and calls to attorneys, plaintiffs argue that there are no tables or shelves under the telephones to permit the taking of notes or the reviewing of documents while on the telephone; local or "1–800" telephone calls are not permitted; and there are an insufficient number of telephones in each housing unit for general population. With respect to administrative segregation inmates, plaintiffs object that they are allowed only one telephone call per month, with additional calls to lawyers permitted only if the attorney initiates the request.[63] Additionally, plaintiffs assert, administrative segregation inmates are cuffed behind their back and not assisted in holding the receiver or taking notes during telephone calls.[64]

Defendants counter the "1–800" and "1–900" telephone calls are prohibited due to the potential for fraud and local calls are permitted but must be made "collect." With respect to the number of telephones, defendants report that telephone usage is evaluated by the company providing inmate telephone service, so that telephone instruments may be added or removed based on the amount of usage.[65] Defendants also report that both administrative segregation and disciplinary segregation CP inmates are allowed one personal telephone call every thirty days (with more permitted if approved by the functional unit manager due to an emergency); legal calls are available to administrative segregation CP inmates if requested by the attorney or if an inmate's written request is approved; and one legal call is available to disciplinary segregation inmates every ten days (although only one personal telephone call every thirty days is permitted, even if several disciplinary periods are run together).

Prisoners do not have a right to unlimited telephone calls. *Aswegan v. Henry,* 981 F.2d 313, 314 (8th Cir.1992); *Benzel v. Grammer,* 869 F.2d 1105, 1108 (8th Cir.), *cert. denied,* 493 U.S. 895, 110 S.Ct. 244, 107 L.Ed.2d 194 (1989). Reasonable restrictions on personal telephone calls may be imposed. *Benzel,* 869 F.2d at 1108 (upholding, against challenges based on equal protection and free speech provisions of the federal constitution, requirements that prisoners in administrative segregation and detention submit a list of three individuals who may receive telephone calls and that such inmates' personal calls may only be made to listed persons). Restrictions on telephone calls to counsel may also be imposed so long as prisoners have some manner of access to counsel and the courts. *Pung,* 984 F.2d at 953; *Aswegan,* 981 F.2d at 314. Furthermore, the fact that inmates' telephone calls must be "collect" is not unconstitutional. *Aswegan, supra* (finding a state penitentiary's prohibition against prisoners making toll free telephone calls, even to 1–800 numbers, not violative of the federal constitution's court and attorney access requirements); *cf. Griffin–El v. MCI Telecommunications Corp.,* 835 F.Supp. 1114, 1122–23 (E.D.Mo.1993) (finding a requirement that the telephone operator identify a Missouri inmate's telephone call "as a collect call from a correctional institution" did not violate any federal constitutional right to privacy and, in any event, was reasonable).

***14** In general, the evidence indicates that calls by CP inmates in minimum custody and general population have been available during the time those inmates are released from their cells, approximately eight to ten hours per day. For those in a segregated custody status, telephone calls to attorneys have been permitted either upon request of the attorney or, with approval of a function unit manager, upon the inmate's request; and one personal call per month is permitted.[66] For some periods of time, a CP inmate in administrative segregation was permitted telephone calls to attorneys upon the inmate's request. Although inmates in administrative segregation have been handcuffed during telephone calls,[67] secure booths have been constructed in the housing units to permit segregated inmates to be cuffed as they are moved to the booth and uncuffed once they are in the booth for the telephone call.

Plaintiffs' objections regarding telephone access do not implicate the terms of the Modified Decree. That decree requires all inmate telephone calls to be "collect." Thus, the fact that class members must make collect calls only is not violative of that decree. Furthermore, that decree does not set forth: the number of telephone instruments that must be available to class members; the number and frequency of either personal calls or calls to attorneys that class members may make; or requirements for amenities available during the telephone calls. Thus, the allegedly small number of telephones available to class members; limitations on the number and frequency of telephone calls available to segregated class members; the absence of a shelf or table by the telephone instruments; and the cuffing of certain segregated inmates during the placing and duration of the telephone calls are not violations of the Modified Decree. Finally, the evidence does not persuasively indicate the duration of telephone calls by plaintiff class members is now being shortened in a manner contrary to the terms of the Modified Decree.[68]

Moreover, the record does not establish that the policy and practice regarding the placing of telephone calls by class members violates the federal constitution. The restrictions appear reasonable in light of defendants' concerns regarding both internal prison security and the prevention of fraudulent billing and harassment of those outside the institution. Additionally, telephone access to counsel is only one of several methods of access to counsel available to plaintiff class members. Visits and written correspondence are also available for communicating with CP inmates' attorneys. Plaintiffs did not establish actual prejudice or denial of access to the courts and counsel as the result of telephone access policies and practices applicable to the plaintiff class. Importantly, there is no indication of record that CP inmates have been unreasonably denied access to the telephone for either personal calls or calls to attorneys for unduly prolonged periods of time. Under the circumstances, the Court may consider vacating the telephone access provisions of the Modified Consent Decree.

***15** With respect to the Medical Services section of the Modified Consent Decree, plaintiffs contend they have not consistently received either prescribed medications within twenty-four hours of the prescription or visits with the eye doctor within eight working days of the submission of a Medical Services Request form ("MSR") seeking such services.[69]

Defendants respond that they are making good faith efforts to comply with these time requirements but have not been able to do so at all times. Defendants point out that they provide quality medical care to all class members.[70]

PCC provides medical services twenty-four hours a day, seven days a week in PCC facilities consisting of three private examination areas,[71] a dental clinic, an eye clinic with ophthalmia and retinal scopes, and an emergency area. Until November 30, 1992, the MDCHR's licensed medical staff at the PCC included a physician, an eye doctor, a dentist, three registered nurses, ten licensed practical nurses, an x-ray technician, and a lab technician. The physician was on the premises twice a week for twenty to thirty hours; the eye doctor was at the PCC four hours per week; and the dentist was on site twenty four hours per week. After December 1, 1992, medical services at the PCC have been provided through the MDCHR's contract with Correctional Medical Systems ("CMS"). Under the contract, CMS provides a staff physician at least three times a week for a total of twenty-four or more hours, a dentist twenty hours per week, an optometrist approximately six hours per week, two administrative and supervisory nurses, registered and licensed practical nurses, an x-ray technician, a dental assistant, and a records clerk. A referral system and off-premises care is available for those inmates requiring medical attention that may not be provided by medical staff at the PCC. Medical care provided to PCC inmates is reviewed by supervisory medical personnel periodically on a regular basis, and through consideration of grievances and letters submitted by inmate patients.

Before December 1, 1992, in stock prescribed medications were usually distributed within twenty-four hours. If the medication was not available on site, then the medication was ordered and distributed to the inmate promptly, within one to five days. Under CMS' operation, efforts are made to obtain emergent medications the day they are prescribed and nonemergent medications within twenty-four to forty-eight hours of the prescription. The nursing staff distributes the medications.

The nursing staff[72] conducts sick call five days a week, processes medications, gives immunizations and flu shots, distributes medications where necessary, performs necessary medical testing and allergy checks, takes

medical histories, triages MSRs, provides emergency care, and cares for infirmary patients. In addition to specialized care, the physician performs physical examinations.

To obtain medical care, CP inmates must complete an MSR.[73] Nursing staff triage the MSRs and, depending on the nature of the complaint(s), schedule the inmates for nursing or doctor's sick call. When CP inmates are in a segregated custody status, nurse's sick call is held either in a room on the housing unit or in the inmate's cell, unless the problem requires that the inmate be escorted to the clinic. For non-emergency conditions, an appointment to see a nurse is scheduled within one to three days after submission of an MSR, whereas an appointment with a physician is scheduled from one to seven days after submission of an MSR. Efforts are made, including the rescheduling of non-CP inmate appointments, to schedule CP inmates to see the eye doctor and dentist within eight working days of the submission of an MSR clearly requiring the services of the eye doctor or dentist.

***16** It is undisputed that deadlines in the Modified Consent Decree for the distribution of prescribed medications and the provision of plaintiff class members with access to the eye doctor have not been satisfied in every instance. The record shows that at most there may be a two to four week delay in visiting the eye doctor and a five day delay in obtaining prescribed medications.

While such delays violate the express terms of the Modified Consent Decree, there is no indication that defendants' failure to comply with the relevant time deadlines resulted from bad faith efforts not to provide those services in a timely manner. Nothing demonstrates that the delays constituted defendants' ignorance or improper refusal of a request for medical treatment. Rather, the record establishes that, when medications were prescribed for a CP inmate or a CP inmate's need for eye doctor services was determined, efforts were made promptly to obtain such services. Any delays resulted from staff shift changes; the limited amount of time the eye doctor was on site each week; and the fact neither certain medications nor a pharmacy are on PCC's premises.

A delay in the provision of medical care to prisoners may, under certain circumstances, be a constitutional violation. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (deliberate indifference to prisoner's serious medical needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment); *Vaughan v. Lacey,* 49 F.3d 1344, 1346 (8th Cir.1995) ("[d]eliberate indifference may include intentionally denying or delaying access to medical care, or intentionally interfering with treatment or medication that has been prescribed"). Here, the delays in providing prescriptions or eye doctor appointments within the deadlines of the Modified Decree do not establish constitutional problems in the delivery of medications and eye doctor care to CP inmates. There is no indication that the delays constitute a deviation from professional standards so as to amount to the deliberate indifference to class members' serious medical needs. *Czajka v. Caspari,* 995 F.2d 870, 872 (8th Cir.1993) (per curiam) (affirming the granting of summary judgment in favor of defendant prison officials upon finding no evidence that delay in scheduling inmate's surgery deviated from professional standards so as to amount to deliberate indifference). Nor is there any indication that class members needing emergency medical care were adversely affected by the failure to comply with the deadlines. *Givens v. Jones,* 900 F.2d 1229, 1233 (8th Cir.1990) (finding prisoner's claim for delay of one month between complaint of leg pain and visit with doctor was insufficient to state a constitutional claim absent allegations the condition required immediate attention or the delay in treatment aggravated the condition).

Under the circumstances, the Court may consider vacating the Medical Services section of the Modified Consent Decree.

***17** With respect to the Classification section of the Modified Decree, plaintiffs contend that decree's tiered system sets forth "specific criteria for what offense or misbehaviors would result in reduction of classification" so that CP inmates knew how long the more severe confinement would last and what behaviors were required to obtain a better confinement status. Now, plaintiffs contend, the criteria for demotion "is solely within the discretion of the staff" and may result in an "indefinite stay in the most harsh and restricted level of confinement" for the duration of the class member's life. Individual class members also complain of reportedly long periods of time in administrative segregation under circumstances where other inmates receive a shorter period of time; and arbitrary placement of class members "in the hold" absent a violation of an institutional rule.

Defendants respond that the decree does not encompass special criteria for the movement of CP inmates through the classification system; placements in administrative segregation for indefinite periods of time have been possible whether under the Modified Decree or under the policies applicable after mainstreaming; prisoners may be placed in an administrative segregation status in the absence of a conduct violation; and an inmate's placement in administrative segregation is subject to periodic review.

The Classification section of the Modified Decree states in relevant part only that there are "contemplate[d] 4 classifications: Minimum Custody CP; [Medium] Custody CP; Close Custody CP; [and] Administrative Segregation," as well as disciplinary segregation and protective custody for CP inmates. Section III.7.a at page

12 of the Modified Consent Decree. Because of the non-specific language of the Modified Consent Decree regarding the classification of CP inmates, the objections of the plaintiffs regarding criteria for the tiered classification system cannot be addressing the express terms of that decree.

Instead, these objections appear to rely on terms of SOP 21–1.5, the SOP that was promulgated by defendants upon the 1989 transfer of the CPU from the MSP to the PCC. In relevant part that SOP defines the custody classifications and sets forth criteria for the movement of CP inmates among the classifications, as well as the privileges CP inmates may receive in each classification. Section III.B.6 through Section III.B.8 at pages 5 through 13 of SOP 21–1.5. Because no language in the Modified Consent Decree expressly incorporates that SOP, the Court is not persuaded the terms of that SOP are part of the Modified Decree.[74] *See United States v. ITT Continental Baking Co.,* 420 U.S. 223, 238, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975) (finding a consent decree must be construed basically as a contract, including in relevant part consideration of "any other documents expressly incorporated in the decree"; and finding under the circumstances that an appendix and a complaint "were proper aids to the construction" of the relevant consent order).

***18** Even assuming the classification terms of the SOP are necessary to clarify the otherwise undefined classifications set forth in the Modified Consent Decree, the Court finds plaintiffs' objections unpersuasive. The "Criteria" provision in the SOP expressly states that "[c]lassification decisions shall be in the sound discretion of the institutional staff." Section III.B.6 at page 5 of SOP 21–1.5. Additionally, the "[c]riteria for progressive placement" only sets forth certain conduct and time periods that will make the CP inmate "eligible" for progression to a better classification. Section III.B.7(a) at pages 7–8 of SOP 21–1.5. Therefore, a CP inmate's movement within the classification system applicable to the CPU was not as clearly and mandatorily delineated as plaintiffs urge; and was based on the custodial officials' discretion even when plaintiffs' conduct and the passage of time complied with the requirements set forth in the SOP. Whether or not officials properly exercised their discretion as to classification placements in light of particular class members' circumstances and relevant guidelines is not properly before the Court in this case.[75]

Plaintiffs also contest the placement of CP inmates for up to thirty days, rather than up to ten days, in disciplinary segregation as a sanction for serious or major conduct violations. Defendants respond that the duration of the potential sanction was lengthened in accordance with an amendment of IS21–1.4.

The Modified Consent Decree states in relevant part that "death-sentenced inmates can be placed on disciplinary segregation status for 10 days or less pursuant to Division Regulation IS21–1.4 (212.010)." Effective February 1, 1992, MDCHR amended IS21–1.4 so as to provide that "[i]nmates may be placed in disciplinary segregation up to ... [a] maximum of 30 continuous calendar days for major conduct violations." This amendment was available in the institution's law library and is reflected in the Inmate Rulebook which was effective November 1, 1992, and distributed to class members in November, 1992.[76] Although there is some evidence that, prior to November 1, 1992, CP inmates received more than ten days in disciplinary segregation as a sanction for conduct violations, there is no indication of the earliest date on which a CP inmate received such a sanction.

The Court does not find the application of the thirty day disciplinary segregation period to class members violative of the Modified Decree or a barrier to vacating the Classification section of that decree. That decree's reference to the ten day period is not isolated. The Modified Decree does not simply state "death-sentenced inmates can be placed on disciplinary segregation status for 10 days or less." Instead, immediately following the phrase "10 days or less" is the phrase "pursuant to Division Regulation IS21–1.4 (212.010)." Thus, the regulatory authority for the ten day period of disciplinary segregation is expressly and immediately referenced; and is clearly the basis for the ten day period. When that regulation was amended[77] with respect to the permissible period for disciplinary segregation, it was appropriate for the new period of time to be applied to class members.

***19** Plaintiffs further assert that defendants violated the Modified Decree in that plaintiffs did not agree to the changes in the classification system applicable to them and the Court did not approve those changes prior to their implementation.[78] Defendants counter that the Modified Decree does not require either the plaintiffs' consent or the Court's approval for the classification changes they made. The Court does not find plaintiffs' present objections persuasive.

As noted earlier, *see* footnotes 40 and 41 *supra,* unlike the Original Decree, the Modified Decree does not require the defendants to amend any regulation regarding the CP inmates' classification system so as to reflect the terms of the Modified Decree; does not require the parties to make efforts to resolve disputes regarding changes in the classification system; and does not require defendants to furnish plaintiffs' counsel with any inter-office communications affecting or implementing the classification system or decree. Instead, the Modified Decree only requires that counsel for plaintiff class (i) receive a copy of any proposed modifications to the classification system and (ii) have at least seven days "in which to comment before any such modifications are adopted." Because there is no explicit requirement that

plaintiffs agree to proposed changes in the classification system applicable to plaintiffs, plaintiffs' failure to agree to such changes is not violative of the Modified Decree.

Moreover, although there are assertions plaintiffs' counsel did not receive copies of any classification modifications prior to their implementation, the record does not support such an assertion. With respect to the mainstreaming, it is clear that, more than a month prior to implementation of the mainstreaming, the parties discussed the possibility of mainstreaming the CP inmates, at least for a short period. Under the circumstances, the Court finds no violation of the prior notice requirements of the Modified Decree or any violation of that decree to the extent the plaintiffs do not agree to mainstreaming.

With respect to the changes implemented through the mainstreaming, the Court does not find the CP inmate classification system modifications resulting from the mainstreaming "inconsistent with the terms and intent" of the Modified Decree.[79] Under that decree, CP inmates were subject to classification as: minimum custody;[80] medium custody;[81] close custody;[82] administrative segregation;[83] disciplinary segregation;[84] and protective custody.[85] Although not clearly set forth in the Modified Decree, the record establishes that CP inmates were also subject to a temporary assignment, referred to as prehearing detention, under certain circumstances, such as during the investigation of a conduct violation. Such an assignment resulted in a reduction of privileges otherwise available to the CP inmate.

Under the Modified Decree a CP inmate's confinement in a particular type of custody was determined at the custodial officials' discretion pursuant to certain guidelines and was subject to periodic reviews. Sections III.4 through III.7 at pages 4–9 of SOP 21–1.5. Except with respect to a CP inmate's placement in disciplinary segregation for a set period of time as a sanction for certain conduct, the duration of a CP inmate's confinement at any custody level varied depending on the inmate's behavior and history. Sections III.6 at pages 5–6 of SOP 21–1.5.

***20** As a result of the mainstreaming, the CPU has been eliminated. Therefore, CP inmates are no longer subject to restrictions or limitations based solely on the type of sentence they have. This comports with class members' efforts to eliminate restrictions imposed on them only because of their sentence.

Moreover, they are still subject to a multiple level classification system, with an inmate's placement in a particular custody level dependent on (a) custodial staff discretion, exercised pursuant to guidelines, and (b) the inmate's behavior and history. The present custody levels are: general population;[86] administrative segregation,[87] including temporary administrative segregation confinement ("TASC");[88] disciplinary segregation;[89] and protective custody ("PC").[90] Only disciplinary segregation and TASC placements have finite periods of duration. The other placements have indefinite durations, similar to the classification levels existing under the Modified Decree. While no written document specifies the behaviors that may affect a class member's classification level, the testimony establishes that factors similar to those set forth in SOP 21–1.5 remain relevant to custody decisions regarding a class member's movement between an administrative segregation and a general population placement.

For a time after the mainstreaming, CP inmates having administrative segregation, TASC, protective custody or disciplinary segregation status were housed with similarly segregated non-CP inmates. Because CP inmates at these custody levels were permitted amounts of telephone calls and property,[91] as well as physical access to the library, which were not available to non-CP inmates at the same custody levels, PCC officials created a separate unit, referred to as the Protective Custody Capital Punishment ("PCCP") unit, for CP inmates in these segregated custody classifications to ease management and security concerns. *See* SOP 21–1.6.

Under the circumstances, the Court finds the conditions of CP inmates' segregated confinement after mainstreaming constitutional and within the purpose of the Modified Decree. Although the potential types of custody levels have changed, the class members are still able to seek improvement in their custody status by altering their behavior and the more restrictive classifications are subject to regular review by custodial officials and their discretion must be exercised within the factors pertinent to the institutions' concerns. There is no indication of record that defendants are deliberately indifferent to the class members' conditions of confinement through the policy or practice of the classification scheme. Nor is there any evidence that the plaintiff class is deprived of due process in the consideration and application of the classification system. Thus, the Court may consider vacating the Classification section of the Modified Decree.[92]

The Modified Decree provides only that minimum custody CP inmates be given the same opportunity for outdoor and indoor recreation as general population inmates at the PCC; that medium custody CP inmates be given the opportunity for indoor and outdoor recreation during day room access; and that close custody and administrative segregation CP inmates have recreation one hour every other day. With respect to this section of the Modified Decree, plaintiffs object that outdoor recreation is limited to the small yards adjacent to the housing units, there is no indoor recreation,[93] and protective custody inmates do not have the same opportunity for recreation as general population inmates.

Defendants counter that protective custody inmates have recreation more limited than general population due to the need to keep protective custody inmates away from general population and other inmates; and those in general population have access to all the recreational facilities at the PCC, whereas those in a segregated status are limited to the recreational facilities available within the housing unit and the policies applicable to the particular custody status.

***21** Although during the time of the CPU's existence minimum custody inmates may not have had the same number of hours of recreation or the same type of access to PCC's recreational facilities beyond the CPU as the general population inmates and such limitations now exist for protective custody inmates after mainstreaming, any distinction in access results from the need to secure other areas of the institution each time CP inmates before mainstreaming or now protective custody CP inmates leave their housing unit. This does not mean, however, that minimum custody CP inmates did not have the "same opportunity" as general population inmates for outdoor and indoor recreation. Nothing of record indicates that on a systematic basis, minimum custody CP inmates were denied access to indoor and outdoor recreation during the existence of the CPU. Moreover, while protective custody CP inmates may not have recreation opportunities equal to those in general population now due to their particular security needs, PCC officials have tried to increase their out-of-cell recreation opportunities through group release efforts and the creation of a PCCP unit. Notably, plaintiffs do not object to the amount or type of recreation accessible to general population inmates since mainstreaming.[94]

With respect to administrative segregation CP inmates, there is evidence that recreation was not consistently provided every other day until, after the hearing in this case, the PCC obtained an exemption from the division's policy allowing recreation only three times a week. With this exemption, PCC's policy has been to provide recreation to administrative segregation inmates every other day. Although the failure to comply with the terms of the Modified Decree eliminated one hour of recreation every other week for CP inmates on administrative segregation, the noncompliance did not constitute a total denial of recreation or an unconstitutional denial of recreation. There is no persuasive evidence that PCC officials consistently denied CP inmates on administrative segregation the opportunity for recreation. Moreover, this noncompliance did not result from an effort to treat CP inmates in administrative segregation differently from or worse than non-CP inmates in administrative segregation.

Additionally, the Modified Decree does not specify the type of recreation, i.e., outdoor or indoor recreation, or the location of the recreation, i.e., in the dayroom or in the yard adjacent to the housing unit or in the gymnasium, that had to be provided to CP inmates on administrative segregation. Therefore, the type of recreation offered to CP inmates on administrative segregation may not be the basis of finding either that defendants failed to comply with the Modified Decree or that this section of that decree may not be vacated.

With respect to the Visiting section of the Modified Decree, plaintiffs object that CP inmates in administrative segregation must visit behind glass partitions;[95] that some visits with attorneys have been while the CP inmate was shackled at the wrist and ankle; that protective custody CP inmates have not been allowed contact visits with their family; and that some attorneys have been unable to engage in contact visits with CP inmates.[96]

***22** Defendants counter that no-contact visits are in an area where the inmate is physically separated from the visitor but is able to see the visitor and may communicate with the visitor by telephone. This is the type of visit permitted CP inmates while on administrative segregation, both under the Modified Decree and after mainstreaming. As to attorney visits while the inmate is in shackles, visits with counsel are usually contact visits, meaning the inmate and the attorney are in the same room. Such visits may occur while the inmate is in shackles if the attorney requests or when the institution believes security issues require shackling. Furthermore, protective custody CP inmates may not be permitted contact visits with family members because contact visits occur in a large room with numerous prisoners and others present, and protected custody inmates are to have severely limited or no contact with other inmates.

The record supports both sides' positions. Because plaintiffs' objections do not address the visiting provisions of the Modified Decree, the Court will not discuss them further and these objections do not prohibit the Court from vacating this portion of the decree.

The Education section of the Modified Decree states that "[d]efendants will provide inmates with an education program for G.E.D." Plaintiffs object that CP inmates in administrative segregation do not have the opportunity to participate in "any type of educational course." Defendants respond that administrative segregation inmates may participate in educational courses by correspondence, which are free of charge. General population inmates have a G.E.D. course available to them at the institution. There is no persuasive evidence to support a finding that defendants have not provided CP inmates with educational programs for G.E.D. Significantly, the Modified Decree does not expressly state the manner in which the education program will be provided and does not clearly state that such a program must be provided in a certain manner regardless of the CP inmate's classification. Because there is no violation of the Modified Decree and no apparent constitutional

violation with respect to the educational program for CP inmates, the Court may consider vacating this section of the Modified Decree.

With respect to Lighting, the Modified Decree specifies only that defendants "will supply inmates with light bulbs sufficient to provide 20 footcandles of light at the bed and desk level." Plaintiffs' objections regarding lighting focus on the presence of light early in the morning or the absence of light late at night. Neither of these matters are addressed by the Modified Consent Decree. The record establishes that the lighting within PCC satisfies the requirement of this section. Nothing of record indicates a violation of the Lighting provision in the Modified Decree or a constitutional deprivation of light. Therefore, the Court may consider vacating this section of the Modified Decree.

***23** The Feeding section of that decree states only that "[d]efendants will make good faith efforts to provide death row inmates with meals on the same schedule that applies to feeding of general population inmates." Plaintiffs object that almost fourteen hours pass between the last meal of one day and the first meal of the next day; and those CP inmates in administrative segregation receive their meals approximately one hour prior to the general population inmates. While the record supports plaintiffs' concerns, the record does not support a determination that these aspects of feeding CP inmates either violates the Modified Decree or a provision of the federal constitution. The logistics of serving a large number of inmates in the dining room and also serving a number of inmates in their cells in segregated units not necessarily close to the kitchen areas support a distinction between when the segregated inmates and the general population inmates are served. Serving segregated inmates in their cells within an hour of serving the general population in the dining room appears to be within the bounds of a good faith effort to serve segregated and general population inmates "on the same schedule." Accordingly, the Court may consider the vacating of this section of the Modified Decree.

Finally, in the earlier discussion of various sections of the Modified Decree, the Court has addressed plaintiffs' concerns that defendants are not complying with the Equal Access section of that decree. This section of the decree requires CP inmates to have "equal access to all rights and privileges" conferred upon others within their classification status by the decree. There is no indication that unequal access has been provided in violation of this section, except perhaps with respect to any CP inmates designated as no-contact or protective custody CP inmates. The Court has found, however, that any distinctions in those inmates' access to facilities and privileges as compared to CP inmates not having protective custody status are a result of the former inmates' need to be kept away from other inmates. The record demonstrates that all protective custody CP inmates have the same access to the rights and privileges accorded such CP inmates. Thus, any distinctions in access do not require the maintaining of jurisdiction over this section of the decree.

Plaintiffs seek the retention of this Court's jurisdiction over the Modified Decree so that they have another avenue (through their counsel and this Court) to raise and address concerns regarding their confinement. If this was a proper basis for continuing a Court's jurisdiction over its injunctive order in a prison conditions case, all such injunctions would remain in effect ad infinitum. As noted earlier, however, injunctions in cases such as this are not to last indefinitely.

Furthermore, there is no dispute that plaintiffs may pursue their concerns regarding conditions of their confinement through written correspondence, the institution's grievance procedure, and litigation. Plaintiffs contend they have been subjected to harassment and/or retaliation for seeking such relief. The existence of this Modified Decree would not necessarily stop any such alleged harassment or retaliation; and such conduct by the institution's staff may be the subject of grievances and litigation, if appropriate. There is no indication of record that there is a policy or a general practice to harass or retaliate against those CP inmates who seek relief through written correspondence, the grievance procedure or litigation.

***24** Plaintiffs further urge that the constant changes in the policies at the PCC and the changes in MDCHR and PCC personnel support continuation of this Court's jurisdiction over this case and the Modified Decree. As with the previous argument, this is not a proper basis for denying the motion to vacate. If it was a proper reason for continuing the Court's jurisdiction over an injunction in a prison conditions case, then such injunctions would last in perpetuity since corrections officials and policies will inevitably change.

Plaintiffs also raise concerns that defendants will impose unconstitutional conditions on the CP inmates once this Court ends its jurisdiction and terminates the Modified Decree. The record does not support this contention and the Court is not persuaded that defendants will do that. In addition to the Court's earlier findings, the Court notes defendants did not treat CP inmates more adversely than non-CP inmates after a widespread disturbance occurred at the PCC in August, 1992, in which at least six CP inmates were reportedly involved.

By their motion to reopen fairness hearing, plaintiffs ask the Court to either reopen the fairness hearing or deny defendants' motion to vacate. Plaintiffs urge that a population increase at PCC and double-bunking in cells designed for single occupancy have put stress on PCC

staff and facilities resulting in denials of access to necessary medical or dental care, psychological counseling, adequate vocational and educational programs, legal materials and assistance, exercise equipment, and recreational facilities and opportunities; inadequate supervision; inadequate space in the dining area; unconstitutional and dangerous conditions regarding fire safety; increased risk of disease; improper classification; delays in family visitation and attorney visits; a heightened threat of violence; overcrowding in common areas; and a loss of opportunities to utilize hobby-craft facilities or equipment. Plaintiffs concede that CP inmates are not being double-bunked at this time.

By a supplement to the motion, plaintiffs urge a lockdown beginning August 7, 1995, creates unconstitutional conditions of confinement that should be redressed in this proceeding through a Court order denying defendants' motion to vacate, directing defendants to comply with the Modified Consent Decree, or reopening the hearings.

Upon careful consideration, the Court will deny plaintiffs' motion to reopen fairness hearing.

The Modified Consent Decree does not expressly address the number of inmates or staff at the PCC; whether or not class members may share cells; the adequacy of vocational and educational programs; class members' accessibility to legal materials and assistance; plaintiffs' accessibility to exercise equipment; the adequacy of staff supervision; the adequacy of dining area space; the propriety of classifications; the timing, as opposed to the number, of visits with family members and attorneys; the numbers of persons in common areas; the utilization of hobby-craft facilities or equipment; or the circumstances under which a lockdown may occur, conditions during a lockdown or the duration of a lockdown. Thus, these allegations do not support either the reopening the fairness hearing or the denial of the motion to vacate.

***25** The allegedly unconstitutional conditions pertaining to fire safety also do not support plaintiffs' requests. The Modified Decree's Fire Safety section only requires an evaluation by two consultants, their preparation of a report with recommendations, defendants' implementation of those recommendations, and a follow-up inspection of PCC by those consultants "to ensure the necessary fire safety measures have been implemented." Defendants complied with this section of the Modified Decree during 1989 and 1990. Plaintiffs' present contentions do not address the Fire Safety provisions of the Modified Decree and therefore do not require further consideration in this proceeding.

As to the alleged denial of recreational facilities and equipment, plaintiffs have not specified how their recreational opportunities have been denied in a manner inconsistent with the relatively broad terms of the Modified Decree's Recreation section. Plaintiffs who are not in administrative segregation do not allege they have received less of an opportunity for recreation than other general population inmates at the PCC. Nor do plaintiffs allege that, as the result of PCC's increased population, CP inmates in administrative segregation receive less than one hour every other day. The Modified Decree does not expressly address the duration of recreation for CP inmates not in administrative segregation and does not set forth the schedule for and location of recreational opportunities required for any CP inmates.

Furthermore, plaintiffs contend generally that they are denied access to medical care, dental care, and psychological counselling. Such generalizations are inadequate to raise potential problems with the express terms of the Modified Consent Decree. Thus, it is not appropriate to consider those nonspecific assertions in this proceeding.

Plaintiffs rely on a statement in the Mutuality section of the Modified Decree, Section III.1(c) at page 8 of that decree, to support their present motion. The Mutuality section states in full:

> a. The responsibilities imposed by this decree are mutual.
>
> b. Damage to or abuse of programs, facilities or equipment by inmates will be a defense in any judicial proceedings on their behalf to cure defects in such programs, facilities or equipment occasioned by that abuse.
>
> c. In the event of continued or consistent abuse or misuse, the nature of which renders such programs, facilities or equipment a risk to the safety and security of inmates, staff or the institution, those programs, facilities or equipment may be substantially modified, suspended, or discontinued to the extent necessary to restore said safety and security. Defendants shall give notice to plaintiffs' counsel and file a request with the Court for modifying, suspending, or discontinuing programs, facilities, or equipment required by this decree. It is contemplated by the parties to this decree that damage, abuse, or misuse by a single individual will normally be handled by appropriate action as to that individual.

***26** Plaintiffs contend defendants have violated the second sentence of Section III.1(c) of the Modified Decree by failing to give notice to plaintiffs' counsel and file a request with the Court regarding the August, 1995, lockdown and its attendant restrictions on CP inmates' activities. The Court disagrees.

Because of its context, the relevant statement focuses on the modification, suspension or discontinuation of PCC

programs, facilities, and equipment due to CP inmates' "continued or consistent" abuse or misuse of them. That is not the basis of the August 7, 1995, lockdown. As set forth in plaintiffs' supplement, the August lockdown occurred upon the discovery that items were missing from the prison chapel. Therefore, defendants' failure to give notice to plaintiffs' counsel or to file a request with this Court regarding the restrictions and limitations imposed during the August, 1995, lockdown does not constitute a violation of Section III.1(c) of the Modified Decree or support the granting of plaintiffs' present requests.

Additionally, plaintiffs' present concerns are potentially encompassed by at least two lawsuits before the United States District Court for the Eastern District of Missouri. In one lawsuit a certified class, consisting of non-CP inmates at the PCC, seeks injunctive relief based on alleged constitutional violations resulting from the increased population at the PCC. *Rentschler v. Schriro,* Cause No. 4:94CV00396GFG (E.D. Mo. filed Mar. 30, 1994). In a second lawsuit, the constitutionality of the circumstances surrounding the August, 1995, lockdown at the PCC is the focus. *Tyler v. Carnahan,* Cause No. 95CV01611CDP (E.D. Mo. received August 18, 1995). To borrow words of the United States Court of Appeals for the Sixth Circuit in its consideration of circumstances surrounding the modification or termination of a consent decree: "not every wrong [of the PCC] can be righted by a decree which is now [6] years old, and the district court may find that other pending litigation offers a better vehicle for addressing any alleged legal wrongs in the [defendants'] policies today." *Dalzell,* 925 F.2d at 961–62. A different proceeding is a better vehicle for addressing plaintiffs' most recent challenges to the conditions of their confinement.

Under the circumstances, the Court will vacate the decree, terminate its jurisdiction, and dismiss this case. The conditions of confinement applicable to CP inmates at the PCC, as shown in this record, meet or exceed the terms of the Modified Consent Decree. The record supports this determination even as to those aspects of that decree that have not been specifically addressed by the Court.[97]

After careful consideration,

IT IS HEREBY ORDERED that originally named plaintiffs Gerald M. Smith and Rayfield Newlon are DISMISSED as class representatives.

IT IS FURTHER ORDERED that Mel Carnahan and Dora Schriro are SUBSTITUTED for the individuals previously named as the defendant Governor of the State of Missouri and as the defendant Director of the MDCHR, respectively.

***27** IT IS FURTHER ORDERED that Michael Bowersox is SUBSTITUTED for Paul Delo as the defendant Superintendent of the PCC.

IT IS FURTHER ORDERED that any pending request for the appointment of new counsel for plaintiffs is DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion to reopen fairness hearing is DENIED.

IT IS FURTHER ORDERED that defendants' motion to vacate is GRANTED so that the Modified Consent Decree, filed May 10, 1989, is VACATED and the Court's jurisdiction over this matter is TERMINATED.

An appropriate order will accompany this memorandum and order.

Footnotes

1 When this lawsuit was filed and certified as a class action, Samuel L. McDonald, Gerald M. Smith, Rayfield Newlon, Thomas Battle, and Alan J. Bannister were the named class representatives. Since that time, Gerald M. Smith has been executed and Rayfield Newlon has been resentenced and is no longer confined under a death sentence. Accordingly, the Court will delete them as named class representatives.

2 In the May 10, 1989, order of the United States District Court Judge presiding over this case before it was transferred from the United States District Court for the Western District of Missouri to this Court, the positions of the defendant officials were identified as: the Governor of the State of Missouri; the Director of the Missouri Department of Corrections and Human Resources ("MDCHR"); the Director of the Missouri Division of Adult Institutions within the MDCHR; and the Superintendent of the Potosi Correctional Center ("PCC"), the state correctional institution where the male members of the plaintiff class are now confined. Order dated May 10, 1989, at 7, *affirmed, McDonald v. Armontrout,* 908 F.2d 388 (8th Cir.1990). Paul Delo, the Superintendent of the PCC, and George Lombardi, the Director of the Division of Adult Institutions for the MDCHR, were expressly substituted for the individuals previously named as the defendant Superintendent and the defendant Director of the Division of Adult Institutions for the MDCHR. *See* page 1, footnote 1 of the memorandum and order, dated September 24, 1990. Individuals other than those previously named in this lawsuit now hold the positions of Governor of Missouri and Director of the MDCHR: Mel Carnahan and Dora Schriro, respectively. Accordingly, the Court will substitute those individuals for John Ashcroft and Dick Moore, respectively, the individuals who held those positions before. Additionally, the Court was recently advised that Paul Delo is no longer the Superintendent of the PCC and Michael Bowersox has been named to that position. Therefore, the Court will substitute Bowersox for Delo as the defendant Superintendent in this case.

3 The Court has construed this motion as a motion to vacate the consent decree and to terminate its continuing jurisdiction over this matter. *See* footnote 2 at page 5 of the Court's July 8, 1991, memorandum and order. Therefore, the Court will refer to this motion as a motion to vacate.

4 Specifically, plaintiffs contended defendants were violating: (1) plaintiffs' right to be free from cruel and unusual punishment by subjecting plaintiffs "to conditions that [ (a) ] offend minimal concepts of dignity and civilized standards of human decency," (b) are excessive and disproportionate to legitimate correctional objectives, and (c) demonstrate a deliberate indifference to the basic medical and psychological needs of the plaintiffs; (2) plaintiffs' rights to substantive and procedural due process of law by arbitrarily depriving plaintiffs, without a meaningful hearing or classification proceeding, of their right to be free of conditions "equal to or worse than conditions of administrative or punitive segregation"; (3) plaintiffs' right to equal protection of the laws by "singling them out for confinement under the conditions alleged ... solely on the basis of their sentencing status"; (4) plaintiffs' right to access to the courts and assistance of counsel by failing to provide plaintiffs "with meaningful access to legal materials and an effective means of communicating with counsel and the courts"; and (5) other rights under the First, Eighth, and Fourteenth Amendments by (a) interfering with plaintiffs' incoming and outgoing mail, (b) restricting plaintiffs' visits, and (c) refusing to allow plaintiffs to attend group religious services.

5 References to the Original Consent Decree or Original Decree are references encompassing the following documents: the consent decree submitted by the parties for approval on May 22, 1986, as amended by the parties' December 15, 1986, addendum to consent decree, *see* order, filed December 15, 1986, and approved by the Western District in its January 7, 1987, Final Judgment, and as further amended by the Western District's September 10, 1987, clarifying order and the parties' December 3, 1987, Memorandum of Agreement. The record reflects that various issues arising under this consent decree were addressed throughout the course of these proceedings and were resolved either by the Court; by counsel for the parties both during and outside of judicial proceedings; by the class members themselves, i.e., issues pertaining to telephone access; or by the Special Probation Officer appointed by the Western District to address certain issues, *see, e.g.,* April 25, 1988, letter to counsel from Dennis W. Nielson. While resolution of those issues may have affected the implementation of the Original Decree, it is not clear that the resolution of all such issues affected the terms and provisions of that decree. Under the circumstances, the Court will rely on the terms and provisions set forth in the documents enumerated in the first sentence of this paragraph as the terms and provisions of the Original Consent Decree.

The December, 1987, Memorandum of Agreement ("Memorandum Agreement"), as well as the parties' "Guidelines for a Special Probation Officer," which was filed September 28, 1987, reflect the parties' efforts to resolve outstanding issues raised in plaintiffs' then-pending motion for contempt and for appointment of a special master, filed March 2, 1987. Certain other matters raised by that motion had been resolved during a two day hearing conducted by the Western District in June, 1987. This Court does not find of record a written ruling by the Western District expressly approving or adopting the Memorandum Agreement. Both the Western District and the parties, however, have consistently treated that document as though it was part of the Original Consent Decree. *See, e.g.,* pages 1 through 2 of the May 10, 1989, order ("The Memorandum Agreement filed on December 3, 1987 modified and supplemented the Consent Decree and was approved by this Court"); pages 9 through 11 and exhibit 1 of defendants' Plan to Implement the Consent Decree at the PCC, filed March 28, 1989 (summarizing whether and to what extent terms of the Memorandum Agreement would be implemented when the Capital Punishment Unit at the MSP was moved to the PCC); pages 8 through 11 of defendants' Compliance Report for the Fourth Quarter of 1988, filed March 15, 1989 (reporting on defendants' compliance with the provisions of the Memorandum Agreement in addition to their compliance with the Original Consent Decree's provisions); pages 9 through 13 of defendants' Compliance Report for the Third Quarter of 1988, filed November 1, 1988 (same); pages 9 through 12 of defendants' Compliance Report for the Second Quarter of 1988, filed September 16, 1988 (same); and pages 10 through 13 of defendants' Fourth Quarterly Compliance Report, filed May 4, 1988 (same). Therefore, the Court construes the Original Consent Decree as encompassing the terms of the December 3, 1987, Memorandum Agreement. The parties' dispute as to whether or not the May 10, 1989, decree incorporates the terms of that Memorandum Agreement will be addressed later in this memorandum and order.

6 This unit has also been referred to as "death row."

7 At the time this lawsuit was filed, no females under sentence of death were confined in Missouri state correctional facilities. Thus, the class members consisted only of males confined under sentence of death by the MDCHR. Since the filing of the lawsuit, however, several females have been confined under sentence of death by the MDCHR. Defendants' efforts to exclude females from the certified class have not been successful. *See, e.g.,* memorandum and order, filed December 10, 1990, denying defendants' motion for modification of the class definition, filed July 19, 1990, and defendants' motion to discharge female capital punishment inmates from consent decree, filed August 6, 1990; memorandum and order, filed September 28, 1989, denying without prejudice defendants' motion for modification of the consent decree and memorandum agreement, filed May 30, 1989; order filed August 1, 1988, denying defendants' motion to amend the class definition, filed July 21, 1988. While the certified class encompasses female prisoners confined under sentence of death, during the pendency of this lawsuit such class members have not been confined at the same institution as the male class members. Unless otherwise specified, references in this ruling to class members will be references to male class members only.

8 This contempt motion focused in particular on conditions pertaining to medical care, telephone access, recreation, classification,

personal property, staff training, and visitation, as well as defendants' alleged failure to file the required quarterly reports. By stipulation of the parties, the only matters that remained in dispute at the time of the three day evidentiary hearing on the motion were (1) indoor/outdoor recreation for medium and close custody inmates; (2) changes in an individual's classification based on written conduct violations; (3) placements in administrative segregation pending investigation; (4) allowing only non-contact visits when a class member is under investigation; (5) access to caseworkers; (6) coordination of defense attorney visits; (7) personal property rights; (8) access to legal supplies, particularly the price of such supplies; (9) access to the telephone; (10) sick call by nurses; (11) the discontinuation of medication without consultation or offering alternate treatment; (12) legal research; and (13) electricity.

9 By this motion, defendants had also sought an order denying as moot plaintiffs' contempt motion. The Court has denied the contempt motion without prejudice and the motion to deny the motion for contempt as moot. *See* memorandum and order, filed April 16, 1994. Accordingly, neither the motion for contempt nor the portion of the motion to vacate that seeks the denial of the motion for contempt are now before the Court.

10 In *United States v. Swift & Co.,* 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932), the Supreme Court required a showing of a "grievous wrong evoked by new and unforeseen conditions" to support the modification of a consent decree enjoining conduct. *Id.* at 119. The United States Supreme Court subsequently rejected the "grievous wrong" standard of *Swift* and adopted a more flexible standard for the consideration of requests to modify or dissolve decrees in institutional reform cases, such as this one. *Dowell,supra* (discussing the vacating of a court-imposed decree entered after finding intentional segregation on the basis of race in the public schools); *Rufo,supra* (discussing the modification of a consent decree entered after finding pretrial detainees were subject to unconstitutional jail conditions); *accord Appeal of Little Rock Sch. Dist.,* 949 F.2d 253, 258 (8th Cir.1991) (noting the adoption of the flexible standard).

In *Dowell,* the Supreme Court rejected the "grievous wrong" standard because the relevant decree was "not intended to operate in perpetuity." *Dowell,* 111 S.Ct. at 637; *cf. In re Pearson,* 990 F.2d at 658 (finding it proper for a district court *sua sponte* to appoint a special master to analyze, among other things, the "continued viability" of consent decrees in an institutional reform case). Here, as in the Original Consent Decree, the May 10, 1989, decree contains provisions stating that the Court will retain jurisdiction "to insure compliance with [the decree's] provisions until such time as all provisions of th[e] decree have been fully implemented." Paragraph 20 at page 19 of the May 10, 1989, decree. Additionally, no other language in the May 10, 1989, decree intimates that it is to operate in perpetuity. Under the circumstances, the Court will apply the more flexible standard, rather than the "grievous wrong" standard, to the motion to vacate.

11 The Original Consent Decree also has approximately three pages of introductory paragraphs. In addition to summarizing the status of the case at the time the Court approved the parties' consent decree, the introduction includes observations that portions of the decree depend on appropriations by the state legislature for implementation; defendants would make their best efforts to request and secure such appropriations promptly; and non-compliance with the decree's terms as the result of a failure to obtain the necessary funds would not result in a finding that defendants were in contempt. The introductory paragraphs also state:

> Although no findings of fact or conclusions of law are made by the Court, this decree contemplates and is intended to eliminate any conditions of confinement which may deny the inmates sentenced to death the rights, privileges, and immunities secured to them by the Constitution and the laws of the United States.

12 Although the Western District had only recently approved the Original Consent Decree, defendants had implemented the decree upon its filing in May, 1986.

13 These letters are attached to defendants' reply to plaintiffs' response to defendants' motion to stay, and are not attached to defendants' response to the contempt motion.

14 With respect to recreation issues, the Memorandum Agreement provided for: the equal division lengthwise of two 20′ x 50′ outdoor recreation yards, and the placement of basketball goals at one end of each of the four resulting yards for use by either no-contact status CP inmates or CP inmates who specifically request use of such an individual recreation area; the provision of a weight machine on a concrete pad in another 24′ x 50′ outdoor recreation yard; the construction of a new 50′ x 50′ concrete padded outdoor recreation yard with two basketball goals at each end; the expansion of a grassed outdoor recreation yard from 36′ x 90′ to 50′ x 85′; and the construction of an additional 50′ x 75′ outdoor recreation yard. Additionally, defendants were to: insure that during construction there was sufficient space to permit recreation without disruption of the recreation schedules set forth in the Original Consent Decree; provide plaintiffs' counsel with copies of the written materials addressing the proposed construction, to permit review and comment by plaintiffs' counsel prior to the commencement of construction; furnish plaintiffs' counsel with proposed recreation schedules for use of the yards during and after construction, with any modifications to those schedules provided to plaintiffs' counsel before the modifications were implemented; limit recreation to no more than eight inmates in a group at a time, absent plaintiffs' consent and approval; and "not subdivide the yards or modify the space available for recreation without plaintiffs' consent."

15 With respect to fire safety, the Memorandum Agreement provided that, until "the electronic lock capital improvement project for" the housing unit was complete, keys necessary to unlock the CPU walks and cells would be kept "in the bubble located in the central corridor" of the housing unit, and that "bubble" would be staffed twenty-four hours a day. Once the electronic lock capital improvement project was completed, the Memorandum Agreement expressly stated defendants did not have to staff the "bubble"

twenty-four hours a day. Additionally, rugs confiscated from cells would be returned to the inmates after fire-proofing; rugs could be purchased by inmates from the canteen or vendors; and all rugs would be treated every eight months with the fire-proofing solution recommended by the consultants.

16 With respect to medical services, the Memorandum Agreement provided that defendants would continue their efforts to hire a pharmacist or contract for pharmaceutical services to staff the institution pharmacy nights, weekends, and holidays; class members' prescriptions would be given priority to insure delivery of the medication within twenty-four hours as required by the Original Consent Decree; and, with the exception of emergency treatment, medical examinations, evaluations or treatment by physicians would be conducted in the CPU's privacy cells, the hospital or the appropriate clinics, and not in the inmates' cells.

17 The sanitation section of the Memorandum Agreement noted that defendants had received funds to conduct a study of the renovation of the heating and ventilation systems used on the CPU; that the ventilation systems would be replaced in accordance with the consultants' recommendations, with defendants presenting a request for the necessary funding no later than January, 1988, and making good faith efforts to secure the necessary appropriations; that the consultants would be meeting with defendants to establish a completion schedule for this replacement project; and all spoiled or damaged foodstuffs would be marked, denatured and then removed within six weeks or less, with a log kept of the dates of discovery, denaturing and removal.

18 With respect to personal property, the Memorandum Agreement established a committee of four inmate representatives selected by plaintiffs and no more than four representatives of defendants to meet within a week, and then annually, to compose a list of personal property authorized for each inmate in regular custody or regular custody-no contact status and a list of personal property authorized for each inmate in closed custody. The Memorandum Agreement stated that the committee's lists would be submitted to the warden for review and approval, with approval withheld for security reasons only. Any unresolved disputes were to be submitted to the Special Probation Officer for resolution, with appeal to the Court possible.

> This "joint personal property committee" was also to recommend to defendants "an appropriate selection of video games" to be purchased by the institution for inmates' use. At least two video games were to be provided to each walk of the CPU, with games checked out upon an inmate's request for a period of no less than two hours.
>
> The Memorandum Agreement further stated that legal supplies, including specified items, could be purchased by inmates from outside vendors, although defendants would continue to furnish indigent CP inmates with such supplies and would provide all CP inmates with any legal materials defendants supplied to general population inmates who were not indigent. Moreover, legal supplies for which inmates were charged were to be sold "at the price paid for them by defendants."

19 With respect to new arrivals, the Memorandum Agreement provided that plaintiffs' counsel, "after consultation with appropriate mental health professionals and experts," would submit to defendants' recommendations for the treatment of new arrivals to the CPU, taking into consideration defendants' need to protect new arrivals from potential suicide attempts. If the parties were unable to agree on the treatment of new arrivals, then the matter would be submitted to the Special Probation officer who could make a recommendation to the court.

> The Memorandum Agreement explicitly noted that, at the time of filing,
>
> > new arrivals are placed in detention cells located on the end of the walk. All clothing, bedding, personal property, reading material and items of personal hygiene are taken from them. Their movements are monitored twenty-four hours a day by a video camera and a light is left on in their cell or shines into their cell constantly.

20 The window screening section of the Memorandum Agreement directed "[d]efendants [to] remove the expanded metal screens from the windows on the south side of both B and C walks forth-with."

21 In the new facilities section of the Memorandum Agreement, defendants were required, at least sixty days prior to filing a motion in Court, to provide to plaintiffs' counsel for review and comment and to the Special Probation officer "any plans to expand death row to any other area or facility."

22 With respect to new construction and modifications, the Memorandum Agreement directed defendants to furnish plaintiffs' counsel, for review and comment prior to commencement of work, any written materials pertaining to proposed or contemplated construction or modification projects covered by the terms of the Memorandum Agreement or the Original Consent Decree.

23 The visiting section of the Memorandum Agreement stated that CP inmates would be advised of the proposed dates for contact visits as soon as they were available to defendants and that caseworkers must consult with the CP inmates about scheduling such visits to insure the visitors would be available for the full three hour time period.

24 Defendants sought court approval contingent on the consultants finding no fire safety, environmental, and sanitation reasons to prevent the move. After a pre-move tour, with counsel and others, of PCC's Housing Unit 1, which was to be used for CP inmates subject to disciplinary segregation, and PCC's Housing Unit 3, which was to be used for other CP inmates, the Consultants reported that "occupancy of the facility by [CP inmates] in the relatively near future will not expose the occupants to 'unreasonable' risk [of) injury and illness." Page 4 of Consultants' Preoccupancy Evaluation on Environment and Sanitation and Fire Safety at PCC, filed April 12, 1989.

25 In this ruling, the Western District also denied plaintiffs' requests for injunction to prevent the move, which included a change in

the manner in which death sentences were carried out. That court found no violations of the Original Decree or the federal constitution in the proposed move and the change in the method of execution.

26 This SOP, as adopted effective August 7, 1989, remained in effect until the mainstreaming of the CP inmates.

Written policies for correctional facilities within the State of Missouri are contained in the MDCHR's Institutional Services Policy and Procedure Manual and in Standard Operating Procedures which are developed for a particular correctional facility. The former are referred to by the designation "IS" followed by the number; and the latter are referred to by the designation "SOP" followed by the number of the relevant policy or procedure. It is not necessary to have an SOP for every IS policy or procedure. When an SOP is developed, its terms may not conflict with IS provisions, although an SOP may provide more than the minimums set forth in the IS provisions.

An SOP is usually drafted by designated officials at the institution, taking into consideration the institution's level of security, architecture, and schedules. After the SOP is signed by the institution's superintendent, it is forwarded to the MDCHR's Central Office for review and comparison to relevant MDCHR policies and related authority. If the SOP is approved, it is signed by the official(s) in the relevant MDCHR division, dated, and returned to the institution.

While each IS or SOP has an effective date when it is officially in effect, the PCC may implement an SOP prior to final approval, subject to changes or termination upon review by the Central Office and other officials. Furthermore, the terms of an SOP may be implemented although it is not actually "in effect" until later approved. This occurs when an SOP is in the process of development and a "working copy" of the SOP is available to guide implementation of a proposed policy or procedure to determine whether or not it is feasible in light of institutional and MDCHR requirements.

Other policies or procedures may be reflected in Inter Office Communications (referred to as "IOCs") and other written documentation.

In general, unless court rulings or statutory changes require more frequent consideration, policies are reviewed annually to determine whether changes are necessary and to make any such changes.

27 This amendment relieved the appointed special probation officer "of any further responsibility in this cause of action."

28 This decree also has several pages of introductory paragraphs. The introduction includes a summary of the status of the case at the time of the Court's ruling; observations that certain portions of the Modified Consent Decree would depend on appropriations by the state legislature for implementation; directives that defendants make their best efforts to request and secure such appropriations promptly; and statements that noncompliance with the decree's terms as the result of a failure to obtain the necessary funds would not result in a finding that defendants were in contempt.

29 This provision is identical to the wording of the same section in the Original Consent Decree, without the changes made by the December 15, 1986, addendum.

30 The only difference between the "Legal Mail and Materials" section in the Modified Consent Decree and in the Original Consent Decree is a change in the reference to the regulation requiring the opening of legal mail in the inmate's presence.

31 As in the Original Consent Decree, the Modified Consent Decree also noted other services would be provided in the privacy rooms. Section III.3 *Religious Services.*

32 The Court understands this is a reference to disciplinary segregation.

33 The only differences between the Original and the Modified Consent Decree provisions regarding religious services is that the Modified Decree's provisions required annual reviews for the possibility of increasing the number of CP inmates who could participate in the privacy room services, rather than requiring such a review once (when a specific indoor recreation area was completed) as set forth in the Original Decree; and included a new provision allowing minimum custody CP inmates to attend services in the chapel.

34 The duration of and basis for terminating telephone calls is the same in the Original and Modified Consent Decrees. The hours of access to the telephone are different, with the Original Decree containing no express distinction between the custody levels for access to a telephone.

35 The Modified Consent Decree did not contain provisions that had been in the Original Consent Decree for conducting physical examinations of consenting inmates; for conducting sick call by the physician in the CPU; requiring doctor's sick call to occur behind a privacy screen in an office until privacy rooms on the CPU were available; for storing CP inmates' medical and psychological records in a locked fire-safe file on the CPU; and for defendants to make good faith efforts to obtain appropriations from the state legislature for an additional medical assistant.

The Original Consent Decree stated that the escort of an inmate to the eye or dental clinic must be within "eight days" of receipt of the written request for such services, rather than within "eight working days" of receipt of the written request for such services as set forth in the Modified Consent Decree.

In other respects the terms of the medical services provisions in the Original and Modified Consent Decrees are the same.

36 While most of the provisions of the "mental health care" sections of the Original and Modified Consent Decrees are the same, there are several differences. In the Modified Consent Decree defendants expressly retained the right to seek a state court order for the provision of treatment to an inmate declining such care if the defendants believe such care is advisable. Section III.6(b) *Mental Health Care.* This is different from the same provision in the Original Decree because it omits both the phrase "and necessary" at the end of the sentence and a requirement that notice be given to the inmate and counsel. The omitted provisions had been added to the Original Decree by the parties' December, 1986, addendum.

Additionally, in the Original Decree, there was no mention of whether the death row psychologist was a voting or non-voting member of the classification committee. The Modified Consent Decree contains an express statement that the psychologist may not be a voting member.

37 The Modified Consent Decree states this classification system "is intended to give inmates greater privileges commensurate with good behavior." Section III.7(a) *Classification.* The Original Decree had a similar provision stating that the classification "system was intended to give certain inmates greater privileges commensurate with good behavior."

38 At paragraph 7(a) on page 12 of the Modified Consent Decree this is referred to as "Medical Custody CP." Later in the Modified Consent Decree there are no further references to "medical custody" and references to "medium custody," *see, e.g.,* Section III.9.b at page 14 and Section III.11.c at page 15. Moreover, nothing of record intimates that there is any custody level known as "medical custody" at the PCC and several materials of record regarding the levels of CP inmate custody at the PCC refer to "medium custody." Under the circumstances, the Court construes the "medical custody" reference at Section III.7(a) of the Modified Consent Decree to be a reference to "medium custody."

39 While both decrees permit close custody, no-contact custody, administrative segregation, and disciplinary segregation status for CP inmates, the Modified Consent Decree differs from the Original Decree in having minimum and medium custody classifications and no regular custody classifications. Additionally, a paragraph in the Original Consent Decree regarding defendants' amendment of the classification system in effect when the Original Decree was entered and the parties' efforts to resolve disputes pertaining to that amended classification system is omitted from the Modified Consent Decree. Finally, the changes made by the parties' December, 1986, addendum in Section III.7(c) of the Original Decree are not contained in the related section of the Modified Consent Decree.

40 The Modified Consent Decree does not include a provision that had been added to the Original Consent Decree by the parties' December, 1986, addendum. That provision required defendants to furnish plaintiffs' counsel with any inter-office communication which "will affect or implements the classification system" or decree.

Additionally, the Modified Consent Decree does not include a provision, that was in the Original Consent Decree, requiring that the institution's classification SOP be amended to reflect the terms of the decree. *See* Section III.7(b) of the Original Decree.

While a similar provision was in the Original Consent Decree, the Modified Consent Decree emphasized that defendants must seek prior approval of the Court only for those modifications of the classification system that are inconsistent with the terms and provisions of the decree and expressly stated that Court approval is not "otherwise ... warranted." Section III.7(c) of Modified Consent Decree.

Unless a difference has been noted in this discussion of the classification section of the Modified Consent Decree, that section contains provisions similar to those in the Original Consent Decree.

41 The Modified Consent Decree does not contain provisions that were in the Original Consent Decree for the assignment of eighteen additional officers to the CPU at specified times in 1986 and the rotation of custody staff assigned to the CPU "as necessary to enable them to receive [specified] training." Section III.8 of the Original Consent Decree.

42 The recreation provisions in the Modified Consent Decree differ significantly from those set forth in the original Consent Decree. The following provisions in the Original Consent Decree are not in the Modified Consent Decree:

for Regular Custody CP inmates to have eight hours of outdoor recreation and eight hours of indoor recreation per week, with an opportunity to increase that time to twelve hours per week as of April 1, 1987, and sixteen hours per week as of January 1, 1988, "[i]n the absence of a pattern of security-threatening incidents" (Section III.9(a) *Recreation* );

for Close Custody CP inmates to have four hours of outdoor recreation and four hours of indoor recreation per week, with an opportunity to increase that time to six hours per week as of April 1, 1987, and eight hours per week as of January 1, 1988, "[i]n the absence of a pattern of security-threatening incidents" (Section III.9(b) *Recreation* );

for defendants' "review [of] the feasibility of expanding recreation time "consistent with security and the well being of the inmates" after January 1, 1988 (Section III.9(c) *Recreation* );

for defendants to modify the outdoor recreation area between Housing Units 2 and 3 to provide three group recreation yards with specified equipment for Regular Custody and Close Custody CP inmates and six 9′ x 20′ individual recreation yards, three of which will be paved and have a basketball goal, for use by No–Contact Custody CP inmates; and for defendants to "make a good faith effort not to disrupt the inmates' recreation any more than is necessary for ... safety and security" while the yards are being modified (Section III.9(d)-(e) *Recreation* );

for defendants to review the recreation program and determine whether the size of groups participating in indoor and outdoor recreation may be increased, with an increase from two inmates to four inmates per group permitted no later than September 1, 1986, if there is an "absence of a pattern of" any security-threatening incidents, and greater increases possible later if, after review, defendants determine recreation in groups larger than four CP inmates is "feasible" (Section III.9(f) *Recreation* );

for the installation of exhaust fans in the CPU's indoor weight rooms that have windows, the expansion of indoor recreation facilities, subject to appropriations from the state legislature, through the conversion of an area in Housing Unit 2, and the provision of a "variety of recreational equipment" in that expanded area (Section III.10 *Facility for Indoor Recreation* ); and
for defendants to make good faith efforts to obtain appropriations from the Missouri legislature for expansion of indoor recreation facilities (Section III.10 *Facility for Indoor Recreation* ).

43 The Modified Consent Decree provided for one inspection by the consultants after their development of fire safety, environmental, and sanitation plans for the PCC, whereas the Original Consent Decree provided for the consultants' quarterly inspections of the MSP CPU for "at least one year or until such later date as the parties are jointly satisfied that all necessary fire safety[, environmental, and sanitary] measures have been implemented." Otherwise the fire safety and sanitation provisions of the Original and Modified Consent Decrees are the same.

44 The Original Consent Decree directed defendants in part to schedule Regular Custody CP inmates for at least six contact visits of three hours duration per year with no more than one contact visit per month, except as otherwise directed by the institution's superintendent; and to install a new screen in the non-contact visiting area to enhance visibility. Such provisions are not included in the Modified Consent Decree. There is no regular custody classification or a known problem with non-contact visiting room screening at the PCC. Other differences between the visitation sections of the Original and Modified Consent Decrees are that the Modified Decree specifies the number of visitors permitted during the visits, and the Original Decree did not do so; and the number of contact visits for the CP inmates in the less secure custody levels is greater in the Modified Consent Decree. For instance, the Original Decree allowed regular custody CP inmates at most twelve contact visits per year because those visits were expressly limited to no more than one per month. Under the Modified Consent Decree, minimum custody CP inmates are permitted "up to four contact visits per month," and medium custody CP inmates are permitted "up to two medium contact visits per month." Otherwise, the visitation sections in the two decrees are similar.

45 The Modified Consent Decree does not specify, as did the Original Consent Decree, that a television channel will provide the education program or that programs other than a G.E.D. program (e.g., Positive Mental Attitude and religious broadcasting) will be provided to the CP inmates.

46 The lighting provision in the Modified Consent Decree is different from the lighting provisions in the Original Consent Decree. The latter provisions required defendants to provide CP inmates with "light bulbs in wattages of their choice up to 200 watts" and to make a good faith attempt to obtain the desired wattage if it is not available; and required defendants to re-evaluate the number of security fluorescent lights needed on the walks and to turn off the unnecessary lights between 11:00 p.m. and 7:00 a.m.

47 The Original Consent Decree required that, until the new schedule for feeding CP inmates is achieved, defendants were to continue to provide in a sanitary manner the evening snack. That provision is not part of the Modified Consent Decree.

48 This is identical to the *Equal Access* section of the Original Consent Decree.

49 This is identical to the *Inspections* section of the Original Consent Decree.

50 While the Original Consent Decree contains a similar *Reports* section, that section required the defendants to provide the quarterly reports for at least two years from approval of the decree, at which time the parties were to "jointly decide on the need for and frequency of compliance reports." Thus, the length of time defendants had to provide quarterly reports was reduced in the Modified Consent Decree.

51 A provision in the Original Consent Decree requiring the implementation of all provisions by September 1, 1986, unless otherwise specified in the decree, is not included in the Modified Consent Decree. Otherwise, all provisions of the *Implementation* section of the Modified Consent Decree are the same as the *Implementation* section of the Original Consent Decree.

52 The only difference between the two decrees with respect to the *Jurisdiction* section is that the Original Decree stated the Western District "shall retain jurisdiction" over the matter and the Modified Decree states the Western District "shall transfer jurisdiction ... to the Eastern District of Missouri." In all other respects the terms of this section in the Original and Modified Consent Decrees are the same.

53 The Modified Consent Decree also does not contain a section on attorneys' fees similar to Section III.28 in the Original Decree.

54 Defendants reportedly denied the inmates' property requests based on a need to maintain "a controllable amount of property in an individual's cell." Restrictions on the amount of property in an inmate's cell are reportedly related to security in that defendants need "to be able to search each inmate's cell in a short amount of time in order to control contraband." Thus, defendants contend, the denial of the inmates' property requests fell within the limitation that approval of the proposed list could be denied for security reasons.

55 Therefore, plaintiffs' objections to both defendants' compliance with the Modified Consent Decree and the proposed vacating of that Decree based upon the personal property issues permitted pursuant to the December, 1987, Memorandum Agreement will not be further addressed. Such objections include objections to limitations on the personal property items allowed in the cells, prohibitions on the purchase of supplies from vendors outside the prison, the cost of legal supplies to nonindigent CP inmates, limitations on canteen purchases, and access to an iron.

56 In particular one of the plaintiffs' pro se objections appears to rely on a position that the provision in the Original Consent Decree requiring an escort to the eye doctor or dentist within eight days of receipt of a written request for such services remains in effect. As noted earlier, however, the Modified Consent Decree expressly altered that requirement to eight *working* days. Accordingly, it is the "eight working day" period rather than the "eight day" period that is significant for purposes of determining whether dental and eye doctor clinic services are timely provided under the terms of the Modified Consent Decree.

57 Pro se plaintiffs assert that they are not provided with meaningful access to the courts in that those inmates with knowledge and skill "in working on death penalty cases" are not permitted to aid others and there are times when there are no CP law clerks although there were four when the CPU was first transferred to the PCC. Additionally, class members object to other limitations on their access to the law library. The only law-related matters encompassed by the Modified Consent Decree are limitations on the reading of a CP inmate's "readily identifiable" legal mail, limitations on the handling of a CP inmate's legal materials during a cell search or shakedown, and provisions regarding access to attorneys through telephone calls and visits. These matters do not address class members' access to legal materials either through CP law clerks, law clerks, or personal visits to the PCC library. Therefore, the Court will not discuss this objection to the vacating of the decree.

To the extent some of the class members reiterate in their pro se objections their desire that new counsel be appointed to represent the plaintiff class and that request remains before the Court, that request will be denied for the reasons set forth in other rulings denying such requests. *See* order, filed February 3, 1989; memorandum and order, filed September 28, 1989; memorandum and order, filed March 15, 1990; memorandum and order, filed July 8, 1991; memorandum and order, filed December 4, 1992.

58 In the plaintiffs' pro se objections to the motion to vacate, there are contentions that certain legal mail was returned to the courts or attorneys without the recipient inmate's knowledge or approval; that incoming mail is occasionally delivered too late in the day for reading and responding to it before lights are turned off; and that there are delays in the processing of outgoing mail. These contentions do not pertain to provisions of the Modified Consent Decree. Therefore, the Court will not further discuss these objections.

59 Some class members testified to the destruction or mishandling of personal property during cell searches. Nothing in the Modified Consent Decree focuses on the handling of class members' personal property during cell searches. The Court's discussion will, therefore, not address searches of personal property items.

60 There was testimony that a non-CP inmate law clerk who had assisted CP inmates in administrative segregation was subject to repeated cell searches during a short span of time. Because the Modified Decree is inapplicable to non-CP inmates, the Court will not further discuss this evidence.

61 The provision of the Modified Consent Decree directing CP inmates to notify prison officials in writing when they believe their legal or personal mail has been improperly handled by prison staff does not guide conduct of the defendants. There-fore, the Court will not further analyze this provision for purposes of the motion to vacate.

62 No issue(s) under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, are raised in this proceeding.

63 Plaintiffs further report that disciplinary segregation inmates are allowed more calls than administrative segregation inmates because disciplinary segregation inmates are permitted one call every ten days.

64 Plaintiffs also urge that a hand-held telephone could be used for the administrative segregation inmates to allow them to make calls from their cells.

65 Defendants also report, through an affidavit, that the use of hand-held telephones was tested and they were found not to function well due to the construction of the housing units.

66 No personal telephone calls are available to class members in temporary administrative segregation custody ("TASC").

67 Correctional officials actually place the call and record whether the call was completed or not.

68 There are a few documents listing privileges applicable to inmates in administrative segregation that reflect those inmates were limited to ten minute telephone calls. *See, e.g.,* Plaintiffs' Exhibit No. 21. It is not clear that these lists applied to CP inmates. *See, e.g.,* discussion of Phase III recreation on page 2 of Exhibit 21 (noting "[i]nmates will be subject to the same Housing Unit Rules

as Capital Punishment and General Population"). Nor is it clear for how long such privileges were in effect.

69 Plaintiffs also object that: daily sick calls should not be "dropped," particularly in light of delays in obtaining medical care; they have been subjected to conduct violations for being out-of-bounds, when they have attempted to walk to the clinic for treatment; an MSR may be submitted by a class member any day of the week, but the requesting inmate may not be seen until 48 to 72 or more hours later and may have to be seen by a nurse prior to or in lieu of being seen by a doctor; medical staff will not treat a problem that has not been set forth on an MSR; and the PCC has a policy of having the doctor (a) prescribe either the least expensive medications or only certain medications, regardless of their benefit and (b) "discontinue certain medications for skin rash[e]s, migraine headaches and sinus problems." These contentions do not focus on express terms of the Modified Consent Decree and will not be further addressed by the Court.

Notably, there is no objection to the fact that nursing staff, rather than "Medical Assistants" as set forth in the Modified Consent Decree, provide the daily sick call, medications to inmates, and MSRs for inmates.

70 Additionally, defendants acknowledge that nurse's sick call was not regularly conducted during the first few months after the CP inmates arrived at the PCC. That failure was reportedly "due to a miscommunication to medical staff" regarding the Modified Consent Decree's requirements. In any event, defendants report they are not considering the dropping of daily sick call, which is regularly held except during lockdowns or when the medical staff is attending a medical emergency away from the clinic.

With respect to plaintiffs' concerns regarding the issuance of "out-of-bounds" conduct violations, defendants state that, absent a medical emergency, those violations are issued only when an inmate attempts to visit the medical clinic without having first submitted an MSR and been scheduled for the visit.

71 These rooms include, among other features, oxygen, needles, eye equipment, intravenous tubing and fluids, cardiac crash carts, minor surgery trays, incubators, fibrillation monitors, and suction machines.

72 In general, at least three nurses are scheduled for the evening and night shifts and at least five nurses are scheduled for each day shift.

73 Before December 1, 1992, MSRs were available from custody officers in the housing units or from the nursing staff and were collected once each day. Under CMS' operation, MSRs are available through the nursing staff and at various locations throughout the PCC, including the cafeteria and library; and correctional officers are not involved in the inmates' acquisition of health care.

74 Notably, as mentioned earlier, the Modified Consent Decree does not contain a provision for the amendment of the classification policy to reflect the terms of the decree, as was expressly required by the Original Consent Decree. That omission is telling and further supports a determination that the SOP is not an integral part of the Modified Decree.

Moreover, the SOP was not expressly included in the Western District's May 10, 1989, ruling, which referenced the SOP in the discussion prior to setting forth the Modified Decree. That court expressly stated in relevant part:

> Treatment of inmates in [the PCC] is governed by the Standard Operating Procedure Manual. Particular provisions of this manual, though not identical in form to those in the Consent Decree and Memorandum Agreement, describe policies and procedures at PCC that ensure the goals of the Consent Decree will be achieved. These new policies and procedures guarantee the inmates' right to constitutional conditions of confinement and accom[m]odate the needs of the new prison facility which is physically distinct from MSP.

Pages 3–4 of the May 10, 1989 Order.

75 As the subsequent discussion discloses, administrative segregation placements are not necessarily punitive in nature and, therefore, may occur despite the absence of a conduct violation. Additionally, a temporary placement in administrative segregation is a possible placement for CP inmates whether under the Modified Decree or not.

76 Both that Rulebook and the Inmate Rulebook effective December, 1988, state in part:

> Each of you should remember that Institutional Services Policies and Procedures affecting inmate living conditions, programs, housing and work areas are available in the inmate library. In addition, all institutional standard operating procedures are also available in the library for your review.

77 Notably, the statute authorizing the extended time set forth in amended IS21–1.4 was effective in 1990, or approximately two years prior to the amendment of the MDCHR's regulation. *See* Mo.Rev.Stat. § 217.380(2).

78 Plaintiffs further contend that the classification system after mainstreaming deprives segregated class members of substantial privileges provided by the Modified Decree. Except for conditions pertaining to visitation, recreation, meals and lighting, which will be addressed in the discussion of the relevant sections of the Modified Decree, plaintiffs specifically complain that the following are violations of the Modified Decree:

> no-contact cells do not have chairs, light switches, shelves, wall hooks for clothes or Velcro strips for hanging paper items, typewriters, shower curtains; the electricity in no-contact cells goes out at 10:00 p.m.; the no-contact housing units are subject to "standing head counts," which require inmates to stand by their bunks several times during the night; and CP inmates in no-contact status have no microwave oven or ice machine;
>
> administrative segregation cells have only "one six inch wide" shelf for property and no trash can; CP inmates in

administrative segregation are not permitted access to televisions, radios or video games; and only one administrative segregation unit has light switches in the cells; and

disciplinary segregation is different from such segregation at other Missouri correctional facilities in that electrical power is not controlled within the cell and may be turned off by the staff.

These matters do not address explicit terms of the Modified Decree because nothing in the Modified Decree sets forth conditions and privileges attendant to the various custody levels with respect to cell features, head counts, or accessible appliances. Therefore, the Court will not further address these objections.

79 No party contends the mainstreaming was "necessary to preserve the security and safety of the inmates o[r] staff," so the Court will not address the emergency implementation provision of Section III.7(c) at page 13 of the Modified Decree.

80 This level was for CP inmates who were "expected to comply and continue to comply with program expectations and guidelines," who "demonstrated the behaviors consistent with PCC goals and objectives and [who] can responsibly handle increased freedom and privileges." Section III.B(8)(a) at page 9 of SOP 21–1.5.

The privileges for this classification level were: meals in the inmate dining room; canteen; barber shop; the retention of a razor in the cell under specified conditions; the delivery of mail first; telephones during release hours; five possible job assignments; access to a variety of recreation facilities; access to arts and crafts; physical access to the library; attendance at education classes, sanctioned social functions and religious services in the chapel; contact visits consisting of three visitors for four hours four times a month on two weekdays and a weekend day plus photos with the visitors; "special food" purchase days from the vendor once a quarter; no lights out restrictions; and sick call in the clinic. Section III.B(8)(a) at pages 9–10 of SOP 21–1.5.

81 This classification was for CP "[i]nmates [who] have successfully demonstrated behavior commensurate with PCC goals and objectives, and can responsibly handle the freedom and privileges or increased freedom and privileges, whichever the case may be, of Unit 3–A wing." Section III.7(B)(b) at page 10 of SOP 21–1.5.

The privileges attendant to this classification level were: approximately twelve hours of daily access to the dayroom; meals in the dayroom; the delivery of mail second; access to canteen; telephone access from 9:00 a.m. to 3:00 p.m. (plus legal telephone calls available during dayroom access); two possible job assignments; recreation in the adjacent yard; access to educational material and the quiet rooms; medium contact visits consisting of two visitors for one or two hours twice a month (once on a weekday and once on a weekend) plus photos with the visitors; indirect access to the library; pastoral counseling and visits; special food purchase opportunity; attendance at sanctioned social functions; and medical treatment in the wing.

82 This was used as both a short term closely supervised placement for new arrivals, Section III.B. at page 4 of SOP 21–1.5; and for "[i]nmates whose behavior are expressions of rebellion against or at least an unwillingness to conform to the policies of PCC," Section III.B(8)(c) at page 11 of SOP 21–1.5.

This placement restricted inmates to their cells; permitted recreation in yards adjacent to the housing unit for one hour on alternating days; permitted telephone calls by arrangement; allowed access to educational course materials; permitted inmates to obtain at most two books from the library; provided for mail delivery; permitted access to canteen; allowed one no-contact visit with one visitor for one hour once a month on a weekday; disallowed attendance at sanctioned social functions; provided no dayroom access; and permitted pastoral counseling and visits. Section III.B(8)(c) at pages 11–12 of SOP 21–1.5.

83 This custody level was for those "CP inmates who, by the nature of their behavior or as a result of threats, real or implied, made by/or against them, may not be safely permitted physical contact with other inmates. Such status of itself may result in a loss of privilege and assignment to either Ad Seg or Close Custody." Section III.B(8)(d) at page 12 of SOP 21–1.5. Privileges for this custody level mirrored the privileges of close custody except that there was less recreation and severely restricted personal property.

84 This custody level was a Special Management Unit for CP inmates "who fail to conform to minimal standards of orderly conduct or who constantly misbehave[ ]." Section III.8(e) at page 12 of SOP 21–1.5. In this classification, CP inmates had telephone calls only by arrangement; no visits; no out-of-cell exercise; no access to educational course material; indirect access to only the legal materials at the library; pastoral counseling and visits; no canteen; meals in cell; no property; and no access to the quiet room, sanctioned social functions or the dayroom. *See, e.g.,* Level System Grid, provided with defendants' Plan to Implement the Decree at the PCC, filed March 28, 1989.

85 This classification is for those CP inmates needing no contact status. The Modified Decree specified that this status "may include some or all of [the] privileges of the classification the inmate is assigned when placed on full or partial no contact status." Section III.7(a) at page 12 of the Modified Consent Decree. The Court interprets this to mean that CP inmates on protective custody were to have the same or fewer of the privileges that those CP inmates would have absent the protective custody status. For instance, if the inmate would have been assigned to medium custody absent the need for protective custody, then that inmate on protective custody would be segregated from the other CP inmates and would have the same or fewer of the privileges otherwise available to CP inmates as-signed to medium custody.

Because there was sufficient room in the CPU to move inmates having different custody levels around, no separate protective custody section existed when the CPU existed.

86 Upon mainstreaming, CP inmates that had been in minimum, medium, and closed custody were placed in general population

unless some behavior or request of the CP inmate required a more secure custodial status. Additionally, some CP inmates that had been in the CPU's administrative segregation were placed in general population upon mainstreaming, unless there was a recent or serious basis for maintaining the administrative segregation custody level or the inmate requested a more secure custodial status.

There is no dispute that CP inmates in general population have more privileges and better access to institutional facilities than they had during the existence of the CPU. Now general population CP inmates may move more freely, in accordance with policies and procedure applicable to all maximum security general population inmates at the PCC. They are not regularly escorted throughout the institution as they were before.

87 Under the policy in effect as of November, 1992, an inmate may be placed in administrative segregation due to the inmate's commission of a serious wrongdoing, witnessing of a major violation or criminal act requiring protective custody, status as an immediate security risk, violent behavior, or urgent need for separation for the safety of himself or others. Section III.A at page 2 of IS21–1.2 and Section III.A(1)-(6) at page 2 of IS21–1.1. Additionally such a placement may be permitted when a shift supervisor determines "that confinement is necessary to maintain the good order and security of the institution." Section III.A at page 2 of IS21–1.2 and Section III.A(7) at page 2 of IS21–1.1. Such a placement is subject to regular periodic review. Section III(c)(4) at page 4 of IS21–1.2.

This is a placement providing high security and limited privileges, including in cell meals; no recreation except in the adjacent yard (at least one hour three days a week); five three-hour no-contact personal visits per month; no-contact attorney visits; restricted personal property; one personal telephone call per month; telephone calls with attorneys; at least weekly access to a chaplain for a one-on-one meeting; and limited canteen and law library access. *See* Section III.I at pages 6–8 of IS21–1.2; Sections III.E, III.M and III.N at pages 3 and 6 of SOP 21–1.2 and segregation privilege list, effective November 1, 1991, provided with SOP 21–1.2.

88 Under the policy in effect as of November, 1992, an inmate may be placed in TASC for the same reasons he may be placed in administrative segregation. Section III.A at page 2 of IS21–1.2 and Section III.A at page 2 of IS21–1.1. This is usually a three day placement, similar to what was referred to as prehearing detention. For a period of time it was the practice at PCC to assign an inmate to TASC for up to three three-day periods if the placement was due to the investigation of disciplinary charges, conduct violations or criminal acts and the investigation was not completed within three days. As of November, 1992, the policy is to limit TASC placements to three days only. Section III.E at page 4 of IS21–1.1. If an investigation is not complete or a decision as to the appropriate segregated custody status for a TASC inmate is not completed within that time period, then the inmate may be assigned to administrative segregation. *Id.*

The privileges for a class member on TASC after mainstreaming are the same as for CP inmates' on administrative segregation except that property may be more restricted due to the short term nature of the classification. *See, e.g.,* TASC and Disciplinary Property List, effective November 1, 1991, provided with SOP 21–1.2.

89 As of February, 1992, MDCHR regulations provide that a disciplinary segregation placement may be for up to ten continuous calendar days for minor conduct violations and up to thirty continuous calendar days for a major conduct violation. Section III.B at page 2 of IS21–1.4. Privileges during such segregation are the same as the privileges of those in administrative segregation except that CP inmates in disciplinary segregation receive no out-of-cell recreation, severely restricted access to the canteen, and no personal visits. Section III.C at pages 2–3 of IS21–21–1.4; *see also* segregation privilege list, effective November 1, 1991, provided with SOP 21–1.2. The property permitted those on disciplinary segregation is the same as the property permitted those on TASC. *See, e.g.,* TASC and Disciplinary Property List, effective November 1, 1991, provided with SOP 21–1.2.

Time in TASC may be credited to related disciplinary segregation, Section III.A(3) at page 2 of IS21–1.4, but time in administrative segregation will not be credited, Section III.C(1) at page 4 of IS21–1.2.

90 This status is for an inmate who "may not come into contact at any time with another inmate or only come into contact with certain inmate(s)." Section II.A at page 1 of SOP 21–1.2. Non–CP inmates at the PCC that require this status are transferred to the protective custody unit available at the other maximum security institution, the Jefferson City Correctional Center.

There also is a temporary segregated placement under close supervision for new CP inmates and a segregated placement in a holding cell for those CP inmates having received a death warrant. Nothing before the Court raises issues concerning the conditions of confinement or treatment of either new class members or class members having received a death warrant, so the Court will not further address any such issue.

91 Now this consists of all or a majority of the CP inmate's legal materials, personally owned typewriters, and unlimited telephone calls to legal counsel.

For a period of time, CP inmates in administrative segregation, TASC and disciplinary segregation custody levels were permitted to retain all or at least the majority of their personal property, whereas non-CP inmates in those custody levels had restricted access to their personal property. After the first few days of hearings on the motion to vacate, officials decided to restrict such CP inmates' property comparable to the property permitted non-CP inmates in these classification levels, with the exception that such CP inmates could have typewriters and greater amounts of legal materials, due to the distinct nature of CP inmates' criminal and habeas proceedings.

92 Plaintiffs also contended defendants have not consistently complied with Section III.7(d) of the Modified Decree which requires defendants to distribute a copy of the Modified Decree to each class member. Although the record supports a finding that some class members may not have received a copy, it is not clear that such a failure was purposeful or malevolent. The policy is to

distribute a copy of the Modified Decree as part of the orientation of new CP inmates. As to other class members, it is not clear that any failure to obtain a copy of the decree did not result from merely an inadvertent or mistaken failure of staff members to follow through on a class member's request. Moreover, it is not clear whether copies were available to class members when the CPU was originally transferred to the PCC and over time the copies have been mislaid or otherwise discarded. The Modified Decree does not necessarily require the distribution of more than one copy to each class member but it is a provision without significance if it permits class members to have a copy at one time and then does not require distribution of a replacement copy when necessary to provide a class member adequate notice of the terms of the Modified Decree. Based on the present record, the Court is not persuaded that any failure to comply with this requirement of the Modified Decree prohibits vacating of this section of that decree.

93 The Court assumes this is a reference to the indoor gymnasium facilities at the PCC because indoor recreation facilities are available to a different extent in housing unit day-rooms.

94 Medium custody inmates were placed in general population upon mainstreaming. Those inmates are now receiving a much greater opportunity for recreation in that they are not now restricted to recreation during dayroom hours only or to the adjacent recreation yard and other housing unit recreation facilities only.

95 Plaintiffs also allege that CP inmates in administrative segregation were required to have an adult present when a child under eighteen years old visited, yet the no-contact visits only permitted one person to communicate by telephone with the inmate. This in essence prevented CP inmates on administrative segregation from visiting with minors. Defendants' counsel has advised the Court that the PCC policy has changed so as to permit visits with minors for those inmates on administrative segregation.

96 The Court will not discuss or address the evidence and issues regarding certain female attorneys' experience with the detection devices at the PCC entrance. Nothing in the Modified Decree focuses on the security policy and procedures that may or may not be used by the PCC with respect to visitors. Importantly, nothing in the record indicates that these attorneys were denied complete access to any class members; and means of communication between these attorneys and their class member clients exist regardless of the ability of the attorneys to have a contact visit with such clients at the time the attorney arrived at the institution. While the Court acknowledges the correctional facility's need to address security issues, the Court does not condone improper conduct of prison officials toward those attempting to visit inmates. The Court understands that the policy regarding visitors who do not pass the detection devices at the PCC entrance has been clarified since the hearing in this case.

The evidence indicates one attorney is not permitted contact visits with her clients at PCC, which include class members. The Court does not find this evidence prohibits the vacating of the decree even though it may mean that CP inmates who are not in administrative segregation or disciplinary segregation, are not receiving contact visits with their attorney. The circumstances regarding that attorney's situation support MDCHR's and PCC's decision to treat her differently from other attorneys having class members as counsel. Any challenges to that decision are more appropriately addressed in another forum because this proceeding focuses on matters affecting the plaintiff class as a whole and there is no indication that this attorney is unable to communicate with her class member clients.

97 For instance, the Staffing section's requirement that there be training regarding the special needs of CP inmates has been incorporated in the regular training program for PCC custodial staff. While it is not clear that such training is repeated periodically as a refresher course, the Modified Decree does not require repetitive training. Additionally, the amounts of visitation permitted the different classification levels of CP inmates are satisfied or exceeded.