IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DON JOHNSON, DWAYNE COX,
DANIEL JONES, JAMAL 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; DR. TODD RILEY; PAM BARTELS,
Prison Health Services; JOHN DOE(S);
JANE DOE(S); VICKIE SHARPE;
T.M. HARIG and TIM HAINES,

Defendants.

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiffs Don Johnson, Dwayne Cox, Daniel Jones, Jamal Jones, Ferdinan Rivera and Andre Avery, who are presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, allege that defendants violated their rights to be free from cruel and unusual punishment, to gain access to the courts, to be jailhouse lawyers, to receive due

process, to exercise free speech and to have medical privacy.

Plaintiffs have paid the full fee for filing their complaint. However, because they are prisoners and defendants are "governmental entit[ies] or officer[s] or employee[s] of a governmental entity," this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(a), (b). Although this court will not dismiss plaintiffs' case sua sponte for lack of administrative exhaustion, if defendants can prove that plaintiffs have not exhausted the remedies available to them as required by § 1997e(a), they may allege their lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Plaintiffs will be allowed to proceed on their claim that they are being subjected to conditions at the prison that constitute cruel and unusual punishment. However, the proceedings as to the merits of this claim will be stayed because plaintiffs are members of the pending class in Jones 'El v. Berge, No. 00-C-421-C, in which the claim is being considered. Plaintiffs will not be allowed to proceed on their claims for violations of their rights of access the courts, to be jailhouse lawyers, to exercise free speech and to receive medical privacy against defendants Litscher, O'Donnell, Berge, Huibregtse, Haines, Sharpe, Harig, Bartels

and Riley because these claims fail to state a claim upon which relief may be granted. Plaintiffs will not be allowed to proceed on their due process claim against defendants Litscher, O'Donnell, Berge, Huibregtse, Haines and Sharpe because the claim is legally frivolous.

In addition to these claims, plaintiffs have filed four motions that are presently before the court. First, plaintiffs' motion to be excluded from the class action in Jones 'El will be denied because the class was certified under Rule 23(b)(2), which does not allow class members to opt out. Second, plaintiffs' motion to allow plaintiff Johnson to sign papers filed in this case on behalf of all other plaintiffs will be denied because Rule 11(a) does not provide for individuals who are not lawyers to sign for parties. Next, plaintiffs' motion to waive the exhaustion requirement for some plaintiffs will be denied because lack of administrative exhaustion is an affirmative defense that the court may not waive on defendants' behalf. Finally, plaintiffs' motion to strike plaintiff Jamal Jones from the action will be denied because Jamal Jones did not sign the motion and it is not clear from the filing that he agreed to its submission.

In their complaint, plaintiffs make the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Plaintiffs Don Johnson, Dwayne Cox, Daniel Jones, Jamal Jones, Ferdinan Rivera and Andre Avery are inmates confined at the Supermax Correctional Institution in Boscobel, Wisconsin. Defendant Jon E. Litscher is Secretary of the Department of Corrections. Defendant Cindy O'Donnell is Deputy Secretary of the Department of Corrections and is an inmate complaint reviewer. The remaining defendants are employed at Supermax: defendant Gerald Berge is warden; defendant Peter Huibregtse is deputy warden; defendant Todd Riley is a medical doctor; defendant Pam Bartels is a medical nurse for Prison Health Services; defendant Vickie Sharpe is a program director; T.M. Harig is director of education; defendant Tim Haines is a unit manager; and John and Jane Does are individuals whose identities are unknown.

B. 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, Daniel 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 create 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.

C. Access to the Courts

Inmates at Supermax must choose between going to the recreation facility and the legal cell. If they choose to use the legal cell, they have access to a "unit starter library." There, inmates must remain in full shackles with their handcuffs secured to a waistbelt, making mobility almost nonexistent. Plaintiffs believe there is no reason for security not to remove the handcuffs; staff could use the same procedure used when taking an unmanacled inmate out of his own cell. The "legal rec" cell is a standard inmate cell with books on the bed and floor and with a security camera monitored by the unit sergeant. The starter library

consists of 84 books with no access to reporters, digest keynotes or Shepard's. Inmates have no direct access to case cite books and access to only two single cases off a computer printout each day. When defendant Harig was asked for keynote digests and Shepard's, he responded that "this facility is not required to Shepardize cases. . . . [and has] no access to keynotes."

All plaintiffs are at various stages of criminal and civil litigation and all are impaired in their ability to pursue litigation because of defendants' failure to provide adequate legal resources. Plaintiff Johnson needed to buy 12 books to be able to file this action. Plaintiff Cox has a civil proceeding dealing with Corrections Corporation of America in Whiteville, Tennessee. Plaintiff Cox wrote a letter to defendant Harig in which he asked for materials relating to the action. Defendant Harig responded that "we are unable to access Tennessee material" and that plaintiff Cox would "need to contact attorney or have family or friends do the necessary research." Inmates have access to the Legal Assistance to Institutionalized Persons Project but this assistance does not include civil actions.

Inmates are limited in the way in which they may assist other inmates with legal matters. In the past, inmates could send one legal document to another inmate each day. Currently, inmates can send only one handwritten legal document to another inmate each week. Inmates must copy by hand any case, transcript or any other document that they wish to share with another inmate, making it nearly impossible to assist others with their legal matters.

Defendants Litscher, O'Donnell, Berge, Huibregtse, Haines, Sharpe and Harig have either been notified about the inadequacy of the law library and the obstacles in assisting others in legal matters or signed off as reviewers of inmate complaints in which plaintiffs complained about it.

D. Level System

The Supermax "level system" is derived from Wis. Admin. Code Chapter DOC 303, which addresses discipline for prisoners. All inmates are on administrative segregation status. An inmate must complete one level successfully for a certain amount of time before advancing to the next. When an inmate commits a sanctionable offense or is accused of doing so, he is demoted to a lower level where his use of the canteen, telephone and recreational facility is limited. Plaintiffs believe Supermax's level system is punitive in nature. Inmates are not given due process hearings before being demoted. Defendants Litscher, O'Donnell, Berge, Huibregtse, Haines and Sharpe have either been notified about the allegedly punitive nature of the level system or signed off as reviewers of inmate complaints in which plaintiffs complained about it.

1. Use of telephone

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. Inmates do not have due process hearings before they are placed on telephone restrictions.

2. Canteen

All inmates on administrative segregation receive minimal canteen privileges for the first 30 days at Supermax. At level two, an inmate receives only a slight increase in canteen privileges. Level two lasts at least 90 days. Inmates remain at level three for six months, during which time they receive another minimal increase in canteen items. Assuming irreproachable conduct, inmates reach level four after 10 or 11 months at Supermax. At level four and five, inmates receive "full canteen privileges."

E. Mail

Supermax's policy requires that all mail other than exempt mail be left unsealed for monitoring. Exempt mail includes mail addressed to a lawyer, a court and various other political and correctional administrators. The security director is required to keep a record of all non-exempt mail that is read.

Plaintiff Johnson keeps a personal log of all mail that he sends and receives. On the "mail read" logs maintained by security officers, it is noted that 36 of plaintiff Johnson's letters that he sent to other inmates were monitored. Of the 359 pieces of mail that plaintiff Johnson sent to the outside, none were registered in the "mail read" log.

Defendants Litscher, O'Donnell, Berge and Huibregtse have either been notified about the fact that security officers monitor all incoming and outgoing mail and fail to record this fact properly or signed off as reviewers of inmate complaints in which plaintiffs complained about the mail handling procedures.

F. Medical Privacy

Inmates at Supermax are escorted to medical examinations by two security officers. The examination rooms are approximately 15 feet by 20 feet with a single entrance. The door has a window in it and opens onto the main hallway of the unit, allowing any staff to see into the room. The examination tables are on the wall directly across from the door and a sink and cabinets are on the same wall as the door.

On September 20, 2000, plaintiff Johnson was examined by defendant Riley in the unit exam room. Two female officers escorted him in full mechanical restraints, including handcuffs and leg shackles. These officers remained in the room during the exam. During the course of the exam, defendant Riley asked plaintiff Johnson to give details about his

medical history, including his history of benign prostatic hypertrophy and related urinary problems. Defendant Riley was concerned about prostate or colon cancer and explained this possibility in detail.

At the end of the exam, defendant Riley determined that he needed to perform a manual examination of plaintiff Johnson's prostate and rectum. Plaintiff Johnson told defendant Riley that he was uncomfortable with having this procedure performed because the two officers in the room were female and because the window in the room opened directly onto the main hallway. The female officers were standing near the sink. Plaintiff was on the table and defendant Riley stood between the officers and plaintiff. Plaintiff remained in full restraints, stood up, bent over the exam table with his back to the door and was manually examined by defendant Riley.

Defendants Litscher, O'Donnell, Berge, Huibregtse, Bartels and Riley have either been notified about the lack of medical privacy or signed off as reviewers of inmate complaints in which plaintiffs complained about it.

DISCUSSION

I. MOTION TO EXCLUDE FROM CLASS IN JONES 'EL

Plaintiffs have filed a "motion to exclude plaintiffs from class action; or of a commencement of a class action pursuant to rule 23(b)(1)(B); requesting exclusion in

accordance to 23(c)(2) [and] (3) or; become a subclass pursuant to and in accordance with rule 23(c)(4)(b) accordingly." Plaintiffs state that they are aware of the Jones 'El case, no. 00-C-421-C, in which this court certified four claims for class action: conditions of confinement; searches without cause; inadequate medical, dental and mental health care; and excessive force by use of the stun gun and stun shield. The plaintiffs in Jones 'El seek a judgment declaring that the alleged conditions at Supermax are unconstitutional and enjoining the defendants from engaging in the policies and practices that cause such conditions. The class in Jones 'El includes all persons who are now or will in the future be confined in the Supermax Correctional Institution in Boscobel, Wisconsin, and was certified pursuant to Rule 23(b)(2), under which successful litigants are entitled to injunctive and declaratory relief. Because the relief sought by the plaintiffs in Jones 'El is injunctive, class members may not opt out of the class.

Plaintiffs refer to Rule 23(c)(2) and (3) as authority for their motion to be excluded from the class. However, these subsections list conditions for opting out for members of classes certified under Rule 23(b)(3). It does not apply to a class certified under Rule 23(b)(2).

In the alternative, plaintiffs assert that they should become a subclass pursuant to Rule 23(c)(4)(B), which states in part: "When appropriate, . . . a class may be divided into subclasses and each subclass treated as a class. . . ." This rule allowing for the creation of

subclasses is designed to accommodate classes in which members have adverse interests that would otherwise defeat class certification. 7B Charles Alan Wright, Federal Practice and Procedure, § 1790, at 268 (2d ed. 1986). Plaintiffs point to no adverse interests that would justify the creation of a subclass. Instead, plaintiffs assert that their interests would not be served by the plaintiffs in Jones 'El because the class seeks only declaratory and injunctive relief but plaintiffs seek monetary relief. Plaintiffs seem to misunderstand the procedure of class actions certified pursuant to Rule 23(b)(2). A determination of the constitutionality of the alleged practices and procedures in Jones 'El will lead to a ruling that will affect the class as a whole. If the defendants' practices are found to be unconstitutional, each class member will have the opportunity to file a lawsuit to prove his particular injuries resulting from the constitutional violations. For this reason, I will dismiss plaintiffs' motion to exclude them from the class action in Jones 'El. Instead, I will stay a determination of the constitutionality of any of plaintiffs' claims that overlap with the claims certified for class action in Jones 'El, thus preserving plaintiffs' right to recover damages if the conditions are found to be unconstitutional.

II. CONSTITUTIONAL CLAIMS

A. Section 1983

Before addressing the merits of plaintiffs' complaint, there is an initial issue to be

considered. Section 1983 creates a federal cause of action for "the deprivation under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States." Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997) (citations omitted). To prevail on a § 1983 claim, a plaintiff must prove that (1) the defendant deprived him of a right secured by the Constitution and laws of the United States; and (2) the defendant acted under color of state law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

To establish individual liability under § 1983, plaintiffs must allege that the individual defendants were involved personally in the alleged constitutional deprivation or discrimination. Under § 1983, individual defendants cannot be held liable under a theory of respondeat superior. See Hearne v. Board of Education of City of Chicago, 185 F.3d 770, 776 (7th Cir. 1999). "'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). It is not necessary that the defendant participate directly in the deprivation. The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of

plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). See also Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 908 (7th Cir. 1996); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

In their complaint, plaintiffs name John and Jane Doe as defendants but do not allege that any individuals whose identities are unknown to plaintiffs violated any of their constitutional rights. Plaintiffs will not be allowed to proceed against defendants John and Jane Doe.

B. Conditions of Confinement

Plaintiffs contend that defendants Litscher, O'Donnell, Berge, Huibregtse, Haines and Sharpe violated their rights under the Eighth Amendment by subjecting them to cruel and unusual punishment. Plaintiffs allege that the following make up the unconstitutional conditions of confinement: 24-hour lighting; inadequate ventilation; inadequate recreation; and limited time on the phone. This claim overlaps with the conditions of confinement claim certified for class action in Jones 'El, in which this court certified a conditions of confinement claim as follows:

> the totality of the conditions at Supermax constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Such conditions include constant illumination; hourly bed checks throughout the night;

> extreme temperatures; confinement of prisoners in their cells for 24 hours a day; a lack of windows in cells; limited use of the phone; visits by video screen; constant monitoring; insufficient time in recreational facilities and inadequate recreational facilities.

Jones 'El, No. 00-C-421-C, slip op. at 37 (order entered Aug. 14, 2001). In the Jones 'El case, I noted that prisoners are entitled to "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Regardless of the merit of plaintiffs' claims individually, the determination whether prison conditions violate the Eighth Amendment requires a court to consider the totality of the conditions of confinement, considering things such as security and feasibility as well as the length of confinement. Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997); DeMallory v. Cullen, 855 F.2d 442, 445 (7th Cir. 1988). The rationale for examining the prisoner's conditions as a whole is that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have 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." Wilson v. Seiter, 501 U.S. 294, 304 (1991).

Plaintiffs allege facts sufficient to state a claim that defendants are violating their rights under the Eighth Amendment and will be allowed to proceed on this claim. As with all paid litigants in federal court, plaintiffs are responsible for serving their complaint upon

the defendants against whom they have been allowed to proceed. As usual, defendants will be required to file a responsive pleading. However, because the conditions of confinement about which plaintiffs complain are at issue in the Jones 'El class action, I will stay plaintiffs' proceeding as to the merits of this claim until a determination on the merits of the conditions of confinement claim in Jones 'El has been reached. This will preserve plaintiffs' claim for money damages should the class succeed in proving that the conditions violate the Eighth Amendment. However, the proceedings in this case will not be stayed insofar as defendants may wish to raise procedural or exhaustion issues on a motion to dismiss because they would not go to the merits of the case and may lead to its resolution. If defendants file an answer to the complaint, I will stay the proceedings automatically at that time without a further order. After the constitutionality of the claims in Jones 'El has been determined, I will consider this claim again. If the conditions of confinement claim in Jones 'El is dismissed, I will also dismiss the claim in this case. If the conditions of confinement are found to be unconstitutional, I will lift the stay in this case so that the case can be scheduled for further proceedings on plaintiffs' claim for damages.

C. Access to the Courts

Plaintiffs allege that defendants have impeded plaintiffs' constitutional right of access to the courts by denying them an adequate law library and by limiting the number of hours

they can use the library. 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. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez, 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828.

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial." Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. 343). At a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint).

Plaintiffs' claim that defendants Litscher, O'Donnell, Berge, Huibregtse, Haines, Sharpe and Harig violated plaintiffs' right of access to the courts must be dismissed for

failure to state a claim upon which relief may be granted. Plaintiffs assert that they are in various stages of litigation and that the inadequate law library impedes their litigation. For example, plaintiff Cox is not able to read Tennessee law books to research issues in a civil litigation matter. Plaintiff Johnson purchased 12 books to help him litigate this case. However, plaintiffs do not allege injury over and above the denial. Specifically, they do not allege that because of the limited library resources or hours, a nonfrivolous legal action of theirs was dismissed or the time for filing such an action ran out. Thus, plaintiffs will not be allowed to proceed on their denial of access to the courts claim against defendants Litscher, O'Donnell, Berge, Huibregtse, Haines, Sharpe or Harig.

D. Right to Be a Jailhouse Lawyer

I understand plaintiffs to allege that defendants Litscher, O'Donnell, Berge, Huibregtse, Haines, Sharpe and Harig have violated plaintiffs' right to be jailhouse lawyers by severely limiting mail among inmates relating to legal matters. However, the United States Supreme Court ruled recently that inmates do not possess a First Amendment right to provide legal assistance to other inmates. Shaw v. Murphy, 121 S.Ct. 1475, 1480 (2001). Instead, inmate-to-inmate correspondence that relates to legal matters receives the same First Amendment protections as any other inmate-to-inmate communication. Id. Plaintiffs do not allege facts from which an inference may be drawn that their First Amendment rights are

being violated by the restrictions put on inmate-to-inmate correspondence. Therefore, plaintiffs will not be allowed to proceed on their jailhouse lawyer claim against defendants Litscher, O'Donnell, Berge, Huibregtse, Haines, Sharpe and Harig.

E. Due Process

Plaintiffs allege that the level system at Supermax violates their right to due process. Plaintiffs argue that the level system is punitive in nature because it is derived from Wis. Admin. Code Chapter DOC 303, which addresses discipline within the Department of Corrections. Plaintiffs argue that although the level system is punitive in nature, inmates are not allowed a hearing before being demoted to a lower level. Plaintiffs assert that because all inmates are in segregated status, they are subject to Wis. Admin. Code Chapter DOC 308, which states that an inmate may be placed in administrative confinement only after a due process hearing. Wis. Admin. Code § DOC 308.04(3).

A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison

context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty).

The level system and the related increase or decrease in canteen, telephone and recreational facility use at Supermax do not implicate a liberty interest. Under Sandin, these alleged losses do not impose atypical and significant hardships on plaintiffs; they do not create a loss in good time credits or otherwise lengthen an inmate's sentence. Plaintiffs will not be allowed to proceed on their due process claim because the claim is legally frivolous.

F. Freedom of Speech

Plaintiffs allege that defendants violate plaintiffs' right to free speech by monitoring non-exempt inmate-to-inmate correspondence more than non-exempt inmate-to-outside correspondence.

The Supreme Court has held that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Turner v. Safley, 482 U.S. 78, 90 (1987). Prison officials violate the First Amendment when for reasons unrelated to legitimate

penological interests, they engage in "censorship of . . . expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974).

The fact that defendants have a tendency to monitor correspondence between inmates in the same prison more carefully than correspondence mailed to an address outside the prison does not implicate the First Amendment. Although defendants may be differentiating between mail that stays within the prison and mail that leaves the prison, plaintiffs have not alleged facts tending to suggest that this policy is not reasonably related to legitimate penological interests. Therefore, plaintiffs have failed to state a claim upon which relief may be granted under the First Amendment for the monitoring of inmate-to-inmate mail. This claim against defendants Litscher, O'Donnell, Berge and Huibregtse will be dismissed.

G. Medical Privacy

Plaintiffs allege that defendants Litscher, O'Donnell, Berge, Huibregtse, Bartels and Riley violated their right to privacy by requiring medical examination rooms to be staffed by security officers and by allowing the windows in the examination rooms to open onto a main hallway. I understand plaintiffs' allegations to encompass the fact that security officers can both observe the medical examination and hear communications between the inmate and

physician.

"Whether prisoners have any privacy rights in their prison medical records and treatment appears to be an open question." Massey v. Helman, 196 F.3d 727, 742 n. 8 (7th Cir. 1999) (citing Anderson v. Romero, 72 F.3d 518, 522-23 (7th Cir.1995)). In Anderson, 72 F.3d at 523, the Court of Appeals for the Seventh Circuit could not "find any appellate holding that prisoners have a constitutional right to the confidentiality of their medical records," but noted in dictum that the cruel and unusual punishments clause of the Eighth Amendment might protect against a state's dissemination of "humiliating but penologically irrelevant details of a prisoner's medical history." The Eighth Amendment imposes a duty on prison officials to provide adequate shelter and 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). Although 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)), 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, 109 (7th Cir. 1971).

Plaintiffs have failed to allege that defendants have disseminated any humiliating information they may have gleaned from their presence in the examination room. At most,

plaintiff Johnson may have experienced discomfort in revealing his medical history in the presence of security officers. Considering that defendants have a legitimate penological interest in having security officers present during medical examinations, defendants' conduct does not implicate the cruel and unusual punishment clause of the Eighth Amendment or an uncertain right to medical privacy.

Plaintiffs also allege that defendants violated their right to physician-patient confidentiality by requiring security guards to remain in the examination room while inmates discuss their medical history. Defendants' reliance upon the physician-patient privilege is misplaced for two reasons. First, federal courts do not recognize a physician-patient privilege. Whalen v. Roe, 429 U.S. 589, 602 n. 28 (1977) ("The physician-patient evidentiary privilege is unknown to the common law."); Patterson v. Caterpillar, Inc., 70 F.3d 503, 506-07 (7th Cir. 1995) ("federal common law does not recognize a physician-patient privilege"). Second, the physician-patient privilege is inapplicable to this case. The physician-patient privilege protects a person who has imparted confidential information to a physician from having such information revealed in the course of litigation. The privilege does not exist independently of certain proceedings to which it applies. See I John W. Strong et al., McCormick on Evidence § 98 (5th Ed. 1999). The physician-patient privilege is inapplicable in the context of a prisoner who does not wish security guards to be present at his medical examination. I conclude that plaintiffs have

failed to state a claim for which relief may be granted against defendants Litscher, O'Donnell, Berge, Huibregtse, Bartels and Riley on their right to medical privacy claim.

H. State Law Claims

Plaintiffs allege that defendants failed to follow the Wis. Admin. Code when they took action or failed to take action relating to the claims involving the law library, the level system and mail handling procedures. I have already determined that these factual circumstances do not raise viable federal law claims. Although plaintiffs will be allowed to proceed on their conditions of confinement claim, the facts that support that claim do not overlap with those that support plaintiffs' state law claims. Accordingly, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over plaintiffs' state law claims. See 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims).

III. MOTION TO ALLOW PLAINTIFF JOHNSON TO SIGN FOR OTHER PLAINTIFFS

Plaintiffs have filed a "motion to allow power of attorney signature delegated to plaintiff Johnson in accordance with rule 11(a)." Plaintiffs explain that the circumstance of being housed at Supermax make it "impractical and unduly time consuming" to obtain the

individual signature of each plaintiff on papers filed with the court. Although plaintiff Johnson alone signed the motion, the five other plaintiffs attached signed affidavits in which they authorize plaintiff Johnson's signature to represent their own in this action.

Fed. R. Civ. P. 11(a) provides that "Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party." Plaintiff Johnson does not allege that he is an attorney but rather that all plaintiffs agree to grant him power of attorney to sign in their place. Nevertheless, Rule 11(a) does not make any exceptions to the requirement that "the party" must sign all pertinent documents submitted to the court. In this case, plaintiffs chose to file their lawsuit together. Therefore, "the party" consists of Don Johnson, Dwayne Cox, Daniel Jones, Jamal Jones, Ferdinan Rivera and Andre Avery, each of whom must sign any document filed with the court that pertains to him. Although this procedure may be burdensome under the circumstances at Supermax, it is the only way to assure that each plaintiff consented to the filing of certain documents on his behalf. Covington v. Cole, 528 F.2d 1365, 1370 n.7 (5th Cir. 1976). For this reason, I will deny plaintiffs' motion to allow plaintiff Johnson to sign documents on the behalf of all plaintiffs.

IV. MOTION TO WAIVE COMPLETION OF DUPLICATE EXHAUSTION OF ADMINISTRATIVE REMEDIES WHERE EXHAUSTION IS COMPLETE

Plaintiffs have filed a "motion to waive completion of duplicate exhaustion of administrative remedies where exhaustion is complete." Plaintiffs assert that four of them have exhausted their administrative remedies and that requiring the two remaining plaintiffs, Jamal Jones and Andre Avery, to exhaust their administrative remedies would delay plaintiffs' action. Although plaintiff Johnson alone signed the motion, plaintiffs Jamal Jones and Avery attached signed affidavits in which they join with plaintiff Johnson in asking the court to waive the requirement that they exhaust their administrative remedies.

The fact that all plaintiffs may not have exhausted the remedies available to them as required by § 1997e(a) is an affirmative defense that may be asserted by defendants on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999); this court will not dismiss plaintiffs' case sua sponte for lack of administrative exhaustion. It follows that this court does not have the authority to waive the requirement that plaintiffs exhaust their administrative remedies. Accordingly, I will deny plaintiffs' motion to waive the requirement that all plaintiffs exhaust their administrative remedies.

V. MOTION TO STRIKE JAMAL JONES AS PLAINTIFF

Plaintiff Don Johnson has also filed a "motion to strike Jamal Jones; Plaintiff, from 42 U.S.C. § 1983 filing for non-compliance with 42 U.S.C. § 1997e." Plaintiff Jamal Jones

did not sign the motion or attach an affidavit in which he states that he wishes to withdraw from the case. Because it is not evident from the filing that plaintiff Jamal Jones agreed to its submission, the motion will be denied. However, plaintiff Jamal Jones will be given the opportunity to inform the court whether he wishes to remain a plaintiff in this case. Plaintiff Jamal Jones may have until September 7, 2001, to do so. If such notice is not filed by September 7, 2001, plaintiff Jamal Jones will be dismissed from this case for failure to prosecute.

ORDER

IT IS ORDERED that

1. Plaintiffs Don Johnson, Dwayne Cox, Daniel Jones, Jamal Jones, Ferdinan Rivera and Andre Avery are allowed to proceed on their conditions of confinement claim, including 24-hour lighting, inadequate ventilation, inadequate recreation and limited time on the telephone, against defendants Jon E. Litscher, Cindy O'Donnell, Gerald Berge, Peter Huibregtse, Vickie Sharpe and Tim Haines; however, the proceedings relating to the merits of this claim are STAYED until this court has ruled on the constitutionality of the conditions of confinement at Supermax in Jones 'El v. Berge, No. 00-C-421-C. If defendants file an answer to the complaint, this case will be stayed automatically without further order. However, if defendants exercise their right to file a motion permitted under Fed. R. Civ. P.

12 that does not go to the merits of plaintiffs' Eighth Amendment claim, the court will schedule briefing on the motion.

2. Plaintiffs' claims that their rights to access to the courts, to be jailhouse lawyers, to have unhindered inmate-to-inmate communications and to have medical privacy against defendants Litscher, O'Donnell, Berge, Huibregtse, Haines, Sharpe, Harig, Bartels and Riley are DISMISSED for failure to state a claim upon which relief may be granted.

3. Plaintiffs' due process claim against defendants Litscher, O'Donnell, Berge, Huibregtse, Haines and Sharpe is DISMISSED because the claim is legally frivolous.

4. Defendants T.M. Harig, Pam Bartels, Todd Riley and John and Jane Does are DISMISSED from this case.

5. Plaintiffs' motion to be excluded from the class action in Jones 'El is DENIED.

6. Plaintiffs' motion to allow plaintiff Johnson to sign papers filed in this action on behalf of all other plaintiffs is DENIED.

7. Plaintiffs' motion to waive completion of duplicate exhaustion of administrative remedies is DENIED.

8. Plaintiffs' motion to strike Jamal Jones as a plaintiff in this case is DENIED. Plaintiff Jamal Jones may have until September 7, 2001, to notify the court whether he wishes to remain a plaintiff in this case. If his notification is not filed by September 8, 2001, he will be dismissed from the case for failure to prosecute.

9. As paid litigants in federal court, plaintiffs are responsible for serving their complaint upon the defendants. This means that they will have to file proof either that they served their complaint on the defendants against whom they have been allowed to proceed in accordance with Fed. R. Civ. P. 4(e) or that they notified these defendants of the commencement of the action and requested that defendants waive service of a summons as set out in Fed. R. Civ. P. 4(d)(2). Enclosed with a copy of this order to plaintiff Johnson are blank waiver of service of summons forms. (I have chosen plaintiff Johnson to receive these forms and tend to their completion because he is the first named plaintiff in the caption.) If any defendant agrees to waive service, plaintiffs must file the completed waiver with this court but are not required to file proof of service as to that defendant. Fed. R. Civ. P. 4(d)(4). If service is not waived, plaintiffs must file proof of service consisting of the affidavit of any person other than a United States Marshal or deputy United States Marshal who effected service of plaintiffs' complaint upon the defendants. Fed. R. Civ. P. 4(l).

Entered this 24th day of August, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge