IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RAYNARD R. JACKSON,

Petitioner, OPINION and ORDER

v. 07-cv-656-bbc

JOAN GERL, GARY BOUGHTON, DANE ESSER, T. BROWN, J.T. BROWN, LARRY JOHNSON, MICHAEL SHANNON, JEFF REWEY, THOMAS TAYLOR, VICKY MANDERFIELD, RICHARD SCHNEITER, PETER HUIBREGTSE, DR. COX, DR. LAMAR, R. HABLE, S.D. HABLE, CAPTAIN GARDNER, T. SAWINSKI, JOHN SHARPE, KELLY TRUMM, T. LANSING, MS. THESING, TOM GINZKE, RICK RAEMISCH, JOHN BETT, STEVE CASPERSON, DAN WESTFIELD, MARION HARTMANN and MATHEW FRANK,

Respondents.

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This is a proposed civil action for monetary, injunctive and declaratory relief brought under 42 U.S.C. § 1983 by petitioner Raynard Jackson. At times relevant to his complaint, petitioner was housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Petitioner requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

He contends that respondents Joan Gerl, Gary Boughton, Dane Esser, T. Brown, J.T. Brown, Larry Johnson, Michael Shannon, Jeff Rewey, Thomas Taylor, Vicky Manderfield, Marion Hartmann, Richard Schneiter, Peter Huibregste, R. Hable, S.D. Hable, Captain Gardner, T. Sawinski, John Sharpe, Kelly Trumm, T. Lansing, Ms. Thesing, Dr. Lamar, Dr. Cox, Tom Ginzke, Rick Raemisch, John Bett, Steve Casperson, Dan Westfield and Matthew Frank violated his rights under the United States Constitution, the Wisconsin Constitution and Wisconsin criminal statutes.

I understand petitioner to allege numerous claims against respondents. He asserts that correctional officers involved with the use of a "No. 15 stinger grenade" in his cell on March 26, 2005 and those involved with the development of policies that allowed for the use of a grenade in an enclosed cell violated his rights under the Eighth Amendment. In addition, he contends that he was subjected to an unconstitutional strip search following the use of the grenade. Next, petitioner contends that he received inadequate medical care for the injuries he received as a result of the explosion of the grenade. Finally, petitioner alleges that prison officials intentionally disposed of critical records regarding the use of the grenade.

Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915. However, because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act 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 damages. 28 U.S.C. §§ 1915 and 1915A.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint and attached materials, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Raynard Jackson is a prisoner who was housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin at times relevant to this complaint. At this time, petitioner was 24 years old. He is 5'8" and weighed 135 pounds. He was incarcerated for a non-violent crime.

Respondents Joan Gerl, Gary Boughton, Dane Esser, T. Brown, J.T. Brown, Larry Johnson, Michael Shannon, Jeff Rewey, Thomas Taylor, Vicky Manderfield, Marion Hartmann, Richard Schneiter, Peter Huibregste, R. Hable, S.D. Hable, Captain Gardner, T. Sawinski, John Sharpe, Kelly Trumm, T. Lansing, Ms. Thesing, Dr. Lamar and Dr. Cox were employed at the Wisconsin Secure Program Facility. The duties of respondents Schneiter, Huibregste, Boughten, R. Hable, S.D. Hable, Sharpe, T. Sawinski, Gardner and Gerl include establishing policies at the Wisconsin Secure Program Facility.

Respondents Tom Ginzke, Rick Raemisch, John Bett, Steve Casperson, Dan

Westfield and Matthew Frank were employed by the Wisconsin Department of Corrections. Their duties include establishing policies for all Wisconsin Department of Corrections institutions.

Petitioner was transferred to the Wisconsin Secure Program Facility on March 4, 2005, where he was housed in a cell with an 8-foot radius in the E-unit. The interiors of the cells are visible from three outside vantage points: the cell-door window, a camera in an upper corner of the cell and a window at the rear of the cell, above the camera. There are toilets, wash bowls and shower heads in the cells, but there are no privacy curtains. Therefore, prisoners may be viewed by staff at all times. It is common for prisoners to cover their cell-door window when using the toilet or shower. Prisoners who refuse to remove the covering when they are ordered to are placed on "paper restriction." When a prisoner is on "paper restriction," all paper property is removed from his cell, including books, photos, legal pads and files and hygiene items.

Petitioner was unhappy with his placement at the Wisconsin Secure Program Facility and was determined to be transferred from it to another institution. He began "acting out" in ways that he thought would result in transfer. For example, petitioner had heard that other inmates had been transferred from the Wisconsin Secure Program Facility after exposing themselves to female staff. On March 26, 2005, petitioner exposed himself to respondent J.T. Brown, who is a female correctional officer.

