IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAHEED TAALIB'DIN MADYUN,

OPINION AND ORDER

Petitioner,

07-C-318-C

v.

JUDY SMITH; CO. II. LEMON; CAPT. SCHROEDER;
KENNETH KELLER; ANGIE WOOD; LT. KUSTER;
LT. SCHNEIDER; CAPT. PHILLIPS; LT. KIRBY LINJER;
CO. II CAROL COOK; PETER ERICKSON; CAPT. BRANT;
CAPT. LESATZ; WILLIAM POLLARD; DR. STEVEN
SCHMIDT; LT. LAMBRECHT; LT. SKIEWICKI;
CAPT. BRUCE MURASKI; PHIL KINGSTON;
DON STRAHOTA; CAPT. O'DONOVAN; SGT. VOSS;
SGT. LEHMAN; SIEDSCHLAG; and CAPT. WIERENGA;
(Others to be named); CO. II ERIC TAYLOR,

Respondents.

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This is a proposed civil action for monetary, injunctive and declaratory relief filed under 42 U.S.C. §§ 1983 and 1985. Although petitioner has paid the $350 filing fee in full as he was required to do under 28 U.S.C. § 1915(g), because he is a prisoner, I am required to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant

who by law cannot be sued for money damage. 28 U.S.C. §§ 1915 and 1915A.

The allegations in petitioner's complaint are serious. If they are true, there is a vast conspiracy involving many different prison officials at several different Wisconsin correctional facilities aimed at punishing petitioner for being a jailhouse lawyer. Not only is the extent of the alleged conspiracy shocking, but so is its severity. Petitioner's allegations suggest that many of the respondents are vicious, even blood thirsty, and that each of them is eager to cause petitioner pain. He says that they will stop at nothing to shut him down, going as far as poisoning him, brutally assaulting him and attempting to induce a heart attack.

Needless to say, many of petitioner's allegations seem highly unlikely and others border on the fantastic. However, at this stage of the litigation, I must accept petitioner's allegations as true. A court may reject the allegations in a complaint only if the court determines them to be "factually frivolous," an extremely narrow standard. Although petitioner's allegations may be far fetched, they "do not quite cross the line into the territory, illustrated by cases in which plaintiffs complain about electrodes being implanted in their brains by inhabitants of far-off galaxies, in which a district court can . . . properly dismiss a complaint, even though it makes factual allegations, without bothering to take any evidence." Bontkowski v. Smith, 305 F.3d 757, 760 (7th Cir. 2002) (declining to conclude that claim of implausible conspiracy was factually frivolous). See also Loubser v. Thacker,

440 F.3d 439, 441 (7th Cir. 2006) (district court could not dismiss as factually frivolous complaint alleging "vast conspiracy. . . to destroy [plaintiff] financially and drive her out of the country"). Accordingly, I conclude that petitioner may proceed with his claims in which he alleges that various respondents hurt him physically and in other ways because he was a jailhouse lawyer.

In addition to being serious, petitioner's allegations are also lengthy, spanning 47 pages. I have excluded any allegations that petitioner says he included for "background" and allegations against officials petitioner has not named as respondents (unless they are John Doe respondents and petitioner has identified them as such). In addition, I have excluded the following types of allegations because they fail to state a claim upon which relief may be granted:

• Verbal harassment and threats by various prison officials. DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) (verbal abuse of prisoners by prison staff does not state claim under Constitution); Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir.1987) (prison official's use of vulgar language did not violate inmate's civil rights); Martin v. Sargent, 780 F.2d 1334 (8th Cir.1985) (inmate's rights not violated by threat that he would have "bad time" if he refused to cut his hair and shave his beard);

• Instances in which various respondents planned or attempted to retaliate against petitioner, but were unable to carry out their plans (because petitioner's only claim against

respondents Schroeder and Phillips was a failed attempt to "set up" petitioner, the complaint will be dismissed as to respondents Schroeder and Phillips); Harris v. Kuba, 486 F.3d 1010, 1014 (7th Cir. 2007) (no recovery under § 1983 unless harm materializes); Doe v. Welborn, 110 F.3d 520, 523 (7th Cir. 1997) (same);

• Conclusory allegations that provide neither notice of the claim nor the grounds upon which it rests (for example, petitioner alleges that respondent Cook "withh[e]ld [his] incoming mail" but he does not identify when this occurred, what mail was withheld, why it was withheld or even what he means by "withheld"); Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007);

• Harassment of petitioner's wife by prison officials, because petitioner does not have standing to sue for the injuries of others. Hinck v. United States, 127 S. Ct. 2011, 2017 n.3 (2007).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner has been incarcerated by the Wisconsin Department of Corrections since at least 1997. During this time, petitioner has been involved in numerous lawsuits against prison officials, including Madyun v. Bertrand. (Petitioner says this case was pending before the Court of Appeals for the Seventh Circuit and that the case number was 99-42442, but

there are no cases on record in the Seventh Circuit matching that name or case number. However, Wisconsin's electronic courts records show that petitioner filed several appeals in cases against Daniel Bertrand in state court in 1997.) In addition, petitioner helped many prisoners file their own lawsuits. In one instance, petitioner agreed to assist another prisoner who was being framed by respondent Angie Wood, a unit manager. Petitioner filed at least two grievances against respondent Wood as well. Petitioner was widely known as a jailhouse lawyer.

A. Oshkosh Correctional Institution

Petitioner was transferred to Oshkosh Correctional Institution in April 2001. As soon as he arrived there, two officers told him that "the entire staff at [the prison was] afraid of [petitioner] because of his ability to litigate, and no one wanted him" there.

1. Confiscated watch

In June 2001, respondent Lieutenant Kuster confiscated a watch from petitioner and kept it for himself. The watch had special sentimental value to petitioner because his mother had given it to him just before she died. Kuster took the watch in an attempt to incite petitioner to act out and thus justify a transfer to maximum security.

2. First placement in segregation

In September 2001, respondent Wood placed petitioner in segregation to "discourage" him from filing lawsuits against prison officials and from helping other prisoners do the same.

3. Food tampering

Respondent Carol Cook was a correctional officer at Oshkosh who sometimes delivered petitioner's meal tray. Whenever she did so, she put "something in [his food] that tasted as if it could be medicine or poison." This caused petitioner "to faint and have a lot of pain throughout his body." Cook would spit in petitioner's food as well. Petitioner complained to respondent Kenneth Keller, a lieutenant, but he refused to conduct an investigation.

4. Smoke inhalation

In October 2001 petitioner was moved to a different segregation unit, where respondent Wood "ran things." In November, a prisoner housed near petitioner set a fire in his cell. Petitioner pressed his emergency button, but it took respondent Kirby Linjer, a lieutenant, 45 minutes to respond and an additional 30 minutes to take petitioner out of his cell. As a result of petitioner's prolonged exposure to smoke, petitioner had to be taken to

the hospital for chest pains.

5. Additional food tampering and failure to provide medical care

Another day, officers delivered a cream-covered pie to petitioner. After petitioner began eating the pie, he felt "hard objects" in his mouth. He swallowed "a large part" of them before realizing that the objects were actually "finely cut razor blades." Other parts of his meal had "medication" in it that made petitioner "vomit blue and red foam." He also discovered a black marker in his bread. The objects petitioner ingested caused him a great deal of stomach pain.

Petitioner called the officer who served him the pie and showed him the razor pieces he had spit out. After taking the pie from petitioner, the officer discovered more "razor chips." Petitioner asked to see a doctor and the sergeant on duty. The officer walked away and encountered respondent Wood where petitioner could still see them. The officer showed the pie to Wood, who then began laughing. The officer never returned.

Petitioner wrote to Judy Smith (the warden) and respondents Wood, and Lieutenant Kuster, telling them what happened and asking them for help. Wood came to petitioner's cell, telling him that officers would not do what petitioner was accusing them of, that she would not worry about petitioner's safety until he was killed and that she was not going to conduct an investigation.

6. Retaliation for filing 2002 lawsuit

Two days later, two officers took petitioner to an interview room. The officers' uniforms indicated that one of them was a lieutenant and another was a correctional officer II. Neither of them was wearing a name tag; both refused to tell petitioner their names. In the interview, the lieutenant told petitioner, "it appears that you have a problem," before handing petitioner a copy of a complaint that petitioner had filed in the Western District of Wisconsin in January 2002. (Presumably, petitioner is referring to Madyun v. Litscher, 02-C-43-C (W.D. Wis. 2002), in which he sued various prison officials for issues related to parole eligibility, the location of his confinement and the manner in which Wisconsin's pension system invests in private prisons. In the 2002 case, I dismissed some of petitioner's claims as legally frivolous and others for failure to state a claim upon which relief may be granted. On appeal, the Court of Appeals for the Seventh Circuit concluded that all of petitioner's claims were legally frivolous. Madyun v. Litscher, 57 Fed. Appx. 259, 2002 WL 31898230 (7th Cir. 2002).) The lieutenant told petitioner that "he would get to know pain" if he did not "abandon the idea of filing a lawsuit." After ripping up the complaint, the lieutenant warned petitioner that he had better watch himself because no one at Oshkosh liked him.

In February 2002, respondent Lemon, a correctional officer, demanded that petitioner drop his lawsuit because it was going to "mess up [Lemon's] retirement pension." Around

this time, Lemon began referring to petitioner as the "black Jew" and accusing him of being involved in the September 11 attacks. When petitioner refused to drop the lawsuit, Lemon told petitioner, "you leave me no choice." Respondent Lieutenant Schneider placed petitioner in segregation.

Petitioner wrote the warden to let her know that he feared for his life. This letter was intercepted by respondent Kuster, who threatened him about speaking against officers.

7. Assault by officers

One night in February 2002, petitioner was awakened to the sound of many feet outside his cell. His door was opened, allowing in three individuals in black suits and ski masks. They rushed petitioner, beating his face and kicking him all over his body. Petitioner endured "repeated, vicious blows" while being held down. One of the officers placed a night stick "between [petitioner's] legs and kicked hard by the officer, busting [petitioner's] rectum."

Eventually, the officers dropped petitioner hard on the floor, raised their masks over their head and began talking about what to do with petitioner. Petitioner recognized two of the officers as respondents Kuster and Linjer; the third officer he "only recognized by face and not by name." After some debate, the officers decided not to kill petitioner. Before leaving, one of the officers said to petitioner, "file a complaint on this you 'legal guru' and

you'll really learn what pain is all about."

Petitioner filed a grievance and wrote a letter to the warden about this incident, but the only response he received was from a man in "civilian" clothing named James Zanon who told petitioner to stop filing grievances and writing letters to the warden. Because of the threats, petitioner did not seek medical treatment. However, petitioner endured significant amounts of pain and suffered serious injuries as a result of the assault; he continues to experience difficulty during bowel movements.

8. Handcuffs

On March 4, 2002, petitioner attempted to notify Captain Darringer of his situation by writing him a letter using another prisoner's name on the envelope. Darringer never responded; the following day respondent Cook retaliated against petitioner for seeking help.

Respondent Cook came to petitioner's cell to take petitioner "to go through his property." She directed him to place his hands through the slot in the cell door so that he could be handcuffed during the transport. When petitioner complied, Cook squeezed the handcuffs as tight as she could, telling petitioner, "You were warned to keep quiet . . . Only you can bring this to end by cooperating. . . Do you understand what I'm saying? Officers at OSCI hate inmates like you, and we will stick together against you."

Cook ignored petitioner's repeated requests to loosen the cuffs, even after there was

a "bone cracking sound" and blood started "gushing" from petitioner's wrists. Cook refused to seek medical treatment for petitioner and told petitioner "he'd be sorry" if he mentioned the incident to anyone.

As soon as respondent Cook's shift was over, petitioner pressed the emergency button in his cell. Over the intercom, he reported that he thought his left wrist might be broken. An officer took petitioner to the health services unit, where he was treated by Doctor Kaplan. Because petitioner was afraid of retaliation, he "stated the facts in a version that would not make it appear he was saying that the officer tried to hurt him." "Although the nurse noticed the swelling on [petitioner's] face, nothing was done about it."

9. Conduct reports for lying about staff and second placement in segregation

In March 2002, petitioner received two conduct reports for lying about staff, one from respondent Kuster and one from respondent Linjer. Petitioner received 30 days' program segregation for the first conduct report and 180 days' program segregation for the second conduct report. There was no evidence to support either report. Respondent Keller found petitioner guilty, telling him that he had been ordered "to remove any admissions [by officers] from the record, find [petitioner] guilty and get him out of OSCI as soon as possible."

B. Green Bay Correctional Institution

1. Third placement in segregation

In June 2002, petitioner was transferred to Green Bay Correctional Institution. Respondent Peter Erickson, the security director, placed petitioner in segregation even though he had completed his segregation time at Oshkosh. (Petitioner spells the last name of this respondent as "Erickse*n*" in the body of the complaint; I have used the spelling petitioner uses in the caption of his complaint.) Erickson placed petitioner in segregation to help Erickson's "friends" at Oshkosh retaliate against petitioner for his legal activities.

2. False conduct reports

In September 2005, respondents Erickson and Captain Brant coerced another prisoner into calling petitioner's sister and asking her to send $200 to petitioner. When the money arrived, Brant intercepted it for an investigation. Fifteen days later, Brant placed petitioner in "lock up" and then gave him a conduct report for "Enterprising and Fraud" and "Unauthorized Transfer of Property." In October 2005, respondent Lieutenant Lambrecht found petitioner not guilty of Enterprising and Fraud but guilty of Unauthorized Transfer of Property. Petitioner was sentenced to 120 days in segregation.

3. Induced "agoraphobic attack"

Before petitioner was scheduled to be released from segregation, respondents Erickson and William Pollard (the warden) began searching through petitioner's files, looking for information they could use to keep petitioner in segregation. (Pollard was retaliating against petitioner because petitioner had filed a grievance against him.) They discovered that petitioner had been diagnosed with a kind of agoraphobia that "caused him to become uncontrollably violent to get out of that situation, even to the point of killing or making someone kill him." In addition, an "agoraphobic attack" caused his heart rate to drop dramatically, below 35 beats a minute; his panic disorder "simulated . . . full cardiac arrest." As a result of this condition, the Department of Corrections had "Red Tagged" petitioner so that he would never be placed in a cell with another prisoner.

After respondent Erickson discovered this information, he removed petitioner's single cell restriction, with the hope that petitioner would either refuse to be housed with another prisoner (and thus remain in segregation) or be provoked into a violent confrontation. When petitioner was released from segregation, Erickson and Pollard ordered petitioner to be celled with a "young, loud Hispanic gang member who is always fighting" and later with a "racist skin head." After petitioner received the first order, he experienced "severe symptoms of having a heart attack." At the hospital, the doctor told him he could die if staff "continued to pressure" him.

4. Fourth and fifth placement in segregation

Ultimately, petitioner refused to be double celled. As a result, respondent Lieutenant Skiewicki sentenced him to 120 days' segregation time. Skiewicki "didn't like following Erickson's order to keep [petitioner] in segregation."

When petitioner was released from segregation, respondent Erickson immediately ordered him to be celled with a "young, racist, skinhead gang member." Petitioner refused to enter the cell and was sentenced to another 90 days in segregation by respondent Lieutenant Lesatz. However, when Lesatz learned that Erickson was disregarding petitioner's medical orders, Lesatz complained to the deputy warden.

Petitioner filed a grievance against respondents Erickson and Pollard, but it was denied at every level. When Erickson learned that petitioner had been complaining, Erickson ordered the prison psychologist, respondent Steven Schmidt, to remove from petitioner's file all references to his agoraphobia. Schmidt "rewrote" petitioner's diagnosis, reducing it to a "phobia." As instructed by Erickson, Schmidt recommended petitioner for a double cell.

Although petitioner was scheduled to be released from segregation on May 6, 2006, on that day, respondents Erickson and Pollard moved petitioner to a "receiving segregation cell," where Erickson hoped to keep petitioner permanently. This cell had no electrical outlets, no tables and no chairs.

On June 10, 2006, petitioner went to the prison law library, where respondent Schmidt approached him. Schmidt asked petitioner, "Is it true you think you'll kill someone if doubled up?" Petitioner said that it was true as a result of his agoraphobia. Twenty minutes later an officer returned petitioner to segregation on respondent Erickson's orders. Petitioner was sentenced to another 90 days' segregation on a charge of threatening to kill another prisoner.

5. Missed court deadline

When petitioner was released from segregation, respondent Pollard ordered that petitioner be transferred to Waupun Correctional Institution in Waupun, Wisconsin. However, before the transfer respondents Lesatz and Erickson directed correctional officers to confiscate all of petitioner's "legal files" in order to keep petitioner from meeting an April 2007 appellate court deadline. (Petitioner says that the deadline was for a "2241 petition to the Federal Court of Appeals," but a review of Wisconsin's electronic court records reveals that the case numbers petitioner provides, 2003AAP2972 and 2003AP2973, are for a challenge to his conviction that petitioner filed in Wisconsin circuit court and appealed to the Wisconsin Court of Appeals.) In addition, officers confiscated "every document relating to the original filing of this complaint as filed in the" United States Court of Appeals for the Seventh Circuit.

C. Waupun Correctional Instititution

1. Denial of religious and legal materials

When petitioner arrived at the Waupun prison, respondents Captain Wierenga, Sergeant Lehman, Don Strahota and Phil Kingston "conspired" to deny petitioner all of his religious and legal materials "because of their dislike of Muslims and jailhouse litigants." Petitioner was denied the Qur'an, the Bible and his prayer books. As a result of the loss of his legal books, petitioner is "without . . . a way to litigate his cases" because the computer program the prison uses for research is inadequate.

2. Sixth placement in segregation

Respondents Captain Bruce Muraski, Don Strahota and Captain Wierenga made multiple attempts to plant contraband in petitioner's cell. When these attempts failed, these respondents, along with respondent Sergeant Voss, attempted to move petitioner to another double cell.

Respondents Voss and Eric Taylor escorted petitioner to his new cell. While petitioner was in the presence of his potential new cell mate, Voss and Taylor asked petitioner to describe his "agoraphobic attacks." When petitioner complied, he was again sent to segregation for making a threat. On the orders of respondents Muraski, Strahota and Voss, respondent Taylor issued a conduct report to petitioner for "disruptive conduct" and

"threats." At the hearing, respondent Taylor testified that petitioner never made a threat and was only explaining his mental illness. Nevertheless, respondent Captain O'Donovan found petitioner guilty and sentenced him to 120 days' segregation.

After petitioner was placed in segregation, respondent Siedschlag "continued the harassment" by "keeping" petitioner on the lowest level of the step program, meaning that petitioner was denied a television, radio, telephone calls and "more books." Also, Siedschlag denied petitioner use of the prison law library for more than two months.

Respondent Muraski ordered officers to confiscate and destroy petitioner's legal and personal papers. The officers threw petitioner's last photo of his father on the floor and ground their feet into it.

DISCUSSION

A. Eighth Amendment Claims

The Eighth Amendment prohibits the infliction of pain that is "totally without penological justification." Hope v. Pelzer, 536 U.S. 730, 737 (2002); Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Of course, there could be no justification for poisoning a prisoner's food, brutally beating him without provocation or intentionally inducing the symptoms of a heart attack.

In addition, placing handcuffs on a prisoner so tightly that his wrists bled could

constitute excessive force in violation of the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 321 (1986) (in determining whether force is excessive under Eighth Amendment, court considers need for application of force; relationship between need and amount of force that was used; extent of injury inflicted; extent of threat to safety of staff and inmates and any efforts made to temper severity of a forceful response). And denying a prisoner necessary medical care or intentionally prolonging his exposure to harmful smoke as a result of a fire could violate the Eighth Amendment's prohibition on acting with deliberate indifference to a substantial risk of serious harm. Helling v. McKinney, 509 U.S. 25 (1993); Estelle v. Gamble, 429 U.S. 97 (1976). Accordingly, I will allow petitioner to proceed on these claims.

The main question at this stage regarding petitioner's Eighth Amendment claims is whether particular respondents were sufficiently involved in the alleged conduct to permit a finding of liability under 42 U.S.C. § 1983. As petitioner likely knows as a result of his extensive experience in litigating civil rights cases, the court of appeals has held that a respondent may not be held liable under § 1983 unless "the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir.1995).

For example, petitioner does not allege that respondent Keller was directly involved

in attempting to poison him, only that Keller refused to investigate petitioner's complaint regarding those incidents. By itself, a refusal to take action on a complaint of a constitutional violation after it has been committed is not sufficient to trigger liability under § 1983. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002); Vasquez v. Raemisch, 480 F. Supp. 2d 1120, 1133-34 (W.D. Wis. 2007) . However, if a prisoner complains to an official about an ongoing risk to the prisoner's health or safety and the official refuses to take steps to prevent further harm, that could constitute an independent violation of the Eighth Amendment. Strong, 297 F.3d at 650. In this case, petitioner's claim against respondent Keller is not that he failed to prevent harm, but only that "he did no investigation on the matter." Accordingly, petitioner cannot proceed on this claim against Keller.

With respect to the incident involving razor blades in petitioner's food, petitioner neither names as respondents any of the officers directly involved in the incident nor suggests that he wishes to proceed against them as John Does. Rather, the only person he names is respondent Wood, who petitioner alleges laughed when she discovered that petitioner was fed razor blades. Although laughing at petitioner would not violate his constitutional rights, failing to seek medical care for him despite knowledge that he needed it would violate the Eighth Amendment. Because it may be reasonably inferred from petitioner's allegations that respondent Wood had such knowledge, I will allow him to proceed on this claim.

I have set out the remaining Eighth Amendment claims on which I am allowing petitioner to proceed in the order below. I note that I am allowing him to proceed against one John Doe respondent, the third officer who allegedly beat petitioner and who petitioner "only recognized by face and not by name." Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed respondent and will set a deadline within which petitioner is to amend his complaint to include the unnamed respondent.

B. Retaliation Claims

Prison officials may not discipline or otherwise take adverse action against a prisoner for exercising a constitutional right. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). In this case, petitioner alleges that nearly everything bad that happened to him in prison from 2001 to the present was a result of retaliation for filing lawsuits and grievances on behalf of himself and others and for more generally complaining about prison conditions. Of course, petitioner has a constitutional right of access to the courts, which includes the right to file lawsuits. Lehn v. Holmes, 364 F.3d 862, 868 (7th Cir. 2004). He also has the right to complain about prison conditions under the free speech clause, at least when the complaint touches a matter of public concern, Pearson, 471 F.3d at 740-41, and to file

grievances under the petition clause, Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007).

Normally, to state a claim, the prisoner must identify the lawsuit, grievance or statement that he believes prompted the retaliation. E.g., Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) ("Had Higgs merely alleged that the defendants had retaliated against him for filing a suit, without identifying the suit or the act or acts claimed to have constituted retaliation, the complaint would be insufficient.") In this case, petitioner identifies three cases, one filed in the late 1990s, one filed in 2002 and another appeal filed more recently. However, the Court of Appeals for the Seventh Circuit concluded that the 2002 case was legally frivolous. Madyun v. Litscher, 57 Fed. Appx. 259, 2002 WL 31898230 (7th Cir. 2002) ("We also note that Madyun's pursuit of this frivolous appeal results in an additional strike for purposes of that statute."). Because the right of access to the courts does not extend to frivolous lawsuits, Christopher v. Harbury, 536 U.S. 403, 415 (2002), any actions that prison officials took against petitioner because of that lawsuit could not be considered unconstitutional retaliation. Because petitioner's only claim against respondents Schneider and Lemon is that they placed him in segregation for filing that lawsuit, I will dismiss petitioner's complaint as to those respondents.

However, for the most part, petitioner does not suggest that respondents' alleged misdeeds were triggered by any particular lawsuit, so it would be inappropriate at this early stage to conclude that the other acts of retaliation about which petitioner complains were

constitutionally permissible. Rather, the theme of petitioner's allegations is that respondents were targeting him because of his conduct as a jailhouse lawyer *collectively*. In such a case, it is impossible for petitioner to identify with particularity the impetus for the retaliation. If respondents were retaliating against petitioner because of his work as a whole, that is all petitioner has to allege to provide notice.

Regardless whether petitioner believes that respondents were retaliating against him for one complaint or all of them, he will have to prove either at summary judgment or at trial that the actions about which he complains were taken *because* of his conduct as a jailhouse lawyer. As petitioner's complaint amply demonstrates, an unlawful motive is very easy to allege. Crawford-El v. Britton, 523 U.S. 574, 585 (1998). Petitioner should be aware that it is significantly more difficult to prove. For example, petitioner will first have to prove that each respondent *knew* he was a jailhouse lawyer. Salas v. Wisconsin Dept. of Corrections,– F.3d –, 2007 WL 2048945, *8 (July 18, 2007) (in retaliation case, plaintiff must show that defendant knew that plaintiff was engaging in protected conduct). However, such knowledge will not be sufficient by itself to prove his claims. Rather, he will have to show that similarly situated prisoners not engaging in jailhouse lawyering were treated better than he was, cf. Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir 2006), or point to other evidence suggesting a retaliatory motive, such as suspicious timing or statements by the defendant suggesting that he was bothered by the protected conduct. E.g., Mullin v. Gettinger, 450

F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005).

Even suspicious timing is rarely enough to prove an unlawful motive without additional evidence. Sauzek v.Exxon Coal USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second.") In this case, because it appears that petitioner was continually filing lawsuits and grievances, it would not be very suspicious at all if respondents happened to take a disciplinary action against petitioner around the same time he made a complaint. Cherry v. Frank, 03-C-129-C, 2003 WL 23205817, *10 (W.D. Wis. Dec, 4, 2003) ("In plaintiff's case, even a lawsuit that was filed close in time to the disciplinary action would have little probative value when one takes into account the number of lawsuits that plaintiff files.") Further, to the extent that respondents put petitioner in segregation or took other adverse acts against because of a frivolous lawsuit he filed or because he was lying about staff, there would be no violation because such actions are not protected by the Constitution, Hale v. Scott, 371 F.3d 917, 918-19 (7th Cir. 2004).

As with petitioner's Eighth Amendment claims, petitioner appears to be asserting retaliation claims against a number of prison officials who had no involvement in the alleged violations. He alleges that respondents Taylor, Lesatz and Skiewicki issued conduct reports or disciplined him, but he makes it clear in his complaint that none of them had a retaliatory

or otherwise constitutionally impermissible motive for their actions. Rather, he alleges that each of them was duped by other respondents and objected to efforts by those respondents to harm petitioner. Accordingly, I will dismiss the complaint as to these three respondents.

C. Other Alleged Constitutional Violations

Petitioner appears to be contending that a number of respondents' allegedly retaliatory actions would violate petitioner's constitutional rights even if they had been taken for reasons unrelated to petitioner's status or conduct as a jailhouse lawyer. Petitioner is correct with respect to one of these claims, which is that respondents Captain Wierenga, Sergeant Lehman, Don Strahota and Phil Kingston denied petitioner his religious materials. Petitioner has the right to practice his religion in prison under both the First Amendment and Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. If petitioner can show that the absence of these religious materials substantially burdened his ability to practice his religion, confiscating those materials may have been a violation of the First Amendment or RLUIPA unless respondents can show that the deprivation was adequately justified by a legitimate interest (or compelling interest, under RLUIPA). Borzych v. Frank, 439 F.3d 388 (7th Cir. 2006); Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005); Tarpley v. Allen County, Indiana, 312 F.3d 895, 898 (7th Cir. 2002).

Second, petitioners raises multiple claims for a denial of due process, saying that he

did not receive adequate process before his watch was confiscated and before he was placed in segregation. With respect to petitioner's alleged deprivation of property, petitioner's allegations suggest that the confiscation of the watch was an unauthorized act by respondent Kuster; it was not carried out pursuant to a policy of the institution or the Department of Corrections. In such a situation, pre-deprivation procedures are not required so long as the state provides an adequate post-deprivation remedy. Hudson v. Palmer, 468 U.S. 517 (1984). The state of Wisconsin provides several post-deprivation procedures for challenging the taking of property. Under Wis. Stat. § 810.01, provides a remedy for the retrieval of wrongfully taken or detained property. In addition, Chapter 893 of the Wisconsin Statutes contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property.

With respect to petitioner's alleged deprivation of liberty (placement in segregation), the Court of Appeals for the Seventh Circuit has held repeatedly that confinement in segregation does not trigger the protections of the due process clause. Lekas v. Briley, 405 F.3d 602, 612 (7th Cir. 2005); Hoskins v. Lenear, 395 F.3d 372, 374- 75 (7th Cir. 2005); Thomas v. Ramos, 130 F.3d 754 (7th Cir.1997); Williams v. Ramos, 71 F.3d 1246 (7th Cir. 1995).

Finally, petitioner appears to be raising several claims for denial of his right of access to the courts. First, petitioner says he missed an April 2007 deadline related to an appeal

in case numbers 2003AAP2972 and 2003AP2973. The problem with this claim is that Wisconsin's electronic court records show that petitioner could not have had an April 2007 deadline related to that appeal. The court of appeals decided petitioner's appeal in November *2005* and the Wisconsin Supreme Court denied his petition for a writ of certiorari in January 2006. State v. Madyun, 2006 WI 23, 289 Wis. 2d 10, 712 N.W.2d 34. Thus, petitioner could not have been prejudiced in April 2007 by any inability to file documents in a case long since resolved.

Second, petitioner points to two instances at Waupun Correctional Institutions in which various respondents confiscated his legal materials. Because petitioner fails to allege how the deprivation of these materials prevented him from litigating a particular case, I will not allow petitioner to proceed on these claims. Lehn, 364 F.3d at 868

In closing, I note that petitioner filed a lawsuit including many of the allegations he makes in this case in a previous case filed in the Eastern District of Wisconsin. Madyun v. Cook, 204 Fed. Appx. 547, 2006 WL 2053466 (7th Cir. 2006). Because that case was dismissed for petitioner's failure to exhaust his administrative remedies rather than on the merits, this case is not barred under the doctrine of claim preclusion. Ross ex rel. Ross v. Board of Education of Township High School District 211, 486 F.3d 279 (7th Cir. 2007) (claim preclusion applies only when court decided previous case on merits). However, if petitioner has still failed to complete the grievance process for any of his claims, those claims

may be subject to dismissal at summary judgment for failure to exhaust.

D. Other Motions

Petitioner has filed three other motions with his complaint: (1) a motion "seeking clarification of assignment of judge in this case from Barbara Crabb to Stephen Crocker"; (2) a motion "for permission to serve only defendants counsel"; and (3) a motion for appointment of counsel.

Petitioner's first motion was prompted by an order dated June 26, 2007, in which Magistrate Judge Stephen Crocker denied as moot petitioner's motion to use funds from his release account to pay his court filing fee because the court had already received the full fee. That order does not mean the case has been reassigned to the magistrate judge; Judge Crabb remains the presiding judge in this case. Rather, under 28 U.S.C. § 636(b)(1), a district court judge may designate a magistrate judge to rule on various pretrial matters, so long as they do not involve potential dismissal of one or more claims. Most relevant to this case, the magistrate judge will most likely decide any future discovery disputes that the parties have. In addition, he will preside over the preliminary pretrial conference, which will be scheduled once all of the respondents have filed an answer. If petitioner has any other questions regarding the role of the magistrate judge, he may present them at the preliminary pretrial conference.

Petitioner's motion to serve his complaint on respondents' counsel (instead of respondents themselves) will be denied as unnecessary. This court has an informal service agreement with the state attorney general's office under which that office will seek permission from Department of Corrections' employees to accept service of the complaint on the employees' behalf. If the attorney general's office is able to accept service for all of the respondents in this case, petitioner need not serve the complaint himself. If the attorney general's office is not able to accept service for everyone, I will instruct petitioner how to proceed at that time.

Petitioner's motion for appointment of counsel will be denied. In deciding whether to appoint counsel, I must first find that petitioner has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Petitioner does not say that he has been prevented from trying to find a lawyer on his own. To prove that he has made reasonable efforts to find a lawyer, petitioner must give the court the names and addresses of at least three lawyers that he asked to represent him in this case and who turned him down.

Petitioner should be aware that even if he is unsuccessful in finding a lawyer on his own, that does not mean that one will be appointed for him. At that point, the court must consider whether petitioner is able to represent himself given the legal difficulty of the case,

and if he is not, whether having a lawyer 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 simply too new to allow the court to evaluate petitioner's abilities or the likely outcome of the lawsuit. Therefore, the motion will be denied without prejudice to petitioner's renewing his request at a later time.

ORDER

IT IS ORDERED that

1. Petitioner Shaheed Taalib'din Madyun is GRANTED leave to proceed on the following claims:

a. respondent Carol Cook put "medicine or poison" in petitioner's food in September 2001;

b. respondent Angie Wood failed to provide petitioner with medical care when she learned that petitioner had been fed razor blades;

c. respondents Kuster and Kirby Linjer and an unknown officer assaulted petitioner in his cell in February 2002;

d. respondent Cook used excessive force against petitioner by placing handcuffs on him so tightly that it caused his wrists to bleed and then refused to seek medical treatment for him;

e. respondent Linjer was deliberately indifferent to petitioner's health when Linjer prolonged petitioner's exposure to smoke;

f. respondents William Pollard and Erickson were deliberately indifferent to petitioner's health when they induced him to experience symptoms of a heart attack;

g. respondent Kuster confiscated petitioner's watch in retaliation for petitioner's work as a jailhouse lawyer and his complaints about prison conditions;

h. respondent Angie Wood placed petitioner in segregation in September 2001 because of petitioner's activities as a jailhouse lawyer and his complaints about prison conditions;

i. respondent Peter Erickson placed petitioner in segregation in 2002 because of petitioner's activities as a jailhouse lawyer and his complaints about prison conditions;

j. respondents Erickson and Brandt issued conduct reports to petitioner and respondent Lambrecht placed petitioner in segregation for "Enterprising and Fraud" and "Unauthorized Transfer of Property" because of petitioner's activities as a jailhouse lawyer and his complaints about prison conditions;

k. respondents Pollard, Erickson and Steven Schmidt conspired to send petitioner to segregation in 2005 and 2006 because of petitioner's activities as a jailhouse lawyer and his complaints about prison conditions;

l. respondents Captain Bruce Muraski, Don Strahota, Captain Wierenga, Sergeant

Voss and Captain O'Donovan conspired to place petitioner in segregation because of his activities as a jailhouse lawyer and his complaints about prison conditions;

m. respondent Siedschlag refused to advance petitioner through the segregation step program and denied him access to the law library because of petitioner's activities as a jailhouse lawyer and his complaints about prison conditions.

n. respondent Muraski ordered officers to destroy petitioner's legal materials and personal documents because of petitioner's activities as a jailhouse lawyer and his complaints about prison conditions;

o. respondents Linjer, Kuster and Keller issued a conduct report against petitioner and sentenced him to segregation in March 2002 because of petitioner's activities as a jailhouse lawyer and his complaints about prison conditions;

p. respondents Captain Wierenga, Sergeant Lehman, Don Strahota and Phil Kingston denied petitioner his religious and legal materials because he is a Muslims and jailhouse lawyer;

2. Petitioner is DENIED leave to proceed on all other claims.

3. Petitioner's complaint is DISMISSED as to respondents Captain Phillips, Lieutenant Schneider, Eric Taylor, Captain Lestaz, Captain Schroeder, Lieutenant Skiewicki and CO II Lemon.

4. Petitioner's motion for clarification is GRANTED.

5. Petitioner's motion for appointment of counsel is DENIED without prejudice to petitioner's refiling it at a later date.

6. Petitioner's motion "for permission to serve only defendants counsel" is DENIED AS UNNECESSARY. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint, attached materials and this order are being sent today to the Attorney General for service on the state respondents.

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

8. 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.

Entered this 31st day of July, 2007.

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