IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DANIEL R. WILLIAMS,

ORDER

Petitioner,

04-C-0774-C

v.

HELENE NELSON, Secretary, Wisconsin Department of Health and Family Services, STEVE WATTERS, Director, Sand Ridge Secure Treatment Center, DAVID THORTON, Treatment Director SRSTC, STEVE SCHNEIDER, Security Director SRSTC and DR. WILLIAM AEYTEY, Psychiatrist SRSTC,

Respondents.

- -

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner Daniel R. Williams is presently detained by the State of Wisconsin at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin, as a patient pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stat. ch. 980. He alleges violations of his federal constitutional rights and rights under state law in connection with his confinement and treatment as a chapter 980 patient. He 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. In addition to his complaint, petitioner has submitted a motion for the appointment of counsel. 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. Because he is a patient and not a prisoner, petitioner is not subject to the 1996 Prison Litigation Reform Act.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, pursuant to 28 U.S.C. § 1915(e)(2), if a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief. For the reasons stated below, petitioner will be granted leave to proceed on two claims: (1) that he is receiving inadequate medical treatment in violation of the due process clause of the Fourteenth Amendment and Wis. Stat. § 51.61 and (2) that his outgoing phone calls are being recorded in violation of the Fourth Amendment. Petitioner will be denied leave to proceed on all other claims raised in his complaint and his motion for appointment of counsel will be denied without prejudice.

Before setting out petitioner's allegations, I note that a substantial number of facts in petitioner's complaint concern incidents that occurred at treatment facilities other than Sand Ridge. Specifically, petitioner discusses incidents that occurred at the Racine

Correctional Institution, Kettle Moraine Correctional Institution, Mendota Mental Health Institute and the Wisconsin Resource Center. Because petitioner has not named any official from any of those institutions as a defendant in this suit, those allegations are immaterial (except to the extent they relate to incidents at Sand Ridge) and I have omitted them. From the remainder of petitioner's complaint, I understand him to be alleging the following.

ALLEGATIONS OF FACT

A. Parties

Petitioner is committed involuntarily at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin. He has been committed involuntarily to the custody of the Wisconsin Department of Health and Family Services pursuant to Wis. Stat. § 980.06 since December 1995. Respondent Nelson is the secretary of the Wisconsin Department of Health and Family Services. In that capacity, she has administrative and supervisory authority over the Sand Ridge Secure Treatment Center. She has a duty to provide appropriate mental health treatment to patients in the custody of the Department of Health and Family Services. She knew or should have known that treatment provided at Sand Ridge is not appropriate to meet patients' needs. Respondent Watters serves as the director of the Sand Ridge Secure Treatment Center. He has supervisory and administrative responsibility for all patients at Sand Ridge and a duty to insure that all Sand Ridge patients receive adequate mental health

treatment. Respondent Thorton is Treatment Director at Sand Ridge; he has supervisory and administrative responsibility for the treatment needs of all patients. He knew or should have known that treatment provided at Sand Ridge did not address the treatment needs of all ch. 980 patients. Respondent Schneider is Security Director at Sand Ridge. He has supervisory and administrative authority over the employees providing direct care to patients and over all patient-related safety concerns at the institution. He has no authority to assess medical or psychological treatment needs and should have known to defer to the professional judgments of medical experts when dealing with patients. Respondent Aeytey is a psychiatrist at Sand Ridge.

B. Petitioner's Initial Commitment

Before being committed as a ch. 980 patient, petitioner was examined by a psychologist, not a physician or a psychiatrist. The psychologist determined that petitioner was mentally ill relying only on a historical condition and not on petitioner's then-current mental health status. During petitioner's involuntary civil commitment trial, expert medical evidence was never presented to properly establish petitioner's mental illness. Petitioner is committed for the purpose of receiving appropriate mental health treatment.

C. Living Conditions at Sand Ridge

1. Level of security

The Department of Health and Family Services does not place ch. 980 patients in medium or minimum security facilities. The only less restrictive form of confinement is supervised release. Before a patient is placed on supervised release, he must agree to abide by 48 rules, 23 of which are connected to the Department of Corrections' Administrative Code, an intensive sanctions program.

Ch. 980 patients are examined on a regular basis, although this was not the case in the early years of ch. 980's existence. Patient examinations are coordinated by Dr. Dennis Doren of the Mendota Mental Health Institute. Dr. Doren trains psychologists to examine sex offenders. The examinations are made on the basis of a patient's past mental illnesses instead of the patient's current condition. The examinations do not address a patient's degree of illness or level of danger.

2. Armed guards

Ch. 980 patients are the only class of civilly committed mental health patients against whom lethal force may be used. Sand Ridge staff carry firearms and can use lethal force only on this class of patients. In this way, mental health patients are treated the same as prison inmates and worse than mental health patients under criminal commitments.

3. Recreation time

The security department, headed by respondent Schneider, controls all of the medical, psychological and psychiatric treatment areas at Sand Ridge. Security staff monitor the patients' recreation time. Patients have movement times at three points during the day and may return to their units once during each half hour of recreation. Patients often take controlling roles in sports activities as umpires or referees.

4. Living quarters

The living quarters lack many amenities of normal life. For example, most cell doors do not have door knobs or keys and the rooms lack comfortable furniture and control over water temperature in the shower. The doors have small traps that allow employees to pass food trays into the rooms and allow employees to fasten restraints on patients. Each room contains roughly the following: a plastic chair, sink and toilet, cabinet, shelf, desk and television stand, all of which are bolted down. Each room has a concrete bed and mattress pad. The amenities of each room vary depending on the unit in which the room is located. The rooms on several units have keyholes and patients are given keys to their rooms. Patients in other units do not have keys and are unable to secure their possessions in their rooms.

5. Use of money

Patients at Sand Ridge are not allowed to posses or use money.

6. Courtyards, elevated walkways and electric fencing

All courtyards at Sand Ridge are made of concrete. Units in the A-wing are more secure than units in the E and F-wings because A-wing has two electronic doors controlled by security personnel inside the control bubble. E and F-wings do not have similar doors. The courtyard in the A-wing is surrounded by a fifteen-foot concrete wall; the courtyards in the B, E and F-wings are surrounded by a ten-foot chain link fence. The fence around B-wing is topped with razor wire; the fences around the E and F-wing courtyards are not.

Individual housing units at Sand Ridge have elevated walkways. A person standing on one of these walkways looks down on the unit's dining area and dayroom. The walkways have a single railing that extends with the path of the walkway. There is no safety device to prevent a patient from throwing an item, another patient or himself from this elevated walkway.

A high voltage electric fence surrounds Sand Ridge. Patients on the recreation field are separated from this fence by a plastic chain strung through pipes spaced ten feet apart. At some points, the fence is within ten feet of a walking path.

7. Patient transport

When Sand Ridge patients are transported outside the facility, the amount of security needed is not determined on a patient-to-patient basis. Barring a documented medical condition, all patients are strip-searched, dressed in standard green clothing and put in hard restraints consisting of leg irons, a waist chain and handcuffs. A black box is placed over the chain links between the handcuffs and is attached to the waist chain by a padlock.

D. Use of Term "Predator"

Wisconsin Senators and Representatives use the term "predator" to identify patients who are committed as sexually dangerous persons under ch. 980. The term also appears in connection with ch. 980 patients in the 2001-2002 edition of the Wisconsin Blue Book. Use of this term stigmatizes ch. 980 patients and perpetuates discrimination against all patients with mental illnesses.

E. Petitioner's Diagnosis History

1. Pre-Sand Ridge diagnoses

A medical professional licensed by the state of Wisconsin diagnosed petitioner with anxiety disorder and prescribed medication for him while he was imprisoned at the Racine Correctional Institution.

Dr. Allen Bradley, chief psychologist at Kettle Moraine Correctional Institution, determined that petitioner suffers from polysubstance dependence abuse and antisocial personality disorder.

Craig Monroe, a licensed psychologist, examined petitioner for purposes of petitioner's pending involuntary civil commitment after he was transferred to Mendota Mental Health Institute. After examining all of petitioner's Department of Corrections records, Dr. Monroe concluded that petitioner suffered from paraphilia, pedophilia, polysubstance abuse and personality disorder with antisocial features.

Petitioner's discharge summary from Mendota Mental Health Institute indicated that he had a history of alcohol dependence, cocaine and cannibis abuse and antisocial personality disorder. The summary stated petitioner's final diagnosis according to the DSM-IV as

Axis I: Paraphilia Not Otherwise Specified Including Pedophilia, Alcohol and Polysubstance Abuse in a Controlled Environment

Axis II: Personality Disorder Not Otherwise Specified

2. Initial diagnosis at Sand Ridge

After petitioner was transferred to Sand Ridge, respondent Aeytey diagnosed him as having anxiety disorder, mood disorder and depression. Respondent Aeytey has informed

administration officials and security and treatment personnel repeatedly of petitioner's need for appropriate treatment to complement his medication. The group treatment currently being provided to petitioner is potentially harmful to him physically, emotionally and psychologically because of his medication, the lack of other treatment being given to him and his environment.

F. Sand Ridge Treatment Protocol

The medical department at Sand Ridge is not the controlling authority for establishing treatment and care plans for patients. Treatment plans are constructed in the treatment department, which is supervised by respondent Thorton. Lloyd Sinclair, the associate treatment director, does not have a degree in psychology or psychiatry.

Sand Ridge employees identified as "PCT"s and "PCS"s are the primary caretakers of patients. Security personnel (PCTs, PCSs, officers, sergeants and captains) are part of the treatment teams. Decisions about patient living units, treatment, behavior and property are made by Unit Managers and PCSs who have no professional judgment or training in medical or clinical treatment or in maintaining a therapeutic environment for mental health patients. Clinical or psychiatric personnel do not assess behavioral or property issues to determine whether a patient's problem stems from his mental illness or is merely voluntarily disruptive behavior. Security staff have little to no training in mental health and the training they do

receive comes from Wisconsin Department of Corrections procedures, which have a penological focus. A PCS conducts hearings for "Behavioral Disposition Reports" and "Client Rights Limitation and Denial Documentation" and presides over appeals of the hearings. On many occasions respondents have ignored Sand Ridge procedures and due process requirements by not informing clinical staff that a patient was acting in a way that posed a danger to himself.

1. The SVP Program

Employees at the Wisconsin Resource Center and the Department of Health and Family Services implemented the SVP Program 2000 for ch. 980 patients. The program consists of three tracks of treatment: conventional, adaptive and corrective thinking. Each track is further broken down into "components" and then into "blocks." Placement in the corrective thinking track is premised on a patient having a high degree of psychopathy. A patient's degree of psychopathy is determined according to the Hare Psychopathy Check List. Treatment and care plans are formulated around each of the three treatment tracks, not the individual patient.

Patients at Sand Ridge are treated exclusively in group settings under the SVP Program. These treatment groups meet in an area called the Treatment Mall. By contrast, the usual practice in mental health facilities is to use diversion therapy and other

individualized treatments.

The rules at Sand Ridge that apply to a particular patient correspond to the patient's stage of treatment. Patients in the upper components are provided the most property, access to kitchen appliances, more freedom and social interaction, better jobs and longer working hours. Currently, petitioner is assigned to an individual treatment group as a sanction arising from behavioral issues that arose in his regular treatment group.

Recently, the environment in the conventional and corrective thinking tracks has become adversarial because patients are required to report on other patients and issue "CT cards" for alleged behavior. Failure to issue CT cards can result in the removal of a patient from treatment. Security officials control the environment and contribute to the adversarial feeling. This environment in which patients live and are treated is stressful. Patients who wish to see a psychologist or psychiatrist because of the stressful environment are put on a waiting list because of the lack of psychologists and psychiatrists employed at Sand Ridge.

2. Treatment tools

Patients must consent to treatment and to the use of tools used in treatment, such as the polygraph, plethysmograph and video taping. If a patient refuses to consent to the use of a tool, he is considered to have refused treatment and will not be given any further treatment until he consents to use of the tool. For example, if a patient refuses to take a

polygraph test, he is removed from treatment until he agrees to take a polygraph test. If a patient fails a polygraph test, he is moved back in treatment to a higher security unit. Once a patient is removed from treatment, it can take a long time to get back into treatment, and even then a patient has to start at the beginning of the component track of treatment.

The polygraph is not a tool normally used in the treatment of mental illness and has not been generally accepted by the scientific or medical communities, yet it is relied on by staff as an indicator of a patient's truthfulness. The short and long term physical and psychological effects of the polygraph have not been studied, and respondents have not provided petitioner with information about the potentially harmful effects of the polygraph. Numerous patients at Sand Ridge have been removed from treatment because they either refused to take or failed a polygraph test.

3. Sanctions

Numerous patients have been placed in segregation by staff who did not follow proper procedure or provide due process. Present policy allows a patient to be placed under investigation for 72 hours even if he does not pose a danger to himself or others. When placed under investigation, patients are deprived of their property, given only basic hygiene and told that their only recourse is to file a complaint. Patients under investigation are placed in an isolation wing.

While at Sand Ridge, petitioner has been sanctioned for his behavior and given Behavior Disposition Reports. Security staff, unit managers and PCSs ordered the sanctions; no psychiatric staff were ever provided accurate information about the incidents. In a July 2004 incident, petitioner was placed in segregation for 72 hours and criminal charges were filed on the basis of incidents arising from his mental illness. Petitioner was sanctioned because security concerns override the psychiatric treatment needs of patients. Petitioner is under constant stress because he fears being sanctioned for violating rules or interpretations of rules.

G. Searches and Drug Testing

Patient rooms are searched monthly without cause. Patients are pat searched two to three times each day. Patients are tested for drugs at random times; in some cases, they are awakened at four or five o'clock in the morning, well before they would normally be awake. If a patient cannot produce a urine sample, he must stay in the testing area until he does so. If a patient refuses to give a urine sample, he is placed in segregation and given other sanctions.

H. Shower Stall Configuration, Telephone and Visitation Privileges

The doors on the shower stalls are made of glass. The lower half of the door is frosted

glass; the upper half is regular glass. Anyone walking past the shower area can look inside and see patients showering. Showers are located near each unit's entry and a staff desk. Tour groups move through the units at times when the showers are in use.

Sand Ridge patients are not allowed to receive incoming telephone calls. Instead, a "message system" is used; only persons who are on a patient's calling list may leave a message for that patient. If the caller is not on the patient's list, the patient cannot return the call. Patients can make collect calls or use specific calling cards to place calls. Patients cannot choose their telephone service provider, even if another provider charges lower rates than patients are receiving. All outgoing calls are recorded, even when a patient calls his attorney.

Sand Ridge patients are allowed visitors in limited circumstances. Potential visitors must undergo a criminal background check and be pre-approved by a Sand Ridge employee. The twenty individuals on any patient's calling list are the only individuals allowed on that patient's visiting list.

I. Law Library

The law library at Sand Ridge contains the following: copies of the United States Constitution, 42 U.S.C. §§ 1771-2000d, federal procedures and a computer that has limited access to caselaw from the United States Supreme Court, the Court of Appeals for the Seventh Circuit and the Eastern and Western Districts of Wisconsin. Shepherd's Citation

Service is available on the computer but patients are not allowed to use it.

J. Jerry Herman

Jerry Herman was a ch. 980 patient who struggled with obesity. He was not given the psychiatric treatment necessary to combat his obesity. He was not allowed to use the handicapped shower despite the fact that he walked with a cane. He died in 2003 while taking a shower. Petitioner discovered Herman's dead body in the shower. A PCT performed CPR on Herman while nurses stood by and watched. The previous day, petitioner witnessed Herman fall and hit his head; nurses arrived twenty minutes after Herman fell and security was notified before medical staff.

DISCUSSION

A. Initial Commitment

I understand petitioner to allege that the state lacked sufficient evidence to commit him as a ch. 980 patient. He alleges that necessary medical expert testimony establishing his mental illness was not presented at his civil commitment hearing. These allegations present a challenge to the fact of petitioner's confinement, a claim that he may not bring under § 1983. He may raise challenges to the fact or validity of his confinement only in a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 and only after

exhausting all available administrative remedies. Therefore, petitioner's allegations regarding his initial commitment are dismissed for failure to state a claim on which relief can be granted.

B. Conditions of Confinement

I understand petitioner to be challenging several conditions of his confinement at Sand Ridge: that (a) ch. 980 patients are not housed in medium or minimum security living conditions; (b) guards at the institution carry firearms; (c) petitioner cannot possess a key to his room or secure his possessions; (d) the furniture in the living quarters is uncomfortable; (e) he is unable to control the temperature of the water in his shower; (f) he is unable to possess or use money at the institution; (g) all of the courtyards at Sand Ridge have concrete floors; (h) housing units are surrounded by elevated walkways; (i) Sand Ridge is surrounded by an electric fence; (j) patients are strip-searched and put in restraints when they are transported outside the institution; and (k) persons wishing to visit Sand Ridge must pass a criminal background check and be approved by Sand Ridge officials.

Unlike criminally confined offenders, who may be subject to punishment as long as it is not cruel and unusual under the Eighth Amendment, persons civilly confined (including those confined under ch. 980) may not be punished. Youngberg v. Romeo, 457 U.S. 307, 320 (1982). Punishment of civilly confined patients violates their substantive due process

rights under the Fourteenth Amendment. Id. However, ch. 980 patients "may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others." Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003). The question is whether the conditions petitioner complains of are punitive.

Youngberg holds that in examining whether conditions of civil confinement are punitive, "courts must show deference to the judgment exercised by the qualified professional." Id. at 321. Professional decision makers include persons "competent, whether by education, training, or experience, to make the particular decision at issue." Id. at 323 n.30. Day-to-day decisions that create the conditions of civil confinement may be made by employees without formal training, provided the employees are subject to the supervision of qualified persons. Id. Decisions made by such professionals are "presumptively valid." Id. at 323; see also Barichello v. McDonald, 98 F.3d 948 (7th Cir. 1996); Estate of Cole v. Fromm, 94 F.3d 254 (7th Cir. 1996) (applying same standard to pretrial detainee committed to psychiatric ward). Liability arises only when the decision by the professional is such a departure from accepted professional judgment, practice or standards that it demonstrates that the person responsible did not base the decision on such judgment. In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good faith immunity would bar

liability. Youngberg, 457 U.S. at 320. Thus, for petitioner to overcome the presumptive validity of respondents' decisions and state a claim that his constitutional rights have been violated by the conditions of his civil confinement, petitioner must allege facts that indicate that respondents are not basing their actions on professional judgment. The court of appeals has stated that "professional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct." Porter v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994) (quoting Shaw by Strain v. Stackhouse, 920 F.2d 1135 (3d Cir. 1990)). (I assume that in Porter, the court meant to define *lack* of professional judgment in those terms.) Thus, to make out an arguable basis for his claim, petitioner must allege facts that indicate that respondents are acting more than negligently, but he need not show intentional misconduct.

Petitioner's allegations regarding the eleven conditions of confinement noted above fail to state a claim under the Fourteenth Amendment individually or collectively. Petitioner does not allege that any of the conditions of confinement (1) exist to punish him or (2) are anything but the product of professional medical judgment or legitimate security concerns.

1. Lack of medium or minimum security living conditions

Petitioner's allegation that ch. 980 patients are not allowed to live in medium or minimum security conditions is insufficient to state a claim under the Fourteenth

Amendment. Nowhere in his complaint does petitioner allege facts from which an inference may be drawn that his confinement in maximum security conditions constitutes punishment. The state of Wisconsin has an interest in protecting the public from the risks posed by sex offenders. See Addington v. Texas, 441 U.S. 418, 426 (1979). In and of itself, the fact that Sand Ridge is a maximum security facility does not violate the Constitution.

2. Armed guards

It is not unconstitutional for Sand Ridge to be guarded by armed individuals who can use their weapons under circumstances in which prison guards would be allowed to use the same weapons. Petitioner does not allege that a guard ever used a weapon on him to punish or inflict pain. This claim must be dismissed.

3. Inability to lock rooms

Petitioner's allegation that certain patients at Sand Ridge are unable to lock the doors to their living quarters is insufficient to state a claim under the Fourteenth Amendment.

4. Uncomfortable furniture

Just as the Constitution does not mandate comfortable prisons, Rhodes v. Chapman, 452 U.S. 337, 349 (1981), petitioner's allegation that the furniture in Sand Ridge living

quarters is uncomfortable does not violate the Constitution absent an allegation that the furniture is used to punish patients or has caused petitioner serious injury.

5. Lack of control over shower temperature

Petitioner's allegation regarding the lack of control over the water temperature in his shower must be dismissed because it is legally frivolous. Petitioner does not allege that institution officials set the temperature of the water to cause him any physical harm.

6. Inability to possess or use money

Petitioner's bald assertion that civilly committed sex offenders are unable to "use" or possess money while at Sand Ridge does not make out a claim of a violation of the Constitution. Nothing in this allegation allows the inference to be drawn that petitioner's inability to possess or spend money while he is institutionalized deprives him of the basic necessities of life.

7. Concrete courtyards

That all of the courtyards at Sand Ridge consist of a concrete floor and concrete walls does not violate the Constitution.

8. Elevated walkways

The fact that individual housing units at Sand Ridge have elevated walkways from which something could be thrown at someone standing below does not violate the Constitution.

9. Electrified perimeter

Petitioner's claims that Sand Ridge is surrounded by an electrified fence and that patients can get near the fence are legally frivolous and must be dismissed.

10. Searches and restraints during transport

Petitioner's claim regarding the restraints used during transport outside Sand Ridge is foreclosed by the decisions of the Court of Appeals for the Seventh Circuit in Theilman v. Leean, 282 F.3d 478 (7th Cir. 2002) (holding that, even assuming state law gave civilly committed sex offender right to least restrictive conditions of confinement during transport, it did not give rise to liberty interest protected under Fourteenth Amendment) and Knox v. McGinnis, 998 F.2d 1405 (7th Cir. 1993) (upholding use of "black box" on handcuffs as restrictive mechanism on special status prisoners during transport). Similarly, petitioner's allegations that patients are strip searched and dressed in standard green clothing before transport outside Sand Ridge do not state a claim under the Fourteenth Amendment.

11. Visitation procedures

Petitioner's allegation that visitors to Sand Ridge must pass a criminal background check and be pre-approved fails to state a claim under the Fourteenth Amendment or Wisconsin law. Petitioner's allegation fails to state a claim under the Fourteenth Amendment because petitioner does not allege facts from which an inference may be drawn that the visitation procedures are punitive. Nothing in petitioner's allegations supports an inference that the visitation policy is not the product of professional judgment or legitimate security concerns. In regard to state law, Wis. Stat. § 51.61(t) grants ch. 980 patients the right to see visitors each day but does not guarantee any particular length of visits or procedures for conducting them. Because petitioner has stated no arguable basis in law for his claim that the visitation procedures violate his rights under the Fourteenth Amendment or Wis. Stat. § 51.61(t), his request for leave to proceed on these claims will denied.

C. Use of Term "Predator"

I understand petitioner to allege that use of the term "predator" by elected officials in Wisconsin to identify ch. 980 patients stigmatizes patients and promotes discrimination against them in violation of the Fourteenth Amendment. Petitioner's allegation fails to state a claim upon which relief can be granted for two reasons. First, petitioner has not named any elected officials as potential defendants (and even if he had, they would be entitled to

immunity for their legislative acts, Rateree v. Rockett, 852 F.2d 946 (7th Cir. 1988)). Second, stigmatization stemming from the use of the term "predator" is insufficient by itself to give rise to a protectible liberty interest under the Fourteenth Amendment. Paul v. Davis, 424 U.S. 693 (1976) (holding that injury to reputation alone does not constitute deprivation of liberty or property for purpose of due process).

D. Inadequate Treatment

I understand petitioner to allege that he is receiving inadequate mental health treatment at Sand Ridge in violation of the Fourteenth Amendment. Specifically, petitioner alleges that (1) respondent Aeytey diagnosed him with anxiety disorder, mood disorder and depression, but the group treatment he is receiving currently is inadequate and potentially harmful physically and psychologically; (2) decisions about treatment are made by Sand Ridge employees who lack training in treatment of mental illness; (3) Sand Ridge employs too few psychologists and psychiatrists to meet the treatment needs of patients; (4) the requirement that patients report on each other has created an adversarial environment not conducive to treatment; and (5) Sand Ridge officials use the polygraph as a treatment tool.

1. Federal law

It is not clear that involuntarily committed sex offenders have a constitutional right

to adequate treatment. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 n.12 (1981) ("this Court has never found that the involuntarily committed have a constitutional 'right to treatment'"). In Youngberg, 457 U.S. at 324, the Court held that a mentally retarded person, involuntarily committed, enjoyed "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by those interests." In a footnote, the Court stated that "[a] court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy . . . may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case." Id. at 319 n.25. With regard to the nature of treatment, however, the state "enjoy[s] wide latitude in developing treatment regimens [for sex offenders]." Kansas v. Hendricks, 521 U.S. 346, 368 n.4 (1997). In determining whether the state has met its obligation to provide minimally adequate treatment, "decisions made by the appropriate professional are entitled to a presumption of correctness." Youngberg, 457 U.S. at 324.

Here, petitioner alleges that treatment decisions are not made by persons with appropriate training in treating mental illness; he alleges that treatment decisions are made by Unit Managers and PCSs who lack training or expertise in the mental health field. Petitioner alleges also that he is not receiving appropriate treatment addressing respondent

Aeytey's diagnosis that petitioner suffers from anxiety disorder, mood disorder and depression. These allegations are sufficient to state a claim for failure to provide minimally adequate treatment, particularly in light of petitioner's allegation that he has been sanctioned for his behavior and placed in segregation. This allegation suggests that the treatment petitioner is receiving may be inadequate to maintain him in "reasonably nonrestrictive confinement conditions."

Petitioner's allegations regarding inadequate clinical staff, reporting requirements and use of the polygraph are each insufficient to state a claim under the Fourteenth Amendment. Decisions regarding how many psychologists and psychiatrists to employ at Sand Ridge are made in the context of budgetary as well as treatment considerations. Petitioner's concern that every wing or unit at Sand Ridge does not have full-time clinical staff available is not sufficient to state a claim under the Fourteenth Amendment. As for the use of reporting requirements, petitioner alleges that patients are required to "tell on other patients" and "issue CT cards for alleged behaviors" pursuant to the SVP Program 2000. However, petitioner concedes that the SVP Program 2000 was created and implemented by employees of the Department of Health and Family Services and the Wisconsin Resource Center. Petitioner's allegations go to matters concerning the nature of treatment. Thus, the use of reporting requirements is entitled to a presumption of correctness under Youngberg. Petitioner's allegation that the reporting requirements have created a more "adversarial"

environment is not enough to overcome that presumption. Finally, petitioner's allegations regarding the use of the polygraph are nonsensical. Petitioner alleges that (1) the polygraph has not been generally accepted by the scientific or medical communities; (2) the polygraph has not been studied for its "potential psychological and physical effects"; and (3) if a patient fails a polygraph, he is removed from treatment. Petitioner may not like having to tell the truth during treatment, but his allegations are insufficient to overcome the presumption of correctness that applies to the decision to use the polygraph as a treatment tool. Allison, 332 F.3d at 1079-80.

2. State law

Wisconsin law grants rights to persons committed under ch. 980. Among those rights is the right to receive "adequate and prompt treatment . . . appropriate for his or her condition under programs, services and resources that the county board of supervisors is reasonably able to provide within the limits of available state and federal funds and of county funds required to be appropriated to match state funds." Wis. Stat. § 51.61(1)(f). Section 51.61(7)(a) provides a right of action for patients who suffer damage as a result of the denial of rights guaranteed under § 51.61. Petitioner's allegation that he is receiving inadequate treatment is sufficient to state a claim under § 51.61(1)(f). Because petitioner's state law claim arises out of the same facts as his claim for inadequate treatment under the

due process clause, I will exercise supplemental jurisdiction over petitioner's state law claim. 28 U.S.C. § 1367(a). At this early stage of the proceedings, I will allow this claim to go forward against all five respondents.

E. Use of Sanctions

I understand petitioner to allege that respondents violated his rights under the due process clause by imposing sanctions on petitioner for behavioral infractions. Petitioner alleges that clinical personnel are not consulted before sanctions are imposed. Nothing prevents a civil institution from imposing rules to maintain order or from imposing minor sanctions for violations of those rules. Porter v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994). Indeed, it is difficult to imagine how an institution such as the one to which petitioner is confined could function without a regime of sanctions for violations of rules. Thus, petitioner's allegations fail to state a claim under the Fourteenth Amendment.

F. Fourth Amendment Privacy Claims

I understand petitioner to allege that respondents are violating his right to privacy under the Fourth Amendment by (1) searching his room without cause every month; (2) recording all outgoing calls made by Sand Ridge patients, including those made to lawyers; (3) pat searching him two to three times per day; (4) conducting random drug tests; and (5)

requiring petitioner to shower in conditions such that anyone walking past can see petitioner naked in the shower area.

The Fourth Amendment is not triggered unless the state intrudes into an area "in which there is a 'constitutionally protected reasonable expectation of privacy.'" New York v. Class, 475 U.S. 106, 112 (1986) (citing Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Although ch. 980 patients do not forfeit all of their rights to privacy, these rights are severely curtailed. Cf. Bell v. Wolfish, 441 U.S. 520, 546 (1979).

1. Room searches

Petitioner's allegation regarding room searches fails to state a claim. Ch. 980 patients, like persons detained while awaiting trial, do not have a reasonable expectation of privacy in their living quarters. Zimmerman v. Hoard, 5 F. Supp. 2d 633, 637 (N.D. Ind. 1998) (citing Mitchell v. Zupnik, 75 F.3d 517, 522 (9th Cir. 1996)).

2. Telephone monitoring

In the same vein, the Court of Appeals for the Seventh Circuit has held that prisoners do not have a reasonable expectation of privacy on prison phone lines. United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989); United States v. Fekes, 879 F.2d 1562, 1569 n.6 (7th Cir. 1989). In United States v. Poyck, 77 F.3d 285 (9th Cir. 1996), a pre-trial

detainee challenged a jail's policy of recording telephone calls. The court held that the detainee did not have an expectation of privacy in his use of the telephone because he knew of the jail's policy before he made his first call and "any expectation of privacy in outbound calls from prison is not objectively reasonable." Id. at 290-91. In addition, the court held that even if the detainee had a reasonable expectation of privacy in his telephone calls, institutional security concerns made the monitoring reasonable under the Fourth Amendment. In a footnote, the court noted that the jail did not monitor calls between a detainee and his lawyer. Id. at 291 n.9. The Court of Appeals for the Seventh Circuit has not addressed the issue whether an involuntarily committed patient has a constitutionally protected expectation of privacy in his telephone calls. Moreover, assuming an expectation of privacy exists, Sand Ridge's policy of recording all outgoing phone calls would not violate the Constitution if it is reasonably related to a legitimate governmental purpose. Martin v. Tyson, 845 F.2d 1451, 1458 (7th Cir. 1988). For the purpose of this order, I will assume that petitioner has a constitutionally protected expectation of privacy in his outgoing phone calls.

Petitioner alleges that all outgoing calls at Sand Ridge are recorded, including those between a patient and his lawyer, because the recording system cannot differentiate between personal and legal calls. Petitioner does not allege that any of his outgoing calls were ever recorded, much less any calls to a lawyer; however, construing the allegations liberally, I will

assume that petitioner's calls have been recorded. Nevertheless, petitioner is on notice that if he does not bring forth evidence showing that *his* telephone calls have been recorded at a later stage in the litigation, his Fourth Amendment claim will be dismissed for lack of standing. See Rakas v. Illinois, 439 U.S. 128, 133-34 (1978). At this early stage of the proceedings, I will allow petitioner to proceed on this claim against respondent Watters.

3. Pat searches and drug tests

Petitioner's allegations about pat searches and drug tests likewise fail to state a claim. In Bell v. Wolfish, 441 U.S. at 558, the Supreme Court upheld the practice of subjecting pre-trial detainees to visual strip-searches after all outside visits. In examining the practices of pat searching and drug testing ch. 980 patients, I must balance Sand Ridge's interests in institutional security against petitioner's privacy interests (and in doing so, I am forced to assume again that petitioner has been pat searched and drug tested because he does not state as much in his complaint). Sand Ridge personnel have a right to frisk patients and conduct random drug tests as a matter of institutional security, and their decisions to frisk and drug test patients are entitled to "wide-ranging deference." Id. at 547. Petitioner has made no allegation that would suggest that Sand Ridge officials are abusing their discretion in frisking and drug testing patients. Thus, his allegations must be dismissed for failure to state a claim.

4. Shower stall configuration

Petitioner's claim that inmates are visible to corrections officers or tour groups when showering is foreclosed by Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995), in which the Court of Appeals for the Seventh Circuit held that the Cook County jail did not violate the Fourth Amendment by assigning female guards to monitor a male pretrial detainee, even though such monitoring meant that these guards would observe the inmate naked in his cell, the shower and the toilet. In light of Johnson, it is clear that any corrections officers who observe plaintiff showering are not violating his right to privacy. Moreover, petitioner does not allege that any institution guard or member of the public has seen him showering. His allegations are framed in terms of the possibility that he *could* be seen showering because of the shower stall doors and the way the shower area is constructed. These allegations are not enough to allow petitioner to proceed on this claim.

G. Telephone Policies

I understand petitioner to allege that Sand Ridge policies regarding incoming telephone calls violate his First Amendment rights. Petitioner will not be granted leave to proceed on his First Amendment claims because his allegations are legally frivolous. Petitioner's claim that Sand Ridge patients cannot choose the company that will provide their telephone service is foreclosed by the decision in Arsberry v. Illinois, 244 F.3d 558 (7th

Cir. 2001) (holding that exorbitant rates charged to institutionalized persons by telephone service provider with exclusive right to provide service to institution did not violate First Amendment). Petitioner's allegation that Sand Ridge inmates are not allowed to receive incoming calls but instead must rely on a "message system" is legally frivolous. Petitioner has not alleged that Sand Ridge officials have prevented him from receiving any of his incoming calls. The mere fact that Sand Ridge uses a "message system" does not violate petitioner's First Amendment rights.

H. Law Library

I understand petitioner to allege that his right of access to the courts is being violated because the Sand Ridge law library has limited legal materials and because respondents did not provide assistance to petitioner in writing his complaint. It is well established that prisoners and civilly confined individuals 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. 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

involuntarily institutionalized persons 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, petitioner must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). Petitioner 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, petitioner 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). In this case, petitioner fails to allege that he suffered any actual injury or that he has been prevented from litigating this or any other case. Thus, petitioner's claim of denial of access to the courts will be dismissed for lack of standing.

I. Jerry Herman

Petitioner alleges that a ch. 980 patient named Jerry Herman was given inadequate psychiatric treatment, denied the use of a handicapped shower despite the fact that he walked with a cane and died while taking a shower. Petitioner's allegations regarding Jerry Herman fail to state a claim upon which relief could be granted because petitioner lacks standing to raise the claim. Standing is a critical component of the case and controversy

requirement of Article III of the Constitution. A party bringing suit must allege injury that is "actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A corollary to this requirement is that the injury alleged must affect the person raising the claim. In this case, petitioner has not alleged that he was harmed in any way by the events surrounding Jerry Herman. Petitioner's only involvement with Herman appears to be that he found Herman dead in the shower. This allegation does not confer standing on petitioner to assert claims on Herman's behalf.

J. Motion for Appointment of Counsel

Petitioner asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find that petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a petitioner must list the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner does not suggest that he has made an effort to find a lawyer on his own and that his efforts have failed.

Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel

would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess petitioner's abilities. Therefore, petitioner's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

1. Petitioner Daniel Williams' request for leave to proceed in forma pauperis against respondents Nelson, Watters, Thorton, Schneider and Aeytey is GRANTED on his claims that respondents are providing inadequate treatment in violation of the due process clause of the Fourteenth Amendment and Wis. Stat. § 51.61;

2. Petitioner's request for leave to proceed in forma pauperis against respondent Watters is GRANTED on his claim that all of his outgoing telephone calls, including those to lawyers, are being recorded in violation of the Fourth Amendment;

3. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to all other claims raised in petitioner's complaint;

4. Petitioner's motion for appointment of counsel is DENIED without prejudice to his renewing it at some later stage of the proceedings;

5. 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 lawyer who will be representing respondents, he should serve the lawyer 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' attorney.

Entered this 9th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge