IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GUADALUPE GUAJARDO, JR., *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. H-71-570
	§	
JANIE COCKRELL, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Defendants have filed a motion to terminate the consent decree in this prisoner class action lawsuit. Plaintiffs oppose that motion. After considering all of the relevant pleadings, voluminous exhibits, and the applicable law, this court grants defendants' motion and terminates the decree's prospective effect. This court also addresses other pending motions in this case, including plaintiffs' request for attorneys' fees.

I. Procedural History

This litigation began in 1971, when a state inmate incarcerated in the Texas Department of Corrections ("TDC"), now known as the Texas Department of

Criminal Justice – Institutional Division ("TDCJ-ID"),[1] filed suit under 42 U.S.C. § 1983. In this case, which was consolidated with several others to form a class action, Guadalupe Guajardo Jr. and other similarly situated inmates challenged the constitutionality of the prison correspondence rules and practices then in effect. Following a trial in 1972, the district court found a number of those rules invalid and granted injunctive relief.[2] *See Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972). The Fifth Circuit reversed and remanded, holding that rules and regulations of statewide application such as those promulgated by the Texas prison system could only be enjoined by a three-judge panel. *See Sands v. Wainwright*, 491 F.2d 417 (5th Cir. 1973), *cert. denied sub nom. Guajardo v. Estelle*, 416 U.S. 992 (1974).

In 1975, plaintiffs amended their complaint and withdrew their request for injunctive relief. TDC promulgated new correspondence rules that were conditionally approved by the district court. After settlement negotiations failed to resolve plaintiffs' objections to the new rules, the district court severed certain disputed issues for trial. Following that trial in December 1976, the district court

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[1] TDC became TDCJ-ID when the state legislature restructured the Texas criminal justice system in 1989. *See* Comprehensive Justice Reform Act, 71st Leg., R.S., ch. 785, 1989 TEX. GEN. LAWS 3471 (generally effective Sept. 1, 1989). The class members in this case include only those inmates incarcerated in TDCJ's Institutional Division. For consistency, this order refers to defendant as TDCJ-ID except where it is appropriately referred to as TDC.

[2] The Honorable John Singleton originally presided over this case.

entered a declaratory judgment in plaintiffs' favor and final judgment approving a set of correspondence rules. *See Guajardo v. Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977). The United States Court of Appeals for the Fifth Circuit affirmed most of the rules approved by the district court and modified others. *See Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978).

Disputes over the correspondence rules continued. In 1979, plaintiffs moved to enjoin TDC from violating the amended correspondence rules. The parties selected an independent consultant to monitor TDC's compliance with the amended rules. On February 23, 1983, the parties reached an agreed settlement. On July 14, 1983, the district court entered a *Memorandum and Order* and *Final Judgment* approving the agreed settlement and the resulting revisions to TDC's correspondence rules. *See Guajardo v. Estelle*, 568 F. Supp. 1354 (S.D. Tex. 1983). The court retained jurisdiction to enforce the July 14, 1983 agreed settlement and related consent decree.[3]

II. Defendants' Motion to Terminate

Defendants have filed a motion to terminate the prospective relief the consent decree provides. Defendants' motion is governed by the Prison Litigation

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[3] Since the 1983 agreed settlement, the judgment has been modified by stipulation on more than one occasion.

Reform Act (the "PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), codified as amended at 18 U.S.C. § 3626(b)(2). The PLRA limits a court's power to continue "certain forward looking relief" in civil actions challenging prison conditions. *See Benjamin v. Jacobson*, 172 F.3d 144, 154-55 (2d Cir.) (en banc), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999). The PLRA prohibits a court order approving any prospective relief unless the court first finds that such relief is: (1) narrowly drawn; (2) extends no further than necessary to correct the violation of the involved federal right; and (3) is the least intrusive means necessary to correct the violation of that federal right. *See* 18 U.S.C. § 3626(a)(1). If a court order granting prospective relief does not expressly state that these three conditions are satisfied, then the PLRA mandates that prospective relief shall terminate in the following manner:

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. § 3626(b)(2); *see also Plyler v. Moore*, 100 F.3d 365, 369 (4th Cir. 1996) (The PLRA "provides an avenue for states to end their obligations under consent

decrees providing for greater prospective relief than that required by federal law."), *cert. denied*, 520 U.S. 1277 (1997).

The PLRA broadly defines "prospective relief" to include "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). The PLRA expressly includes prospective relief awarded pursuant to a "consent decree," which is defined as any relief entered by the court "based in whole or in part upon the consent or acquiescence of the parties . . . ." *See id.* at § 3626(g)(1), (9). The consent decree in this case secures an order compelling TDCJ-ID's compliance with the correspondence rules developed under the terms of the agreed settlement. *See Guajardo*, 568 F. Supp. at 1359. That order is "enforceable by contempt action should it not be followed by either [Defendants] or [TDCJ-ID]." *Id.* Since the settlement agreement was approved in 1983, the parties have filed motions and individual inmates have sought relief under the consent decree. Because the consent decree provides for continuing prospective relief, it is subject to termination under the PLRA.[4]

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[4] Every circuit court of appeals to consider the PLRA's termination provision, including the Fifth Circuit, has upheld the statute's constitutionality. *See Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001); *see also Gilmore v. State of California*, 220 F.3d 987 (9th Cir. 2000); *Berwanger v. Cottey*, 178 F.3d 834 (7th Cir. 1999); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3rd Cir. 1999); *Nichols v. Hopper*, 173 F.3d 820 (11th Cir. 1999); *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir.) (en banc), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir.), *cert. denied*, 524 U.S. 952 (1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 524 U.S. 956 (1998); *Gavin v. Branstad*, 122 F.3d 1081

The consent decree in this case was entered long before Congress enacted the PLRA. It is undisputed that the consent decree includes none of the findings required by 18 U.S.C. § 3626(b)(2). The court that entered the consent decree observed that plaintiffs "were able to secure substantially more modifications in the TDC correspondence rules and practices than they would have achieved had they prevailed on their request for injunction." *See Guajardo v. Estelle*, 568 F. Supp. 1354, 1358 (S.D. Tex. 1983). In other words, the consent decree provides for greater prospective relief than required by federal law. Defendants are entitled to the immediate termination of existing prospective relief regarding the prison conditions at issue,[5] unless plaintiffs can establish that such relief "remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary

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(8th Cir. 1997), *cert. denied*, 524 U.S. 955 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 529 U.S. 951 (1998); and *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997). *See also Miller v. French*, 530 U.S. 327 (2000) (upholding the constitutionality of the PLRA's automatic stay provision found in 18 U.S.C. § 3626(e)).

[5] Plaintiffs express concern that the consent decree will be vacated if the court grants defendants' motion to terminate. When a court terminates a consent decree under the PLRA, the effect is to end prospective relief. The consent decree itself is not vacated. As one circuit court has explained, "[w]hile terminating a consent decree strips it of future potency, the decree's past puissance is preserved and certain of its collateral effects may endure." *Rouse*, 129 F.3d at 662. By contrast, vacating a consent decree "wipes the slate clean, not only rendering the decree sterile for future purposes, but also eviscerating any collateral effects and, indeed, casting a shadow on past actions taken under the decree's imprimatur." *Id.*

to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3).

Plaintiffs contend that termination is inappropriate under section 3626(b)(3) because constitutional violations are both current and ongoing.[6] Plaintiffs bear the burden to show that such violations persist. *See Laaman v. Warden, New Hampshire State Prison*, 238 F.3d 14, 20 (1st Cir. 2001). Both parties have submitted supplemental briefing on whether termination is appropriate. In March 1999, this court held a hearing on the motion. At that time, the court granted plaintiffs leave to conduct additional discovery and entered a scheduling order. plaintiffs have since filed more than one evidentiary supplement, to which defendants have replied.[7] The parties' submissions and contentions are considered below.

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[6] Plaintiffs have also previously argued that: (1) the PLRA's termination provisions are unconstitutional; (2) the PLRA does not apply because the consent decree does not concern "prison conditions" with the meaning of that statute; and (3) the termination provisions do not apply because the consent decree does not provide for prospective relief. Plaintiffs have since withdrawn these arguments. (*See* Docket No. 1057).

[7] At a status conference on September 6, 2002, both parties indicated that no evidentiary hearing was required. "The PLRA does not specifically provide for an evidentiary hearing prior to termination of a consent decree." *Laaman*, 238 F.3d at 16. A court must, if the plaintiffs request, allow an opportunity to show current and ongoing violations of their federal rights. *Benjamin*, 172 F.3d at 165-66. Plaintiffs were given that opportunity following the hearing on the motion to terminate in March 1999, and they have submitted voluminous exhibits. (Docket No. 996, 998). This court has considered plaintiffs' evidentiary submissions and finds that they do not allege specific facts which, if true, would establish systemwide constitutional violations sufficient to continue prospective relief in this class action in accordance with the PLRA's mandate. *See, e.g., Cagle v. Hutto*, 177 F.3d 253 (4th Cir. 1999) (holding that the decision to hold a pre-termination evidentiary hearing is within a district court's discretion unless the party opposing termination alleges specific facts which, if true, would amount to a current and ongoing constitutional violation), *cert. denied*, 530 U.S. 1264 (2000). This court concludes that an evidentiary hearing is unnecessary.

III. Allegations of Current and Ongoing Constitutional Violations

The consent decree and the correspondence rules adopted under that decree implicate the First Amendment to the United States Constitution. Prisoners retain those First Amendment rights that are not inconsistent with their status as prisoners or with the legitimate penological objectives of the correctional institution. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984). "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823 (1974); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The Supreme Court has held that "even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Id.* (citing *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1977)).

In the prison context, regulations burdening an inmate's First Amendment rights traditionally have been subject to a deferential standard and held valid if "reasonably related to legitimate penological interests." *Turner v. Safley*, 482

U.S. 78, 89 (1987); *see also Thornburgh v. Abbott*, 490 U.S. 401 (1989) (applying the deferential *Turner* standard to a case dealing with the First Amendment rights of free citizens communicating with inmates). Factors typically relevant in deciding the reasonableness of such a prison regulation under this standard include: (1) whether there is a valid, rational connection between the regulation and the asserted governmental interest; (2) whether alternative means for exercising the right remain open to the prisoner; (3) the impact of the regulation on prison staff, other inmates, and the allocation of prison resources; and (4) the availability of ready alternatives to the regulation. *Turner*, 482 U.S. at 89-91.

Plaintiffs argue that it would be improper to terminate the consent decree because the prison mail system continues to violate inmates' constitutional rights. Defendants disagree, arguing that plaintiffs cannot show actual violations of prisoners' constitutional rights on a class-wide basis, sufficient to justify the consent decree's continued prospective effect. To make the required finding of a current and ongoing violation of a federal right required by 18 U.S.C. § 3626(b)(3), this court must examine the conditions in the prison at the time termination is sought, not conditions that existed in the past or that may possibly occur in the future. *Castillo v. Cameron County, Texas*, 238 F.3d 339, 353 (5th Cir. 2001).

Plaintiffs claim that constitutional violations continue in the following areas: (1) unnecessary delays by TDCJ-ID mail room personnel in processing

publications; (2) delays in processing legal mail and inadequate access to indigent legal supplies, which have resulted in a denial of access to the courts; (3) improper processing of special or privileged mail, in violation of the correspondence rules; (4) improper content-based denials of correspondence and publications; (5) lack of a meaningful opportunity to appeal censorship decisions; and (6) retaliation against inmates for exercising their constitutional rights. Defendants respond that any problems are sporadic and isolated, rather than system-wide or systemic, and cannot justify the continued decree. The evidence and the parties' contentions are examined below.

A. The Claim of Unnecessary Delays in Processing Publications

Correspondence Rule 3.9.1.9 provides that an inmate's mail, "whether incoming or outgoing, shall be handled with all reasonable dispatch."[8] Plaintiffs allege that prison officials engage in unnecessary delay in the processing of publications, pointing to failures to comply with Rule 3.9.10.6, otherwise known as the "72-hour rule," as evidence of a current and ongoing constitutional violation.

The 72-hour rule, which governs the rejection of publications received by TDCJ-ID inmates, provides as follows:

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[8] Correspondence Rule 3.9.1.7 provides that all incoming mail, including packages, will be delivered within forty-eight hours of receipt, except on weekends or holidays when seventy-two hours is allowed. That rule also provides that outgoing mail is delivered to a United States Postal Officer within forty-eight hours, except on weekends or holidays, when seventy-two hours is allowed.

> If a publication is rejected, the inmate, the editor and/or the publisher will be provided a written notice of the disapproval and a statement of the reason therefore within seventy-two (72) hours of receipt of said publication on Publication Denial Forms. Within the same time period, the inmate, the editor and/or the publisher shall be notified of the right to and the procedure for appeal. The inmate will be given a sufficiently detailed description of the rejected publication to permit effective utilization of the appeal procedures. Whereupon the inmate, the editor or the publisher may appeal the rejection of the publication through the Correspondence Review Procedure outlined in Rule 3.9.14.

(Correspondence Rule 3.9.10.6). Defendants appear to concede that they have not complied fully with this rule and the parties have negotiated toward a modified approach.[9]

Even if plaintiffs' complaint is true and defendants' review of publications is untimely under the 72-hour rule, a State's failure to follow its own rules or regulations, standing alone, does not establish a constitutional violation. *See Jackson v Cain*, 864 F.2d 1235, 1251-52 (5th Cir. 1989); *see also Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986) (per curiam) (rejecting an inmate's claim that TDCJ-ID's mere failure to follow an administrative rule violated his constitutional rights). The Fifth Circuit has stated that delay in processing a

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[9] Defendants have filed a motion to modify the 72-hour rule portion of the consent decree. (Docket No. 878). That motion remains pending. Plaintiffs advise, however, that the parties have reached a "tentative agreement" and that defendants have "voluntarily adopted a rule which conforms in large part to that agreement." (Docket No. 970, at 4-5). Plaintiffs report further that the adopted rule is "a marked improvement over Defendants' prior practice." (*See id.* at 5 n.6). Defendants have filed a motion to abate their request for a modification of the 72-hour rule, advising that, should the court grant the motion to terminate the consent decree, the motion to modify would become moot. (Docket No. 897).

prisoner's mail "will not offend the constitution unless it is shown that the delay prejudiced the prisoner legally." *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988). Plaintiffs do not allege or show that class members have suffered actual prejudice from a violation of the 72-hour rule. Plaintiffs' bare allegation that defendants have failed to comply with the 72-hour rule does not demonstrate a current and ongoing constitutional violation requiring the continuation of the decree for the purpose of 18 U.S.C. § 3626(b)(3).

B. The Claim of Delayed Mail Resulting in a Denial of Access to Courts

Plaintiffs characterize TDCJ-ID's mail system as unreliable and slow and complain that delayed mail has resulted in denial of access to courts. Prisoners clearly have a constitutionally protected right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 360 (1996) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)). This right "is founded on the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Access to the courts is also protected by the First Amendment's right to petition the government for redress of grievances. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Brewer v. Wilkinson*, 3 F.3d 816, 820-21 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123 (1994).

A prisoner's right of access to courts is not unlimited. *See Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) (citing *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir.), *cert. denied*, 522 U.S. 995 (1997)). The right encompasses only a reasonably adequate opportunity to file nonfrivolous legal claims challenging convictions or conditions of confinement. *See Jones*, 188 F.3d at 325 (citing *Lewis*, 518 U.S. at 351). Inmates are "not guarantee[d] the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Lewis*, 518 U.S. at 355. They are guaranteed "the conferral of a capability — the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id.* To show a denial of access to the courts under these circumstances, a plaintiff must demonstrate that an "actual injury" stemming from the processing of his mail. *See Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999) (citing *Lewis v. Casey*, 518 U.S. 343, 351-54 (1996)); *see also Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998). A prisoner must establish that "his position as a litigant was prejudiced by his denial of access to the courts." *McDonald v. Stewart*, 132 F.3d 225, 231 (5th Cir. 1998).

Declarations from class members generally reference thirty-eight instances of delayed or mishandled inmate mail that allegedly resulted in a missed court deadline or the dismissal of a legal proceeding. (Docket No. 996, Ex. A. Tab

1 (category 1)). Defendants note that in many of the declarations, inmates claim a denial of access to a court but do not identify the case name or cause number. There is no way to determine the extent to which these prisoners' constitutional right of access to the courts was violated, if at all. *See Johnson*, 110 F.3d at 311-12 ("Almost all of the prisoners who testified alluded to participation in numerous lawsuits. In the absence of detailed information regarding the named parties, subject matter, arguable merit, and disposition of those lawsuits, however, there is no way to determine the extent to which the prisoners' constitutional rights of access to the courts . . . are implicated."). A review of all the declarations shows that they fail to establish a violation of the right of access to courts.

Class member Thomas Sawyer complains in his declaration that mail room personnel removed a certified inmate trust fund history from court correspondence, which he claims caused him to lose his appeal. (Docket No. 996, Ex. A, Tab 151). Defendants present evidence that the Fifth Circuit granted Sawyer leave to proceed *in forma pauperis* without the benefit of his inmate trust fund account statement and then dismissed his appeal, finding it frivolous. (Docket No. 999, Ex. G-1). Sawyer does not establish that he was actually prejudiced by any action taken by TDCJ-ID personnel. This allegation does not establish a violation of the constitutional right of access to the courts.

James William Smith alleges that mail room officials mistakenly "mislabeled" copies of his federal habeas corpus petition and sent them to Kim Vernon, the General Counsel of the Texas Board of Pardons and Paroles, instead of to the United States District Court for the Eastern District. (Docket No. 996, Ex. A, Tab 161). Smith claims that Vernon refused to return his pleadings. Smith confided in correspondence attached to his declaration that he had other copies of his pleadings available. Smith does not allege that he missed a limitations deadline or that he was unable to pursue habeas corpus relief as a result of intentional or malicious conduct attributable to prison mail room staff. This claim does not demonstrate a constitutional violation.

Troy Bishop alleges that he placed a complaint in the mail on September 18, 1996, and that it was stamped by the mail room on September 20, 1996, the same day the statute of limitations expired. (Docket Entry No. 996, Ex. A, Tab 11). Bishop claims that because the mail was not recorded in the outgoing legal mail log until September 24, 1996, the district court dismissed his case as barred by limitations. *See Bishop v. TDCJ-ID Havins Unit*, Civil Action No. 3:96cv2712 (N.D. Tex.). Defendants respond by submitting a letter from Bishop, in which he admits that he had proof that he had timely placed his complaint in the mail, but chose not to submit this proof to the court. (Docket No. 999, Ex. H-12). Defendants argue that because Bishop deprived the district court of this evidence, he cannot demonstrate

that the dismissal was attributable solely to delay by TDCJ-ID mailroom personnel. Defendants note further that plaintiffs have not demonstrated that Bishop's claims were "nonfrivolous." This court agrees that this case does not establish a valid claim for denial of access to courts.

Randy Burleson claims that mail room staff "refused" to file a brief with the United States Supreme Court "concerning violence and cigarett[es]" and that his case was dismissed "as untimely and lacking jurisdiction" as a result. (Docket No. 996, Ex. A, Tab 15). Burleson provides no specific information about his case, although he hints that the defendant was Allen Polunsky. Court records reveal only one federal court action by Burleson, styled *Burleson v. Polunsky*, Civil Action No. 95cv256 (W.D. Tex.). The district court in that case granted the defendants' motion to dismiss and the Fifth Circuit dismissed Burleson's appeal as frivolous. If Burleson's petition for a writ of *certiorari* concerned this case, he cannot establish that he was denied the right to file a nonfrivolous claim. This allegation does not establish a violation of the constitutional right of access to the courts.

Bennie Finister alleges that mail officials delayed mailing his appellate brief and that, as a result, his appeal was "nearly" dismissed. (Docket No. 996, Ex. A, Tab 46). A near dismissal does not rise to the level of actual prejudice necessary to claim a denial of access to the courts. This claim does not establish a constitutional violation.

David Tweedy complains that mail room staff confiscated an envelope of pleadings prepared for him by another inmate. (Docket No. 996, Ex. A, Tab 177). Defendants respond by explaining that Tweedy's mail was withheld because the return address on the correspondence did not match the inmate's name.[10] (Docket No. 999 at 20, n. 26). Defendants note that Tweedy could have agreed to allow mail room officials to treat the mail as general correspondence or he could have appealed the decision to withhold the correspondence. Tweedy did neither. Because Tweedy bears the responsibility for his failure to comply with prison regulations that area not challenged, this example does not demonstrate a constitutional violation.

Richard Ayers maintains that prison officials delayed sending his objections to the magistrate judge's report and recommendations in *Ayers v. Kinker, et al.*, Civil Action No. 6:92cv242 (E.D. Tex.).[11] Ayers claims that because his objections were late, the district court adopted the magistrate judge's memorandum and recommendation without considering the objections. Court records provided by defendants reflect that the court did not receive Ayers's objections before adopting the memorandum and recommendation. However, these records also show that the district court considered at least two motions for reconsideration filed by Ayers. This

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[10] Correspondence Rule 3.9.1.1 requires inmates to place their name, number, and address on each envelope.

[11] Ayers reportedly used an envelope provided by the district court. According to Defendants, the envelope containing Ayers's objections was delayed because it failed to comply with Correspondence Rule 3.9.1.1, which requires inmates to include their name, number, and address. (Docket No. 999 at 21 & n.27).

record does not establish that Ayers lost his opportunity to have the district court consider the issues and arguments raised in his objections. Ayers's claim does not demonstrate a constitutional violation of the right of access to the courts.

Rafael Vasquez complains that the mail room at the Allred Unit lost several volumes of exhibits related to *Vasquez v. Bexar County Adult Detention Center*, Civil Action No. 95cv477 (W.D. Tex). (Docket No. 996, Ex. A, Tab 178). Vasquez explains that he had attached "voluminous exhibits" to his petition for a writ of *certiorari* in that case. He claims that the mail room lost his exhibits when the United States Supreme Court returned them. As a result, he claims that he was denied the opportunity to file a motion for rehearing from the United States Supreme Court's decision to deny his petition for a writ of *certiorari*. (*See id.*). Vasquez does not indicate what, if any, meritorious claims he would have raised in his motion for rehearing, or that the absence of exhibits presented him from filing his motion. Given that Vasquez had the opportunity to present his claims to the district court, the court of appeals, and the Supreme Court on a petition for a writ of *certiorari*, his allegations do not demonstrate that he was actually prejudiced by the loss of his exhibits. This claim does not state a constitutional violation.

Anthony Gill reports that, in a letter dated November 29, 1995, the United States Supreme Court returned his petition for a writ of *certiorari* and advised him that he had sixty days to correct certain filing deficiencies. (Docket No. 996, Ex.

A, Tab 57). Gill complains that he received this letter stapled to a United States Postal Service Form 1510 (a "PS 1510" form) on February 7, 1996, but that it was too late to comply. Defendants explain that a PS 1510 form is a "tracer form" used by individuals to send to the United States Postal Service to trace missing mail. (Docket No. 999 at 22, n.29). According to defendants, this means that the mail was not lost by TDCJ-ID. Grievance paperwork attached to Gill's declaration indicates that the lost letter and PS 1510 form arrived at TDCJ-ID on February 6, 1996 and was delivered to Gill the next day, on February 7, 1996. This evidence does not establish that TDCJ-ID personnel tampered with or otherwise delayed Gill's mail, in violation of his right of access to the courts.

Alvin Goodwin claims that, in "early 1996," a supervisor at the Ellis I mail room delayed mailing the notice of appeal in a case in which he was one of the plaintiffs, *Castillo et al. v. Lynaugh et al.*, Civil Action No. H-91cv2576 (S.D. Tex.), causing the plaintiffs to miss their appellate filing deadline. (Docket No. 996, Ex. A, Tab 61). Court records show that the court dismissed that case on April 23, 1993. Delay by the mail room supervisor, if any, did not cause the notice of appeal to be untimely. This court also notes that the *Castillo* case was dismissed as frivolous. Goodwin cannot show that he was denied the opportunity to litigate a nonfrivolous claim. This allegation is not evidence of a constitutional violation of the right of access to the courts.

Claude Joiner claims that he submitted legal documents for mailing on or about January 29, 1999, but that the mail room staff delayed mailing them for over two months. (Docket No. 996, Ex. A., Tab 96). Joiner claims that as a result, his appeal in *Joiner v. Director, TDCJ-ID*, Civil Action No. 6:95cv707 (E.D. Tex.), was dismissed. Defendants provide mail logs showing that legal mail from Joiner was sent to the United States District Court for the Eastern District of Texas and to the United States Court of Appeals for the Fifth Circuit on January 27, 1999. (Docket No. 999, Ex. H-9). Court records for the case Joiner referenced show that the Fifth Circuit dismissed the appeal for Joiner's failure to order the transcripts or make financial arrangements with the court reporter. *See Joiner v. Director, TDCJ-ID*, (5th Cir. No. 98-41142 March 12, 1999). Joiner then filed numerous motions seeking transcripts at government expense. On December 3, 1999, the Fifth Circuit reinstated the appeal. On November 15, 2000, the Fifth Circuit affirmed the district court's dismissal order. There is no indication in the record that Joiner was denied access to courts because of any delay in processing his mail.

Jeff Leggett makes a vague reference to "problems" with filing a timely pleading with the federal district court in Amarillo because the court ordered TDCJ-ID to produce a copy of the mail log. (Docket No. 996, Ex. A, Tab 107). Leggett maintains that he placed his legal documents in the mail box in time, but that they were not logged in or mailed to the court in time. Leggett had two federal habeas

corpus proceedings on file at that time, *Leggett v. Sanders*, Civil Action No. 2:95cv309 (N.D. Tex.) and *Leggett v. Director, TDCJ-ID*, Civil Action No. 2:95cv310 (N.D. Tex.). The district court denied each one on March 31, 1999. Leggett appears to claim that he timely filed motions for extensions of time to file notices of appeal by placing the motions in the prison mail system on April 29, 1999. The district court received those motions on May 6, 1999. Leggett then filed notices of appeal on June 3, 1999. The district court ordered the respondents to provide copies of the outgoing prison mail logs for the relevant period. The district court considered the outgoing mail logs and denied Leggett's motions for an extension of time.[12] Subsequently, the Fifth Circuit dismissed Leggett's appeals for lack of jurisdiction because his notices of appeal were untimely. *See Leggett v. Sanders*, No. 99-10657 (5th Cir. Sept. 12, 2000) and *Leggett v. Director, TDCJ-ID*, No. 99-10649 (5th Cir. Sept. 12, 2000). Leggett does not demonstrate that his delay in submitting the motions was caused by TDCJ-ID. Leggett does not demonstrate that TDCJ-ID violated his constitutional right of access to courts.

Darryl Daniel claims that the Fifth Circuit dismissed his appeal in *Daniel v. Ferguson*, Civil Action No. H-95cv3613 (S.D. Tex.), because mail room officials did not forward a court order from the Ellis I Unit to the Estelle Unit, where he had

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[12] In doing so, the district court would have considered whether Leggett had complied with Rule 4(a) of the Federal Rules of Appellate Procedure. Rule 4(a)(5) requires that motions for an extension of time must be filed no later than 30 days after the time prescribed by Rule 4(a) expires, and that the movant demonstrate excusable neglect or good cause. FED. R. APP. P. 4(a)(5).

been transferred. The order, dated March 31, 1998, required Daniel to authorize payment of the initial partial appellate filing fee. *See Daniel v. Ferguson*, No. 98-20029 (5th Cir. June 23, 1998). The appeal was dismissed when Daniel failed to comply. However, the docket sheet shows that Daniel failed to inform the court of his change of address. The court's local rules provided that a *pro se* litigant is responsible for keeping the Clerk advised, in writing, of his current address. *See* Rule 83.4 of the Local Rules for the United States District Court for the Southern District of Texas, Houston Division. The court only sends notices to the address on file. If Daniel had provided a current address, the court would have sent his mail to the Estelle Unit, rather than to his former facility. This allegation does not state a claim that prison officials denied Daniel access to the courts.

William J. Dockeray complains that, on April 9, 1999, he received a notice from the Texas Court of Criminal Appeals dated March 11, 1999. (Docket No. 996, Ex. A, Tab 43). He received another notice from the Texas Court of Criminal Appeals on April 30, 1999, that was dated April 14, 1999. Dockeray points to these incidents and complains of the delay. Plaintiffs do not demonstrate how Dockeray was harmed, if at all, by this delay. In the absence of actual prejudice, Dockeray's allegations do not state a constitutional violation.

Jesse Ware complains that, although he placed his complaint in the mail on December 8, 1997, the district court did not receive it until December 30, 1997.

(Docket No. 996, Ex. A, Tab 183). Ware claims that, as a result, his lawsuit was dismissed on the basis of limitations. In that case, following a trial, a jury found that Ware did not place his complaint in the mail before December 13, 1997 and that his complaint was time-barred as a result. *See Ware v. Scott*, Civil Action No. C-98cv16 (S.D. Tex.). To the extent Ware claims that prison officials delayed filing his complaint, a jury has already found otherwise. The Fifth Circuit affirmed the district court's final judgment. *See Ware v. Scott*, No. 99-41212 (5th Cir. May 3, 2001). Given the jury's findings against him, Ware's allegations do not show that prison officials denied him access to the courts by delaying his mail.[13]

Clarence G. Wilkins Jr. alleges that he has filed "writs" with the Fifth Circuit that have not reached the court. (Docket No. 996, Ex. A, Tab 189). A review of court records shows that Wilkins has filed no fewer than thirteen prisoner cases in the federal courts. He provides no information about the "writs" or any other documents he may have filed with the Fifth Circuit. His conclusory allegation does not demonstrate a claim for denial of access to the courts.

Timothy Redic alleges that, in December 1998, he stopped receiving notices from this court concerning several of his pending lawsuits. (Docket No. 996, Ex. A, Tab 141). Defendants present incoming mail logs which document that Redic

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[13] Ware filed a separate suit complaining that prison officials falsified information that resulted in the dismissal of his previous case under the statute of limitations. *See Ware v. Becker*, Civil Action No. H-00-2237 (S.D. Tex.). That case was dismissed as frivolous.

received several items of correspondence from the court in December 1998. (Docket No. 999, Ex. H-11). Defendants note that it is possible that Redic did not receive certain pieces of court correspondence because he failed to provide the court with a current address after he was transferred to TDCJ-ID from the Harris County Jail.

A national prisoner index shows that Redic has filed over twenty-three cases in federal court while incarcerated. Redic's filing practices have made it necessary for courts to enter orders directing the Clerk's Office to return all mail received from Redic by marking his correspondence "Frivolous Filer; Return to Sender." *See Redic v. Johnson*, Civil Action No. H-00-2680 (S.D. Tex.) (Docket No. 67). The Fifth Circuit has also barred Redic from filing any further submissions. *See Redic v. County of Harris*, No. 01-20243 (5th Cir.). Plaintiffs cannot demonstrate that Redic was denied an opportunity to presenting a nonfrivolous issue as a result of any mishandling of his mail. This example provides no evidence of a constitutional violation.

Demetrius Moore claims that, in 1996, prison officials prevented him from filing a timely appeal in Walker County Court Cause No. 19,309-C, styled *Maurice Pennington a/k/a Demitrious P. Moore v. J.A. Collins*, by failing to deliver an order from the court. (Docket No. 996, Ex. A, Tab 127). Defendants present evidence that Moore's appeal was dismissed for lack of subject matter jurisdiction because it concerned an interlocutory summary judgment order. (Docket No. 999, Ex.

G-6). Moore's allegation that the mail room failed timely to deliver the county court's order, even if true, does not show actual prejudice. This allegation does not demonstrate a constitutional violation.

Plaintiffs complain that TDCJ-ID has interfered with correspondence from inmates assisting other inmates with legal proceedings. They cite the experience of inmate Susan N. Rivas as an example. (Docket No. 996, Ex. A, Tab 146). Rivas alleges that, on one occasion, prison officials "intentionally impeded" her ability to file a "power of attorney" form prepared for another inmate. (*See id.*). Plaintiffs do not demonstrate that Rivas's position as a litigant was prejudiced in any way as a result of any impediment to filing the power of attorney form. The Supreme Court has held that prisoners possess no First Amendment right to provide legal assistance to other inmates. *Shaw v. Murphy*, 532 U.S. 223, 225 (2001). Inmate-to-inmate correspondence, which may include legal advice, enjoys no special protection under the First Amendment. *See id.*, 532 U.S. at 230-32. This claim does not show a constitutional violation.

Plaintiffs argue further that TDCJ-ID has violated the correspondence rules by providing inmates with inadequate access to indigent legal supplies, which has also prejudiced their constitutional right of access to courts.[14] Plaintiffs point to

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[14] Correspondence Rule 3.9.7.1 provides that "[p]ostage and stationary for mail from indigent inmates (defined as those inmates with less then $5.00 in the Inmate Trust Fund Account) may be secured through the mail room or the Warden's representative."

a declaration from inmate Robert Magoon. (Docket No. 996, Ex. A, Tab 115). Magoon claims that a lack of supplies prevented him from answering a court order entered in one of his civil rights cases, *Magoon v. West*, Civil Action No. 01:96cv0090 (E.D. Tex.), and that the case was dismissed for want of prosecution as a result. Court records presented by defendants show that Magoon's case was dismissed after he failed to keep the district court informed of his current address. (Docket No. 999, Ex. G-10). These records further show that the case was later reinstated. (*See id.*). Magoon suffered no actual harm as a result of inadequate access to legal supplies; he has no claim for denial of access to the courts.[15] This example does not evidence a current and ongoing constitutional violation.

Plaintiffs point to several examples of what they claim is TDCJ-ID's failure to abide by the rules definition of what constitutes a "package." (Docket No. 996, at 8-9, Ex. A, Tabs 31, 55, 68, 125, 165, 175, 179). In none of these instances, however, do plaintiffs demonstrate that any misapplication of the rule definition of a "package" resulted in actual prejudice to a prisoner's position as a litigant in a court proceeding. These allegations do not show a denial of access to the courts.

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[15] Plaintiffs also point to inmates Richard Ayers and Pearl Lanum as additional examples involving a lack of adequate indigent supplies. (Docket No. 996, Ex. A, Tabs 4 and 105). As with Magoon, a review of these inmates' declarations shows that neither provide proof that an alleged lack of access to adequate supplies resulted in actual prejudice amounting to a denial of access to the courts.

At best, plaintiffs' evidence depicts isolated instances in which delays or mishandling of mail have caused some inconvenience or interference with a prisoner's access to court. Plaintiffs have not shown a system-wide or institutional disregard for, or violation of, the right of access to the courts. Even if each of the thirty-eight instances plaintiffs identified was true, however, the small number of claims and the idiosyncratic nature of the acts and omissions described do not demonstrate current and ongoing constitutional violations a system-wide basis. The evidence simply fails to demonstrate systemic denial of access to courts as a result of problems with the prison mail process.

C. The Claim of Improper Processing of Special or Privileged Correspondence

Plaintiffs complain that prison officials have violated the correspondence rules by opening mail belonging to a privileged class. Specifically, plaintiffs complain that prison mail room employees have opened sealed correspondence to and from courts, governmental agencies or officials, attorneys or legal aid societies, and the media, in violation of the correspondence rules.

Correspondence Rules 3.9.2, 3.9.3, and 3.9.4 allow incoming "special correspondence" from courts and governmental agencies, attorneys, or the media to be opened only in the inmate's presence and then only for the purpose of inspecting for contraband. Outgoing sealed mail is not subject to search. Correspondence Rule 3.9.9 requires that mail room staff check outgoing mail to verify that it is addressed

correctly to a special, legal, or media correspondent in accordance with the rules. Correspondence addressed incorrectly is to be returned to the prisoner.

1. The Claim of Opening Special or Privileged Correspondence

Plaintiffs report that, in four instances, correspondence from United States District Court Judge William Wayne Justice in the *Ruiz* prison conditions case and letters from *Ruiz* class counsel Donna Brorby have been opened by TDCJ-ID mail room staff. (Docket No. 996, Ex. A, Tabs 134, 149, 151, and 159). Two inmates report that correspondence from counsel in this case has been opened outside of their presence. (Docket No. 996, Ex. E, Tabs 1 and 2). According to plaintiffs, declarations from class members reference a total of seventy-five instances in which prison officials opened mail from attorneys or legal aid societies outside the inmates' presence and seventy instances in which mail from government agencies or officials, including courts, was opened outside the inmates' presence, in violation of the correspondence rules. (Docket No. 996, Ex. A, Tab 1 (category 6 & 7)). Plaintiffs allege that TDCJ-ID officials have opened sealed mail to and from media outlets on numerous occasions, in violation of the correspondence rules. (Docket No. 996, Ex. A, Tabs 6, 93, 103, 104, 112, and Ex. B, Tabs 2, 3, and 4).

Prison officials do not violate the Constitution by opening and inspecting incoming mail. A prison has a legitimate security interest in opening and inspecting

incoming mail for contraband.[16] *Thornburgh*, 490 U.S. at 413-14; *Turner*, 482 U.S. at 91-92. The United States Supreme Court has emphasized that "by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, [prison officials] have done all, and perhaps even more, than the Constitution requires." *Wolff*, 418 U.S. at 577.

Legal mail, in particular, is entitled to protection. Clearly marked legal mail may not be censored. *Henthorn v. Swinson*, 955 F.2d 351, 353 (5th Cir.) (citing *Freeze v. Griffith*, 849 F.2d 172, 175 (5th Cir. 1988)), *cert. denied*, 504 U.S. 988 (1992). This right is not absolute, however. Prison officials may establish reasonable regulations, such as requiring an attorney to identify himself in writing to prison officials, before they must treat correspondence as legal mail. *Id.* (citing *Taylor v. Sterrett*, 532 F.2d 462, 475 n.20 (5th Cir. 1976)). The Fifth Circuit has recognized that "the violation of a prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights." *Brewer*, 3 F.3d at 825; *see also Henthorn*, 955 F.2d at 353 (rejecting a complaint concerning the opening of legal mail not bearing the required "special mail" inscription outside of an inmate's presence). An inmate's assertion

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[16] Outgoing correspondence has different implications for prison security than incoming materials. *Thornburgh*, 490 U.S. at 413. Thus, the Fifth Circuit has recognized that a prisoner has a "right to be free from completely arbitrary censorship of his outgoing mail." *Brewer*, 3 F.3d at 826.

that privileged mail was opened outside of his presence fails to state a cognizable constitutional claim.[17]

Defendants acknowledge that correspondence is sometimes opened in error. They argue, however, that the evidence does not show that prison officials intentionally open and read privileged inmate mail on a routine basis. Defendants point to TDCJ-ID's *Thirtieth Comprehensive Report on the Internal Auditing Program for the Uniform Inmate Mail System* for August 1998 as support. (Docket No. 996, Ex. D). This report demonstrates that TDCJ-ID had a population of 94,857 offenders from March 1, 1998 through August 1, 1998. (*See id.* at 46). During this period, mail room personnel recorded 166,353 items of incoming legal, special, and media mail. (*See id.*). Records show that 832 pieces of this type of mail were reported as opened in error during this period. (*See id.*). During this same period, mail room personnel processed a total of 5,964,160 items of incoming general correspondence. (*See id.* at 57). Defendants maintain that, in light of the volume of incoming correspondence, the small number of special items opened erroneously indicates that any failure to comply with the correspondence rules prohibition against

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[17] Plaintiffs also point to several instances in which a prisoner's legal mail was opened and read by TDCJ-ID mail room staff, in violation of the correspondence rules. (Docket No. 996, Ex. A, Tabs 41, 114, 160, 183). Absent a claim that mail has been censored, such allegations do not state a cognizable constitutional claim. *See Walker v. Navarro County Jail*, 4 F.3d 410, 413 (5th Cir. 1993) (citing *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993)).

opening legal, special, or media mail is isolated and unintentional, not a class-wide systematic violation of the rules.

Under Fifth Circuit precedent, allegations that prison officials have opened privileged classes of mail in violation of the correspondence rules, even if true, do not rise to the level of a current and ongoing constitutional violation. *Brewer*, 3 F.3d at 825. To the extent that a prisoner's mail is opened in error, allegations of negligent mishandling, standing alone, do not state a cause of action for purposes of 42 U.S.C. § 1983. *See Richardson*, 841 F.2d at 122. In light of this authority, and in light of the record of the TDCJ-ID, this court concludes that plaintiffs' allegations that prison officials have opened privileged mail does not rise to the level of an ongoing constitutional violation.

By contrast, evidence that privileged legal mail has been censored presents a closer question. Plaintiffs allege that defendants have interfered with legal mail in this case. (Docket No. 998). Plaintiffs' counsel distributed 1,458 questionnaires to class members during the discovery phase of the proceedings on defendants' motion to terminate. After receiving only 225 timely responses, plaintiffs' counsel circulated a follow-up questionnaire. Plaintiffs present forty-six declarations from class members who allege that they never received the initial questionnaire. Forty-six other class members indicate that they returned the

questionnaire, but plaintiffs' counsel did not receive them. Plaintiffs argue that this evidence shows a constitutional violation.

These allegations would, if proven, establish a constitutional violation. Defendants report that they have turned this matter over to the Internal Affairs Division. (Docket No. 1000). Even in light of this evidence, however, proof that ninety-two pieces of legal mail were interfered with is not enough to warrant continued prospective relief in the form and breadth of the current decree. *See Lewis*, 519 U.S. at 360 & n.7 (explaining that, no matter how expansive the class, there is no basis for imposing a remedial decree upon all institutions in a state's prison system unless it is shown that constitutional violations are systemwide). This evidence is insufficient to justify the continuation of the federal court decree.

2. The Claim of Restrictions on Media Mail

Plaintiffs complain that TDCJ-ID's correspondence rules unfairly restrict a prisoner's right to send sealed correspondence to the media. Correspondence Rule 3.9.4.1 requires that prisoners may send sealed letters to members of the editorial or reporting staff of any newspaper or magazine listed in the *Ayer's Directory of Publications* or the *Editor & Publisher's Yearbook*. Plaintiffs argue that this rule frustrates inmates' ability to send sealed correspondence to media outlets by allowing the prison to determine which of those outlets are "legitimate."

Plaintiffs point to two complaints from prisoners whose mail was not sent for lack of a proper addressee. (Docket No. 996, Ex. A, Tabs 85, 97). Plaintiffs also point allegations from a handful of prisoners allegedly denied an opportunity to send sealed correspondence to radio broadcasters such as Ray Hill, whose "Prison Show" is featured locally in Houston on the public radio station. (Docket No. 996, Ex. A, Tabs 14, 15, 58, 61, 78, 89, 96, 114, and 173).

A prisoner's First Amendment right to communicate with the media is properly limited by considerations underlying the penal system. *See Pell*, 417 U.S. at 822 (citing *Price v. Johnston*, 334 U.S. 266, 285 (1948)). The media have " no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Saxbe v. Wasthinton Post Co.*, 417 U.S. 843, 850 (1974) (quoting *Pell*, 417 U.S. at 834)); *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978). The Supreme Court has observed that inmates are permitted to receive limited visits from members of their families, the clergy, their attorneys, and friends. *Pell*, 417 U.S. at 824-25. In light of these alternative channels of communication, restrictions on the right to correspond with the media are constitutionally permissible if they are imposed in a content-neutral manner. *See id.* at 827; *see also Houchins*, 438 U.S. at 12-13 (identifying a number of alternatives available to "prevent problems in penal facilities from escaping public attention").

Correspondence Rule 3.9.4.1 has been upheld as providing "an objective standard for determining which newspapers and magazines qualify to send media correspondence and considerably expands the number of the newspapers and magazines covered from prior TDC practice." *Guajardo*, 580 F. Supp. at 1362. Defendants maintain that, while this rule is restrictive, it provides more access to the media than the Constitution requires.[18] Plaintiffs' inability to send sealed correspondence to certain media outlets, while having the ability to send regular mail to those outlets, does not demonstrate that the current rule violates the Constitution.

D. The Claim of Content-Based Denials of Correspondence and Publications

Plaintiffs allege that defendants have denied correspondence and publications containing unpopular political subject matter or religious content, without a legitimate reason. Defendants respond that legitimate, if not compelling, reasons explain the decisions to deny the materials identified by plaintiffs.

Correspondence Rule 3.9.1.6 provides that "[a]ll general correspondence shall be subject to the right of inspections and rejection by the unit mail room

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[18] Defendants cite a special report published by the Society of Professional Journalists which indicates that, depending on prior approval of a unit's warden, the press enjoys broad physical access to Texas prisons and offenders than afforded by prison administrators in other states. (Docket No. 999, Ex. K at 25). Defendants also point to an affidavit from the Program Administrator for the prison Mail System Coordinators Panel, Linda Patteson. Patteson explains that, while prisoners may not send sealed correspondence to media personnel such as Ray Hill, inmates are not denied the ability to send letters to those sources. (Docket No. 999, Ex. H at 6).

officers." Under this rule, incoming and outgoing mail may be "disapproved for mailing or receipt" if it falls into any of the following categories:

(a) the letter contains threats of physical harm against any person or place or threats of criminal activity;

(b) the letter threatens blackmail or extortion;

(c) the letter concerns sending contraband in or out of the institutions;

(d) the letter concerns plans to escape or unauthorized entry;

(e) the letter concerns plans for activities in violation of institutional rules;

(f) the letter concerns plans for future criminal activity;

(g) the letter is in code and its contents are not understood by the reader;

(h) the letter solicits gifts of money under false pretenses or for payment to other inmates;

(i) the letter contains graphic presentation of sexual behavior that is in violation of the law;

(j) the letter contains information which if communicated would create a clear and present danger of violence or physical harm to a human being.

(Correspondence Rule 3.9.1.6).

Publications fall under a separate set of correspondence rules. Under these rules, inmates may receive pre-paid publications only from a publisher or publications supplier, including bookstores. (Correspondence Rules 3.9.10.1,

3.9.10.2). "All publications intended for inmates shall be inspected by a member of the prison unit staff before delivery to the inmate." (Correspondence Rule 3.9.10.4). Publications may be rejected for a number of reasons set forth in Rule 3.9.10.6, as follows:

> A publication may be rejected only if: (a) it contains contraband; (b) it contains information regarding the manufacture of explosives, weapons or drugs; (c) it contains material that a reasonable person would construe as written solely for the purpose of communicating information designed to achieve the breakdown of prisons through inmate disruption such as strikes or riots; (d) a specific factual determination has been made that the publication is detrimental to prisoner's rehabilitation because it would encourage deviate criminal sexual behavior; (e) it contains material on the setting up and operation of criminal schemes or how to avoid detection of criminal schemes by lawful authorities charged with the responsibility for detecting such illegal activity. Publications shall not be rejected solely because they advocate the legitimate use of prison grievance procedures or urge prisoners to contact public representatives about prison conditions or because they contain criticism of prison authorities. Publications shall not be excluded solely because they have sexual content." Publications that contain graphic depictions of homosexuality, sado-masochism, beastiality, incest or sex with children will ordinarily be denied. Publications that are primarily covering activities of any sexual or political rights groups or organizations will normally be admitted.

When correspondence or publications are denied, inmates are entitled to a statement of reasons so that they may pursue an appeal. (Correspondence Rules 3.9.10.4 and 3.9.10.6).

Inmate Kenneth Malone complains that he was denied a package of publications concerning Scientology, without an adequate reason. (Docket No. 996, Ex. A, Tab 116). Linda Patteson, who is the Program Administrator for the prison

Mail System Coordinators Panel (the "MSCP"), reports that the decision to deny these publications had nothing to do with their content. (Docket No. 999, Ex. H at 6). The MSCP rejected the materials because it was unable to verify the legitimacy of the package. (*Id.*). Patteson explains that prison mail room personnel will not accept packages which the MSCP cannot verify as having come from an authorized source. (*Id.* at 6-7). In Malone's case, prison officials were simply unable to verify whether the package came from an authorized publisher.[19] Malone's allegation does not establish that the materials were denied for improper, content-based reasons.

Two inmates, Todd Steinhauer and Daniel Whitehead, complain of being denied information related to the practice of witchcraft or Wiccan. (Docket No. 996, Ex. B, Tabs 5 and 6). Defendants note that Steinhauer's correspondence was denied for attempting to organize an unauthorized group within the prison, in violation of Administrative Directive 70.40. Whitehead's correspondence to the Rowan Tree Church at Hermit's Grove was denied for violating Administrative Directive 3.72, which prohibits inmates from obtaining items from an outside supplier without prior approval from the warden. Plaintiffs do not dispute the content-neutral nature of the proffered reasons.

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[19] Defendants note that inmate Dennis Hood was also denied several "Islamic Books" because the MSCP was unable to verify that they came from an authorized source. (Docket No. 996, Ex. A, Tab 85 (grievance number 98033325)). The MSCP denied materials ordered by inmate Leslie Davis from a publisher in Iran, for similar reasons. (Docket No. 996, Ex. A, Tab 38).

Other inmates, including Steinhauer, Carl Davis, and David Harris, complain that they were denied religious materials. (Docket No. 996, Ex. A, Tab 68; Ex. B, Tabs 7 and 8). Steinhauer's materials consisted of two photocopied pages depicting the "Magical and Alchemical Alphabets." Davis complains that prison officials seized his copy of the Hebrew alphabet. Harris reports that he was denied correspondence containing translations in "Hebrew or Greek." Defendants explain that, in each of these instances, prison officials denied the materials for security reasons because the materials in question contained text or symbols that could be used as a code.

Salvador Buentello, who serves as the Assistant Director for TDCJ-ID's Security Threat Group Management Office, explains that security threat groups or prison gangs represent "the greatest day to day threat to institutional security within TDCJ, in terms of employee and offender safety and preventing illegal and unauthorized activities." (Docket No. 999, Ex. I at 2). Buentello reports that security threat groups "have utilized codes, symbols, secret messages hidden in otherwise normal text, and other means to communicate or carry out their activities undetected." (*Id.* at 3). Correspondence related to security threat groups is closely monitored. (*Id.*). Because any form of covert correspondence presents a direct risk to prison security, even those codes and symbols unrelated to "security threat group correspondence" may pose a threat to institutional security. (*Id.* at 4). Because the

items identified by Steinhauer, Davis, and Harris contained text or symbols that could have been used for code, a legitimate reason existed to deny this correspondence.

Other complaints identified by plaintiffs involve the denial of publications or correspondence because of a "racial" nature. (Docket No. 996, Ex. B, Tabs 9, 10, 11, 12, 15, 17). Two letters addressed to prisoners were denied because they contained racial slurs. (Docket No. 996, Ex. B, Tabs 14, 15). Plaintiffs note that prison officials have also denied correspondence identified as coming from the Ku Klux Klan, despite the fact that it is not a designated security threat group. (Docket No. 996, Ex. B, Tabs 16, 18, 19).

Defendants respond that prison officials did not reject the items identified as "racial" in nature because of political content, but because such correspondence openly advocated or promoted racial violence. Buentello explains that racially derogatory or inflammatory materials or literature are not allowed to enter the prison system because of the potential to cause "increased racial unrest and an increased threat of violence." (Docket No. 999, Ex. I at 6). Buentello notes that the danger in allowing inmates access to this type of material is "substantial" because, once materials make it into the system, "they generally circulate among the offender population, ultimately coming to the attention of those individuals who would be offended and angered by the contents." (*Id.*). Buentello observes that because much of the violence in TDCJ occurs along racial lines, the addition of "racially derogatory

or racially inflammatory materials to this mix dramatically increases the chances of violence or some other types of disturbances."[20] (*Id.* at 7).

The Supreme Court has long held that prison administration decisions are entitled to deference, especially with regard to matters of institutional safety and security. *See, e.g., Thornburgh*, 490 U.S. at 407-08 ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."); *Bell*, 441 U.S. at 547 (acknowledging that courts have "accorded wide-ranging deference [to prison administrators] in adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); *Martinez*, 416 U.S. at 405 (conceding that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform . . . [and], where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.").

The record demonstrates that TDCJ-ID rejected the materials plaintiffs identified for valid security reasons. The Fifth Circuit has recognized that

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[20] Buentello reports that when newspaper articles on the murder of James Byrd, a black man, by white assailants in Jasper, Texas circulated, "the hostility, anger and tension created resulted in a number of racial disturbances and attacks on white offenders by black offenders," in spite of the fact that the articles did not condone racial violence or contain racially derogatory remarks.

institutional security represents a compelling interest in the prison setting. *See Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997); *see also Powell v. Estelle*, 959 F.2d 22, 25 (5th Cir.), *cert. denied*, 506 U.S. 1025 (1992). In light of that compelling interest, in plaintiffs have not show that prison officials denied the correspondence for improper content-based reasons, without a legitimate basis. *See Chriceol*, 169 F.3d at 316 (recognizing that a prison mail policy restricting access to potential violence-producing materials is valid). The proffered examples do not demonstrate a current and ongoing constitutional violation, for the purpose of 18 U.S.C. § 3626(b)(3).

E. The Claim of Lack of a Meaningful Opportunity to Appeal Censorship Decisions

Plaintiffs allege that the correspondence rules and the prison grievance process provide an insufficient opportunity to appeal decisions by prison mail room personnel to censor or withhold mail. The decision to censor or withhold delivery of a particular piece of correspondence "must be accompanied by minimum procedural safeguards." *Martinez*, 416 U.S. at 417. Although "qualified of necessity by the circumstance of imprisonment," the interest of prisoners and their correspondents in uncensored communication is grounded in the First Amendment and is a liberty interest within the meaning of the Fourteenth Amendment. *Id.* Procedures required to protect against arbitrary governmental invasion include: (1) notice that the correspondence has been rejected; (2) a reasonable opportunity to protest that decision; and (3) that complaints be referred to a prison official other than the person

who originally disapproved the correspondence. *Id.* at 418-19. TDCJ-ID's correspondence rules satisfy this criteria.

Correspondence Rule 3.9.1.6 provides that if a letter is rejected,"[t]he inmate and the sender or addressee will be provided a written statement of the disapproval and a statement of the reason therefore within seventy-two hours of the receipt of said correspondence; this notice will be given on Correspondence Denial Forms." Correspondence Rule 3.9.10.6 provides that If a publication is rejected, "the inmate, the editor, and/or the publisher will be provided a written notice of the disapproval and a statement of the reason therefore within seventy-two (72) hours of receipt of said publication on Publication Denial Forms." Both these rules expressly contemplate a "sufficiently detailed description" of the rejected item to permit effective utilization of the appeals procedure, which is outlined in Rule 3.9.14. Correspondence Rule 3.9.14 provides that decisions rejecting correspondence or publications are determined by the prison Director's Review Committee, according to the following procedure:

> An inmate, non-inmate correspondent, or editor or publisher of a publication may appeal the rejection of any correspondence or publication or may appeal the action of the Bureau of Classification in prohibiting correspondence between an inmate and any other person by sending to the Director's Review Committee written notice of such appeal within two weeks of receipt of notification of rejection.

(Correspondence Rule 3.9.14.1). "The Director's Review Committee shall render its decision within two (2) weeks after receiving the appeal, and will notify the parties

involved of its decision in writing within forty-eight (48) hours." (Correspondence Rule 3.9.14.3).

Plaintiffs acknowledge that defendants have appeals and grievance procedures in place that "facially meet the minimum constitutional standards." (Docket No. 996 at 14). Plaintiffs note, however, that there is a high number of appeals and a very low reversal rate. According to TDCJ-ID's *Thirtieth Comprehensive Report on the Internal Auditing Program for the Uniform Inmate Mail System* for August of 1998, the Director's Review Committee received 8,142 appeals between August 1, 1998, and March 1, 1998. (Docket No. 996, Ex. D at 32). Of those, only 65 decisions were reversed while 833 were returned to mail room personnel for additional paperwork. (*See id.*). Plaintiffs also point to deposition testimony from Director's Review Committee member Sherman Bell, who estimates that, in meetings which average approximately three hours in length, the committee handles as many as five hundred to seven hundred appeals. (Docket No. 996, Ex. C, Tab 1 at 16, 26). Plaintiffs complain that, in view of these numbers, the appeals process does not provide for meaningful review. Rather, the Director's Review Committee "simply rubber stamps the decisions of mail room personnel."

In response, defendants present an affidavit from Sandra Lansford, who has been the Coordinator for the Director's Review Committee since 1990. (Docket

No. 999, Ex. I). Lansford states that each appeal is closely reviewed by the committee, in the following manner:

> Appeals are closely scrutinized for appropriate and valid statements of the reason for rejection of the denied item. Letters which are denied for 'gang related content' must include written explanation from security threat group officers who review correspondence to and from confirmed and suspected security threat group members. The specific reason for content being determined to concern security threat group activities must be stated. If this information is not provided, the correspondence and denial form is returned to the unit. Photographs which are rejected must be rejected for their content and the denial form must clearly state the photograph(s) depict a violation of the rules. Authored books are reviewed at the unit level and pages specified as containing material in violation of the reasons for rejection contained in Rule 3.9.10.6 will be scanned or read by DRC staff to ensure the denial is correctly stated on the denial form.

(*Id.* at 1). Lansford adds that, where the question is close or the denial questionable, the committee "closely examines the content" of the correspondence or publication before voting. (*Id.* at 2).

Sherman Bell's deposition offers an additional description of the appeals process performed by the Director's Review Committee. He explains that each member of the committee receives a packet of the challenged denials, with a space to vote "yes" or "no" as to each. (Docket No. 996, Ex C, Tab 1 at 27). He explains the process:

> Those cases that are difficult or unusual are always brought to us with all the documentation. The other cases are not. And we vote on those – all of the cases. If we have any question about it, the staff have to get the information and bring it to us. We vote on those cases. If there is something that needs to be read during the committee, it will be passed

> around or reviewed, such as a printed information or a picture or something that needs to be viewed. We pass it around until it gets back to there. Then we vote on it, each voting how they feel is appropriate in their professional opinion. After we have all voted, then we turn our packets back to the MSCP for the appropriate announcements to be sent out.

(*Id.* at 27-28).

Plaintiffs' main concern appears to be that the Director's Review Committee places undue reliance on information provided by the mail room personnel who made the initial decision to reject the materials. While the committee members may rely on such information, the descriptions of the appeals process indicate that the information provided is subject to scrutiny as well as the members' "professional" consideration. The fact that some decisions are reversed or returned for additional information shows that the appeals process provided under the correspondence rules is not a meaningless "rubber stamp."

Plaintiffs allege that the prison grievance procedures are equally inadequate to protect inmates' rights concerning censorship decisions. Plaintiffs point out that the correspondence rules for TDCJ's Transfer, State Jail, and Substance Abuse facilities contain no provision for appeal to the Director's Review Committee. (Docket No. 996, Ex. H, *Defendants' Answers to Plaintiffs' First Set of Interrogatories*, at Answer to Interrogatory No. 11(o)). Offenders incarcerated at these facilities must rely on the grievance system.

TDCJ's Transfer, State Jail, and Substance Abuse facilities are apparently not considered part of TDCJ's Institutional Division for the purpose of the correspondence rules. Because the class includes only those prisoners confined to Institutional Division units, claims by prisoners held in non-Institutional Division facilities are not covered by the consent decree. To the extent that plaintiffs complain about the prison grievance process generally, defendants correctly note that the consent decree governs only the correspondence rules, not the prison grievance system. Further, based on the evidence plaintiffs provide or cite, there is no showing that the grievance process fails to provide adequate review of correspondence rule violations.

Plaintiffs complain that the grievance process fails to provide meaningful review of complaints concerning inmate mail issues because grievance investigators frequently deny relief based on no more than the word of prison mail room personnel. In support of their position, plaintiffs present six examples. (Docket No. 996 at 16, Ex. B, Tab 23 - 28). In three of those examples, the prisoners complain that prison personnel have tampered or interfered with the mail.[21] The other three examples

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[21] James Steen accuses prison mail personnel with destroying or tampering with his mail. (Docket No. 996, Ex. B, Tab 23). The grievance was denied for lack of evidence to support the accusation. (*See id.*). Raul Gonzalez, Jr., accuses a correctional officer of picking up an outgoing letter and giving it to another inmate in the prison instead of sending it to the mail room. (Docket No. 996, Ex. B, Tab 24). The officer denied the inmate's accusation; the grievance was denied. (*See id.*). In another grievance, Gonzalez accuses a correctional officer of failing to mail a "legal letter" to his attorney. (Docket No. 996, Ex. B, Tab 25). The warden denied the grievance after the officer stated that he did mail the letter. (*See id.*).

plaintiffs cite involve grievances by inmates concerning mail opened outside their presence in violation of the correspondence rules.[22]

These grievances do not concern censorship decisions similar to those addressed by the Director's Review Committee. These examples do not show that the grievance process is inadequate to provide a review of those decisions. Moreover, the small number of complaints presented do not establish that the grievance process is insufficient to address prisoner complaints in general. Because the grievance system is not within the terms of the consent decree, plaintiffs do not demonstrate that ongoing constitutional violations in connection with the grievance process require continued prospective relief.

F. The Claim of Retaliation

Plaintiffs allege that class members have been retaliated against for exercising their right of access to the courts and that this constitutes evidence of current and ongoing constitutional violations under 18 U.S.C. § 3626(b)(3). Although many of these allegations concern grievances against mail room personnel or the right of access to the courts, defendants correctly note that the retaliation

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[22] Norman Crittenden filed a grievance accusing mail room personnel of opening mail from the Texas Supreme Court and writing derogatory comments on the contents. (Docket No. 996, Ex. B, Tab 26). The warden forwarded Crittenden's claim to the Internal Affairs Division, but declined to take any further action after mail room supervisors denied Crittendon's accusations. (*See id*). Bruce Howser accused mail room personnel of opening a sealed letter containing a copy of House Bill 949. (Docket No. 996, Ex. B, Tab 27). The warden denied the grievance for lack of substantiating evidence. (*See id.*). Thomas H. Tramel accused mail room personnel of opening a letter from a court. (Docket No. 996, Ex. B, Tab 28). The warden denied the grievance because Tramel's allegations could not be substantiated. (*See id.*).

claims plaintiffs assert are separate from complaints about the correspondence rules. These allegations, however troubling they may be, are outside the scope of the consent decree and do not represent current and ongoing constitutional violations in connection with the consent decree, for the purpose of 18 U.S.C. § 3626(b)(3).

G. The Claim of Persistent Systemwide Violations

The PLRA embodies "Congress's desire to get the federal courts out of the business of administering prisons, except where court action is necessary to remedy actual violations of prisoners' constitutional rights." *Gavin v. Branstad*, 122 F.3d 1081, 1090 (8th Cir. 1997), *cert. denied*, 524 U.S. 955 (1998). In First Amendment cases, the actual injury requirement "derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (citing *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982)). The Supreme Court has cautioned courts against granting wide-ranging relief in the absence of evidence showing actual harm:

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. . . . Of course, the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional

> organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. If — to take another example from prison life — a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, *see Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed.2d 251 (1976), simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

Lewis, 518 U.S. at 349-50. Plaintiffs have not met their burden to show that ongoing, actual constitutional violations require the continued prospective relief of the breadth and nature of the consent decree.

Plaintiffs must show actual injury to the class as a whole. A systemwide remedy requires a systemwide injury. *Lewis*, 518 U.S. at 359 (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977)). At best, plaintiffs present isolated, individualized complaints concerning mishandled mail or disagreements over censorship decisions. Most of these complaints do not establish an individual claim for a constitutional violation. Even considering the cumulative effect of plaintiffs' evidence, the examples and evidence are insufficient to show class-wide constitutional violations, necessary to justify continued systemwide relief.

This court must terminate prospective relief unless it can find that the relief extends no further than necessary to correct the violation; that the relief is

narrowly drawn; and that the relief is the least intrusive means to correct the violation. *See* 18 U.S.C. § 3626(b)(3). This court must "make new findings about whether the relief currently complies with the need-narrowness-intrusiveness requirements, given the nature of the current violations." *Castillo*, 238 F.3d at 354 (citing *Cason v. Seckinger*, 231 F.3d 777, 784-85 (11th Cir. 2000)). It is not enough under § 3626(b)(3) that the consent decree, *when entered*, was "sufficiently narrow considering the violations that existed *at that time*." *Id.* (emphasis in original). This "requir[es] particularized findings, on a provision-by-provision basis, that each requirement imposed by the consent decrees satisfies the need-narrowness-intrusiveness criteria, given the nature of the current and ongoing violation." *Id.* (citing *Cason*, 231 F.3d at 784-85). Plaintiffs do not allege or show that the relief afforded by the consent decree in this class action satisfies any of these additional factors.

Plaintiffs concede that TDCJ-ID has implemented correspondence rules to address the complaints lodged in 1971. These rules have become institutionalized procedure within the TDCJ-ID. The Fifth Circuit has urged an end to cases that have served the purpose of improving prison conditions. *See Ruiz*, 243 F.3d at 953 (Reynaldo Garza, J., concurring). Prisoners with individual claims of First Amendment violations have a remedy under 42 U.S.C. § 1983. In the absence of evidence showing system-wide constitutional violations, there is no showing that

prospective relief is necessary on a class-wide basis, that the relief is narrowly drawn, or that the relief is the least intrusive means to correct the violation. *See* 18 U.S.C. § 3626(b)(3). Defendants' motion to terminate the prospective relief afforded by the consent decree is granted.

IV. Attorneys' Fees

Plaintiffs have filed a motion for attorneys' fees. (Docket No. 970). Plaintiffs have been represented continuously by the Houston office of Vinson & Elkins, which has acted vigorously and enthusiastically on behalf of the class. Through Vinson & Elkins' effort, plaintiffs were able to secure the consent decree. Defendants concede that plaintiffs are entitled to attorneys' fees in this case. However, to determine the proper amount of fees allowed, defendants have filed a motion for a ruling on whether the PLRA applies to plaintiffs' pending request. (Docket No. 977). Defendants' motion for a ruling on the applicability of the PLRA to plaintiffs' request for attorneys fees is granted.

The PLRA places limits on the fees that may be awarded to attorneys who litigate prisoner lawsuits. *See* 42 U.S.C. § 1997e(d) and 42 U.S.C. § 1988(b). The hourly rate for plaintiffs' counsel is capped and fees must be directly and reasonably incurred in enforcing the relief ordered for the violation.[23] *See* 42 U.S.C.

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[23] The PLRA provides as follows in relevant part:

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under

§ 1997e(d)(B)(2); 42 U.S.C. § 1988(b); *see also Carruthers v. Jenne*, 209 F. Supp.2d 1294, 1301 (S.D. Fla. 2002) (citing *Association for Retarded Citizens of North Dakota v. Schafer*, 83 F.3d 1008, 1011 (8th Cir. 1996)). The Supreme Court has held that the limits imposed by the PLRA apply to attorneys' fees for services performed after the PLRA's effective date of April 26, 1996, but not to fees for services performed before the effective date. *Martin v. Hadix*, 527 U.S. 343, 347 (1999); *see also Webb v. Ada County, Idaho*, 285 F.3d 829 (9th Cir. 2002) (upholding the district court's decision to apply the PLRA's rate cap to all fees, whether related to the merits or postjudgment monitoring, earned after the PLRA's effective date), *pet. for cert. filed*, 71 U.S.L.W. 3137 (Aug. 5, 2002) (No. 02-188).

> section 1988 of this title, such fees shall not be awarded except to the extent that –
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief order for the violation.
>
> * * * *
>
> (3) No award of attorneys fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A, of Title 18, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d).

Plaintiffs' pending motion for attorneys' fees seeks an award that does not comply with the PLRA's hourly limit for work performed after April 26, 1996. Plaintiffs appear to concede that the PLRA's application will limit their recovery of attorney fees in this case. Plaintiffs indicate that they will file an amended motion for attorney fees, in light of recent authority. (*See* Docket No. 1057). Plaintiffs' pending motion for attorneys' fees is denied, at this time, without prejudice to re-urging their request in an amended motion.

V. Conclusion

This Court **ORDERS** as follows:

1. Defendants' supplemental motion to terminate the consent decree (Docket No. 898) is **GRANTED**.

2. Defendants' motion to abate proceedings on their motion to modify the consent decree (Docket No. 897) is **GRANTED**, and the motion to modify the consent decree (Docket No. 878) is **DENIED** as **MOOT**.

3. Plaintiffs' motion for attorneys' fees (Docket No. 970) is **DENIED** without prejudice to reurging that request in an amended motion. Plaintiffs are instructed to file their amended motion for attorneys' fees within sixty (60) days from the date of this order.

4. Defendants' motion for a ruling on the applicability of the PLRA to plaintiffs' motion for attorneys fees (Docket No. 977) is **GRANTED**.

5. Plaintiffs' motion for leave to supplement their evidentiary supplement (Docket No. 998) is **GRANTED**.

6. All other pending motions not specifically referenced herein are **DENIED** without prejudice to reurging by the parties if necessary.

7. This is final judgment for purposes of Rule 54 of the Federal Rules of Civil Procedure.

SIGNED on September 20, 2002, at Houston, Texas.

Lee H. Rosenthal
United States District Judge