IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DON JOHNSON, DWAYNE COX,
DANIEL JONES, FERDINAN RIVERA
and ANDRE AVERY,

ORDER
01-C-0257-C

Plaintiffs,

v.

CINDY O'DONNELL, Inmate Complaint Reviewer;
JON E. LITSCHER, Secretary of D.O.C.;
PETER HUIBREGTSE; GERALD BERGE,
Warden; VICKIE SHARPE;
and TIM HAINES,

Defendants.

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In an order entered on August 24, 2001, I allowed plaintiffs Don Johnson, Dwayne Cox, Daniel Jones, Jamal Jones, Ferdinan Rivera and Andre Avery to proceed on their claim that defendants Jon E. Litscher, Cindy O'Donnell, Gerald Berge, Peter Huibregtse, Vickie Sharpe and Tim Haines violated their Eighth Amendment constitutional rights by subjecting them to cruel and unusual conditions of confinement, including 24-hour lighting, inadequate ventilation, inadequate recreation and limited time on the telephone. At the same time, I

stayed the proceedings relating to the merits of this claim until this court had ruled on the constitutionality of the conditions of confinement at Supermax in Jones 'El v. Berge, No. 00-C-421-C. In the same order, I dismissed all of plaintiffs' other claims. Plaintiff Jamal Jones was later dismissed from the case for failure to prosecute. Separately, on March 28, 2002, this court approved the settlement in the Jones 'El class action lawsuit.

Because the Jones 'El lawsuit has been resolved, I will lift the stay with respect to plaintiffs' claims that defendants subjected them to conditions of confinement that violate the Eighth Amendment. Because the settlement in Jones 'El did not resolve the issue of liability on the conditions of confinement claim, it is necessary to reconsider whether plaintiffs have alleged facts in this lawsuit sufficient to make out an independent claim of a constitutional violation. Plaintiffs will be allowed to proceed on their claim that defendants Litscher, O'Donnell, Berge and Haines subjected them to extreme temperatures and inadequate ventilation in violation of the Eighth Amendment and on their claim that defendants Litscher, O'Donnell, Huibregtse, Berge and Haines deprived them of their human need for sleep and sensory stimulation by subjecting them to 24-hour illumination. Plaintiffs will not be allowed to proceed on their claims that the lack of exercise equipment and limited use of the telephone deprive them of their constitutional rights because they fail to state a claim upon which relief can be granted as to those claims.

Despite the stay imposed in this court's order of August 24, 2001, defendants filed

an answer on November 7, 2001. Because the contours of this case have changed since the stay was imposed, defendants will be given an opportunity to file an amended answer.

One final matter needs to be addressed. Recently, I determined that as a general rule, pro se prisoners who file joint lawsuits would be required to refile their action in separate lawsuits. Lindell v. Litscher, case no. 02-C-79-C, slip op. dated July 15, 2002, at 2-3. Although this case involves multiple plaintiffs, they are not proceeding pro se, which removes the concerns raised in Lindell. Because plaintiffs are represented by counsel, they will be allowed to prosecute this lawsuit jointly.

## ALLEGATIONS OF FACT

### Conditions of Confinement

1. 24-hour lighting

Inmate cells at Supermax are illuminated 24 hours a day, which creates a false environment of sensory deprivation and causes plaintiffs irritation, ill temperament, erratic sleep patterns and sleep disorders. Plaintiffs Johnson, Jones and Cox require psychotropic medication or other sleep aids from clinical services as a direct result of the 24-hour illumination. Defendants Litscher, Berge, Huibregtse and Haines created and enforce the policy of 24-hour illumination. Defendants Litscher, O'Donnell and Berge signed off as reviewers of inmate complaints in which plaintiffs complained about the 24-hour

illumination.

2. Inadequate ventilation

The poor, inadequate and malfunctioning ventilation system at Supermax forces plaintiffs to endure extremely hot and dry air, extremely cold and wet air and foul-smelling air at various times. Defendants Berge and Haines issued a memorandum to inmates in which they addressed the need for thermal underwear or extra blankets and stated that maintenance was aware of the heating problems. The maintenance staff at Supermax has continuous problems regulating the ventilation system. The ventilation is both an inconvenience and the cause of medical conditions for plaintiffs. Plaintiff Johnson has received medical attention and medication on numerous occasions to treat conditions caused by the poor ventilation. For his excessively dry and bleeding nasal cavities, plaintiff Johnson receives medicated nasal spray. For his continuous nasal lobe and congestive headaches, he receives aspirin, ibuprofen and Actifed. Defendants Litscher, O'Donnell, Berge and Haines have either been notified about the inadequate ventilation or signed off as reviewers of inmate complaints in which plaintiffs complained about the inadequate ventilation.

3. Inadequate recreation

Supermax's recreation facility consists of a room that is approximately 14 feet by 20

feet by 17 feet. This room has three concrete walls and a cage front. There is an opening along the top of the outside wall along the whole length that measures approximately two feet. This opening allows the outside air to come in but does not allow any direct sunlight to enter and does not allow inmates to see out. There is no exercise equipment in the recreation facility. Inmates must reach "level four," which takes a minimum of ten months, before they are allowed to have minimal exercise equipment in the recreation facility. Defendants Litscher, O'Donnell, Berge, Huibregtse, Haines and Sharpe have either been notified about the inadequacy of the recreation facility or signed off as reviewers of inmate complaints in which plaintiffs complained about it.

4. Limited telephone use

During the first 30 days at Supermax, inmates are allowed to make one six-minute telephone call a month. At level two, an inmate is allowed to make two six-minute calls for three months. At level three, he gets two twelve-minute calls a month. At level four, he gets four twelve-minute calls a month. Finally, at level five, he is allowed to make four twenty-minute calls a month.

## DISCUSSION

### Eighth Amendment Conditions of Confinement

With the stay lifted, I must now consider whether the specific conditions about which plaintiffs complain are sufficient to state a claim under the Eighth Amendment standing alone and, if not, whether the totality of the conditions may give rise to an Eighth Amendment claim.

1. Individual conditions

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346. The Court of Appeals for the Seventh Circuit has found Eighth Amendment violations when, for example, an inmate was tied to a bed for nine days, had to use a urinal pitcher which was then left full by his bed for two days, had no change of linen or clothes for that period, had no silverware and had to eat with his hands, and had no opportunity to exercise. See Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985). However, conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108-09 (7th Cir. 1971). In Adams, the court of appeals did not find a

constitutional violation when an inmate alleged that his cell was filthy and stunk, that the water faucet from which he drank was only inches above the toilet and that the ventilation was inadequate. Id.

a. 24-hour illumination

Plaintiffs allege that the 24-hour illumination in their cells creates a false environment that results in sensory deprivation and causes plaintiffs irritation, ill temperament, erratic sleep patterns and sleep disorders. Plaintiffs Johnson, Jones and Cox require medication in order to sleep. Although it may be the case that the constant illumination merely makes "confinement in such quarters unpleasant," Adams, 445 F.2d at 108-09, it is possible that the 24-hour illumination involves "the wanton and unnecessary infliction of pain," Rhodes, 452 U.S. at 347. At this early stage, I am not prepared to state that plaintiffs could not prove any set of facts entitling them to relief on this claim. I note that plaintiffs face an uphill battle: in order to prevail, they will have to adduce evidence establishing that defendants subjected them to bright lights that served no legitimate penological interest. Plaintiffs will be allowed to proceed on this claim against defendants Litscher, Berge, Huibregtse, Haines and O'Donnell.

b. Extreme cell temperatures and inadequate ventilation

Plaintiffs allege that the inadequate ventilation system at Supermax forces them to endure extremely hot and dry air, extremely wet and cold air and foul-smelling air at various times. Plaintiff Johnson has received medical care on numerous occasions to treat his excessively dry and bleeding nasal cavities and his continuous nasal lobe and congestive headaches.

Prisoners are entitled to "the minimal civilized measure of life's necessities." Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)). This includes a right to protection from extreme cold, see id. (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment), and extreme heat, see Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). "[C]ourts should examine several factors in assessing claims based on low cell temperature, such as the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." Dixon, 114 F.3d at 644. In certain circumstances extreme hot or cold cell temperature may constitute violations of the Eighth Amendment. Although at this early stage I cannot say that plaintiffs could not prove any set of facts entitling them to relief on this claim, I note that they face an uphill battle. To succeed on this claim, plaintiffs will have to garner evidence of the actual temperature in their cells during the time in question

and be prepared to prove that as a result of the extreme heat or cold they suffered deleterious effects on their health beyond mere discomfort. Plaintiffs will be allowed to proceed on this claim against defendants Litscher, Berge, O'Donnell and Haines.

c. Inadequate recreation

Plaintiffs allege that they have been denied adequate exercise because the exercise facility at Supermax is small and lacks exercise equipment. I understand plaintiffs to allege that having no meaningful opportunity to exercise violates their Eighth Amendment rights. The Court of Appeals for the Seventh Circuit has recognized that in some circumstances the failure to provide prisoners incarcerated in segregation "with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions." Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988); see also Jamison-Bey v. Thieret, 867 F.2d 1046 (7th Cir. 1989) (although 101 consecutive days of segregation does not alone violate Constitution, severe restrictions on exercise may constitute Eighth Amendment violation). However, in Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988), the court of appeals found no Eighth Amendment violation when an inmate spent four weeks in segregation and was not permitted outside recreation but was allowed to move about his segregation cell and could have exercised by jogging in place, engaging in aerobics or doing push-ups in his cell. Plaintiffs do not allege that they were denied the opportunity to go to

the exercise facility but only that the exercise facility itself is deficient. I am not convinced that inadequate equipment rises to the level of an Eighth Amendment violation. Plaintiffs will not be allowed to proceed on this claim against defendants Litscher, O'Donnell, Berge, Huigregtse, Haines or Sharpe for failure to state a claim upon which relief can be granted.

d. Limited use of telephone

Plaintiffs allege that through the level system, defendants Litscher, O'Donnell, Berge, Huibregtse, Haines and Sharpe severely restrict their use of the telephone. At level one, inmates may make one six-minute telephone call a month. By the time an inmate reaches level five, he is allowed to make four twenty-minute calls a month. Although this restriction may make "confinement in such quarters unpleasant," Adams, 445 F.2d at 108-09, there is no indication that the telephone restriction involves "the wanton and unnecessary infliction of pain," Rhodes, 452 U.S. at 347. Plaintiffs will not be allowed to proceed on this claim for failure to state a claim upon which relief can be granted.

2. Totality of conditions

In Jones 'El v. Berge, case no. 00-C-421-C, in which plaintiffs are class members, I granted the plaintiff class leave to proceed on a claim that the total combination of the conditions of confinement at the Supermax Correctional Institution made out a possible

claim of violation of the Eighth Amendment. In doing so, I relied on Wilson v. Seiter, 501 U.S. 294, 304 (1991), in which the Supreme Court recognized that although certain conditions standing alone might not raise a claim of a constitutional violation, a combination of conditions having a "mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth or exercise – for example, a low cell temperature at night combined with a failure to issue blankets," might state a claim under the Eighth Amendment.

The objectionable physical conditions at Supermax at issue on the totality claim in Jones 'El were as follows:

(1) 24-hour lock down, except that some inmates are able to leave their cells for up to four hours a week to use an unheated or cooled indoor recreation cell;

(2) cells with a sliver of a window and a boxcar door that prevents inmates from seeing outside their cell;

(3) extremely limited use of the telephone, family or personal visits by video screen only and visiting regulations so burdensome as to prevent many inmates from receiving visitors;

(4) chronic sleep deprivation caused by 24-hour cell illumination and, for inmates choosing to block the light by covering their heads, being awakened hourly throughout the night by security staff;

(5) use of a video camera rather than human interaction to monitor all inmate movement; and

(6) extreme cell temperatures.

Rather than analyzing these conditions separately to determine whether each made out an independent claim for a violation of the Eighth Amendment, I accepted the premise that even if one or more of the conditions did not make out a separate Eighth Amendment claim, the plaintiffs had alleged sufficient facts to suggest that the conditions combined to deprive them of the clearly identifiable and basic human needs of social interaction and sensory stimulation. I reiterated this thinking in a later order in Jones 'El, when the plaintiff class attempted to amend the complaint to add to their totality claim a challenge to the ability of female guards to monitor male inmates while allegedly making rude remarks about the inmates' genitals. I denied plaintiffs' motion to include this allegation in their totality claim because it did not relate to "the over-arching concern behind the totality claim, the sensory deprivation and social isolation imposed on inmates." Jones 'El, 00-C-421-C, Aug. 14, 2001, dkt. #90, at 25.

In this case, plaintiffs allege that they were subjected to the following conditions also found among the conditions listed in Jones 'El:

(1) limited use of the telephone;

(2) constant cell illumination;

(3) extreme cell temperatures and inadequate ventilation; and

(4) lack of meaningful exercise.

I have concluded that plaintiffs state independent claims for relief under the Eighth Amendment with respect to the conditions that cause them to suffer from extreme cell temperatures and constant illumination and that plaintiffs fail to state an independent Eighth Amendment claim as to the lack of meaningful exercise and the limited use of the telephone. Combining the lack of exercise equipment and limited use of the telephone claims with plaintiffs' other conditions of confinement claims does not permit the inference that these conditions together have a mutually enforcing effect that produces the deprivation of a separate identifiable human need, such as the need for human contact and sensory stimulation that was lacking in the total conditions at stake in Jones 'El. The conditions central to the totality claim in Jones 'El (cells with only a sliver of a window and a boxcar door that prevents inmates from seeing outside the cell; extremely limited use of phone; family and personal visits by video and visiting regulations so burdensome as to discourage visitors; and the use of a video camera rather than human interaction to monitor inmate movement) do not overlap in any significant way with those conditions that plaintiffs challenge in their complaint in this case. Accordingly, I conclude that plaintiffs' allegations do not make out a claim that the totality of the conditions of confinement about which they complain deprives them of their Eighth Amendment rights. Plaintiffs will not be allowed to

proceed on their totality of conditions claim for failure to state a claim upon which relief can be granted.

ORDER

IT IS ORDERED that

1. The stay imposed as to plaintiffs' Eighth Amendment claims is LIFTED;

2. Plaintiffs will be allowed to proceed on their claim that defendants Jon E. Litscher, Cindy O'Donnell, Gerald Berge and Tim Haines subjected them to extreme cell temperatures and inadequate ventilation in violation of the Eighth Amendment and that defendants Litscher, O'Donnell, Huibregtse, Berge and Haines subjected them to 24-hour illumination in violation of the Eighth Amendment;

3. Plaintiffs will not be allowed to proceed on their claims that the lack of exercise equipment and limited use of the telephone deprive them of their Eighth Amendment rights and will not be allowed to proceed on their totality of the conditions of confinement claim because they fail to state a claim upon which relief can be granted as to those claims;

4. Defendant Vickie Sharpe is DISMISSED from this case; and

5. Defendants may have until August 5, 2002, in which to file an amended answer. If they choose not to file an amended answer, their answer filed on November 7, 2001, will

stand.

Entered this 18th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge