IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RODOSVALDO POZO,

Petitioner, ORDER

v. 02-C-12-C

BRAD HOMPE, VICKI SHARPE,
CAPT. BLACKBOURN, WARDEN GERALD BERGE,
ALL NURSES JANE DOES, SGT. JUNTSEN,
KELLY COON ICES, CAPT. RICHARDSON,
SGT. KUFMAUSS, SGT. SICKINGER,
JULIE BIGGAR, WARDEN BERGE, SGT.
HUIBRETSE, JON LITSCHER,
PSYCHOLOGIST CHRISTINE APPLE, SECURITY
DIRECTOR BOUGHTON, C/O PINNEL, TIM HAINES,
JOHN SHARPE, JOHN DOES 1-50, DR. GERT HUSSELHOF,
(ELLEN RAY ICES), MS. DUESTERBECK, JOANN GOVIER,
C/O ECK, and NURSE MS. RENEE,

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Rodosvaldo Pozo, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that respondents violated his Eighth Amendment right to adequate medical care, his Eighth Amendment right to be

free from cruel and unusual conditions of confinement, his Fourteenth Amendment right to access to the courts, his First Amendment right to the free exercise of religion, his Fourteenth Amendment right to due process, his First Amendment right to free expression, his Fourth Amendment right to reasonable searches and seizures, his Eighth Amendment right to be free from cruel and unusual punishment, his Fifth Amendment right to equal protection and various state laws.

Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted a trust fund statement demonstrating that 100% of his income is being taken to pay fees in other cases. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be

granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner will be granted leave to proceed on his claims that the physical conditions of his confinement and systemic inadequacies in the provision of medical care violate his Eighth Amendment rights. However, the proceedings as to the merits of these claims will be stayed because petitioner is a member of the pending class in Jones 'El v. Berge, No. 00-C-421-C, in which the claims are being considered. Petitioner will be granted leave to proceed on his First Amendment claims for the free exercise of religion and freedom of expression. Petitioner will be denied leave to proceed on his Fourteenth Amendment claim that he was denied access to the courts and his Fourth Amendment claim that he was deprived of his right to reasonable searches and seizures on the ground that these claims fail to state a claim upon which relief can be granted. He will be denied leave to proceed on his Fourteenth Amendment claim that he was denied due process, his Eighth Amendment claim that respondents failed to protect him from harm and his Fourteenth Amendment equal

protection claim because these claims are legally frivolous. Petitioner will be denied leave to proceed on his various state law claims because I decline to exercise supplemental jurisdiction over them.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioner Rodosvaldo Pozo is an inmate at Supermax Correctional Institution. The following persons are employed at Supermax: respondent Brad Hompe is a unit manager; respondent Vicki Sharpe is a program director; Capt. Blackbourn is a security captain; respondent Gerald Berge is warden; respondents Jane Does are nurses whose identities are unknown; respondent Sgt. Juntsen is a sergeant; respondent Kelly Coon is an inmate complaint examiner; respondent Capt. Richardson is a captain; respondent Sgt. Kufmauss is a sergeant; respondent Sgt. Sickinger is a sergeant; respondent Julie Biggar is an inmate complaint examiner; respondent Sgt. Huibretse is a sergeant; respondent Christine Apple is a psychologist; respondent Boughton is a security director; respondent Finnel is a corrections officer; respondent Tim Haines is a unit manager; respondent John Sharpe is a unit manager; respondents John Does 1-50 are individuals whose identities are unknown; respondent Dr. Gert Husselhof is a doctor; respondent Ellen Ray is an inmate complaint examiner;

respondent Ms. Duesterback is a file custodian; respondent Joann Govier's position is unknown; respondent Eck is a corrections officer; and respondent Ms. Renee is a nurse. Respondent Jon Litscher is Secretary of the Department of Corrections.

B. Eighth Amendment: Conditions of Confinement

For months, respondent Hompe has kept petitioner in a cell with the window closed at all times every day of the year. Eight days is the most an inmate can be kept in adjustment status, not 90 days with the window closed. Petitioner was kept in the alpha unit for approximately 180 days. The light in petitioner's cell keeps him from sleeping and the officers wake inmates up every hour just to harass them.

Respondents Berge, Boughton Huibretse and Apple have subjected petitioner to constant illumination, inadequate ventilation and extreme temperatures in his cell. Petitioner has been denied exercise. He has been in these conditions for almost two years. Petitioner has suffered discomfort, anguish, sorrow, pain and mental and spiritual problems. Petitioner has lost his appetite, is not able to sleep or concentrate and has lost sight in his right eye.

C. Eighth Amendment: Inadequate Medical Care

When petitioner has a serious headache and pain, he has to wait for days before he

can see the nurses and the doctors. Petitioner has complained for years about stomach pains and migraine headaches but the nurses give petitioner Tylenol only. They refuse to take him to Madison to see a specialist even though petitioner needs one.

Respondent Dr. Hasselhof prescribed petitioner the wrong medication without asking him any questions or examining him. Petitioner asked him if he had a medical license. Respondent Hasselhof got mad, did not answer and looked at petitioner with deep hatred. Petitioner sent respondent Hasselhof several medical requests, informing him that the medication that he had prescribed gave petitioner deep headaches. Petitioner was very sick but the nurse told him to give the medication time to take hold. Petitioner told the nurse that he wanted to see the doctor but he did not respond to petitioner's medical need.

Petitioner has had stomach problems for years. Petitioner needs to take pills with milk. Petitioner has asked to get 2% milk which is better for his stomach than skim milk. Respondent Hasselhof has not taken the time to help petitioner.

D. Denial of Access to the Courts

Respondent Brad Hompe did not allow petitioner to take his legal paper to the library and denied petitioner his legal books without just cause. Hompe did not provide petitioner with a chair so petitioner was not able to sit down to do his legal work. For months, Hompe did not allow petitioner to take papers to the library. Hompe kept petitioner in handcuffs

and shackles the whole time he was using the library.

Respondent Capt. Blackbourn sentenced petitioner to 30 days' room confinement, which prevented him from going to the law library.

Respondent Capt. Richardson and officer Witter from the mail room destroyed petitioner's brand new legal book entitled Prisoners' Self-Help Litigation Manual. They claimed that the book was illegal and destroyed it without a holding hearing or discussing it with petitioner. They deemed the soft-cover book contraband. They did not provide the sender a note of non-delivery. Petitioner asked both Richardson and Witter to see the book.

Respondents Berge and John Does do not allow petitioner to pass his legal photocopies to other inmates who want to help petitioner with civil and criminal matters. Petitioner has not been able to litigate his criminal and civil cases as a result of this policy.

Respondents Joann Govier and correctional officer Eck took all of petitioner's legal papers for his case, Pozo v. McCaughtry, 99-1464 (E.D. Wis.). Petitioner had to file his motion and brief without the important papers that he needed for litigation; he had to file the brief and motions by guessing what to do. Petitioner filed an inmate complaint. The Honorable Aaron Goodstain called respondent inmate complaint examiner Ellen Ray so the officers would return petitioner's legal papers. It took several weeks for the officers to return the papers.

Respondent inmate complaint examiner Ellen Ray never returned legal evidence that

petitioner sent her in an inmate complaint. Petitioner wrote her several requests to return the evidence. Petitioner needed the evidence to prove in court that he had been wronged and that the institution staff has retaliated against him and denied him access to the courts. Respondent Ray did not go to petitioner's door to discuss any violations petitioner alleged in his complaint. Petitioner sent Ray proof of his legal claim. Ray dismissed the complaint. To cover up the wrongs against petitioner, Ray withheld petitioner's legal evidence and never mentioned it again. Because of respondent Ray's acts, petitioner cannot prove his legal cases.

Respondent Ms. Duesterbeck is the legal custodian of the records at the institution. Petitioner asked respondent Duesterbeck several times to provide him with documents relating to respondent Vicki Sharpe's refusal to allow Robin Mitsans on petitioner's visitors list. Respondent Duesterbeck did not comply. The information petitioner requested was not confidential. Because respondent Duesterbeck refused to provide petitioner with the documents, he was not able to appeal respondent Sharpe's refusal to place Mitsans on the visitors list.

E. First Amendment: Free Exercise of Religion

Respondent Hompe did not allow petitioner to use the Holy Bible or the "two text books from God." Muslims need to use both holy books. Petitioner is a devout Muslim.

When petitioner was in fox trot unit, respondent Sgt. Huibregtse sent several officers to petitioner's cell to take petitioner's grey and black kuffi (a Muslim prayer cap) and his prayer rug. Petitioner did not give the officers his permission. Petitioner called respondent Huigregtse on the intercom and asked why she took his religious hat and prayer rug. She responded, "Don't ask me, I'm not Muslim. Write an [inmate complaint], Pozo, if you don't like that I ordered the officers to take your religious items."

F. Fourteenth Amendment: Due Process

1. Transfer to Supermax

Respondent Jon Litscher transferred petitioner to Supermax without due process. The conditions at Supermax are much more severe than at petitioner's previous institution. Petitioner does not meet the criteria for being housed at Supermax.

2. Conduct report

Respondent Capt. Blackburn found petitioner guilty of conduct report #1186305 without providing legal evidence against him. Blackburn did not state the legal reason why petitioner was found guilty and imposed on petitioner 360 days' program segregation and 30 days' room confinement.

G. First Amendment: Freedom of Expression

The third shift sergeants (John Does) on echo unit and respondent Capt. Blackbourn did not allow petitioner to send out his letters written in Spanish. Petitioner had to quit writing his mother, brother and sisters in Cuba because they do not write or read English. Respondents Blackbourn and John Does sent petitioner threatening notes.

Respondent Capt. Richardson and mail room officer Witter destroy all of petitioner's extra letters and postcards from his friends.

H. Fourth Amendment: Unreasonable Search and Seizure

Respondent John Sharpe sent inmates a threatening memorandum stating that inmates must provide DNA samples or be transferred to alpha unit where their privileges would be taken away. Respondent Sharpe did not allow petitioner to appeal his decision. Petitioner filed an inmate complaint about the DNA collection. Petitioner told respondent Sharpe about his filing the complaint but petitioner still had to provide a sample. Respondent Sharpe did not provide professional health staff to take the samples. Instead, untrained officers who did not know what they were doing took the samples.

I. Eighth Amendment: Failure to Protect

Sgt. Manson, officer Mason or John Does placed petitioner in a cell in which the

intercom was not working. At the time, petitioner was fasting because he had received false conduct reports from correctional officer Stodson. The conduct report was dismissed but petitioner was removed from his cell in echo unit before his due process hearing. Petitioner was almost dying. Doctor Riley came to see petitioner in his cell. Petitioner explained to him that he was not eating and that he had been placed in a cell in which the intercom was not working. After ten days they moved petitioner to another cell. Petitioner lost consciousness several times but no one came to help him. Petitioner had pressed the intercom button but it was not working. As security director, respondent Boughton is responsible for insuring that the institution's operations are running smoothly.

J. Fifth Amendment: Equal Protection

Respondents Capt. Blackburn and Capt. Richardson and social worker Mr. Cravens took part in the hearing for conduct report #1186305. In imposing on petitioner a sentence of 360 days' program segregation and 30 days' room confinement, these individuals violated petitioner's right to equal protection because petitioner is a black Cuban.

Respondent John Doe denied petitioner indoor exercise for several months even though he asked to exercise. Other inmates were allowed to exercise. Petitioner filed an inmate complaint about this problem, which was affirmed. Doe's act was discriminatory.

Respondent correctional officer Finnel wrote petitioner two conduct reports because

he is a black Cuban. The conduct reports should have been written to the white inmate James Kissinger. Respondent Finnell also woke up petitioner every time he made his round just to oppress and abuse him.

Respondents Joann Govier and correctional officer Eck took all of petitioner's legal papers for his case, Pozo v. McCaughtry, 99-1464 (E.D. Wis.), because he is a black Cuban.

Respondent inmate complaint examiner Ellen Ray never returned legal evidence that petitioner sent her in an inmate complaint because petitioner is a black Cuban. Ray has done this act several times to petitioner and she has also done it to a black Cuban named Evelio Duartevestor.

Sgt. Mason and respondent Boughton placed petitioner in a cell in which the intercom was not working because he is a black Cuban. Other inmates are in cells where the intercom works.

Respondent Dr. Hasselhof is not providing petitioner with adequate medical care because he hates petitioner's "black Cuban color."

Respondent Litscher transferred petitioner to Supermax because he is a black Cuban. Litscher is conducting a secret experiment.

K. State Law Claims

1. Denial of visitors

Respondent Vicki Sharpe denied petitioner the right to have his friend, Robins Mitsans, on his visitors list. Only the warden has the right to make a decision regarding visitors lists. Petitioner sent respondent Sharpe several legal requests asking her why she had not told petitioner why his friend is not allowed on the list. Respondent Sharpe has not responded and respondent Berge is trying to cover up this wrong. Respondent Sharpe sent Mitsans two forms that she created in which she asked racial and intimate questions. Respondent Sharpe did not send Mitsans a legal notice for appeal like she is required to do under Wis. Admin. Code § DOC 309. Respondent Sharpe's act of refusing to allow Mitsans to visit petitioner has caused him anxiety and loss of sleep because petitioner has no family in the United States.

2. Advocate under Wis. Admin. Code § DOC 303.78(2)

Respondent Sgt. Sickinger is petitioner's advocate under Wis. Admin. Code § DOC 303.78(2). Respondent Sickinger has not yet spoken on petitioner's behalf. She offended petitioner and threatened him with conduct reports because he asked for help and she refused. Respondent Sickinger has read only the conduct reports that have been issued against petitioner with malice and believes respondent Capt. Blackbourn's side of the story because she is afraid of being fired. Capt. Blackbourn is the hearing officer for conduct reports. Respondents Sickinger and Blackbourn have a tacit agreement to deprive petitioner

of his rights. Respondent Sichinger has not spent more than five minutes by the window of petitioner's door. When she is there, she exhibits a "hateful and racial attitude" toward petitioner. Petitioner has treated respondent Sickinger with "due respect and highest honor." Respondent Sickinger has allowed Capt. Blackbourn to abuse and mistreat petitioner.

3. Harassment by leaving light on

Respondents Sgt. Jantsen and Sgt. Kutmauss left petitioner's light on for several days with the intention of killing him. Petitioner had a legal interview with the Sgt. James Kopp from the Lancaster, Wisconsin Sheriff's Department. Respondent Jantsen harassed petitioner for months with false conduct reports that were all dismissed. Jantsen did not stop harassing petitioner until petitioner was moved to another unit. Jantsen told petitioner, "I'm going to make your life miserable, Pozo," just because petitioner spoke truthfully with the Sheriff's Department. After petitioner was moved to another unit, respondent Sgt. Kutmauss continued to harass petitioner with conduct reports. Kutmauss denied petitioner his level 3 status. Petitioner feared for his life because he did not have anyone to protect him.

Respondent Julie Biggar and officer Kelly saw this oppressive violation. Petitioner filed an inmate complaint, asking the examiner to interview respondent Biggar and Kelly.

Because Biggar and Kelly knew about the incident, they were not interviewed.

DISCUSSION

I. SECTION 1983

Before addressing the merits of petitioner's complaint, there is an initial issue to be considered. Section 1983 creates a federal cause of action for "the deprivation under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States." Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997) (citations omitted). To prevail on a § 1983 claim, a plaintiff must prove that (1) the defendant deprived him of a right secured by the Constitution and laws of the United States; and (2) the defendant acted under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

To establish individual liability under § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. Under § 1983, individual defendants cannot be held liable under a theory of respondeat superior. See Hearne v. Board of Education of City of Chicago, 185 F.3d 770, 776 (7th Cir. 1999). "'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F.3d 987, 991 (7th Cir.

1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). It is not necessary that the respondent participate directly in the deprivation. The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). See also Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 908 (7th Cir. 1996); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). If a petitioner does not know the names of persons directly responsible for the alleged constitutional violations, he may name a high-level prison official as a respondent to uncover through discovery the names of persons directly responsible. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981).

In his complaint, petitioner named John Does, third shift sergeants on fox trot unit who do not allow petitioner to send out letters written in Spanish and who were directly responsible for violating his right to freedom of expression. Under Duncan v. Duckworth, petitioner will be allowed to proceed against respondent warden Berge on his freedom of expression claim so that he may discover the identity of respondents Doe. Petitioner is advised to conduct his discovery promptly and to amend his complaint to reflect the identity

of the third shift sergeants as quickly as possible.

II. CLAIMS THAT OVERLAP WITH JONES 'EL

A. Eighth Amendment: Inadequate Medical Care

I understand petitioner to allege that respondent Dr. Gert Hasselhof violated his Eighth Amendment right to adequate medical care by prescribing him a medication that gave him "deep headaches," by refusing to allow petitioner to see a specialist in Madison for his stomach pains and migraine headaches and by not helping petitioner get 2% milk, which would be better for his stomach than skim milk. Standing alone, a claim that a doctor prescribed medication that had the side effect of giving a patient headaches does not state a claim of constitutional wrongdoing. Similarly, not sending a patient with headaches and stomach pains to see a specialist and not ordering 2% milk for a patient do not state a claim of constitutional wrongdoing. At most, these allegations support a state law claim of negligence not appropriately raised in federal court.

However, petitioner is a class member in Jones 'El, in which the plaintiffs contend that there are systemic inadequacies in the provision of medical care at Supermax that violate class members' rights. Jones 'El v. Berge, 00-C-421-C, slip op. at 37 (order entered August 14, 2001). Because the class in Jones 'El was certified to seek declaratory and injunctive relief only, a member of the class in Jones 'El who wants to recover money

damages for injuries suffered as a result of a systemically inadequate medical care system, for example, must file a lawsuit separate from the Jones 'El case asserting the claim for damages. Although petitioner's complaint does not allege that there are systemic inadequacies in the delivery of health care and that it was those inadequacies that caused him to suffer a "wrong" prescription, not seeing a specialist or not getting 2% milk, I will construe his complaint liberally to include such a claim. Therefore, petitioner will be granted leave to proceed against respondents Berge and Litscher, the defendants in the Jones 'El case, on his claim that he suffered damages as a result of a systemically inadequate health care system at Supermax. This claim will be stayed pending resolution of the question of liability in Jones 'El. Petitioner should be aware, however, that if the claim of systemic inadequacies in the delivery of health care at Supermax is not resolved on its merits in the Jones 'El case, then, when the stay is lifted, petitioner will be given the choice of amending his complaint to assert the claim directly, in which case he will have take sole responsibility for proving the claim, or of having the claim dismissed.

B. Eighth Amendment: Conditions of Confinement

Petitioner alleges that several of the conditions at Supermax violate his right to be free from cruel and unusual punishment: closed cell windows at all times; constant illumination; being awoken during the night by guards making rounds; inadequate ventilation; extreme

temperatures; and lack of exercise. Like petitioner's allegations that he was prescribed the "wrong" medication, these allegations do not by themselves make out a claim of a constitutional violation. However, in the Jones 'El case, the plaintiffs allege that inmates are subjected to a combination of physical conditions of confinement at Supermax that, in their totality, violate the Eighth Amendment. Liberally construing petitioner's complaint, I understand him to allege that he has suffered damages as a result of his being subjected to these conditions. Therefore, I will grant petitioner leave to proceed against respondents Berge and Litscher on this claim. The claim will be stayed pending resolution of the question of liability in Jones 'El. Again, petitioner should be aware that if the claim in Jones 'El regarding the totality of conditions at Supermax is not resolved on its merits, when the stay is lifted petitioner will face the choice of amending his complaint to assert the claim directly and taking responsibility for proving the claim, or the claim will be dismissed.

III. CLAIMS INDEPENDENT FROM JONES 'EL

A. Denial of Access to the Courts

I understand petitioner to allege that respondent have impeded his constitutional right of access to the courts by not allowing petitioner to take legal paper to the library, by denying petitioner use of his legal book entitled Prisoners' Self-Help Litigation Manual, by not allowing petitioner to use a chair when doing his legal work, by keeping petitioner in

handcuffs and shackles while in the law library, by sentencing him to 30 days' room confinement, by not allowing petitioner to pass photocopies of legal materials to other inmates, by taking all of petitioner's legal papers for his civil case, Pozo v. McCaughtry, 99-1464 (E.D. Wis.), by failing to return legal evidence that petitioner had attached to an inmate complaint and by refusing to provide petitioner with documents relating to respondent Vicki Sharpe's refusal to allow Robin Mitsans to be on petitioner's visitors list.

It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez , 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828.

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial." Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis , 518 U.S. 343). At

a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint).

Petitioner asserts that respondents have violated his right to access to the courts in a variety of ways, some relating to the use of legal materials and the law library, some relating to the ability to pass legal materials to other inmates and some relating to respondents' refusal to give petitioner certain documents that, I assume, he could use to support legal actions against respondents. Petitioner also asserts that respondents took legal papers relating to an ongoing civil case, but that after court intervention, respondents returned the papers to petitioner. Despite the large number of allegations, petitioner does not allege injury over and above the inconvenience caused by these policies and acts. Specifically, he does not allege that because of these policies and conduct, a nonfrivolous legal action of his was dismissed or the time for filing such an action ran out. Thus, petitioner's request for leave to proceed on his claim that respondents Hompe, Capt. Blackbourn, Capt. Richardson, Berge, Does, Govier, Eck, Ray and Duesterbeck violated petitioner's right of access to the courts will be dismissed for failure to state a claim upon which relief may be granted.

B. First Amendment: Free Exercise of Religion

Petitioner alleges that respondent Hompe denied him use of the Holy Bible and the "two texts from God," texts that are necessary for Muslims. He also alleges that respondent Huibregtse took his grey and black kuffi (prayer cap) and his prayer rug.

"[T]he Free Exercise Clause does not require states to make exceptions to neutral and generally applicable laws even when those laws significantly burden religious practices." Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998) (citing Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990)); see also City of Boerne v. Flores, 521 U.S. 507 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."); Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997) ("After Smith the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than accidentally hit it while aiming at something else . . . only intentional discrimination . . . is actionable under Smith."). In other words, the restrictions about which petitioner complains must target Muslims alone or amount to intentionally discrimination against Muslims. So long as the restrictions promote a legitimate goal such as safety they do not run afoul of the constitution. At this point, there is no indication that respondents had a legitimate reason

for imposing the restrictions. If anything, the opposite inference seems more likely. Petitioner has stated a claim that respondents Hompe and Huibregtse violated his right to exercise his religious beliefs.

C. Fourteenth Amendment: Due Process

1. Transfer to Supermax

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted).

Petitioner alleges that he was transferred to Supermax, where the conditions are severe, without due process. However, the placement decision about which petitioner complains does not implicate a liberty interest. Prisoners do not have a liberty interest in not being transferred from one institution to another. Meachum v. Fano, 427 U.S. 215

(1976) (due process clause does not limit interprison transfer even when the new institution is much more disagreeable).

Plaintiff also alleges that he does not meet the mandatory criteria for placement at Supermax. Although respondents may not be following a Department of Corrections policy, regulation or even a Wisconsin statute, their failure to do so does not infringe upon a liberty interest of petitioner. At most, this allegation supports a claim that petitioner's rights under state law may have been violated, but such a claim must be raised in state court. Because petitioner has not alleged facts sufficient to establish that remaining out of Supermax implicates a liberty interest under Sandin, his claim will be dismissed as legally frivolous.

2. Conduct report

Petitioner alleges that respondent Capt. Blackbourn found him guilty of a conduct report without providing a legal reason, resulting in 360 days' program segregation and 30 days' room confinement. In Sandin, the Supreme Court held that the plaintiff inmate's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 515 U.S. at 486. In this case, petitioner received a punishment consisting of a number of days in program segregation. After Sandin, however, petitioner does not have a liberty interest in remaining free of segregation because it does not impose an atypical and significant

hardship upon him in light of "the ordinary incidents of prison life." Similarly, given the Supreme Court's holding in Sandin that being confined to segregation does not implicate a protected liberty interest, I cannot find that room confinement would be an atypical or significant deprivation entitling petitioner to due process protections. Petitioner's request for leave to proceed on his claim for due process will be denied as legally frivolous.

D. First Amendment: Freedom of Expression

Petitioner alleges that respondents Blackbourn and Does are violating his First Amendment right to freedom of expression by not allowing him to send out letters to his family written in Spanish. He also alleges that respondent Richardson is violating his right to freedom of expression by destroying all of his "extra" letters and postcards from friends.

Prisoners have a limited liberty interest in their mail under the First and Fourteenth Amendments. Procunier v. Martinez, 416 U.S. 396, 413, 414 (1974). The inspection of personal mail for contraband is a legitimate prison practice, justified by the important governmental interest in prison security. Gaines v. Laine, 790 F.2d 1299, 1304 (7th Cir. 1986). Further interference with an inmate's personal mail must be reasonably related to legitimate prison interests in security and order. Turner v. Safley, 482 U.S. 78, 89 (1987).

Courts have found infringement of prisoners' First Amendment rights in cases involving broad prohibitions on certain activities. See, e.g., Sizemore v. Williford, 829 F.2d

608 (7th Cir. 1987) (complaint stated claim of First Amendment violation to extent it alleged that prison officials permanently withheld and intentionally never delivered copies of inmate's daily newspaper); Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252 (8th Cir. 1987) (although prison security needs could limit inmate's access to materials from white supremacy organization, total ban on such materials violated Constitution); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (prison policy of refusing to deliver mail written in language other than English violated First and Fourteenth Amendments where one-third of prison population was Hispanic and government offered no justification for policy). These cases attack either broad policies or continuing practices. The Court of Appeals for the Seventh Circuit has emphasized that "an isolated delay or some other relatively short-term, non content-based disruption in the delivery of inmate reading material" does not constitute a First Amendment violation. Sizemore, 829 F.2d at 610. A continuing pattern of disregard for a prisoner's First Amendment rights is substantially different from "isolated instances of loss or theft of an inmate's reading materials." Id.

In this case, I understand petitioner to allege that the interference with his mail is ongoing rather than sporadic, isolated instances because he asserts that because of the prohibition on his outgoing mail written in Spanish, he had to quit writing his family. Similarly, he alleges that respondent Richardson "destroys" extra mail from friends, again

suggesting that the conduct is repetitive rather than an isolated incidence. Because the facts do not suggest any legitimate penological interest for respondents to keep petitioner from sending mail written in Spanish or from receiving "extra" mail from friends, petitioner's request for leave to proceed on his claim for freedom of expression against respondents Berge, Blackbourn and Richardson will be granted. As discussed above, petitioner will be granted leave to proceed against respondent Berge for the purpose of discovering the identity of respondents Does, the third shift sergeants who are personally involved in the alleged constitutional violations.

E. Fourth Amendment: Unreasonable Search and Seizure

I understand petitioner to contend that respondents violated his right to reasonable search and seizure by taking a DNA sample from him by force. To pass constitutional muster under the Fourth Amendment, a search must be reasonable. "Reasonableness" is determined by balancing the intrusiveness of the search of the individual against the legitimate interest of the government in conducting the search. Delaware v. Prouse, 440 U.S. 648, 654 (1979). Although reasonableness is measured generally by a warrant demonstrating probable cause, Griffin v. Wisconsin, 483 U.S. 868 (1987), no case has established "a per se Fourth Amendment requirement of probable cause, or even a lesser degree of individualized suspicion, when government officials conduct a limited search for

the purpose of ascertaining and recording the identity of a person who is lawfully confined to prison." Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992)), cert. denied, 113 S. Ct. 472 (1992). Nonetheless, a search that may be undertaken without a warrant must be reasonable in order to comply with the dictates of the Fourth Amendment. Id. at 307. The reasonableness of taking a specimen from petitioner under these circumstances is determined by balancing petitioner's privacy interest against the government's interest in establishing and maintaining a DNA data bank. Id.

Generally, DNA analysis involves the evaluation of blood cells. Id.; see, e.g., United States v. Bonds, 12 F.3d 540, 550 (6th Cir. 1993). The United States Supreme Court has stated repeatedly that the privacy interest infringed by a blood test is minimal because the intrusion caused by the taking of a blood sample is "not significant." See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); Winston v. Lee, 470 U.S. 753, 761 (1985); Schmerber v. California, 384 U.S. 757, 771 (1966). From other cases filed in this court by Supermax inmates, see e.g., Williams v. Berge, 01-C-284-C, I take judicial notice of the fact that the DNA analysis performed at Supermax involved the evaluation of skin and saliva cells collected from the mouth and cheek. Several courts, including this one, have found that blood and saliva DNA testing require the same constitutional analysis and have held that the taking of a saliva sample does not violate an inmate's Fourth Amendment right to privacy. See Shelton v. Gudmanson, 934 F. Supp. 1048 (W.D. Wis. 1996)

(swabbing cheek of sex offenders for DNA data bank did not violate Fourth Amendment); Schlicher v. (NPN) Peters, I & I, 103 F.3d 940 (10th Cir. 1996) (collection of blood and saliva samples from inmates convicted of certain offenses did not constitute unreasonable search and seizure); Vanderlinden v. State of Kansas, 874 F. Supp. 1210 (D. Kan. 1995) (collection of blood and saliva specimens from certain convicted felons not unconstitutional intrusion on inmates' privacy interests).

In this case, petitioner alleges that collecting a sample of cells from the cheek violates his Fourth Amendment privacy interests. In Shelton, 934 F. Supp. at 1051, the inmate plaintiff made a similar claim, with the only difference that DNA samples were collected from inmates convicted of sex crimes only. In Shelton, I found that the state had demonstrated that Wisconsin's interest in the DNA data bank as to sex offenders was similar to that of the states in which such banks had been upheld against constitutional challenge. In particular, I found that "the government had a significant interest in maintaining a permanent identification record of convicted felons for resolving past and future crimes; the intrusion was minimal; the inmates had only a very limited privacy interest at stake; and the sampling was carried out pursuant to state regulations that required the testing of every inmate falling within a certain category, thus ensuring that arbitrary testing decisions would not be made." Id. Because these same interests apply to this case in which petitioner challenges the state's collection of DNA samples from all

Supermax inmates, I conclude that petitioner fails to state a claim upon which relief may be granted on his Fourth Amendment claim for the right to privacy and reasonable search and seizure. Petitioner's request for leave to proceed in forma pauperis on this claim will be denied for failure to state a claim.

F. Eighth Amendment: Failure to Protect

Petitioner alleges that respondents violated his Eighth Amendment rights by failing to protect him from harm when they placed him in a cell in which the intercom was not working during a time in which he was fasting. The Eighth and Fourteenth Amendments give prisoners a right to remain safe from assaults by other inmates. See Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). "'[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' see Hudson v. Palmer, 468 U.S. 517, 526 (1984), having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833. I understand petitioner to argue that this right should encompass prison officials' duty to protect an inmate from harming himself.

In a case alleging a defendant's failure to protect a prisoner from harm, "[t]he inmate

must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. Farmer, 511 U.S. at 847. The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. Id. at 208. In failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

In this case, petitioner alleges only that he was fasting and that respondents placed him in a cell in which the intercom was not working. Even assuming that respondents knew that petitioner was fasting and that the intercom was not functioning properly, petitioner has alleged no facts supporting the conclusion that respondents were deliberately indifferent

to his safety. First, it must be noted that petitioner was choosing to fast and, therefore, placed himself in harm's way. In addition, petitioner does not allege that prison staff never came to the cell, only that he was not able to call prison staff on the intercom. Finally, petitioner was moved to a different cell after ten days because he complained about the intercom. Without facts supporting his contention, petitioner's claim that respondents failed to protect him from harm does not raise a viable Eighth Amendment claim. Petitioner's request to proceed in forma pauperis on this claim will be denied because the claim is legally frivolous.

G. Fifth Amendment: Equal Protection

The equal protection clause of the Fifth Amendment prohibits state actors from applying different legal standards to similarly situated individuals because of their membership in a suspect class or "definable minority" or because of the exercise of a fundamental right. Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996); see also Smith on behalf of Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997). If a petitioner demonstrates he has been treated differently from similarly situated persons because of his membership in a suspect class or the exercise of a fundamental right, the court applies heightened scrutiny to the constitutionality of the act or statute. Nabozny, 92 F.3d at 454. However, "when reviewing class distinctions drawn in social legislation not pertaining to

a fundamental right or a suspect class, '[a court's] review is limited to determining whether the statute is rationally related to legitimate legislative goals.'" Hassan v. Wright, 45 F.3d 1063, 1068 (7th Cir. 1995) (quoting Lindley for Lindley v. Sullivan, 889 F.2d 124, 132 (7th Cir. 1989)).

The equal protection clause does not prohibit governmental actors from making distinctions between individuals on the basis of race in all instances. It does provide, however, that all racial classifications imposed by federal, state or local governmental actors are subject to the strict scrutiny of a reviewing court. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (plurality opinion). Pursuant to this strict scrutiny, racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. Id.

Petitioner alleges that respondents violated his equal protection rights in many ways. He alleges that respondents Blackbourn and Richardson violated his rights by finding him guilty of a conduct report, respondent Doe by denying him exercise, respondent Finnel by writing him two conduct reports, respondents Govier and Eck by taking his legal papers, respondent Ray by not returning legal evidence, respondent Boughton by placing him in a cell in which the intercom was not working, respondent Hasselhof by not providing him with adequate medical care and respondent Litscher by transferring him to Supermax. In most of these contentions, petitioner, who is black, states in a conclusory manner that these

incidents happened to him because he is a black Cuban. These bald assertions are unsupported by any factual allegations. In all but one allegation, petitioner does not state any facts that suggest that respondents treated him differently from other similarly situated persons because of his race. Instead, in most instances, it appears that petitioner is taking issue with the underlying conduct itself. Petitioner's dissatisfaction with respondents' acts does not implicate an equal protection violation absent any supporting factual evidence.

In one of his allegations, petitioner refers to one similarly situated individual who was treated differently, allegedly on the basis of race: he alleges that respondent Finnel wrote petitioner two conduct reports when they should have been written to inmate Kissinger, who is white. However, like petitioner's other allegations, this allegation is a bald assertion. Without any details or further explanation, petitioner concludes that respondent wrote him the conduct report because he is black. He does not provide any information about why inmate Kissinger should have been written the report, or why petitioner should not have been written the report. As in his other allegations, petitioner fails to state a claim upon which relief may be granted; his bald assertions are unsupported by any factual allegations. Accordingly, petitioner will be denied leave to proceed on his equal protection claim on the basis of race because the claim is legally frivolous.

H. State Law Claims

Petitioner alleges that respondents violated various state laws by refusing to allow petitioner's friend to visit him, by not providing him with an adequate advocate under Wis. Admin. Code § DOC 303.78(2) and by harassing him because had an interview with the Wisconsin Sheriff's Department. These state law claims are based on different facts and involves different respondents from the First Amendment free exercise of religion and free expression claims on which I am granting petitioner leave to proceed. The state law claim does not form part of the same case or controversy as the First Amendment claims. See 28 U.S.C. § 1367(a) (district courts have supplemental jurisdiction over claims so related to claims in action that they form part of same case or controversy). Accordingly, I decline to exercise supplemental jurisdiction over petitioner's state law claims.

ORDER

IT IS ORDERED that

1. Petitioner Rodosvaldo's request for leave to proceed in forma pauperis is GRANTED on his First Amendment claim for the free exercise of religion against respondents Brad Hompe and Sgt. Huibregtse and on his First Amendment claim for the freedom of expression against respondents Gerald Berge, Capt. Blackbourn and Capt. Richardson.

2. Petitioner's request for leave to proceed is GRANTED on his Eighth Amendment

conditions of confinement claim against respondents Gerald Berge and Jon Litscher and on his Eighth Amendment inadequate medical care claim against respondents Berge and Litscher; however, the proceedings relating to the merits of the claims are STAYED until this court has ruled on the constitutionality of the alleged conditions at Supermax in Jones 'El v. Berge, No. 00-C-421-C. If, in their answer to the complaint, respondents address petitioner's Eighth Amendment claims, the proceedings relating to the two claims will be stayed automatically without further order. However, if respondents exercise their right to file a motion permitted under Fed. R. Civ. P. 12 that does not go to the merits of petitioner's Eighth Amendment claims, the court will schedule briefing on the motion.

3. Petitioner's request for leave to proceed is DENIED on his claims for denial of access to the courts and unreasonable search and seizure for failure to state a claim.

4. Petitioner's request for leave to proceed is DENIED on his claims for due process, failure to protect and equal protection because the claims are legally frivolous.

5. Petitioner's request for leave to proceed is DENIED on his state law claims because I decline to exercise supplemental jurisdiction over them.

6. Respondents Vicki Sharpe, All Nurses Jane Does, Sgt. Juntsen, Kelly Coon, Sgt. Kufmauss, Sgt. Sickinger, Julie Giggar, Psychologist Christine Apple, Security Director Boughton, c/o Pinnel, Tim Haines, John Sharpe, John Does 1-50, Dr. Gert Husselhof, Ellen Ray, Ms. Duesterbeck, Joann Govier, c/o Eck and Nurse Ms. Renee are DISMISSED from

this case.

7. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers; and

8. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 19th day of February, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge