IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L. CHERRY,

Petitioner,

ORDER

v.

02-C-71-C

JON LITSCHER, GERALD BERGE,
JIM PARISI, CHRISTINE APPLE,
COLETTE CULLEN, VICKI SHARPE,
BRAD HOMPE, SGT. MASON,
CAPTAIN GILBERT and
SGT. LEFFLER,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Eugene L. Cherry, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, contends that respondents violated (1) the Fourteenth Amendment due process clause by transferring him to Supermax, by subjecting him to a level system and "management continuum" and by imposing a biased inmate complaint review system on him; (2) the Fourteenth Amendment equal protection clause by restricting his notary services; (3) the Eighth Amendment by subjecting him to

cruel and unusual conditions of confinement and by restricting basic necessities; (4) the Eighth Amendment by denying him adequate mental health care; (5) the Fourth Amendment by violating his right to privacy; (6) the Fourth Amendment by subjecting him to unreasonable searches; and (7) the First Amendment freedom of expression clause by restricting his publications, confiscating an outgoing letter and restricting the inmate legal mail route.

Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his 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).

Petitioner's request for leave to proceed on his Eighth Amendment conditions of confinement claim, his Eighth Amendment inadequate mental health care claim and his Fourth Amendment unreasonable searches claim will be granted. His request for leave to proceed on his claims of denial of basic necessities and freedom of expression will be denied because they fail to state a claim upon which relief can be granted. His request for leave to proceed on his claims of due process, equal protection and right to privacy will be denied because the claims are legally frivolous. In addition, petitioner's motion for a preliminary injunction will be stayed in order for petitioner to comply with this court's "Procedures to be Followed on Motions for Injunctive Relief." His motion for appointment of counsel will be denied without prejudice.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioner Eugene L. Cherry is an inmate at Supermax Correctional Institution. Respondent Jon Litscher is Secretary of the Department of Corrections. Respondent Gerald

A. Berge is warden of the institution. Respondent Jim Parisi was security director at the institution at the time the incidents took place. Respondents Christine Apple and Colette Cullen are psychologists at the institution. Respondent Vicki Sharpe is a program director, respondent Captain Gilberg is a captain, respondent Brad Hompe is a unit manager and respondents Sergeant Mason and Sergeant Leffler are sergeants at Supermax.

B. Due Process

1. Transfer to Supermax

Petitioner was transferred to Supermax from Waupun Correctional Institution on December 2, 1999, after a classification hearing. He was reclassified and transferred before the chief of the bureau of offenders classification approved the committee's actions. Respondent Berge has received a "google" of offender administrative complaints about partial decisions and inmates' placement at Supermax but Berge has "turned a blind eye."

2. Level system

At Supermax, petitioner is subjected to a level system, which is a forced behavior modification system. Respondent Berge's level system regulates virtually every dimension of petitioner's life: visitation; phone calls; prisoner release from the institution; ordering and receiving books, newspapers, pamphlets, magazines and other packages; personal belongings;

television viewing; religious, educational and clinical programming; visual stimuli; library privileges; and every other facet of daily existence. Petitioner must advance through the level system to be released to general population. To advance through the system, petitioner must avoid disciplinary infractions and warnings and enroll in levels two through five programming. If petitioner does not enroll voluntarily in level two through five programming, he is demoted to level one and his retention at Supermax is continuous with no release until discharge from the Wisconsin Department of Corrections. Petitioner's retention at Supermax will last as long as his sentence if he fails to "volunteer" for programming. Respondent Berge has established no maximum time period that an inmate may be retained at Supermax in the absence of further misconduct.

When petitioner arrived at Supermax, he was assigned to alpha unit (level one). At level one, nonvisual stimuli fluctuate at staff discretion. Inmates are not allowed electronics, library or personal books (not even their personally owned legal books), photocopied material or clinical programming or photographs. Their canteen privileges, telephone privileges, and religious services are reduced significantly.

Petitioner is subject to level demotions without any due process hearings or right to be heard. Respondent Berge and staff maintain a "behavioral log" in which prison staff may enter warnings of a varied nature. These warnings cannot be contested, refuted or appealed by petitioner. There is no Wisconsin Administrative Code provision or statute that governs

the behavioral log and warning system used by respondent Berge. Petitioner has been demoted to level one on numerous occasions on the basis of warnings. With each demotion, petitioner is subjected to a new minimum retention at Supermax of 18 months and lost privileges. Respondent Berge has not established any procedural due process protections or fair play standards to prevent staff from making capricious entries into the behavioral log.

When petitioner is demoted from any level greater than level one, he is returned to alpha unit for a period of time dictated by respondent Berge and staff. Petitioner has remained at level one 98% of his time at Supermax. Petitioner's stay at Supermax has included roughly 15,000 hours of close segregation confinement.

The level system created by respondent Berge operates in a subjective and unpredictable manner that has caused petitioner frequent migraine headaches, sleep disturbances, perceptual distortions, two unreported suicide attempts, severe depression, illusions and brief periods of "overt confusional state" of mind. The level system has caused petitioner anxiety, irritability, problematic thinking, concentration and memory loss. Petitioner has also become obsessed and fixated on one thing or another and lives in constant fear. The level system, coupled with the lack of sunshine, the sounds of normal human existence beyond the prison walls, the constant lighting, and the constant boom and bang of the cell doors in alpha unit is psychological torture designed to rip, tear and break the spirit of the prisoner. The level system has no security or penological connotations and

is meant solely to force behavioral modification through constant property and privilege deprivations. Respondent Berge intensifies petitioner's problems by the very nature of the "privileges," which are parceled out by virtue of progressing through the level system. Most of these so called privileges are granted to petitioner as a matter of course through the Wisconsin Administrative Code and the Constitution.

Respondent Berge does not have a security or penological reason to deny petitioner's release from Supermax if petitioner does not participate in the level system and its programming, which is not individualized but a "generalized promulgation of interspection" without adequate clinical staffing to monitor probable regressions or post traumatic stress disorders and is counter-rehabilitative. The level system, behavior log and warning system are fundamentally unfair and punitive in nature. The system breeds disrespect for authority and fosters a malicious compliance and undermines relational skills needed for rehabilitation.

Respondent Berge has concocted a "level review committee" that decides subjectively which inmates advance through the level system and may graduate and which are retained at the institution. This committee has no authority under the Wisconsin Administrative Codes or state statutes. Petitioner is not allowed to present witnesses, evidence, documentation or an impartial decision maker in the level review process. Respondent Berge's criteria for leaving Supermax are an 18-month minimum retention and completion of levels one through five, including programming. The level review committee renders

biased and moot petitioner's review before the administrative confinement review committee and the program review committee. Respondent Berge instructs both the administrative confinement review committee and the program review committee to consider whether petitioner is participating in the program or the level system. When petitioner is not participating in either he is retained on program status or administrative confinement by the administrative confinement review committee or reduced in custody by the program review committee.

Respondent Berge inflicts mental decompensation on petitioner intentionally by forcing behavioral modification aimed at breaking the wills and spirits of inmates through experimental tactics. Before being placed at Supermax, petitioner was not screened or evaluated by mental health persons to determine the appropriateness of long-term segregation.

Respondent Berge uses petitioner's underlying criminal offense repeatedly when determining placement in program segregation or administrative confinement. He also uses information from petitioner's previous incarceration and information dated 10, 15 and 20 years ago. Respondent Berge's criteria for placement and retention at Supermax are so vague as to be unconstitutional.

3. Management continuum

Respondent Berge abuses various "management continuums." He does not impose

the continuums on the basis of the persisting threat of actual danger but on the basis of how many times petitioner has been on a particular restriction in the past. For example, if petitioner has been on back-of-cell restriction on four occasions for a total of 9 days, then petitioner must remain on back-of-cell restriction for 120 days for any new infraction.

4. Inmate Complaint Review System

Respondent Berge's inmate complaint review system negates independent assessment and inmate involvement. It is "partial" in its decision making process. Because petitioner must exhaust his administrative remedies before proceeding to court, the complaint review system must be meaningful.

5. Notary Services

On November 15, 2001, respondent Sharpe sent petitioner a memorandum stating that because of the repeated incidents in which petitioner had exposed himself to female staff members, effective immediately petitioner would be allowed to receive notary services only from Mr. Ferrell and only when it is Ferrell's week for notary duty. The memorandum also stated that petitioner would need to plan ahead because no special arrangements would be made for him to have documents notarized outside Ferrell's regular schedule. Respondent Sharpe has no authority to interfere with petitioner's access to notary services. During 2001, petitioner did not receive any conduct reports from female notary staff for exposing

himself. Even if he had, these reports would not justify interfering with petitioner's notary requirements. Respondent Sharpe interfered with petitioner's rights because of the degrading sign placed outside his cell for 16 months. Petitioner is not the only inmate who has received conduct reports for sexual misconduct. However, respondent Sharpe singled petitioner out and interfered with his notary needs because of accusations made by staff who are not notaries, with the result that petitioner is unable to get the same notary services as other inmates at Supermax.

C. Eighth Amendment: Conditions of Confinement

Supermax is an extended control facility in which inmates are isolated from contact with other human beings. Human contact is limited to instances when medical staff, clergy or a counselor stops at the inmate's cell front during rounds. Physical contact is limited to being touched through a security door by a correctional officer while being placed in restraints or having restraints removed. The bulk of verbal communication with staff occurs through an intercom system and inmates talk to each other through the prison's ventilation system. Further minimization of human contact results from the use of technologies, such as cameras, remote listening devices and control devices for televisions, water and lights.

Petitioner is subjected to the destruction of the normal functioning of his brain, which depends on constant sensory bombardment. Sensory stimuli have the general function of

maintaining the brain. When a person is restricted under isolating conditions for long periods of time like petitioner, the brain loses its power of arousal.

As Secretary of the Department of Corrections, respondent Litscher has the authority to improve the conditions at Supermax. On numerous occasions, petitioner wrote to Litscher, complaining about the mistreatment by prison staff and the harsh conditions. On each occasion, respondent Litscher has refused to improve the conditions for petitioner.

D. Eighth Amendment: Denial of Basic Necessities

In order to receive meals, clothing, medication, mail and other items, respondent Berge requires inmates to dress in full prison garb, turn on the bright light and stand in the middle of the cell with palms exposed. This policy is meant to humiliate and degrade petitioner.

Respondent Parisi is in charge of restrictions placed on petitioner by staff. In May 2000, respondent Mason placed a computer-generated sign outside petitioner's cell, which stated: "If inmate Cherry exposes himself to staff, it is to be taken as non-compliance and is a refusal of anything being passed at that time - meals, shower rolls, medication, phone calls, supplies, etc." The sign remained outside petitioner's cell for 16 months. Because of it, staff refused petitioner basic necessities on numerous occasions. Respondent Mason has never written petitioner a conduct report pertaining to sexual misconduct. Even if he had

written such a report, he would not have the authority to deny petitioner items that are guaranteed him under the Constitution. Petitioner wrote letters to respondents Parisi and Berge to have them remove the degrading sign. They both supported respondent Mason's reasons for placing the sign. Because of this sign, petitioner was refused basic necessities on many occasions, causing petitioner stomach cramps from lack of food, severe migraine headaches from lack of medication and a foul body odor from a lack of showers, soap and toothpaste.

As unit manager, respondent Hompe is in charge of making alpha unit staff aware of new policies and rules pertaining to alpha unit, where petitioner is housed. In the fall of 2001, respondent Hompe instructed his staff to refuse petitioner whatever is being passed out at the time if petitioner is wearing a t-shirt on his head. T-shirts are no longer allowed to be worn on the head.

On October 24, 2001, third-shift officers refused to open petitioner's trap door and allow the nurse to give petitioner his medication because he refused to take his t-shirt off his head. Petitioner filed an inmate complaint regarding the matter, which was dismissed with modifications: respondent Hompe should inform his staff not to refuse petitioner his medication for refusing to take his t-shirt off his head. Hompe did not comply with the terms of the complaint modifications. He did not instruct his officers not to refuse medication to petitioner.

On November 16, 2001, petitioner was refused his medication for refusing to take his t-shirt off his head. On November 16, 2001, petitioner filed another inmate complaint, which was affirmed, providing that petitioner will not be denied his medication for improper behavior. On November 16, 2001, petitioner was placed on Nutri-loaf and on back-of-cell restriction, under which petitioner has to sit on the floor, face the wall and place both hands on the wall in order to receive his meals, medication or any other items. Petitioner remained on back-of-cell restriction until November 26, 2001. During those ten days, petitioner was denied many items on numerous occasions for not complying with the back-of-cell restriction. Petitioner suffered severe back pain and migraine headaches and passed out twice from not eating.

On December 14, 2001, second-shift unit staff refused to give petitioner hygiene supplies and his meal for refusing to take his t-shirt off his head. Petitioner was hungry all night and suffered stomach cramps. Petitioner had no soap or toothpaste, so he had a foul body odor for three days. Staff refused to give petitioner toilet tissue for three days, so he had to wipe himself with a face cloth, which sat in a corner until staff issued a new one.

E. Eighth Amendment: Inadequate Mental Health Care

Respondents Apple and Cullen are psychologists at Supermax who have the authority to order petitioner to be transferred to an inpatient facility if he shows signs of a serious

mental illness. Petitioner has numerous entries in his clinical file that show that he suffers from several mental illnesses that the staff at Supermax cannot address. From July 2000, to September 2001, petitioner made numerous requests to respondents Apple and Cullen, asking to discuss his suicidal thoughts and unreported suicide attempts. Respondent Apple "turned a blind eye." Respondent Cullen refused to speak with petitioner about his mental illness and instead sent an officer to petitioner's cell to deliver a packet on depression, without instructions on what petitioner was to do with the packet.

Because respondents Apple and Cullen failed to treat or address petitioner's mental illness, his illness worsened, causing him to do abnormal things and to attempt suicide twice in 2001. These attempts were unreported. Respondents Apple and Cullen still did not answer petitioner's request for help in dealing with his mental illnesses. Instead, petitioner talked with crisis intervention worker Natalie Wilmot and another institution psychologist, Dr. Twila Hagan, about his mental illnesses and suicide attempts. These two individuals also turned a blind eye and did not recommend that petitioner be transferred to a different facility to receive mental health treatment. Although seriously mentally ill inmates are not supposed to be housed at Supermax following the preliminary injunction order in Jones 'El v. Berge, respondents Berge, Apple and Cullen have not made an attempt to transfer petitioner to an inpatient facility that can address his mental illnesses properly. Because of respondents' inaction, petitioner's mental illnesses have worsened, causing petitioner to

become rebellious and to act out in a manner that he would not normally do and causing him to remain at level one.

F. Fourth Amendment: Right to Privacy

On shower days, petitioner is given a 3½ foot by 1½ foot terry cloth towel. If petitioner is on back-of-cell restriction, he must sit with a bare bottom on the cement floor before receiving his clothing. The staff at Supermax is approximately 27% female. Petitioner is allowed showers three times a week. During shower periods, petitioner is dressed in a towel and must proceed to the center of the cell, turn on the bright light and display his palms to exchange his clothing. Respondent Berge allows female staff to pass out shower rolls. More often than not, the inadequately sized towel falls off, exposing petitioner's genitals. Female staff give petitioner warnings and conduct reports for exposing himself to staff.

Petitioner's cell is equipped with showers and cameras. Respondent Berge does not allow staff to shut off cameras during showers, when petitioner is using the facilities or washing himself, but he allows staff to give petitioner warnings and conduct reports for exposing himself to staff if staff are doing rounds and see petitioner naked and washing himself. Respondent Berge does not provide robes or allow petitioner or other inmates to purchase them to maintain their modesty on shower and clothing exchange days, causing

petitioner to expose himself to female staff when the towel falls off. Respondent Berge does not provide an inexpensive shower or privacy curtain to petitioner. Respondent Berge allows petitioner to be subjected to opposite sex surveillance.

G. Fourth Amendment: Unreasonable Searches and Seizures

Petitioner is often subjected to body cavity and cell searches in the total absence of security and penological justification. These searches are meant to harass petitioner.

H. First Amendment

1. Limitations on publications

Petitioner's publications receive First Amendment protections under Wis. Admin. Code §§ 309.04 and 309.05. Respondent Berge does not allow level one inmates to possess books, magazines, newspapers, pamphlets or typed and photocopied materials. Respondent Berge does not allow inmates on levels two through five to keep magazines, newspapers, pamphlets or photocopied materials and he limits them to five soft covered books. Under the level system, respondent Berge prohibits legal books and journals. Wis. Admin. Code allows inmates to retain property purchased by the inmate amounting to 8000 cubic inches. Wis. Admin. Code allows inmates to keep religious materials, prayer sheets, prayer schedules, pamphlets, books and magazines that do not cause a disruption. Respondent

Berge's level system infringes on these rights. Respondent Berge has no security or penological reasons to deny petitioner his photographs on level one, limit petitioner's photographs to 12 on other levels or deny petitioner correspondence courses or photocopied material.

2. Mailing letters

On December 9, 2001, petitioner mailed a two-page letter to Reverend Ruth Krymkowski that included legal information and the names of Supermax staff. In the letter, petitioner asked Krymkowski to help petitioner have the Grant County Sheriff's Department serve Supermax staff with copies of this proposed civil suit. Also enclosed in the letter was a one-of-a-kind obituary of petitioner's deceased aunt, Paulette Cherry-McDougal. On December 10, 2001, respondent Gilberg had all the items enclosed with the letter destroyed without writing petitioner a conduct report or giving him a chance to appeal the non-delivery to the warden. Respondent Gilberg destroyed petitioner's mail solely to keep petitioner from having Krymkowski help him serve Supermax staff with copies of this complaint.

3. Inmate-to-inmate legal route

Respondent Berge has promulgated an inmate-to-inmate legal route system that

prohibits the transfer of photocopied legal documents, legal transcripts, typed legal papers and exhibits. The legal route system prohibits inmates from receiving legal assistance from other inmates under the guise of a legitimate security policy.

DISCUSSION

I. MERITS OF THE CLAIMS

A. Fourteenth Amendment Due Process

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhartv. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted).

1. Transfer to Supermax

Petitioner alleges that he was transferred to Supermax, where the conditions are

severe, after a classification hearing, the outcome of which was not approved by the chief of the bureau of offenders classification. However, the placement decision about which petitioner complains does not implicate a liberty interest. Prisoners do not have a liberty interest in not being transferred from one institution to another. Meachum v. Fano, 427 U.S. 215 (1976) (due process clause does not limit interprison transfer even when new institution is much more disagreeable).

Petitioner also alleges that he does not meet the mandatory criteria for placement at Supermax. Although respondents may not be following a Department of Corrections policy, regulation or even a Wisconsin statute, their failure to do so does not infringe upon a liberty interest of petitioner. At most, the allegation supports a claim that petitioner's rights under state law may have been violated, but such a claim must be raised in state court. Because petitioner has not alleged facts sufficient to establish that remaining out of Supermax implicates a liberty interest under Sandin, his request for leave to proceed on this claim will be denied as legally frivolous.

2. Level system

Petitioner alleges that the level system at Supermax violates his right to due process. Petitioner argues that the level system is a forced behavior modification system in which he has been subjected to level demotions without any due process hearings or the right to be

heard. Petitioner alleges that the level system operates in a subjective and unpredictable manner that deprives inmates of "privileges" that are guaranteed to them under the Wisconsin Administrative Code or the Constitution.

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, 515 U.S. at 483-484, 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 limited essentially 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 inmates; they do not create a loss in good time credits or otherwise lengthen an inmate's sentence. Petitioner's request for leave to proceed on his claim that the level system violates due process will be

denied because the claim is legally frivolous.

3. Management continuum

Petitioner alleges that respondent Berge's "management continuum" violates due process. Petitioner alleges that under this continuum, restrictions are calculated on the basis of how many times a particular inmate has already been on a certain restriction rather than on the basis of the existing threat of actual danger. As for the level system, under Sandin, this manner of calculating restrictions does not impose atypical and significant hardships on petitioner; it does not create a loss in good time credits or otherwise lengthen an inmate's sentence. Petitioner's request for leave to proceed on his claim that the management continuum violates due process will be denied because the claim is legally frivolous.

4. Inmate complaint review system

Petitioner contends that the inmate complaint review system deprives him of due process by "negating independent assessment and inmate involvement" and by exceeding the time limits to respond on a consistent basis as set out by state law. In addition, petitioner contends that the inmate complaint review system is "partial." These allegations are too conclusory to state a claim for relief under the due process clause of the Fourteenth Amendment. They do not suggest that petitioner was deprived of a liberty or property

interest. Moreover, petitioner has no constitutional right to have his inmate complaints ruled on by impartial decision makers and he has pointed to no statute that would give him such a right under state law. Petitioner's request for leave to proceed on his due process claim regarding the inmate complaint review system will be denied because the claim is legally friviolous.

B. Equal Protection

I understand petitioner to contend that respondent Sharpe violated his right to equal protection of the laws by interfering with his notary needs. Petitioner alleges that he did not receive any conduct reports for exposing himself to female notaries in 2001, but that respondent singled him out because of accusations made by staff who are not notaries.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Petitioner's allegations fall far short of suggesting that he is similarly situated to other inmates at Supermax who are accused of exposing themselves to female staff but who are not restricted from using the services of female notaries. Petitioner does not allege that in all important respects, his history of exposing himself to staff matches the history of any other prisoner confined at Supermax who was not placed on notary services restrictions. Because petitioner's allegations do not imply that he is being

treated differently from other inmates with whom he is similarly situated, he cannot succeed on his claim that respondent is depriving him of his right to equal protection. Petitioner's request for leave to proceed on his equal protection claim will be denied as legally frivolous.

To the extent that petitioner may be arguing that respondent violated his right to due process by restricting his notary services, petitioner has failed to allege that he has a protected liberty or property interest at stake. For the same reasons that I am denying his claims regarding the level system and the management continuum, petitioner's request for leave to proceed on his due process claim regarding notary services will be denied as legally frivolous.

C. Eighth Amendment

1. Conditions of confinement

Petitioner alleges that several of the conditions at Supermax violate his right to be free from cruel and unusual punishment: isolation from contact with other human beings; the intercom system; constant monitoring; constant lighting; lack of sunshine; constant boom of cell doors; remote listening devices; and remote control devices for televisions, water and lights. Petitioner alleges that he has suffered physically and mentally as a result of the totality of these conditions. In order to state a claim under the Eighth Amendment, plaintiff's allegations about prison conditions must satisfy a test that involves both a

subjective and objective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. It is possible for physical conditions of confinement to violate the Eighth Amendment when viewed in their totality. See Jones 'El v. Berge, 00-C-421-C, slip op. at 37 (order entered August 14, 2001).

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 petitioner's 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. See 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).

Because petitioner's allegations of total isolation and sensory deprivation coupled with inadequate physical activity may violate "contemporary standards of decency," Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986), petitioner may proceed in forma pauperis on a totality of the circumstances claim against respondents Litscher and Berge. As Secretary of the Department of Corrections and warden of Supermax, respondents Litscher and Berge are presumed to be aware of the conditions of confinement at Supermax.

2. Denial of basic necessities

Petitioner alleges that respondents Parisi and Mason violated his right to be free from cruel and unusual punishment by posting a sign outside his door that instructed staff to treat his exposing himself to staff as refusal of anything being passed out at that time. Petitioner also alleges that respondent Hompe instructed staff to refuse petitioner whatever is being passed out if petitioner is wearing a t-shirt on his head. Petitioner alleges that as a result of these restrictions, he was deprived of basic necessities on numerous occasions but he provides no facts to suggest that the deprivations were so harsh as to threaten his health. The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. See Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997). Prisoners are entitled to "the minimal civilized measure of life's necessities."

Farmer, 511 U.S. at 833-34. To succeed on a conditions of confinement claim, a prisoner must also show that prison officials were deliberately indifferent to his needs. Dixon, 114 F.3d at 644 (citing Wilson, 501 U.S. at 30 1-04). The minimum intent required is "actual knowledge of impending harm easily preventable." Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir.1985).

Petitioner does not allege that he ever became ill after being placed on the restrictions, only that he experienced stomach cramps, headaches and a foul body odor from not receiving basic necessities. Moreover, petitioner's allegations establish that the restrictions were imposed because petitioner failed to follow a prison regulation. Because petitioner's description of the conditions he was subjected to as a result of the restrictions fails to point to any specific problems cognizable under the Eighth Amendment, petitioner's request for leave to proceed on his Eighth Amendment claim as it relates to basic necessities will be denied for failure to state a claim upon which relief can be granted.

D. Eighth Amendment: Inadequate Mental Health Care

Petitioner alleges that respondents Apple and Cullen failed to treat his mental illness by not classifying him as unfit for incarceration at Supermax and by refusing to speak with petitioner about his mental illness. To state an Eighth Amendment claim of cruel and unusual punishment arising from improper medical treatment, "a prisoner must allege acts

or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). A condition is serious if "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Gutierrez, 111 F.3d at 1373. Deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. Detella, 95 F.3d 586, 590-9 1 (7th Cir. 1996).

Even assuming that he has a serious mental health need, petitioner has failed to allege facts sufficient to establish that respondents were deliberately indifferent to that need when they failed to recommend him for transfer out of Supermax. Petitioner has not alleged any facts suggesting that respondents Apple and Cullen are responsible for screening inmates at Supermax for mental illness pursuant to the preliminary injunction order in Jones 'El. I will deny petitioner's request for leave to proceed on his claim as to respondents' failure to recommend him for transfer out of Supermax because he has failed to state a claim upon which relief may be granted.

As to petitioner's allegation that respondents Apple and Cullen refused to speak with

him about his mental illness after numerous requests to speak with them, I find that petitioner's allegations state a claim. He has alleged facts sufficient to suggest that respondents were aware of facts from which they could infer that he was at substantial risk of serious harm if he did not receive treatment or that they drew that inference. Farmer, 511 U.S. at 837. Accordingly, petitioner's request for leave to proceed as to his claim of inadequate mental care against respondents Apple and Cullen will be granted.

E. Fourth Amendment: Right to Privacy

I understand petitioner to contend that respondents are violating his right to privacy under the Fourth Amendment by monitoring him constantly and by assigning female guards to his unit where they were likely to see male inmates such as plaintiff undressing, showering and using their cell toilets. The Fourth Amendment is not triggered unless the state intrudes into an area "in which there is a 'constitutionally protected reasonable expectation of privacy."' New York v. Class, 475 U.S. 106, 112 (1986) (citing Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Although prisoners do not forfeit all of their rights to privacy, these rights are severely curtailed. Hudson v. Palmer, 468 U.S. 517 (1984) (prisoner had no reasonable expectation of privacy in his prison cell); Lanza v. New York, 370 U.S. 139 (1962) (prisoner had no reasonable expectation of privacy in jail visiting rooms). Pretrial detainees are subject to the same diminished expectations of privacy. Bell

v. Wolfish, 441 U.S. 520, 546 (1979).

In Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995), the Court of Appeals for the Seventh Circuit held that the Cook County jail did not violate the Fourth Amendment by assigning female guards to monitor a male pretrial detainee, even though such monitoring meant that these guards would observe the inmate naked in his cell, taking a shower or using the toilet. The court explained that inmates "do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life." Id. at 146. In light of Johnson, it is clear that any female guards who observe petitioner undressing, showering or using his cell toilet are not violating his right to privacy. Petitioner's request for leave to proceed will be denied on this claim because it is legally frivolous.

F. Fourth Amendment: Unreasonable Searches

Petitioner alleges that he is subjected to body cavity and cell searches for no legitimate reason. In Bell v. Wolfish, 441 U.S. 520 (1979), pretrial detainees at a New York City facility alleged that the policy of conducting body cavity searches following visits from outsiders violated their Fourth Amendment rights. On the merits, the Supreme Court found that the searches were reasonable in light of the circumstances. Id. at 558-60. The Court held that reasonableness must be determined by balancing the need for the search against

the invasion of personal rights, as revealed by four factors: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559. The court held that the danger of contraband entering the facility was so significant that it outweighed the intrusive nature of the search. Id. at 560. It may be that petitioner has been searched following visits with visitors or visits to the law library or recreation area. However, from the allegations in petitioner's complaint, I cannot determine whether the cell and strip searches are reasonable. Petitioner's request for leave to proceed on this claim against respondents Berge and Litscher will be granted.

G. First Amendment: Freedom of Expression

1. Limits on publications

Petitioner contends that respondents are violating his First Amendment rights by denying him access to certain books, magazines, newspapers, pamphlets, photographs and typed and photocopied materials. Prison actions that affect an inmate's constitutional rights must be "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89-90 (1987). According to petitioner's allegations, it is obvious that the restriction on periodicals and publications at Supermax is part of the institution's level system, an incentive program. Petitioner has not alleged that he receives fewer books and periodicals

than other inmates at the same level. Because restricting reading materials and televisions is part of an incentive program furthers a legitimate penological interest, petitioner's request for leave to proceed on this claim will be denied for failure to state a claim upon which relief can be granted.

2. Mailing letters

Petitioner alleges that respondent Gilberg violated his First Amendment rights by confiscating and destroying an outgoing letter addressed to a minister. Prisoners have a limited liberty interest in their mail under the First Amendment. Thornburgh v. Abbott, 490 U.S. 401,407 (1989); Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). As a general rule, inmate mail can be opened and read outside the inmate's presence, Martin, 830 F.2d at 77, but legal mail may be subject to somewhat greater protection. Although petitioner's letter may have involved legal matters, because it was not addressed directly to a court or a lawyer, it is not legal mail with greater protection. Petitioner alleges only that respondent confiscated a single item non-legal mail, but there is no prohibition against prison officials screening inmates' non-legal mail for contraband. The allegation that respondent destroyed the mail may form the basis for a state law claim, but it does not rise to the level of a constitutional violation under the First Amendment. Petitioner's request for leave to proceed on this claim will be denied for failure to state a claim upon which relief can be

granted.

3. Inmate legal route

Petitioner alleges that respondent Berge is violating his rights under the First Amendment by prohibiting the transfer of photocopied materials under the inmate-to-inmate legal mail system. The allegation that respondent has instituted a policy under which correspondence between inmates in the same prison cannot be typewritten does not implicate the First Amendment. Although respondent may be differentiating between mail that stays within the prison and mail that leaves the prison, petitioner has not alleged facts tending to suggest that this policy is not reasonably related to legitimate penological interests. His bald assertion that the "legal route" policy was instituted "under the guise of a legitimate security policy" does not change this conclusion. Therefore, petitioner has failed to state a claim upon which relief may be granted under the First Amendment for the policies regulating inmate-to-inmate mail. Petitioner's request for leave to proceed as to this claim will be denied.

II. MOTION FOR A PRELIMINARY INJUNCTION

Petitioner has moved for a preliminary injunction directing the warden of Supermax Correctional Institution and the Secretary of the Department of Corrections to transfer him

out of Supermax and into an inpatient treatment facility where his mental illnesses can be treated properly.

Petitioner is being granted leave to proceed in forma pauperis in this case on his claim that respondents Apple and Cullen are violating his Eighth Amendment right to adequate mental health care by refusing to treat his mental illnesses. Ordinarily, a motion for a preliminary injunction is a mechanism designed to allow plaintiffs to obtain immediate relief from acts complained of in the complaint under circumstances in which allowing the acts to continue would cause the plaintiffs irreparable harm. In his brief in support of his motion for a preliminary injunction, petitioner alleges that his remaining at Supermax is causing him such irreparable harm.

In addition to making such allegations, a petitioner filing a motion for preliminary injunction must support his allegations by evidence, such as affidavits or documents certified to be true and correct copies of whatever they purport to be. In completing the briefing of his motion for a preliminary injunction, petitioner should pay strict attention to that requirement and all of the requirements set out in the enclosed "Procedures to be Followed on Motions for Injunctive Relief," including the requirement of establishing a factual basis for a grant of relief set out in II.A. Petitioner's motion will be stayed in order to allow him time in which to comply with this court's procedures.

III. MOTION FOR APPOINTMENT OF COUNSEL

In his motion for appointment of counsel, petitioner asserts that he has contacted several lawyers in an attempt to find representation. Although petitioner has made reasonable efforts to retain counsel and was unsuccessful, the inquiry does not end there. A second consideration in deciding a request for appointed counsel is whether the pro se plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 99 F.2d 319, 322 (7th Cir. 1993)). Petitioner alleges that he is incompetent to represent himself because of his lack of legal experience and his mental illnesses, but the clarity of his pleadings put this assertion into doubt. Petitioner asserts also that his difficulties in representing himself are logistical. At his current placement in alpha unit, petitioner has only limited access to a limited law library. Moreover, petitioner alleges that because of the restrictions on passing photocopied material through the inmate legal route, he has very limited access to assistance from other inmates. Although this restriction on meaningful legal research may be a source of frustration to petitioner, he should be aware that as a pro se plaintiff, his primary responsibility is to relate to the court the facts of his case. It is the role of the court to determine the relevant law and apply it to the facts of his case. At this time I do not believe that the presence of counsel would make a difference in the outcome of petitioner's case.

For this reason, I will deny petitioner's motion for appointment of counsel without prejudice.

ORDER

IT IS ORDERED that

1. Petitioner Eugene L. Cherry's request for leave to proceed in forma pauperis is GRANTED as to his Eighth Amendment conditions of confinement claim against respondents Jon Litscher and Gerald Berge, his Eighth Amendment inadequate mental health care claim against respondents Christine Apple and Colette Cullen and his Fourth Amendment unreasonable searches claim against respondents Litscher and Berge.

2. Petitioner's request for leave to proceed is DENIED on his Eighth Amendment cruel and unusual punishment claim for denial of basic necessities and his First Amendment freedom of expression claims for failure to state a claim upon which relief can be granted.

3. Petitioner's request for leave to proceed is DENIED on his Fourteenth Amendment due process claims and his Fourth Amendment right to privacy claim because the claims are legally frivolous.

4. Respondents Jim Parisi, Vicki Sharpe, Brad Hompe, Sgt. Mason, Captain Gilberg and Sgt. Leffler are DISMISSED from this case.

5. A decision on petitioner's motion for a preliminary injunction is STAYED to

permit the parties to brief it. The parties should observe the following schedule for briefing petitioner's motion for a preliminary injunction filed on February 4, 2002:

a. Petitioner may have until April 12, 2002, in which to serve and file supplemental materials, such as a brief, affidavits and other evidentiary materials, in support of his motion for a preliminary injunction.

b. Respondents Litscher and Berge may have until May 3, 2002, in which to serve and file a brief and evidence in opposition to the motion.

c. Petitioner may have until May 17, 2002, in which to serve and file a reply.

d. All submissions are to be in compliance with this court's "Procedure to be Followed on Motions for Injunctive Relief," a copy of which is enclosed with this order.

6. Petitioner's motion for appointment of counsel is DENIED without prejudice.

7. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers.

8. The unpaid balance of petitioner's filing fee is $147.50; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 1st day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge