IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FAULKNER, #244067,

Plaintiff, ORDER

v. 04-C-409-C

JON LITSCHNER, Former Sec. WI. D.O.C.;
DANIEL BENICK, Former Warden, C.C.I.;
MIKE MARSHALL, Social Worker, C.C.I.;
DR. BRIDGEWATER, M.D., C.C.I.;
FRED FIGUEROA, Former Warden, Whiteville Corr. Facility;
MS. POLK, Social Worker, Whiteville;
MS. RIVERS, Officer, Whiteville Corr. Facility;
JOSEPH OROSCO, #335933, Former Inmate, Whiteville
Corr. Facility;
ALL UNNAMED WHITEVILLE STAFF;
ALL UNNAMED WHITEVILLE SECURITY
PERSONAL/DIRECTORS; and
ALL WI D.O.C. PERSONAL WITH INTERSTATE TRANSFERS,

Defendants.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff William Faulkner, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, alleges that defendants subjected him to an unreasonable risk of serious harm by failing to prevent him from being assaulted by another

inmate.

Although plaintiff has paid the filing fee in full, because he is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. 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.

Because plaintiff had the option of being placed in segregation to protect him from assault, I conclude that he cannot prove that defendants were deliberately indifferent to his safety. Plaintiff's claim will be dismissed for failure to state a claim upon which relief may be granted.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff William Faulkner is an inmate at the Stanley Correctional Institution in Stanley, Wisconsin. Formerly, plaintiff was incarcerated at the Whiteville Correctional Facility in Whiteville, Tennessee and in the Columbia Correctional Institution in Portage, Wisconsin.

In July 2001, plaintiff was in the Whiteville prison. He complained to defendant Polk that he was afraid of being attacked by gang members. Polk gave him the option of staying in his cell or being transferred to segregated confinement.

On July 24, 2001, Joseph Orosco, another inmate, entered plaintiff's cell and began to beat him. The assault "was going on right in front of the guards knowledge." The guards knew what gang members were doing to older inmates like plaintiff but did nothing to stop it. As a result of the assault, plaintiff lost part of his eyesight. He has a metal plate in his eye socket holding in his eye.

DISCUSSION

I understand plaintiff to contend that defendants violated their duty to protect him from serious harm when they failed to prevent his assault. Farmer v. Brennan, 511 U.S. 825 (1994) (prison officials may be liable for failing to stop inmate assault if they were deliberately indifferent to prisoner's safety); see also Washington v. LaPorte County Sheriff's Department, 306 F.3d 515 (7th Cir. 2002) ("prison officials have a duty to protect inmates from violence at the hands of other inmates"). Plaintiff's claim has a number of problems, but I need focus only on one. Plaintiff concedes in his complaint that defendant Polk offered to place him in segregation to protect him from a potential gang-related attack. Understandably, plaintiff may have believed this choice was an unfair one, but unfortunately

for plaintiff, the Eighth Amendment does not require prison officials to protect an inmate in the way that causes him the least inconvenience. Rather, officials comply with their constitutional mandate if they find *some* way to keep the inmate from serious harm.

If plaintiff had accepted defendant Polk's offer to be placed in segregation, he would have been less comfortable, but he would have been safe from an inmate assault. Plaintiff does not allege that the conditions in segregation were so poor that placing him there would have subjected him to a substantial risk of serious harm. Further, the Court of Appeals for the Seventh Circuit has recognized that placing at-risk inmates in segregation is a common and acceptable way of averting an attack. Case v. Ahitow, 301 F.3d 605 (7th Cir. 2002) (citing Babcock v. White, 102 F.2d 267, 269 (7th Cir. 1996); Curley v. Perry, 246 F.3d 1278, 1282 (10th Cir. 2001); Hamilton v. Leavy, 117 F.3d 742, 747-48; Hosna v. Groose, 80 F.3d 298, 301 (8th Cir. 1996)). Accordingly, plaintiff's claim will be dismissed for failure to state a claim upon which relief may be granted.

Plaintiff has named as a defendant Joseph Orosco, the inmate who attacked him. Although plaintiff may not sue Orosco under § 1983, he may have a state law tort claim against him. Because I am dismissing plaintiff's federal claim, I decline to exercise supplemental jurisdiction over his state law claim. Instead, I will dismiss plaintiff's state law

claim without prejudice to his refiling it in state court.

ORDER

IT IS ORDERED that

1. Plaintiff William Faulkner is DENIED leave to proceed under 28 U.S.C. § 1915A on his claim that defendants Jon Litschner, Daniel Benick, Mike Marshall, Dr. Bridgewater, Fred Figueroa, Ms. Polk, Ms. Rivers, Joseph Orosco, "All unnamed Whiteville staff," "All unnamed Whiteville Security Personal/Directors" and "All WI D.O.C. Personal with Interstate Transfers" failed to protect him from an inmate assault, in violation of his right to be free from cruel and unusual punishment. This claim is DISMISSED for failure to state a claim upon which relief may be granted.

2. I decline to exercise supplemental jurisdiction over plaintiff's state law claim against defendant Joseph Orosco. This claim is DISMISSED without prejudice to plaintiff's refiling it in state court.

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because plaintiff's state law claim is part of the action and the court did not dismiss those claims for one of the reasons enumerated in § 1915(g), a strike will not be recorded against plaintiff under § 1915(g).

4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 27th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge