UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FflorENCE DIVISION

CLINTON NORTHCUTT; BAYAN ALESKEY; JAMES BRYANT; LUZENSKI COTTRELL; TAYLOR CROSS (F/K/A JONATHAN BINNEY); WILLIAM DICKERSON, JR.; RON FINKLEA; JERRY INMAN; RICHARD MOORE; JAMES ROBERTSON; BRAD SIGMON; STEPHEN STANKO; NORMAN STARNES; SAMMIE STOKES; BOBBY STONE; GARY TERRY; JOHN WEIK; and LOUIS WINKLER; Plaintiffs, -vs- SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; BRYAN P. STIRLING, Director of the South Carolina Department of Corrections; JOSEPH MCFADDEN, Former Warden of Lieber Correctional Institution; JOEL ANDERSON, Former Interim Warden of Lieber Correctional Institution; RANDALL WILLIAMS, Warden of Lieber Correctional Institution; WILLIE D. DAVIS, Warden of Kirkland Reception and Evaluation Center; and JANA HOLLIS, Unit Manager of Death Row and Maximum Security Unit at Kirkland Reception and Evaluation Center, Defendants.	Civil Action No.: 4:17-cv-3301-BHH-TER **REPORT AND RECOMMENDATION**

I. INTRODUCTION

Plaintiffs in this action are eighteen Death Row inmates incarcerated within the South Carolina Department of Corrections (SCDC) who allege they have been kept in solitary confinement

for between nine and twenty years. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, alleging that Defendants have violated their constitutional rights under the Eighth and Fourteenth Amendments by denying them any meaningful opportunity to challenge their conditions of confinement. Presently before the court is Plaintiffs' Motion for Preliminary Injunction (ECF No. 6). All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d), DSC. This report and recommendation is entered for review by the district judge.

II. RELEVANT FACTUAL ALLEGATIONS

Plaintiffs bring this action challenging the constitutionality of placing them, death row inmates, in solitary confinement regardless of behavioral history or individual status. However, in their present motion for preliminary injunction, Plaintiffs assert that in September of 2017, they were transferred from Lieber Correctional Institution to the Maximum Security Unit (MSU) at Kirkland Reception and Evaluation Centner, which provides even harsher conditions than those they previously experienced in their solitary confinement at Lieber. Their only request in this motion is that they be confined in conditions substantially similar to those at Lieber during the pendency of their ultimate challenge to the constitutionality of their solitary confinement.

Beginning in 1997, SCDC housed death row at the Lieber Correctional Institution in Ridgeville, South Carolina. Compl. ¶¶ 38, 41–61. The inmates were kept in solitary confinement in cells with a single door. Compl. ¶ 44. The cells were sparse and cramped, but featured an electrical outlet that Plaintiffs could use to power approved appliances. Compl. ¶ 43. Plaintiffs were thus able to converse with their immediate neighbors and could pass a microwave and a phone back and forth along the tier. Compl. ¶ 44. At Lieber, Plaintiffs were allowed out of their cells to shower and, up to five times per week, Plaintiffs were allowed recreation in individual outdoor pens where they

could see and interact with other death row inmates. Compl. ¶¶ 50–51. Plaintiffs were allowed non-contact visitation with family and friends who were approved as visitors, and were allowed to speak with fellowship volunteers who went from cell to cell. Compl. ¶¶ 50, 57–59.

On or around September 26, 2017, SCDC moved the Death Row facility to Kirkland in Columbia, South Carolina. Compl. ¶¶ 62–66. Plaintiffs and their fellow Death Row inmates were placed in Kirkland's MSU, which SCDC describes as "specialized housing" for "the most dangerous and violent offenders." Id. ¶¶ 67–69. Plaintiffs faced no disciplinary charges at Lieber before their transfer, and SCDC has provided no explanation or justification for placing Plaintiffs in the MSU. Id. ¶¶ 120, 131–132. In addition to the impacts of Plaintiff's previous confinement, incarceration in the MSU imposes hardships that threaten Plaintiffs' mental and physical health. Plaintiffs are essentially unable to communicate with their neighbors, due to the double doors on each cell, one made of solid steel. Compl. ¶¶ 75–76, 140, 157, 163, 167, 179, 183, 191, 194, 206, 218, 231, 251. Their new cells are dirty, with frequent and persistent water damage and mold growth, and they have virtually no access to cleaning supplies. Compl. ¶¶ 78–82, 89, 123–124, 171, 178, 185, 226, 232, 238, 261. Plaintiffs are likewise deprived of clean clothing and clean bedding. Compl. ¶¶ 109, 123–124, 171, 238. Plaintiffs are deprived of effective phone access, making it extremely difficult to communicate with family, friends, and legal counsel. Compl. ¶¶ 95–103, 150, 163, 183–184, 192, 250, 260. Plaintiffs experience difficulties scheduling visits with friends, family, and legal counsel, because they are unable to obtain any formal visitation policies. Compl. ¶¶ 112–113, 150, 184, 222, 249. Plaintiffs are deprived of contact with previously approved visitors, including fellowship volunteers. Compl. ¶¶ 105–107, 222, 249. Plaintiffs have been denied regular access to recreation. Compl. ¶¶ 108–109, 151–152, 158, 255. When they have been allowed access to the recreation area, many have not been able to use the space due to the unsanitary conditions. Compl. ¶¶ 152, 255.

When Plaintiffs do receive recreation, it is in an isolated pen where they cannot see or interact with others recreating at the same time. Compl. ¶ 83. Plaintiffs are deprived of access to natural light, except on the limited occasions in which they receive recreation, because the cells at Kirkland do not have windows. Compl. ¶ 72. Plaintiffs have no ability to control the lights in their cell and no electrical outlets. Compl. ¶¶ 74, 92–93, 104, 169, 172, 182, 207, 253.

III. DISCUSSION

A party seeking injunctive relief must establish all four of the following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); The Real Truth About Obama, Inc. v. Federal Election Comm'n, 575 F.3d 342, 346–47 (4th Cir.2009), vacated on other grounds, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010), restated in relevant part on remand, 607 F.3d 355 (4th Cir.2010) (per curiam). Each factor must be demonstrated by a "clear showing." Winter, 555 U.S. at 22. Failure to satisfy any one of the relevant factors mandates denial of the preliminary injunction. Real Truth, 575 F.3d at 346. Preliminary injunctions are "extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001). "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter, 555 U.S. at 24. In the prison context, substantial deference is to be given to the judgment of prison administrators. See Overton v. Bazzetta, 539 U.S. 126, 132 (2003). Functions of prison management and security must be left to the broad discretion of prison administrators to enable safe and effective management. See, e.g., Gaston v. Taylor, 946 F.2d 340, 343 (4th Cir. 1991); Wetzel v. Edwards, 635 F.2d 283,

288 (4th Cir. 1980). Courts should grant preliminary injunctive relief involving the management of correctional institutions only under exceptional and compelling circumstances. See Taylor v. Freeman, 34 F.3d 266, 269 (4th Cir. 1994).

A. Likelihood of Success on the Merits

"While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" League of Women Voters of N. Car. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (quoting Pashby v. Delia, 709 F.3d 307, 321 (4th Cir. 2013)). In their motion for preliminary injunction, Plaintiffs focus on their Fourteenth Amendment due process claim. To establish a procedural due process claim, a plaintiff must show (1) that he had a protectable liberty interest and (2) that the defendant failed to afford the plaintiff minimally adequate process to protect that liberty interest. Incumaa v. Stirling, 791 F.3d 517, 526 (4th Cir. 2015).

"Although lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a prisoner's right to liberty does not entirely disappear." Id. "The Supreme Court has long recognized that a prisoner may have a state-created liberty interest in certain prison confinement conditions, entitling him to procedural Due Process protections. Prieto v. Clarke, 780 F.3d 245, 248 (4th Cir. 2015) (citing Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). In Sandin v. Conner, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), the Court held that while a state statute or policy may "create liberty interests" giving rise to Due Process protection, this is so only if the denial of such an interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

In Prieto, the Fourth Circuit held that the plaintiff, a death row inmate, failed to point to a law

or policy "providing him with an expectation of avoiding the conditions of his confinement [or] demonstrate that those conditions [were] harsh and atypical in relation to the ordinary incidents of prison life." Prieto, 780 F.3d at 252. The Fourth Circuit found that Prieto had erred in "contending that harsh and atypical confinement conditions in and of themselves give rise to a liberty interest in their avoidance" rather than identifying a specific state statute that created such a liberty interest. Prieto, 780 F.3d at 251. In addition, the Fourth Circuit found that, in "determining the relevant baseline for atypicality in order to begin a Due Process analysis, a court must consider whether the confinement conditions are imposed on a prisoner because of his conviction and sentence." Id. at 253-54. The "conditions dictated by a prisoner's conviction and sentence are the conditions constituting the 'ordinary incidents of prison life' for that prisoner." Id.

Plaintiffs complain that the conditions at Kirkland are more harsh than those at Lieber, and they point to SCDC's death row policy, SCDC Policy OP-22.16 (Ex. A to Pl. Motion), and restrictive housing unit policy, SCDC Policy OP-22.38 (Ex. B to Pl. Motion), as providing the protected liberty interest. However, Plaintiffs make no showing that either of these policies is applicable, as the death row policy specifically addresses death row inmates housed at Lieber, not Kirkland, and the restrictive housing unit policy addresses inmates on short term, disciplinary, or security detention, not on death row.[1] Further, it is well-established that a prisoner has no due process right to be housed in any particular facility, or to any particular security classification, and

[1]Plaintiffs also mention that "SCDC still has not produced an official policy governing Death Row inmates' detention in Kirkland's MSU." Pl. Motion p. 4. However, as set forth below, because a prisoner has no due process right to be housed in any particular facility or to any particular security classification, it follows that Plaintiffs have no due process right to the establishment of any such policy. Moreover, SCDC made the decision to move the death row inmates from Lieber to Kirkland in the interest of security and safety based upon the uniqueness of Death Row operations and Lieber's difficulty in hiring and retaining employees.

decisions relating to the day-to-day operation of prisons are entrusted to the officials of the particular institution or correctional system. See Meachum v. Fano, 427 U.S. 215, 223-24 (1976); Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed. 813 (1983). The United States Supreme Court has emphasized that the "decision where to house inmates is at the core of prison administrators' expertise." McKune v. Lile, 536 U.S. 24, 26 (2002). Accordingly, Plaintiffs fail to make a showing that they are likely to succeed on the merits of their due process claim.

As set forth above, failure to satisfy any one of the relevant factors mandates denial of the preliminary injunction. Real Truth, 575 F.3d at 346. Nevertheless, out of an abundance of caution, the remaining factors are addressed below.

B. Likelihood of Plaintiffs Suffering Irreparable Harm

As stated above, in their present motion, Plaintiffs assert their incarceration in the MSU at Kirkland provides even harsher conditions than those they previously experienced in their solitary confinement at Lieber. Their only request in this motion is that they be confined in conditions substantially similar to those at Lieber during the pendency of their ultimate challenge to the constitutionality of their solitary confinement. Plaintiffs fail to show that they will suffer irreparable harm if their request for preliminary injunctions is not granted. Many of the differences between Plaintiffs' confinement at Lieber and their confinement at Kirkland as alleged by Plaintiffs amount to a loss of conveniences. They are not able to shout through the doors to the other inmates, they do not have electrical outlets in their cells and, thus, no access to a microwave, they are not able to control the lights in their own cells and must ask a corrections officer to do so, telephones are not as readily available as they were at Lieber, and scheduling visitation at Kirkland is more difficult than it was at Lieber. While the alleged lack of access to outdoor recreation coupled with a lack of windows in the cells gives the undersigned pause, overall, Plaintiffs have failed to show that they

would suffer irreparable harm if their conditions at Kirkland are not changed during the pendency of this action.

C. The Balance of Equities

Under the third Winter factor, the plaintiff must demonstrate "that the balance of equities tips in his favor." Winter, 555 U.S. at 20. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Id. (quoting Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 542 (1987)). Plaintiffs assert that their conditions of confinement at Kirkland are harsher than those they experienced at Lieber. As stated above, much of the harm alleged by Plaintiffs is the loss of conveniences such as microwaves and the ability to control the lights in their cells.

By affidavit of Dennis Patterson, the Assistant Deputy Director for Operations, the SCDC submits that the decision the relocate death row was security driven as part of a strategic plan to enhance public safety, employee safety, and institutional safety. Patterson Aff. ¶¶ 1-3. Patterson avers that Lieber had difficulty finding and retaining employees and, due to the security challenges and uniqueness of death row, it was determined that the best course of action was to relocate death row to Kirkland's MSU because it is the only location where staff have the experience and the ability to handle the unique security and safety issues raised by death row inmates. Patterson ¶¶ 3, 7. The United States Supreme Court has emphasized that "'[t]he difficulties of operating a detention center must not be underestimated by the courts," and that "correctional officials ... must have substantial discretion to devise reasonable solutions to the problems they face.'" Prieto, 780 F.3d at 255 (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326, 132 S.Ct. 1510, 1515–16 (2012)). At least one court has noted that corrections facilities are "likely to be harmed by injunctions that 'would interfere with the daily execution of prison policies and practices,' and

'[s]uch an interference is not the place of federal courts, which do not stand in the position of overseeing the daily operations of prisons.'" Holloway v. Coakley, No. 2:17-CV-74, 2018 WL 1287417, at *6 (N.D.W. Va. Mar. 13, 2018) (citing Dunn v. Federal Bureau of Prisons, 2013 WL 365257, at *2 (N.D. W.Va. 2013)). For these reasons, Plaintiffs fail to show the balance of equities weighs in their favor.

D. The Public Interest

The last Winter element requires Plaintiffs to show that their requested injunction is in the public interest. This question "certainly presents conflicting considerations. On one hand, the general public has an interest in ensuring that the constitutional protections afforded to the public, including those imprisoned, are vindicated; on the other hand, the public most certainly has an interest in the effective management of the prison system, both for the safety of the general public and those in the prison system, whether they be inmates or administrators." Holloway, 2018 WL 1287417, at *7. Nevertheless, given the Supreme Court's "consistent counseling to give great deference to the experience of prison administrators, particularly when the decisions relate to security, id. (citing Turner v. Safley, 482 U.S. 78 (1987); see also Florence, 566 U.S. at 326 ("[C]orrectional officials ... must have substantial discretion to devise reasonable solutions to the problems they face."); Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168 (2003) (holding that in the prison setting, courts should give substantial deference to the judgment of prison administrators), Plaintiffs fail to show that their requested injunction would be in the public interest.

IV. CONCLUSION

Preliminary injunctions are "extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001). Courts should grant preliminary injunctive

relief involving the management of correctional institutions only under exceptional and compelling circumstances. See Taylor v. Freeman, 34 F.3d 266, 269 (4th Cir. 1994). Because Plaintiffs have failed to make the requisite showing, it is recommended that Plaintiffs' Motion for Preliminary Injunction (ECF No. 6) be denied.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

June 26, 2018
Florence, South Carolina