IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID L. SHANKS, JR.,

Petitioner, Order

v. 02-C-0064-C

JON LITSCHER, GERALD BERGE,
KYLE DAVIDSON, DOES 1-100,

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 David L. Shanks Jr., 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 Fourteenth Amendment right to due process, his First Amendment right to free expression, his Fourteenth Amendment right to equal protection of the laws 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 the initial partial payment required under § 1915(b)(1).

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'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 conditions of his confinement and systemic inadequacies in the provision of dental care at Supermax violate his Eighth Amendment rights. Petitioner will denied leave to proceed on his Eighth

Amendment failure to protect claim and First Amendment freedom of expression claim for failure to state a claim on which relief can be granted. Petitioner will be denied leave to proceed on his claim that he was denied due process in his transfer to Supermax, at his disciplinary hearing at Prairie du Chein Correctional Institution and in the administration of the "level system" at Supermax because the claim is legally frivolous. He will also be denied leave to proceed on his denial of access to the courts and equal protection claims because the 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 David L. Shanks Jr. is an inmate at Supermax Correctional Institution. Respondent Gerald Berge is a warden at Supermax. Respondent Kyle Davidson is the warden at Prairie Du Chien Correctional Institution, where petitioner was incarcerated before his transfer to Supermax. Respondent John Litscher is Secretary of the Department of Corrections for the state of Wisconsin. John Does 1-100 are individuals whose identities are unknown.

B. Eighth Amendment: Conditions of Confinement

As an inmate at Supermax, petitioner is subjected to almost total social isolation and sensory deprivation. Petitioner is permitted to leave his cell for a total of only four hours a week. The cell is made of concrete, with a solid metal door. There are no windows. Petitioner is permitted to spend four hours a week in the recreation cell. The recreation cell also has concrete walls, no windows, a solid metal door and a single pole. There is no exercise equipment. Petitioner was told in June 2001 that Supermax would be getting exercise equipment for each recreation cell, but none has arrived. The recreation cell is exposed to outdoor temperatures. During the winter, petitioner often refuses to go to the cell due to the extreme cold. During the summer, the heat often prevents any activity.

Temperatures in petitioner's cell also vary widely during the year. In the summer months, petitioner is in a state of perpetual perspiration which causes heat rash on his skin. The walls and toilet of the cell sweat. The bed linens are constantly wet with sweat which causes petitioner to lose sleep. In the winter months, petitioner's feet feel frozen even while he is wearing socks and shoes. Petitioner sleeps fully clothed under two blankets, which is still inadequate to keep out the cold. Petitioner bundles up in bed for such long periods of time that he suffers from severe muscle deterioration. The cold temperatures have twice made petitioner ill and they cause petitioner physical and psychological injury.

Lights are left on in petitioner's cell twenty-four hours a day. This gives petitioner

headaches and causes him sleep deprivation. Petitioner is forced to take Amitriptyline to get any sleep. Petitioner is not permitted to cover his eyes to block the light.

C. Eighth Amendment: Inadequate Dental Care

Dental care at Supermax is systemically inadequate because of respondent's failure to provide adequate staff resources. On June 3, 2001, petitioner submitted a request slip to see the dentist because of excruciating pain in his mouth. On July 31, 2001, petitioner was informed that he had been placed on the waiting list. On September 6, 2001, petitioner saw the dentist. At that time, the dentist told petitioner that he was hired in July and that no one had been working in dental services for a time before his hiring. Petitioner had nine cavities and two wisdom teeth that needed to be removed. Petitioner was told he could have only four cavities filled or the wisdom teeth removed because there were other inmates the dentist needed to treat. Petitioner asked for pain medication, but was not given any. Petitioner was told that he would have to go back on the waiting list before getting any more work done.

Petitioner requested dental care immediately and was placed on the waiting list. On September 8, petitioner was given 400 milligrams of ibuprofen for his pain. On September 16, 19, and 20, 2001, petitioner submitted requests for additional pain treatment since the ibuprofen was not working. His inmate complaint was rejected.

On September 24, 2001, petitioner was allowed to see the dentist again. Petitioner was again forced to choose between having cavities filled or his wisdom teeth removed. The wisdom teeth were removed. Petitioner again filed an inmate complaint about the lack of dental care and his pain. That complaint was held for a month and dismissed. Petitioner was in so much pain that he was afraid to eat or drink and he could not sleep. Petitioner requested pain medication on September 28, October 4 and October 5, 2001. Petitioner was given medication on October 6, 2001. On October 10, 2001, petitioner filed a request indicating that the ibuprofen was not working. Petitioner received no response.

On December 3, 2001, petitioner was allowed to see the dentist again. Petitioner was told he had five cavities remaining, but that only two would be filled. Petitioner told the dentist how much pain he was in, but was told that there was no time to fill all five cavities. Petitioner was told to go back on the waiting list for his remaining three cavities. At the filing of his complaint, petitioner had not yet received treatment for the remaining cavities.

D. Fourteenth Amendment: Equal Protection

On March 27, 2001, at Prairie Du Chien Correctional Institution, petitioner got into an altercation with fellow inmate Daniel Graham. Graham attacked petitioner, who fought back. Graham suffered a broken jaw during the fight. According to the conduct report written after the incident, petitioner grabbed a metal crutch from another inmate, swung it

at corrections officers and held them at bay for a few moments before surrendering to officers who were attempting to remove him to segregation. On April 6, 2001, as a result of a disciplinary hearing, petitioner was sentenced to 368 days of punitive segregation and was transferred to Supermax.

On or about July 10, 2001, petitioner received a criminal charge for battery by a prisoner. During discovery regarding that criminal charge, petitioner obtained Graham's conduct report for the incident. The report indicated that Graham admitted to pushing and head-butting petitioner, which "caused a major disruption as a fight broke out and inmate Graham sustained a broken jaw." The report also showed that Graham had previously been found guilty of similar offenses. Graham received 180 days of punitive segregation. Under Prairie du Chien Correctional Institution's punitive segregation step program, Graham would spend only half of the 180 days in punitive segregation. At Supermax, there is no similar program and petitioner would spend the full 368 days in punitive segregation. This would extend petitioner's incarceration by 6 months or half the length of his stay in punitive segregation, whereas Graham's sentence would be lengthened by only 45 days. In addition, petitioner was eventually convicted of battery and was sentenced to an additional 5 months incarceration. Petitioner, who is an African-American, believes he was treated differently from Graham, who is white.

E. Fourteenth Amendment: Due Process

1. Transfer to Supermax

Petitioner was transferred to Supermax without due process. He was transferred from a medium security institution shortly after arriving in the system. The conditions at Supermax are much more severe than they were at petitioner's previous institution, resulting in a loss of recreational opportunities, visitation rights, phone privileges, educational and vocational programs and the segregation step program. Petitioner does not meet the criteria for being housed at Supermax. Petitioner was a non-violent offender and had no history of assaultive conduct before the incident on March 26, 2001, which began when he was attacked.

2. Supermax's "level system"

The "level system" is punitive in nature. At Supermax, petitioner must earn back the privileges that were taken from him at transfer. Petitioner must go thirty days on level one, which is the lowest level. Petitioner is not allowed any books, magazines, pictures or any other personal property other than paper, envelopes and state-issued soap, toothbrush and toothpaste. Petitioner is permitted a few more properties on level two, but must spend ninety days on level two before advancing to level three. No family or personal visits are permitted except by video camera. Face to face visits are not permitted until petitioner

advances to level five, which may never happen.

F. Denial of Access to the Courts

The law library at Supermax is deficient. Some of the books have pages missing. Most of the books lie on the floor of the cell that houses the library. Petitioner is handcuffed, shackled and bound at the waist throughout his time in the library, which makes it difficult to write or even pick the books up off the floor. When petitioner does write, he feels excruciating pain in his wrist due to the restraints. Petitioner is allowed only one ink pen and one sheet of paper during the visits to the library.

While petitioner was trying to prepare a defense for his battery by a prisoner charge, he received no opportunity to prepare adequately because of the way the library is operated. On September 11, 2001, petitioner went to a status conference hearing regarding the charge. He tried to take a legal book with him to court at the request of his attorney. Petitioner was not allowed to take the book with him. Petitioner was convicted of the criminal charge.

Petitioner is allowed only one hour of law library time a week, which is then subtracted from his four hours of recreation time. This forces petitioner to choose between going to recreation and working on his legal problems.

G. Failure to Protect: Fire

There are no fire sprinklers in petitioner's cell at Supermax. No plan for escape is provided. At least four solid metal doors bar petitioner's escape should such a fire occur. When the fire alarms go off, the hallway doors slam close and an officer places handcuffs on the door to secure it. Defendants have acted deliberately and indifferently to petitioner's safety.

H. First Amendment: Mail Correspondence

Petitioner's outgoing mail is read for no reason at all. Petitioner is not allowed to seal his outgoing mail and if he does so, it is returned. Petitioner once wrote a letter to Money, Education and Prisons asking for aid in filing a lawsuit against Supermax officials. The letter was returned with a note reading: "you can't solicit gifts."

I. State Law Claims

1. Disciplinary hearing

On April 6, 2001, petitioner received a copy of his conduct report for the fight that occurred on March 27, 2001. The disciplinary hearing took place that same day in violation of Wisconsin Administrative Code § DOC 303.76.

2. Transfer to Supermax

_____Plaintiff was transferred to Supermax on April 6, 2001, in violation of Wisconsin Administrative Code § DOC 302.20 which governs inter-institution transfers. Respondent Kyle Davidson gave approval to the transfer and he is not the classification chief.

3. Failure to record the reading of outgoing mail

_____Petitioner's outgoing mail is read by Supermax officials but they do not keep a record in violation of Wisconsin Administrative Code § DOC 309.04.

DISCUSSION

A. Eighth Amendment: Conditions of Confinement

I understand petitioner to allege that respondents Litscher, Berge and Does 1-100 violated his rights under the Eighth Amendment by subjecting him to cruel and unusual conditions of confinement at Supermax. Petitioner alleges that the following make up the unconstitutional conditions: extremely low and high cell temperatures; 24 hour a day lock-down; 24 hour a day illumination; a lack of windows in his cell and the recreation cells; limited opportunities for use of exercise cells; and a lack of exercise facilities.

In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both a subjective and objective component. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component

focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "'implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)).

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. See Dixon, 114 F.3d at 642. In order to violate the Eighth Amendment, deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

Taken individually, petitioner's allegations describe conditions that are harsh and uncomfortable but are not sufficient to violate the Eighth Amendment. However, regardless of the merit of petitioner's individual claims, the determination whether prison conditions violate the Eighth Amendment requires a court to consider the totality of the conditions of

confinement, considering things such as security and feasibility as well as the length of confinement. See Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997); DeMallory v. Cullen, 855 F.2d 442, 445 (7th Cir. 1988). The rationale for examining the prisoner's conditions as a whole is that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth or exercise -- for example, a low cell temperature at night combined with a failure to issue blankets." Wilson v. Seiter, 501 U.S. 294, 304 (1991).

Because petitioner's allegations of total isolation and sensory deprivation coupled with inadequate physical activity may violate "contemporary standards of decency," Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986), petitioner may proceed in forma pauperis on his conditions of confinement claim against respondents Litscher and Berge, who are presumed to be aware of and responsible for the conditions of confinement at Supermax.

B. Eighth Amendment: Inadequate Dental Care

I understand petitioner to allege that respondents Berge, Litscher and Does 1-100 violated his Eighth Amendment right to adequate dental care by administering a dental care system in which petitioner was forced to wait three months for an initial examination and

treatment after he complained of mouth pain and was forced to spread his treatments over several months.

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim warranting constitutional protection, a plaintiff must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Estelle, 429 U.S. at 104; see also Gutierrez, 111 F.3d at 1369. Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. See id. at 1371. The Supreme Court has held that deliberate indifference requires that "the official must be both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837.

To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Inadvertent error, negligence, gross negligence or even ordinary

malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 987, 97 F.3d at 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91; Franzen, 780 F.2d at 652-53.

In this case, petitioner alleges that as a result of the systemic inadequacies, he suffered months of extreme pain and loss of sleep. He alleges that he received pain medication on only two occasions despite his repeated requests and complaints that he was in pain. These allegations are sufficient to establish a serious medical need.

Although he was forced to wait months, petitioner eventually received treatment for his wisdom teeth that needed to be extracted and for six of his nine cavities. Because petitioner did receive treatment and the majority of his needs were addressed, he fails to state a claim that respondents were deliberately indifferent to his serious medical needs. However, petitioner's allegations encompass more than his individual treatment; he alleges that the entire dental system at Supermax is inadequate, implying that his own situation is only one example of the system's deficiencies. Petitioner also alleges that dental services is understaffed and that the dentist did not have time to treat all of his problems at one appointment. Petitioner alleges that there was no dentist at Supermax for some time before a dentist was hired in July 2001. Petitioner's allegations suggest that many inmates must wait a lengthy amount of time and must divide their treatment among several visits as a result of the staff shortage. These allegations may indicate that those respondents who are

responsible for the dental services, respondents Litscher and Berge, were deliberately indifferent to inmates' serious medical needs. Petitioner's request for leave to proceed in forma pauperis will be granted on his claim of systemic inadequate dental care against respondents Litscher and Berge.

C. 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). If a petitioner demonstrates he has been treated differently from similarly situated persons because of his membership in a suspect class or his exercise of a fundamental right, the court applies heightened scrutiny to the constitutionality of the act or statute. Id. at 454. Petitioner alleges that respondents violated his equal protection rights by giving inmate Graham, who petitioner maintains started their fight, 180 days' punitive segregation yet he received 368 days and was transferred to Supermax. Petitioner argues that his eventual prosecution and conviction for battery is a further violation of his equal protection rights because Graham was never charged. Inmate Graham is white and petitioner is an African-American.

Petitioner's claim fails because he is not similarly situated to Graham. Though

Graham was involved in the altercation and apparently started it, petitioner's actions in the incident broke Graham's jaw, whereas petitioner does not allege that he was injured. In addition, according to the conduct report, petitioner then grabbed a metal crutch from another inmate, swung it at corrections officers and held them at bay for a few moments before surrendering to officers who were attempting to remove him to segregation. On the basis of the severity of the injury to Graham and the actions of petitioner immediately following the fight, it is clear that petitioner was treated differently from Graham not because of his membership in a suspect class but because his actions during the altercation were more violent than those of Graham. Though petitioner believes he was treated more harshly because he is an African-American, this is a bald assertion unsupported by the facts included in the complaint. Petitioner will be denied leave to proceed on his equal protection claim because his claim is legally frivolous.

D. 14th Amendment: Due Process

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).

1. Transfer to Supermax

Petitioner alleges that he was not provided any due process in connection with his transfer to Supermax where the conditions are severe. 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 request for leave to proceed on this claim will

be denied because the claim is legally frivolous.

2. The "level system"

Petitioner alleges that the level system at Supermax violates his right to due process. Petitioner argues that the level system is punitive in nature and that he should not have to earn privileges because he has done nothing wrong.

A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin, 515 U.S. at 483-484, the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty).

The level system and the related increase or decrease in canteen, visitations, telephone and recreational facility use at Supermax do not implicate a liberty interest. Under Sandin,

these alleged losses do not impose atypical and significant hardships on plaintiffs; they do not create a loss in good time credits or otherwise lengthen an inmate's sentence. Petitioner will not be allowed to proceed on his due process claim relating to the level system because the claim is legally frivolous.

3. Disciplinary hearing on the assault

I understand petitioner to allege that respondent Davidson violated his due process rights when he gave petitioner inadequate notice of his disciplinary hearing. Again, a claim that government officials violated the due process clause requires proof of both inadequate procedures and interference with a liberty or property interest. Thompson, 490 U.S. at 460. As with petitioner's challenge to the level system and his transfer to Supermax, he fails to allege interference with a protected liberty interest. After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). To the extent that petitioner alleges that he was sentenced to 368 days in punitive segregation, respondent's alleged failure to provide petitioner adequate notice of his disciplinary hearing does not amount to a violation of his

due process rights because it does not interfere with a protected liberty interest. Petitioner will be denied leave to proceed because the claim is legally frivolous.

Although it is not clear from the allegations, petitioner may be asserting that his due process rights were violated at the disciplinary hearing, resulting in an extension of his incarceration by six months. To the extent that petitioner might be challenging the fact of his imprisonment, he must file a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Under Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973), a petition for habeas corpus under 28 U. S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." Heck v. Humphrey, 512 U.S. 477, 481 (1994). The Court of Appeals for the Seventh Circuit has held that "when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice" rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477). Thus petitioner's allegations as to this claim must be denied without inquiring into their merits. If petitioner wishes to challenge the validity of his confinement, he may file a petition for habeas corpus pursuant to 28 U.S.C. § 2254 after exhausting available state court remedies if he wishes to challenge the validity of his confinement.

E. Denial of Access to the Courts

I understand petitioner to allege that respondents have impeded his right of access to the courts by not allowing him to take a legal book ("the Citebook") to court, by keeping him in handcuffs and shackles while in the law library, by maintaining an inadequate law library and by restricting use of the library to one hour a week.

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 relating to the use of legal materials and the law library. Despite the large number of allegations, petitioner fails to show an actual denial of access to the courts. The allegations do not suggest that petitioner was prevented from litigating a nonfrivolous case. Petitioner states that he was convicted of battery to a prisoner and he makes conclusory statements that he could not prepare a defense "due to the way [Supermax] law library is operated." Yet petitioner had the aid of a lawyer for the case. By providing petitioner with counsel, the state fulfilled its obligation to insure meaningful access. Thus, petitioner's request for leave to proceed on his claim that respondents violated his right of access to the courts by maintaining an inadequate library, restricting his access and refusing to permit him to take a legal book to court will be denied as legally frivolous.

Petitioner also alleges that a letter in which he requested legal aid from a private organization was returned to him by Supermax officers. Construing the complaint liberally, I understand petitioner to allege that this was also a denial of access to the courts. However, petitioner fails to allege actual injury; petitioner does not allege that his inability to contact Money, Education and Prisons prevented him from litigating a nonfrivolous case. Petitioner

will be denied leave to proceed on this claim for denial of access to the courts because this claim is legally frivolous.

F. Failure to Protect

I understand petitioner to allege that respondents have violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to protect him from fire: there is inadequate fire protection equipment; the “box-car” doors in the hallway close and are hand-cuffed by guards during fire alarms; and there is no plan for prisoners to exit should a fire emergency occur.

Punishments are repugnant to the Eighth Amendment if they are incompatible with the "evolving standards of decency that mark the progress of a maturing society." Estelle, 429 U.S. at 102. "Deliberate indifference" is the appropriate standard for all conditions of confinement claims. Wilson v. Seiter, 501 U.S. 294, 298 (1991). Under this standard, a deprivation must be objectively serious enough to violate the Eighth Amendment and prison officials must have acted with deliberate indifference to the inmate's constitutional rights. Id. at 2324, 2326.

The Seventh Circuit has interpreted "deliberate indifference" to require a plaintiff to show that any infliction of suffering by prison officials is "either deliberate, or reckless in the criminal law sense." Franzen, 780 F.2d at 653. Gross negligence is not enough. Id.

According to the court, "punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." Id.

In and of itself the lack of fire safety procedures does not in and of itself rise to the level of a constitutional violation. In French v. Owens, 777 F.2d 1250 (7th Cir. 1985), the plaintiff alleged that a prison in which he was confined did not meet fire and safety standards in violation of his constitutional rights. The plaintiff cited Occupational Safety and Health Administration standards as a guide for alleging the constitutional violation. The court held that although fire and safety are legitimate concerns under the Eighth Amendment, "not every deviation from ideally safe conditions constitutes a violation of the Constitution." Id. at 1250.

In this case, petitioner's allegations about the absence of sprinklers, the closed and locked doors and the lack of a fire plan are objectively serious enough to violate the Eighth Amendment. However, petitioner's allegations are insufficient to meet the deliberate indifference standard. Like the failure to adhere to OSHA standards in French, the absence of sprinklers and the locked doors alone are not sufficient to make out deliberate indifference simply because they amount to deviations from ideally safe conditions. Petitioner's allegation that there is no plan of exit in case of a fire emergency is mere speculation. There are any number of situations that cause a fire alarm to sound and the fact that, in past

instances, petitioner was not removed from his cell and taken to a safe area does not indicate that there is no plan of exit in an emergency. The cause of the alarms petitioner mentions is unknown. Petitioner does not allege that an actual fire took place near or in his cell, which would support his allegation that no plan of exit exists because he was not removed from the area. The fact that the "box-car" doors in the hallway close during alarms may actually demonstrate concern for inmate safety since closed doors can prevent the spread of fires and smoke into areas where prisoners are held. In any event, the closed and locked doors and the absence of sprinklers do not indicate the absence of a plan of inmate exit or demonstrate deliberate indifference. Petitioner will be denied leave to proceed on this claim for failure to state a claim on which relief can be granted.

G. First Amendment: Inmate Mail

Petitioner alleges that respondents are violating his First Amendment right of freedom of expression by reading his outgoing mail and refusing to mail it in one instance. 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). As a general rule, inmate mail can be opened and read outside the inmate's presence. Martin v. Brewer, 830

F.2d 76, 77 (7th Cir. 1987). 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).

Legal mail may be subject to somewhat greater protection. Although prison officials may open a prisoner's legal mail in his presence, Wolff v. McDonnell, 418 U.S. 539, 577 (1974), repeated instances of opening a prisoner's legal mail outside his presence are actionable. Antonelli v. Sheahan, 81 F.3d 1422, 1431-32 (7th Cir. 1996) (allegations that legal mail was repeatedly opened and sometimes stolen stated claim); Castillo v. Cook County Mail Room Dept., 990 F.2d 304, 306-07 (7th Cir. 1993) (allegations that prisoner's legal mail was opened outside his presence stated claim). However, not all legal mail warrants added protection. The extra protections afforded legal mail are reserved generally for privileged correspondences between inmates and their attorneys. Wolff, 418 U.S. at 574; Antonelli, 81 F.3d at 1432. In this instance, petitioner alleges that the letter that was read and returned to him was to Money, Education and Prisons, a private group, rather than a lawyer or government agency. As a result, this letter does not benefit from the heightened protection given legal mail. Petitioner's rights were not violated when the mail was read. Returning the letter to petitioner is also permitted if it serves a legitimate prison interest. Turner, 482 U.S. at 89. Petitioner's own allegations indicate the legitimate prison interest: the letter was returned because it was seen as a solicitation of a gift from a party unrelated

to petitioner. This is a legitimate prison interest that promotes order and security. Petitioner will be denied leave to proceed on his First Amendment claim for failure to state a claim on which relief could be granted.

H. State Law Claims

Petitioner alleges that respondents violated various provisions of the Wisconsin Administrative Code by not keeping a record of any mail that is read, by holding a disciplinary hearing on the same day petitioner was given notice of the hearing and by failing to secure the approval of the classification chief petitioner's transfer to Supermax. Under 28 U.S.C. § 1367(a), district courts have supplemental jurisdiction over claims that are so related to the other claims in the action that they form part of same case or controversy. Since these claims are insufficiently related to the facts underlying the claims on which he has been granted leave to proceed, I decline to exercise supplemental jurisdiction over his state law claims under 28 U.S.C. § 1367(a).

ORDER

IT IS ORDERED that

1. Petitioner David L. Shanks Jr.'s request for leave to proceed in forma pauperis is GRANTED on his Eighth Amendment conditions of confinement claim against respondents

Gerald Berge and Jon Litscher and on his Eighth Amendment claim of systematically inadequate dental care against respondents Berge and Litscher.

2. Petitioner's request for leave to proceed is DENIED on his claims for denial of access to the courts, equal protection and due process because the claims are legally frivolous.

3. Petitioner's request for leave to proceed on his claims for failure to protect and First Amendment freedom of expression is denied for failure to state a claim on which relief can be granted.

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

5. Respondents Kyle Davidson and John Does 1-100 are DISMISSED from this case.

6. 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

7. The unpaid balance of petitioner's filing fee is $145.00; 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 15th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge