

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY CORDOVA,

Petitioner,

ORDER

v.

05-C-487-C

MATTHEW J. FRANK, Secretary,  
Wis. Dept. of Corrections;  
RICHARD SCHNEITER, Warden,  
Wis. Secure Prog. Facility,

Respondents.  
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This is a proposed civil action for declaratory and injunctive relief under 42 U.S.C. § 1983. Petitioner Anthony Cordova, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, contends that respondents violated his constitutional rights under the Eighth and Fourteenth Amendments of the United States Constitution.

In an order dated August 15, 2005, I concluded that petitioner does not have the means to make an initial partial payment of the filing fee and that his request for leave to proceed in forma pauperis on his complaint would be taken under advisement. In this order, I will consider whether some or all of petitioner's complaint should be dismissed on the

ground that the action is legally meritless, fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

In screening a pro se complaint, the court must construe petitioner's allegations generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In this case, I have treated as part of the complaint certain documents petitioner submitted that assisted the court in understanding his claims. Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002). The remaining documents will be held in the court's file where respondents may inspect them if they wish. Only the documents attached to this order will be considered part of petitioner's complaint.

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner Anthony Cordova is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent Matthew J. Frank is Secretary of the Wisconsin Department of Corrections. Respondent Richard Schneider is Warden at the Wisconsin Secure Program Facility.

##### A. Mental Health

Petitioner suffers from serious depression. In the past three years he has attempted

suicide on a number of occasions. He has slashed his wrists and thrown himself onto concrete surfaces from elevated heights. He frequently tells prison officials that he plans to end his life.

Petitioner has engaged in other troubling behaviors. He has eaten his feces and smeared them on walls and windows. He has pounded on cell doors until his fists have bled. Petitioner has been prescribed medication and has been treated at least once at the Wisconsin Resource Center, a facility for inmates with mental health problems. Before he was discharged from the Wisconsin Resource Center, petitioner was told that if his depression ever recurred, he would be returned to the Resource Center. Although petitioner is still suicidal, he remains incarcerated at the Wisconsin Secure Program Facility. Petitioner does not believe the prison is equipped to adequately treat his mental health needs.

On March 11, 2002, petitioner was placed in clinical observation status following an incident in which he attempted to eat a toothpaste tube. While he was in observation status, petitioner was given no clothing, mattress or dining utensils. Prison staff laughed at petitioner as he ate his food with his hands. Petitioner believes this treatment “must be addressed.”

While incarcerated, petitioner has been deprived of certain medical items. Petitioner grinds his teeth, causing the teeth to wear and giving petitioner severe migraine headaches lasting “four or five days.” The pain from the migraines has prompted him to attempt

suicide. Petitioner saw a dentist and purchased a bite plate to treat the condition. This bite plate was taken from him and later lost by the facility. Petitioner filed grievances requesting either the return of his bite plate or a new bite plate. He was told that the Department of Corrections does not provide bite plates, but that petitioner's family members can purchase one from a retailer and "ask the retail outlet to send the appliance" to the Wisconsin Secure Program Facility. Petitioner does not have money to purchase a bite plate.

Petitioner has suffered injuries to his back, knees and shoulders. He wishes to wear "elbow sleeves," "knee sleeves" and a "rib belt" but the Department of Corrections has confiscated these items. Petitioner filed complaints through the inmate grievance system requesting the return of his knee sleeves. Prison officials denied his request, saying that he did not have a doctor's order and could not possess the items without an order.

#### B. Access to Legal Materials

Petitioner asked the prison for a legal loan to cover the cost of copying his medical and psychological records in order to file copies of those records with his complaint in this lawsuit. Prison officials denied his request, stating that photocopies of an inmate's clinical file cannot not be made using a legal loan. Petitioner was told that he could receive copies of the records using legal loan funds only if he has a "court order."

Prison officials have removed petitioner's hard cover law dictionary from his cell. In

addition, they have confiscated his copy of the portion of the Wisconsin Administrative Code governing the conduct of prisoners because he used the cover to make a chess set in violation of prison rules. Petitioner had copies of legal research materials stored in his personal property box. They are missing. Prison officials deny that the missing legal research ever existed.

Prison officials have told petitioner that he is authorized to use the law library up to three times each week. The prison library contains copies of several law dictionaries and of the Wisconsin Administrative Code. Petitioner has been told that he is free to purchase a soft cover copy of the administrative code directly from the prison library and have a soft cover law dictionary shipped to him directly from a publisher.

On four separate occasions petitioner has attempted to use the prison's electronic law library. Each time he has been unable to locate Titles 1-50 of the United States Code Annotated because the necessary computer disks were missing.

Prison policy prohibits inmates from exchanging legal paperwork that is not handwritten. In order to transmit legal paperwork from one inmate to another, prisoners must use the United States postal system rather than the intra-facility "legal route" system. Petitioner objects to this policy as a waste of time and paper.

### C. Deprivation of Personal Property

Over the years prison officials have deprived petitioner of his dental bite plate, hard cover law dictionary, colored pencils, calculator, ruler, plastic cups and chess set. Respondents have denied petitioner's request for a mop or an additional towel with which to dry his floor after showering.

#### D. Equal Protection

Petitioner objects to the facility's limitations on television viewing for inmates placed on "level one." On Mondays, level one inmates are provided with only one hour of television viewing time. Inmates on other levels receive more viewing time.

### DISCUSSION

Petitioner frames this action as a petition for a writ of mandamus under 28 U.S.C. § 1361. However, § 1361 applies only to federal officers and employees. Wisconsin Department of Corrections personnel are state officials and therefore cannot be compelled to act under § 1361. Petitioner's claims are more appropriately framed as a civil action under 42 U.S.C. § 1983, because he is challenging respondents' actions as violations of his constitutional rights. In particular, I understand petitioner to contend that (1) respondents Schneider and Frank endorse policies which have resulted in petitioner remaining incarcerated at the Wisconsin Secure Program Facility even though he suffers from serious

mental illness; (2) unnamed respondents subjected petitioner to cruel and unusual punishment when they placed him in an observation cell without clothing, a mattress or dining utensils in violation of the Eighth Amendment; (3) unnamed respondents have been deliberately indifferent to petitioner's need for medical items in violation of his Eighth Amendment rights; (4) unnamed respondents have denied petitioner's request for a legal loan to cover the cost of copying records from his medical file and have denied him meaningful access to electronic legal materials, his own legal dictionary, and the legal materials of other prisoners thereby interfering with his right of access to the courts in violation of the Fourteenth Amendment; (5) unnamed respondents have deprived petitioner of personal property in violation of the Fourteenth Amendment; and (6) by endorsing the level system, respondents have deprived petitioner of his ability to watch television as often as other prisoners in violation of his Fourteenth Amendment right to equal protection under the law.

#### A. Cruel and Unusual Punishment

\_\_\_\_\_Petitioner contends that respondents subjected him to cruel and unusual punishment when they (1) kept him confined him at the Wisconsin Secure Program Facility despite his multiple suicide attempts and displays of other disturbed behaviors; (2) placed him in clinical observation status without clothes; and (3) denied him access to his dental bite plate

and other medical equipment, which caused petitioner to suffer from severe migraine headaches and other discomforts.

First, petitioner first contends that his incarceration in the Wisconsin Secure Program Facility is cruel and unusual given his mental health problems. As petitioner should be aware, he is a member of the class named in Jones' El v. Berge and is bound by the settlement order in that case. Jones 'El, 00-C-421-C, Feb. 15, 2001 order, dkt. #37, at 13 (defining class members as “all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin”). The settlement agreement provides that, with rare exception, prisoners with serious mental illness will not be confined at the Wisconsin Secure Program Facility. The definition of serious mental illness adopted by the settlement agreement includes major depressive disorders, mental disorders that include being actively suicidal, and any serious mental illness or disorder that is worsened by confinement at the Wisconsin Secure Program Facility. Jones 'El, 00-C-421-C, Apr. 15, 2002 order, dkt. #216, at 14-15.

Because petitioner is bound by the Jones 'El settlement, he cannot obtain injunctive or declaratory relief for issues covered by the settlement agreement or recover money damages for conditions addressed by the agreement to which he was subjected after the settlement agreement was approved. United States v. Fisher, 864 F.2d 434, 439 (7th Cir. 1988) (“A consent decree . . . bars either party from reopening the dispute by filing a fresh



lawsuit. Alternatively, it is a contract in which the parties deal away their right to litigate over the subject matter.”) If petitioner believes that respondents are confining him at the Wisconsin Secure Program Facility in violation of the settlement agreement, he must address his concerns in writing to the settlement monitor, Walter J. Dickey, University of Wisconsin Law School, 975 Bascom Mall, Madison, Wisconsin 53706-1399. He cannot obtain relief for alleged violations of the settlement agreement in a private action such as this one.

Next, petitioner contends that his Eighth Amendment rights were violated when prison officials placed petitioner in clinical observation status with no clothing, utensils or mattress and when he was denied access to a dental bite plate, knee sleeves, elbow sleeves and a rib belt. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners “humane conditions of confinement.” Farmer v. Brennan, 511 U.S. 825, 832 (1994). However, the Constitution does not mandate that prisons be comfortable. Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986). As long as conditions do not fall below contemporary standards of decency, they are not unconstitutional. Id.

The Eighth Amendment is violated only when prison officials are deliberately indifferent to inmate health or safety. Farmer, 511 U.S. at 834. The Supreme Court has said that in the context of prisoner litigation, “deliberate indifference” means that an official (1) was aware of facts that could lead to the conclusion that a prisoner was at substantial risk

of serious harm and (2) actually came to the conclusion that the prisoner was at substantial risk of serious harm. Id. at 837. Under this legal standard, it is not enough that an official “should have known” of a risk to petitioner. Rather, the official must actually know of a risk and consciously choose to disregard it. Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999).

Petitioner alleges that on March 11, 2002, he was placed in clinical observation with no clothing, mattress or dining utensils immediately following an incident in which he attempted to eat a toothpaste tube and smeared feces on the walls of his cell. Although he has not alleged how long he remained in observation status, he has not alleged that his placement put him in any danger or caused him to suffer more than temporary discomfort. The fact that prison officials placed petitioner under observation and removed all potentially harmful items from him indicates that they gave appropriate attention to petitioner’s serious mental and medical health needs. Therefore, petitioner will not be allowed to proceed on his claim that his placement in observation status without clothing, a mattress or dining utensils was a violation of the Eighth Amendment.

Petitioner alleges also that prison officials were deliberately indifferent to his medical needs when they failed to provide him with knee sleeves, elbow sleeves, a rib belt and a dental bite plate. Petitioner indicates that he wants to wear knee sleeves, elbow sleeves and a rib belt because of his back, knee and shoulder injuries. He contends he needs the dental

bite plate to prevent migraine headaches that result from his constant teeth-grinding.

The Court of Appeals for the Seventh Circuit has defined “serious medical needs” as conditions that carry risks of permanent impairment or death if left untreated and those in which the withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Petitioner has not alleged any facts from which an inference may be drawn that he suffers significant pain that could be ameliorated by the use of knee sleeves, elbow sleeves or a rib belt. Furthermore, petitioner has been told by prison officials that he can have knee sleeves if he obtains an order from a physician. Therefore, petitioner will be denied leave to proceed on his claim that his Eighth Amendment rights were violated when respondents denied him knee sleeves, elbow sleeves and a rib belt.

Petitioner has alleged sufficient facts to suggest that prison officials are being deliberately indifferent to his serious need for dental treatment. Petitioner contends that the pain caused by the grinding of his teeth leads to severe migraine headaches and even suicide attempts. Prison officials have told him that the Department of Corrections does not provide bite plates, but that petitioner’s family members can purchase one from a retailer and ask the retail outlet to send the bite plate to the Wisconsin Secure Program Facility. Petitioner alleges that he does not have money to buy a bite plate. Although he does not say so expressly, I will assume that he does not have family members willing and able to purchase

a bite plate and arrange to have it shipped to him. Therefore, I will allow him to proceed on his claim that his Eighth Amendment rights were violated when he was denied a dental bite plate.

Nevertheless, it is well established that liability under § 1983 must be based on a defendant's personal involvement in a constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). In an action under § 1983 there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Gentry, 65 F.3d at 561.

Petitioner does not allege that respondents Frank and Schneider were personally involved in denying him his bite plate. Petitioner has not alleged that respondent Frank has any knowledge of petitioner's medical situation at all or stated any reason to believe he would have such knowledge. Therefore, I will not allow petitioner to proceed against respondent Frank on this claim. Petitioner may proceed against respondent Schneider for the sole purpose of discovering the names of the officials directly responsible for denying him a dental bite plate. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (pro se complaint should not suffer dismissal of defendant high official for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know person or persons directly

responsible absent formal discovery).

#### B. Access to Legal Materials

Several allegations in petitioner's complaint implicate his right of access to the courts. Prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). In order to show that he has been denied access, a prisoner must allege facts suggesting that he “has suffered an injury over and above” the denial of access to a court. Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). At a minimum, he must allege facts showing that the “blockage prevented him from litigating a nonfrivolous case.” Id. Petitioner's allegations fail to state a claim because he has not alleged that he was prevented from litigating a non-frivolous case.

Petitioner contests the denial of a legal loan that would have enabled him to make copies of his psychological records to attach to the complaint in this case. Such documentation is unnecessary. In screening a prisoner's complaint, this court must accept as true all well-pleaded factual allegations made by the petitioner. Gutierrez v. Peters, 111 F.3d 1364, 1368-9 (7th Cir. 1997). Petitioner's assertion that he suffers from mental illness is therefore sufficient; he need not attach supporting documentation at this stage of litigation. Furthermore, prison officials indicated that petitioner could gain access to these

materials through the civil discovery process if his claim were to proceed. Because I have denied him leave to proceed on his claim involving the prison's alleged violation of the Jones 'E] settlement agreement, he will not be prejudiced by his inability to obtain copies of his prison mental health records.

Petitioner's remaining access to court claims fail similarly: he has not shown that his ability to access the courts has been impeded in any way as a result of the obstacles he discusses. Although petitioner was not permitted to retain his hard cover law dictionary and was not provided with a replacement copy of his administrative rules, he has not alleged that he is unable to obtain these materials from the prison library or that he needs these resources in order to litigate a nonfrivolous lawsuit. The failure of the electronic database did not prevent him from obtaining the same information from the prison library's printed collection. And although petitioner may believe prison rules limiting the sharing of legal information between prisoners is a waste of paper, he has not indicated that the rule has prevented him from litigating his case.

### C. Due Process Claims

Petitioner contends that his Fourteenth Amendment rights were violated when prison officials deprived him of his colored pencils, calculator, ruler, plastic cups and chess set without due process. The Fourteenth Amendment prohibits states from depriving "any

person of life, liberty or property without due process of law.” U.S. Const. Amend. XIV. In order for petitioner to state a claim that his due process rights have been violated by prison officials, he must show that (1) he has a protected property interest and (2) government officials used inadequate procedures before depriving him of his property. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

The United States Supreme Court has held that as long as state remedies are available for the loss of property, intentional deprivation of property does not constitute a constitutional violation. Hudson v. Palmer, 468 U.S. 517, 533 (1984). The State of Wisconsin provides several post-deprivation procedures for challenging the taking of property, including replevin and tort remedies. Wis. Stat. Chap. 810 & 893. Section 810.01 provides a remedy for the retrieval of wrongfully taken or detained property. Section 893.51 governs the filing of tort actions for damages related to the wrongful taking of personal property. Because petitioner has post-deprivation procedures available to him through the state courts, he will be denied leave to proceed on his claim that his personal property was taken in violation of the Fourteenth Amendment.

#### D. Equal Protection

I understand petitioner’s final claim to be that respondents’ endorsement and use of the Wisconsin Secure Program Facility’s level system denied him equal protection by

restricting his access to television while he was confined on level one.

The equal protection clause of the Fourteenth Amendment guarantees that “all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Petitioner does not allege that he has been denied television privileges that other similarly situated inmates are given. In fact, he alleges the opposite. Petitioner indicates that all level one inmates are provided with access to one hour of television programming every Monday.

If petitioner means to challenge the differential treatment between level one inmates and inmates on different levels within the Wisconsin Secure Program Facility, his claim is equally unfounded. I have ruled already that the level system employed by the Wisconsin Secure Program Facility is reasonably related to legitimate penological goals and is therefore constitutionally valid. See e.g. Williams v. Lomen, 02-C-70-C (W.D. Wis. 2003); Cole v. Litscher, 04-C-116-C, Mar. 16, 2004 order, at 6; Lindell v. Litscher, 02-C-21-C, May 28, 2002 order, at 26-27. Because petitioner's allegations do not allow me to draw the inference that he is being treated differently from other inmates with whom he is similarly situated, he cannot succeed on his claim that respondents are depriving him of his right to equal protection. Therefore petitioner's request for leave to proceed on his equal protection claim will be denied as legally meritless.



## ORDER

\_\_\_\_\_IT IS ORDERED that

1. Petitioner is GRANTED leave to proceed in forma pauperis on his claim that unknown prison officials are being deliberately indifferent to his serious dental needs by denying him a dental bite plate. Petitioner may proceed against respondent Richard Schneiter for the sole purpose of discovering the names of the persons personally involved in denying him a bite plate.

2. Petitioner's requests for leave to proceed in forma pauperis on all of his remaining claims are DENIED with prejudice because his claims are legally meritless;

3. Respondent Matthew J. Frank is DISMISSED from this lawsuit.

4. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep 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.

\_\_\_\_\_6. The unpaid balance of petitioner's filing fee is \$250.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) when he has the means to do so.

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

8. Petitioner has submitted documentation of exhaustion of administrative remedies in addition to the documents attached to this order. Those papers are being held in the file of this case in the event respondents wish to examine them.

Entered this 12th day of September, 2005.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge

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