Respondent Gerl was a lieutenant and respondent J.T. Brown's supervisor at the Wisconsin Secure Program Facility; she wrote an incident report about petitioner having exposed himself to Brown. In her report, Gerl noted that petitioner "had mostly disruptive and sexual conduct write-ups on his record," and had him disciplined immediately. This discipline included: a pat search, strip search, cell search, confiscation of property and loss of electronics and phone time. The searches took places between 6 p.m. and 7 p.m. on March 26. The officers did not find any weapons in petitioner's cell, nor were any left in petitioner's cell.

Several hours later, petitioner covered his cell-door window when he was using the lavatory. Respondent J.T. Brown saw this. Petitioner "knew" he would be put on paper restriction and attached a note to the paper covering his window saying that he would not comply with an order for paper restriction. While this was going on, petitioner could be viewed through the cell camera or the rear window in his cell.

At approximately 9:40 p.m., respondent Gerl stood outside petitioner's cell door and ordered him to clear the window and submit to restraints and removal from the cell. When petitioner refused, respondent Gerl threatened to use incapacitating agents against him as well as a "cell extraction team," if force was needed to remove him from the cell.

Cell extraction teams had been used many times to remove plaintiff from his cell at the Wisconsin Secure Program Facility. In some cases, respondent Gerl had supervised the

team and incapacitating agents had been used. Petitioner had not injured staff during these cell extractions and he had not been injured. Instead, he had submitted to removal after the use of incapacitating agents or use of physical force by staff.

The incapacitating agents used by the cell extraction teams caused petitioner to experience asthma symptoms. On two separate occasions, respondent Gerl discussed petitioner's medical history with respondent Gardner and Boughton and decided to "rule out" the use of asthma-inducing incapacitating agents. Instead, they approved the use of an explosive against petitioner, even though they knew that it too could affect his asthma. Specifically, respondent Broughton authorized the use of a .32 caliber grenade, known as a "No. #15 stinger grenade" and Ultron II stun gun.

At approximately 10:00 p.m., respondent Gerl assembled a cell extraction team including respondent Esser, Taylor, Rewey, Shannon, Johnson, J.T. Brown, T. Brown, Manderfield and Hartmann. Taylor and Rewey were assigned to Pad 1 and Pad 2, respectively. Respondent Esser was the team leader. Respondent Shannon was assigned to "restraints." Johnson, Manderfield and Hartmann were "extra staff." J.T. Brown and T. Brown were assigned to video cameras at the front and back of petitioner's cell. Together, respondents Taylor, Rewey, Esser, Shannon and Johnson weigh more than 1,000 pounds. Respondent Gerl briefed the members of the cell extraction team on petitioner's recent misconduct, why he was incarcerated, his medical condition and his size before they

approached petitioner's cell. Respondent Gerl also informed the team that an Ultron II stun gun and number 15 stinger grenade could be used on petitioner if needed.

The Ultron II stun gun delivers an electric shock to a target's body. The "No. #15 stinger grenade" is a "flash powder and smoke infusing explosive," which uses a pin-release, a fuse, eight grams of explosive compound, and 180 .32 caliber pellets. It has a 50 foot radius and is designed for use in crowd control and military and police operations; it is not intended for use in small, enclosed areas. It is designed to "impact" targets by creating a bomb blast, barrage of pellets and bright pyrotechnic flash. Its manufacturer warns that the grenade may cause injury or death. Respondents Gerl, Gardner, Boughton, Esser, Taylor, Rewey, Shannon, Johnson, J.T. Brown, T. Brown, Manderfield and Hartmann were aware of the dangers associated with using this device and knew petitioner could be removed from his cell without its use. Respondent Gerl had been trained about the dangers associated with the use of the grenade by respondent Sawinski, the emergency response unit field commander at the Wisconsin Secure Program Facility.

Although petitioner had covered the front window of his cell with paper, members of the cell extraction team could see into his cell through the cell door "trap" (a rectangular slot 16 inches wide and 5 inches tall), the rear window in his cell and a video camera in the cell. Respondent Gerl observed petitioner walking around the cell. He refused to place his hands through the trap, but did not verbally threaten the cell extraction team. At one point, a team

member saw petitioner with his hand "in his groin area" and, at another point, saw petitioner grab "something" in the cell. Respondent T. Brown had a clear view of petitioner from the back of his cell. At no time did T. Brown say that petitioner had grabbed a weapon. No one asked petitioner whether he had a weapon or to disarm.

When the cell extraction team attempted to open the trap a first time, petitioner blocked it with his forearms; petitioner did not attempt to reach through the trap to strike prison officials. When the team attempted to open the trap a second time, petitioner did not block the trap. Instead, he stood right next to it.

As soon as respondent Gerl was able to access petitioner's cell through the trap, she reached in, released the pin on the grenade she was holding, tossed it into the cell and quickly closed the trap. The grenade went off almost immediately. There was a loud blast, a bright flash and a great deal of smoke. The explosion caused burn marks and serious damage throughout the cell and the fire alarm to sound. It knocked petitioner down and to the other end of his cell. He was rendered unconscious momentarily.

When petitioner regained consciousness, he had trouble seeing, standing and hearing. His ears rang, his eyes burned, his head and mouth hurt and his "face and whole body felt as if he had been beaten by an angry mob." He was bleeding from the nose and mouth. (When other inmates saw petitioner, they told him that his face looked like the "Elephant Man," and a staff member exclaimed "What the fuck happened to you!") Petitioner was

observed by members of the cell extraction team "stumbling and falling around in his cell." However, none of the team members reported that petitioner had been hurt during the cell extraction.

Respondent Gerl and other team members took pictures of the cell immediately and respondent Sharpe took a picture of petitioner later that evening.

Members of the cell extraction team had to help petitioner to his feet when they removed him from the cell. Under respondent Gerl's direction, team members removed petitioner's clothing and "forced his butt cheeks open." They grabbed his penis and testicles in a manner that caused petitioner to experience "remarkable pain" and double over.

Petitioner was then moved to another cell and put on "Control Status." When a petitioner is placed on "Control Status" at the Wisconsin Secure Program Facility, he is placed in an empty cell and given either nothing or a smock to wear. He is given no property whatsoever, are not permitted to make phone calls or to receive visitors and are given special food trays. Petitioner remained on "Control Status" from March 26, 2005 until April 10, 2005. He was moved to different cells several times; during the moves, he was escorted through the hallways in restraints and naked, except for a towel around his waist. Other prisoners were able to see petitioner as he walked through the hall.

On March 26, 2005, a policy at the Wisconsin Secure Program Facility allowed staff to use stinger grenades in prisoner's cells in order to get them to come out of their cell.

Respondents Boughton, Bett, Huibregste, Schneiter, Gardner, R. Hable, S.D. Hable, Sharpe, Ginzke, Raemisch, Casperson, Westfield and Frank knew that the emergency response training at the Wisconsin Secure Program Facility included the use of stinger grenades, even though all cells at the facility are one-man, small cells and the stinger grenade was not designed for or intended to be used in situations where there is no physical threat. These respondents were responsible for developing policy related to use of force at the Wisconsin Secure Program Facility and the Wisconsin Department of Corrections. In spite of the policy authorizing its use, a stinger grenade had never been used against any other prisoner at the Wisconsin Secure Program Facility.

After the grenade was used on petitioner, respondent Gerl told respondents Boughton and Gardner about the incident. On March 29, 2005, respondent Boughton told respondents S.D. Hable and R. Hable about the use of force against petitioner. Respondents Bett, Huibregste, Schneiter, R. Hable, S.D. Hable, Sharpe, Ginzke, Raemisch, Casperson, Westfield and Frank reviewed the use of the grenade with respect to petitioner and condoned its use.

When petitioner was removed from his cell for misconduct on another occasion, staff did not use a grenade in his cell.

The Wisconsin Secure Program Facility and Department of Corrections staff have a responsibility to maintain reports on incidents in which force is used against prisoners. All

of the respondents who were involved in the cell extraction on March 26, 2005 had independent responsibilities to maintain reports and evidence regarding the incident. When petitioner reviewed his social services and security files on April 3, 2007, he noticed that the photographs of his injuries, taken by respondent Sharpe, had been removed from the files. The photographs made it clear that petitioner had suffered serious injuries as a result of the use of the grenade. Petitioner filed a complaint about the missing photographs and wrote to respondent Sharpe about it. He also contacted respondents Boughton, R. Hable, Sharpe, Thesing and Lansing about the missing photographs, which they had all had reviewed or possessed at some point. These respondents either destroyed the records themselves or allowed them to be destroyed.

Respondent Thesing is the record keeper at the Wisconsin Secure Program Facility, responsible for maintaining institution records and files. Respondent Thesing is not authorized to destroy records without authorization. Respondent Lansing is the security record clerk at the Wisconsin Secure Program Facility, responsible for maintaining security records. Respondent Lansing is not authorized to destroy security records without authorization.

After petitioner complained about the missing photographs, respondent Trumm responded that there was no requirement that the photographs be maintained, even though this is not true. Respondents Huibregste, Schneiter, Ginzke, Raemisch and Frank reviewed

this decision and upheld it.

On September 27, 2007, petitioner again reviewed his files. At this time, the photographs of the damage to his cell had also been removed, even though they were required to be maintained as part of petitioner's security file. Respondents J.T. Brown, Gerl, Boughton, R. Hable, S.D. Hable, Thesing and Lansing either destroyed the records themselves or allowed them to be destroyed.

Respondents Thesing, Lansing, Gerl and Boughton have had conduct reports and incident reports regarding respondent Gerl's prior use of incapacitating agents against petitioner removed from petitioner's file in an attempt to thwart petitioner's ability to use them as evidence in this case and obtain meaningful relief from the court.

Respondents Gerl and Boughton destroyed or suppressed the videotape that respondent T. Brown took of the cell extraction. They both signed an incident report that indicated that the "video did not record"; however, respondent T. Brown did not note this in his incident report.

Prior to the incident on March 26, 2005, petitioner was healthy, other than his asthma diagnosis. Since then, petitioner has been diagnosed with: tinnitus (constant ringing in his ears, which is likely permanent and untreatable); a hearing deficit in his right ear; a loss of vision, requiring the use of eyeglasses; scar tissue on his right eye; torn ligaments in his right knee, which require treatment with steroids and "likely" will require surgery; a

cracked tooth that needed repair; recurring migraine headaches; psychological problems, including post-traumatic stress disorder, flash backs and sleep deprivation and "occasional" high blood pressure. He has required a "myriad" of pain medications for these conditions, including Torodol injections for his migraine. Petitioner was not examined by an optometrist for nearly three months after the cell extraction on March 26. Until he saw the optometrist, he suffered from blurred and double vision. Respondent Lamar was aware of petitioner's condition and the injuries petitioner had sustained when the grenade exploded. However, he put petitioner on the "routine" waiting list to see an optometrist, rather than placing him on an injury or priority list.

The torn ligaments in petitioner's right knee, sustained as a result of the explosion, have not yet healed. Petitioner's right knee gives out, swells up and gains fluid frequently. It pains him constantly and limits his ability to walk and stand. Respondent Cox has treated petitioner for these injuries and is aware that they continue to cause him pain. Respondent Cox is a doctor, but is not an orthopedist. He has given petitioner pain killers repeatedly, as well as a cortisone anesthetic shot but has not referred petitioner to an orthopedic specialist.

DISCUSSION

As an initial matter, I note that several pages of petitioner's complaint are devoted

to allegations that he exhausted his administrative remedies. Exhaustion of administrative remedies is an affirmative defense and petitioner was not required to submit any information regarding exhaustion at this stage of the case. Therefore, I have not considered these allegations.

A. Wisconsin State Law Claims

Petitioner contends that the events described in his complaint give rise to a host of claims under Wisconsin criminal statutes and the Wisconsin state constitution. Petitioner will be denied leave to proceed on his claims that respondents' actions violated Wisconsin criminal statutes because only the state of Wisconsin has the authority to prosecute a crime. Cf. Maine v. Taylor, 477 U.S. 131, 136 (1986).

In addition, petitioner will be denied leave to proceed on the claims he has raised under the Wisconsin constitution. Petitioner's claims relate to events that took place in the past and appear highly unlikely to reoccur. Therefore, money damages are the only relief petitioner may seek for these events. This presents a problem. Other than one very limited exception inapplicable to this case, I am not aware of any state law provision that allows an individual to sue state officials for money damages arising from a violation of the Wisconsin Constitution. W.H. Pugh Coal Co. v. State, 157 Wis. 2d 620, 634-35, 460 N.W. 2d 787, 792-93 (1990) (holding that plaintiff *could* sue state for money damages arising from an

unconstitutional taking of property because article I, section 13 of the Wisconsin Constitution requires that state provide "just compensation" when property is taken).

The claims on which petitioner will be allowed to proceed relate not to the taking of his property, but to prison officials' past use of excessive force and provision of inadequate medical care. As discussed below, petitioner may pursue these claims for money damages under the Eighth Amendment to the United States Constitution. However, he will be denied leave to proceed on separate claims under the Wisconsin Constitution. (It is difficult to imagine that this will hinder petitioner's case in any way. Article I, Section 6 of the Wisconsin Constitution prohibits "cruel and unusual punishment" and has been interpreted to offer the same protections as the Eighth Amendment to the United States Constitution. E.g., City of Milwaukee v. Kilgore, 185 Wis. 2d 499, 522 n.12, 517 N.W.2d 689, 698 n. 12 (Ct. App. 1994).

B. Use of Grenade on March 26, 2005

Petitioner contends that the use of a "No. 15 stinger grenade" in his cell on March 26, 2005 was excessive force under the circumstances. He names as respondents the prison official who used the grenade, the members of the cell extraction team, prison officials who were involved in developing the policy that permitted the use of a grenade in this setting and prison and correctional officials who learned about the use of the grenade after the fact and

failed to discipline the members of the cell extraction team. Petitioner will be permitted to proceed on excessive force claims against respondent Gerl, members of the cell extraction team and prison officials who were involved in the development of the policy that permitted the use of a grenade in this setting. Petitioner will not be permitted to proceed on his claims that prison officials who learned about the use of the grenade after the fact should have disciplined those involved with its use.

In the context of prison, excessive force claims arise under the Eighth Amendment. Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, 503 U.S. 1 (1992). The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 6-7. To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force . Whitley, 475 U.S. at 321; Outlaw v. Newkirk, 259 F. 3d 833, 837 (7th Cir. 2001). In Hudson, 503 U.S. at 9-10, the Court explained that although the extent of injury

inflicted was one factor to be considered, the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force.

1. Officials who learned about the use of the grenade after it occurred

As noted above, petitioner names as respondents not only those officials who were present during the incident in which a grenade was used, but also many to whom he complained *after* the incident occurred or who otherwise became aware of the incident. These are respondents Bett, Huibregste, Schneiter, R. Hable, S.D. Hable, Sharpe, Ginzke, Raemisch, Casperson, Westfield and Frank. It appears that petitioner believes these individuals should be held liable because they failed to take corrective action against the alleged wrongdoers. Petitioner will not be allowed to proceed against these respondents on these claims.

In some instances, it may be appropriate to impose liability on officials whose only involvement in the alleged constitutional violation is the disregard of a complaint or letter sent by a prisoner. If a prisoner complains of a violation that is ongoing and the official has the authority to stop it, but the official ignores the complaint, then there is a strong argument that the official "kn[e]w about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye," which is the standard for imposing liability under § 1983. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). But an official who does

not learn about an unconstitutional act until after the violation is complete cannot be held liable for it, even if the official could punish the wrongdoers and refuses. There is no constitutional right to this type of corrective action. George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Ruling against a prisoner on an administrative complaint" regarding completed act does not amount to personal involvement.)

2. Respondent Gerl

Respondent Gerl was the official who determined that a grenade could be used against petitioner and who dropped the grenade in petitioner's cell on March 26, 2005. Petitioner may proceed against her for both actions. Petitioner acknowledges that he ignored several orders from respondent Gerl before she dropped the grenade in his cell. She had directed him to remove the paper from his cell window and place his hands through the trap on his cell. In addition, she warned him of the consequences of his failure to comply with her instructions. Given petitioner's refusal to comply with repeated instructions, it is not surprising that prison officials resorted to the use some degree of force to remove him from his cell. However, it is not at all clear that the use of a grenade in a small, confined area was the appropriate degree of force under the circumstances (or any circumstances, for that matter). Therefore, petitioner's allegations are sufficient to state a claim under the Eighth Amendment against respondent Gerl.

3. Members of the Cell Extraction Team

Next, I understand petitioner to allege that respondents Esser, Taylor, Rewey, Shannon, Johnson, J.T. Brown, T. Brown, Manderfield and Hartmann violated his rights because they were part of the cell extraction team that stood by while respondent Gerl placed the grenade in petitioner's cell. He alleges that they knew that the use of a grenade in petitioner's cell was both unnecessary and excessively dangerous and did nothing to intervene to stop respondent Gerl from using the grenade.

The Court of Appeals for the Seventh Circuit has held that a prison official may be held liable for a constitutional violation if he knew about it and had the ability to intervene but failed to do so. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, this rule "is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees." Windle v. City of Marion, Indiana, 321 F.3d 658, 663 (7th Cir. 2003). A prison official may be liable for failure to intervene only if his failure is deliberate or in reckless disregard for the prisoner's constitutional rights. Fillmore, 358 F.3d at 505-06.

In this case, petitioner alleges that the members of the cell extraction team were organized by respondent Gerl and were with her outside petitioner's cell, knew that respondent Gerl was planning to use a grenade in petitioner's cell and that such use of a

grenade was dangerous and unnecessary. At this stage, there is no reason to believe that any one of them could not have intervened to prevent respondent Gerl from putting the grenade in petitioner's cell. Thus, if petitioner is able to demonstrate that the use of the grenade violated his constitutional rights because it was excessive force under the circumstances, he may be able to demonstrate that respondents Esser, Taylor, Rewey, Shannon, Johnson, J.T. Brown, T. Brown, Manderfield and Hartmann could have, but failed to, intervene to stop its use. Therefore, he will be permitted to proceed on his claim against them as well.

4. Officials Who Approved Policy Allowing Use of Grenades

Finally, petitioner contends that prison and correctional officials who were responsible for developing policies related to use of force at the Wisconsin Secure Program Facility and in the Wisconsin Department of Corrections are liable because one of those policies allowed the use a grenade during a cell extraction. Petitioner alleges that respondents Boughton, Bett, Huibregste, Schneiter, Gardner, R. Hable, S.D. Hable, Sharpe, Ginzke, Raemisch, Casperson, Westfield and Frank were responsible for the development of all policies at the institution and within the department; he does not allege that they were involved in the development of this policy in particular. At this stage, it is reasonable to infer that individuals responsible for the development of all policies were involved in the development of this policy. However, petitioner should be aware that to prevail ultimately

on this claim, he will need to present evidence of specific involvement by each respondent.

Because petitioner has not submitted the policy itself, it is difficult to discern what specific theory of liability is appropriate. First, it is possible that the use of a grenade during a cell extraction is excessive under any circumstances and the prison and department policy specifically allowed for such a use. Alternatively, it is possible that the policy simply allows for use of grenades generally, with specific applications left to the discretion of individual officers. In this case, some uses might be appropriate, while others, such as dropping a grenade in an enclosed cell, might not be. Under these circumstances, prison and correctional officials could be liable if they deliberately failed to train the staff in safe procedures and this failure to train staff resulted in a constitutional violation. E.g., Collins v. City of Harker Heights, 503 U.S. 115, 123-24 (1992). Therefore, petitioner will be granted leave to proceed on his claim against respondents Boughton, Bett, Huibregste, Schneiter, Gardner, R. Hable, S.D. Hable, Sharpe, Ginzke, Raemisch, Casperson, Westfield and Frank for their role in developing or condoning a policy that permitted the use of a grenade in petitioner's cell on March 26, 2005.

C. Strip Search on March 26, 2005

Next, petitioner complains of the strip search that occurred after he was removed by force from his cell. Although petitioner's complaint is not entirely clear, I understand him

to be raising two claims arising from that search: (1) the search was unconstitutional because petitioner could not have been hiding any contraband, making the search unnecessary and (2) the search was conducted in an abusive manner.

A strip search is almost always uncomfortable and embarrassing for the subject of the search. However, the circumstances are very limited under which a strip search conducted in the prison setting violates the Constitution. Both the Supreme Court and the Court of Appeals for the Seventh Circuit have concluded that the privacy rights of prisoners are severely curtailed. Hudson v. Palmer, 468 U.S. 517, 527 (1984); Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994). Those courts have concluded that because security is of paramount concern in a prison, officials must be allowed great discretion in determining when and what kind of search is appropriate.

Even in the context of strip searches, prison officials do not need particularized suspicion of wrongdoing. Peckham v. Wisconsin Dept. of Corrections , 141 F.3d 694, 695 (7th Cir. 1998) (upholding various routine strip searches of prisoner, including those that occur "whenever prison officials undertake a general search of a cell block"). Rather, the court of appeals has held that as a general matter the Eighth Amendment governs the constitutionality of strip searches and that, under that standard, the question is whether the search was "conducted in a harassing manner intended to humiliate and inflict psychological pain." Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). Thus, so long as the officers

conducted the search for the purpose of finding contraband or for another legitimate purpose, the search is not unconstitutional simply because the prisoner believes that officials had no reason to suspect that he was hiding anything.

Applying these standards, I conclude that claim 1 listed above does not state a claim upon which relief may be granted. Petitioner may believe that the search was unnecessary because the chances were remote that he was hiding any contraband. However, respondents do not have to show that the search was necessary or wise. It is enough that the general purpose of the search was to detect contraband. Given the fact that petitioner had refused to comply with numerous directives issued by prison staff and had just been removed from his cell by force, it is not possible to draw any other inference than that the search was allowable.

Petitioner's challenge to the manner in which the strip search was conducted is different. He alleges that under respondent Gerl's direction, team members removed his clothing, "forced his butt cheeks open" and grabbed his penis and testicles in a manner that caused him to experience "remarkable pain" and double over. As I have held recently, a failure to permit a prisoner to comply with a visual inspection before conducting a manual inspection could constitute an unreasonable search if there was no legitimate penological reason for proceeding directly to the more intrusive manual inspection. Vasquez v. Raemisch, 480 F. Supp. 2d 1120, 1131-32 (W.D. Wis. 2007). It is possible that petitioner

could not be subdued in any other manner than that used; however, at this stage I must draw all reasonable inferences in favor of petitioner. Therefore, it would be premature to dismiss the claim on that ground.

There is, however, one problem with petitioner's challenge to the manner in which the strip search was conducted: he fails to identify in his complaint which respondents were involved. He says only that respondent Gerl directed the strip search and that members of the cell extraction team carried it out. However, this kind of conclusory statement is insufficient to state a claim against every member of the cell extraction team. Surely, only one or two people actually forced petitioner's buttocks open and grabbed his penis and testicles. Others may not have involved at all. Without information about which officers did what, I cannot allow petitioner to proceed against anyone other than respondent Gerl.

Petitioner may have until March 28, 2008, in which to file an addendum to his complaint in which he identifies and describes the conduct of each of the respondents he believes is liable for the strip search. For example, did they conduct the search or take part in the use of excessive force themselves? Were they present during the incident and failed to intervene? If by March 28, petitioner does not file an addendum to his complaint, he will not be permitted to proceed on claims related to the strip search against any respondent other than respondent Gerl.

D. Medical Treatment for Eye and Knee Injuries

The Eighth Amendment to the United States Constitution requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To prevail ultimately on a claim under the Eighth Amendment, a prisoner must prove that prison officials engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584 -85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or it otherwise subjects the detainee to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). A delay in treatment can constitute harm under the Eighth Amendment if it causes "needless suffering." Williams v. Liefer, 491 F.3d 710, 715 (7th Cir. 2007) (quoting Gil v. Reed, 381 F.3d 649, 662 (7th Cir. 2004)). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim is analyzed in three parts:

(1) Whether petitioner had a serious health care need;

(2) Whether respondents knew that petitioner needed care; and

(3) Whether, despite their awareness of the need, respondents failed to take reasonable measures to provide the necessary care.

Petitioner does not have to allege the facts necessary to establish each of these elements at the pleading stage, but the elements provide the framework for determining whether petitioner has alleged enough to give respondents notice of his claims. Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006); Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

Petitioner alleges that he sustained numerous eye injuries as well as torn ligaments in his right knee as a result of the explosion of the grenade in his cell on March 26, 2005. Petitioner experienced blurred and double vision until he saw an optometrist three months later. He continues to experience pain in his knee, which is sufficiently severe that he has trouble walking and standing and has received treatment for his knee problems repeatedly. Although petitioner's allegations regarding the severity of these conditions are limited, they are sufficient at this early stage to allow an inference that both constitute "serious medical needs."

Next, petitioner asserts that although respondent Lamar was aware of the eye injuries that petitioner had sustained when the grenade exploded, petitioner continued to experience

double and blurred vision, and was responsible for arranging a medical appointment for petitioner he put petitioner on the "routine" waiting list to see an optometrist, rather than placing him on an injury or priority list. Because of respondent Lamar's decision, petitioner had to wait for three months to see an optometrist. Deliberate indifference may be demonstrated by more than just a complete disregard for the prisoner's health. An intentional delay in treatment may violate the Constitution as well. Estelle, 429 U.S. at 104-05. Because petitioner may be able to prove that respondent Lamar's delay in arranging a medical appointment for him violated the Constitution, I will allow him to proceed on this claim.

I turn next to petitioner's claim with respect to respondent Cox. Petitioner acknowledges that respondent Cox has provided him with ongoing treatment for his torn ligaments. He does not suggest that this treatment was inappropriate. However, he believes that respondent Cox, who is a doctor, but not an orthopedic specialist, should have referred him to a specialist. However, respondent Cox's failure to provide petitioner with a referral indicates only a difference of opinion and disagreement with a treatment decision does not give rise to a claim of deliberate indifference. Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision

on such a judgment." Estate of Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996). Therefore, petitioner will be denied leave to proceed on his claim against respondent Cox and respondent Cox will be dismissed from the case.

E. Destruction of Prison Records

1. Access to Courts

Next, petitioner contends that the loss or destruction of photographs, records and videotape documenting his injuries and the damage to his cell caused by the use of a grenade on March 26, 2005 will make it more difficult for him to obtain relief in court. I read his allegations as implicating his right of access to the courts. It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004); Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)). The right of access is grounded in the due process and equal protection clauses. Murray v. Giarratano, 492 U.S. 1, 6 (1989).

To state a claim, the prisoner must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). This rule is derived from the doctrine of standing, id., and requires the prisoner to demonstrate that a non-frivolous legal claim has been frustrated or impeded. In other words, the prisoner must plead at least

general factual allegations suggesting that he "has suffered an injury over and above the denial." 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.; 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).

The problem petitioner faces is that he cannot show that the destruction of these materials has hampered him in litigating *this* case. There is some slight risk, of course, that at some future point in this lawsuit, petitioner's ability to prevail on his claims might be limited by the unavailability of these materials. For now, however, his access to courts claim is not ripe.

2. Spoliation of Evidence

In addition, petitioner appears to argue that respondents are liable for destroying evidence, whether or not the destruction will limit petitioner's efforts to litigate this, or any other lawsuit. Very few jurisdictions recognize destruction or "spoliation" of evidence as an independent tort. E.g., J.S. Sweet Co., Inc. v. Sika Chemical Corp., 400 F.3d 1028, 1032 (7th Cir. 2005). Wisconsin is not one of them. Neumann v. Neumann, 2001 WI App 61 ¶ 80, 242 Wis. 2d 205, 626 N.W. 2d 821. If petitioner can demonstrate that respondents could have reasonably foreseen that the photographs, records and videotape were material

to a potential legal action and lost or destroyed them anyway, they may be subject to evidentiary sanctions as a result. However, petitioner does not state an independent claim for spoliation of evidence.

Because petitioner's only claim against respondents Trumm, Lansing and Thesing relates to the destruction of photographs, records and the videotape, these respondents will be dismissed from the case.

F. Petitioner's Request for Waiver of Service Forms

Finally, I note that petitioner filed a motion in which he requested that the court send him waiver of service forms. Dkt. # 4. Because petitioner is proceeding in forma pauperis on his claim, his complaint and this order will be sent to the Attorney General's office for service on the state respondents pursuant to an informal service agreement between the Attorney General and this court. Therefore, there is no need at this point for him to send waiver of service forms to the respondents directly and his motion will be denied as unnecessary.

ORDER

IT IS ORDERED that

1. Petitioner Raynard R. Jackson is GRANTED leave to proceed on the following

claims:

(a) Respondent Joan Gerl placed a grenade in petitioner's cell during a cell extraction on March 26, 2005, which constituted excessive force under the circumstances;

(b) Respondents Dane Esser, Thomas Taylor, Jeff Rewey, Michael Shannon, Larry Johnson, J.T. Brown, T. Brown, Vicky Manderfield and Marion Hartmann failed to intervene to stop respondent Gerl from placing the grenade in petitioner's cell on March 26, 2005;

(c) respondents Gary Boughton, John Bett, Peter Huibregste, Richard Schneiter, Captian Gardner, R. Hable, S.D. Hable, John Sharpe, Tom Ginzke, Richard Raemisch, Steve Casperson, Dan Westfield and Matthew Frank helped develop the policy that allowed for the use of grenades in enclosed cells at the Wisconsin Secure Program Facility;

(d) respondent Gerl directed members of the cell extraction team to conduct an unconstitutional manual body cavity search when examining petitioner after he was removed from his cell on March 26, 2005; and

(e) respondent Dr. Lamar was deliberately indifferent to petitioner's need for treatment for eye injuries he sustained when the grenade exploded in his cell on March 26, 2005.

2. A decision whether to grant leave to proceed is STAYED with respect to petitioner's claim that unnamed members of the cell extraction team conducted an

unconstitutional manual body cavity search when examining petitioner after he was removed from his cell on March 26, 2005. Petitioner may have until March 28, 2008 to file an addendum to his complaint in which he identifies and describes the conduct of each of the respondents he believes is liable for the strip search. The addendum should explain whether the prison official or officials conducted the search or took part in the use of excessive force themselves and whether they were present during the incident and failed to intervene. If by March 28, petitioner does not file and addendum to his complaint, he will not be permitted to proceed on claims related to the strip search against any respondent other than respondent Gerl.

3. Petitioner is DENIED leave to proceed on with the following claims:

(a) that respondents are liable under Wisconsin criminal statutes and the Wisconsin Constitution;

(b) that prison officials who learned about the use of a grenade in petitioner's cell on March 26, 2005 are liable for failing to discipline officers involved directly with the use of the grenade;

(c) that respondent Dr. Cox was deliberately indifferent to his need for a referral to a orthopedic specialist for treatment of his knee problems. Respondent Cox is DISMISSED from this lawsuit;

(d) that prison officials were responsible for destroying photographs of petitioner and

petitioner's cell after the grenade was used, as well as records documenting its use. Respondents Kelly Trumm, T. Lansing and Ms. Thesing are DISMISSED from this lawsuit.

4. Petitioner's request for waiver of service forms, dkt. #4, is DENIED as unnecessary.

5. Once petitioner has filed his addendum, I will determine whether he should be granted leave to proceed on his claims that members of the cell extraction team conducted an unconstitutional manual body cavity search when examining petitioner after he was removed from his cell on March 26, 2005. After I make that determination, his complaint and any addendum will be sent to the Attorney General's office in accordance with an informal service agreement.

6. Petitioner is obligated to pay the unpaid balance remaining for this case in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 19th day of March, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge