IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SOUVANNASENG BORIBOUNE, ANTHONY CALIPH STEVENS'EL, DONDRAS L. HOUSE and EFRAIN CAMPOS,

ORDER

Petitioners,

04-C-0015-C

v.

GERALD BERGE, PETER HUIBREGSTE, VIKI SEBASTION, ELLEN K. RAY and KELLY COON, as does their individual capacities,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioners Souvannaseng Boriboune, Anthony Stevens'El and Efrain Campos are presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Petitioner Dondras House was a prisoner at the Wisconsin Secure Program Facility when the complaint was filed. Since that time, however, he has been released from prison and presently resides in Milwaukee, Wisconsin. Each petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioners Boriboune,

Stevens'El and Campos each have paid the initial partial payment required of him under § 1915(b)(1). Petitioner House has submitted a letter in which he says that the financial office at the Wisconsin Secure Program Facility will not respond to his request for a trust fund account statement. He states also that he is indigent because he is currently unemployed and has debts incurred by enrolling in classes at the Milwaukee Area Technical College. Petitioner House asks that the court set up a payment plan for him to pay his $250 filing fee or waive the requirement that he pay the fee.

There are a number of problems with petitioner House's request. First, his letter cannot be considered because it has not been served on the other petitioners in the case. The requirement that each pro se petitioner serve the others with copies of their individual submissions in compliance with Fed. R. Civ. P. 5 is particularly important in cases such as this, where each petitioner is prosecuting the lawsuit pro se. Second, even if petitioner House had served his letter on the other petitioners in this case, I cannot construe his letter as an affidavit of indigency, because it is not notarized or declared to be true under penalty of perjury. Finally, although it may be that petitioner House could support his request for pauper status with proof of his current financial situation, I cannot excuse him from the requirements of the Prison Litigation Reform Act simply because he was released after he filed this lawsuit. The fact remains that House was a prisoner at the time he filed his complaint. Therefore, he is subject to each of the disincentives Congress has enacted in its

effort to reduce prisoner litigation.

Because petitioner House has not submitted a trust fund account statement from which I can calculate the amount he owes as an initial partial payment of the fee for filing this action, and because he has not submitted an affidavit of indigency in support of his in forma pauperis request, I will deny his request for leave to proceed in forma pauperis and dismiss him from the case. The dismissal is without prejudice to petitioner House's refiling his complaint at a later time. Petitioner House should be aware that if he refiles his complaint while he is out of prison, he will *not* be subject to the requirements of the Prison Litigation Reform Act. This means that if he submits an affidavit of indigency showing that he qualifies for indigent status: 1) he may be allowed to proceed in forma pauperis without prepaying any part of the filing fee; 2) he will not owe the remainder of the fee in monthly installments; 3) he will not be subject to the exhaustion requirements of 42 U.S.C. § 1997e, and 4) he will not be subject to a strike if his allegations fail to state a claim upon which relief may be granted or are legally frivolous. In other words, his dismissal at this time leaves him free to refile a separate action as an unincarcerated litigant and to avoid the risks and expenses he would face if he were to have been allowed to proceed in this action.

In addressing the remaining petitioners' claims, I must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, where, as here, the litigants are prisoners, the 1996 Prison Litigation Reform Act requires the court

to deny leave to proceed if the complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioners' case on its own motion for lack of administrative exhaustion, but if respondents believe that any 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). 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).

On March 1, 2005, petitioners filed an amended complaint dated February 5, 2005. Because the amended complaint was filed before petitioners' original complaint could be screened by this court, I am considering the amended pleading as the operative pleading in this case.

In their complaint, petitioners allege the following facts.

ALLEGATIONS OF FACT

Petitioner Anthony Caliph Stevens'El arrived at the Wisconsin Secure Program Facility in Boscobel, Wisconsin on September 3, 2001. On November 19, 2001, he was transferred to the Wisconsin Resource Center. He was returned to the Boscobel institution on January 26, 2002.

Petitioners Boriboune and Campos have been confined at the Wisconsin Secure Program Facility for two years. Respondents are employees of the Wisconsin Division of Corrections who are working at the Wisconsin Secure Program Facility.

Petitioners filed a group complaint about participation in a Bible Anger and Management program. Respondents Ellen Ray and Peter Huibregste denied the complaint.

Petitioners filed a group complaint about denial of frequent access to religious books and items. Respondents denied petitioners redress.

Petitioners are denied regular access to the law library and the items in the law library are outdated and "ineffective." When petitioners use the law library, they must wear handcuffs and shackles.

Petitioners are not getting the same rights and privileges as other prisoners in maximum security facilities. They are entitled to such rights and privileges under the settlement agreement in Jones'El v. Berge, 00-C-421-C. In particular, petitioners are

1) forced to leave outgoing mail to the public unsealed;

2) denied regular canteen privileges.

3) permitted televisits that are only 15 minutes long;

4) denied regular and local television channels and the programs they do receive are "Christian dominated" and outdated;

5) refused payment for participating in school or other programs; and

6) subjected to a level system under which they may be demoted without a hearing;

The inmate complaint examiner "system" is ineffective because examiners either do not address the issues in petitioners' inmate complaints or they deny the complaints.

Petitioners must sleep under 24-hour illumination, and it is causing them sleep deprivation.

Petitioners have been denied outside recreation.

Petitioners have endured extreme temperatures in their cells in the summer/spring.

Petitioner Stevens'El's return to the Wisconsin Secure Program Facility violates the settlement agreement in Jones'El v. Berge.

Petitioner Boriboune was the only Muslim to be deprived of participation in Ramadan.

DISCUSSION

I understand petitioners to be asserting the following claims: 1) respondents deprived petitioners of a constitutional right to due process when they denied their group complaints about having to participate in a Bible Anger and Management program and refused them frequent access to religious books and items and when they endorsed an inmate complaint "system" that is ineffective; 2) respondents are violating petitioners' right of access to the courts by denying them regular access to a law library that contains updated case law and by

requiring petitioners to be in handcuffs and shackles when they use the library; 3) respondents are violating the settlement agreement in Jones'El v. Berge, 00-C-421-C, by refusing to afford petitioners the same rights and privileges as inmates in other maximum security facilities and by returning petitioner Stevens'El to the facility; 4) respondents are denying petitioners their Eighth Amendment rights by requiring them to sleep with 24-hour illumination, denying them outside recreation and subjecting them to extreme temperatures in their cells in the summer and spring; and 5) an unnamed individual deprived petitioner Boriboune of his First Amendment right to express his religion freely and his Fourteenth Amendment right to equal protection when he or she refused to allow him to participate in Ramadan. I will address each claim in turn.

A. Due Process

As an initial matter, I do not understand petitioners to be raising claims relating to the Bible Anger and Management program itself or their inability to gain frequent access to religious books and items. Petitioners do not allege any facts underlying such claims or identify anyone who might be responsible for actions relating to these matters. Instead, they focus their allegations on the complaint process and charge respondents with wrongdoing for their participation in an endorsement of it.

Petitioners' due process claim is legally frivolous. Although the due process clause of

the Fourteenth Amendment requires prison officials to provide inmates with certain procedural protections when a liberty interest is implicated, Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980), petitioners do not enjoy a liberty interest in obtaining satisfactory relief from the inmate complaint examiner or from other prison officials at subsequent levels of appeal. The Constitution does not require prisons to have an effective complaint review system or for that matter, any mechanism for reviewing prisoner grievances.

Petitioners have a right to complain about prison conditions and a right to seek redress for their injuries in court. Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002). For that reason, prison officials may not prevent inmates from filing inmate complaints or lawsuits. However, petitioners do not allege that respondents prevented them from doing anything. Rather, they allege only that respondents denied their complaints and that the complaint system is useless. These allegations do not a state a claim under the Constitution. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) ("As long as [defendant prison officials] did not deprive Strong of his opportunity to contest the merits of the charge before the grievance board or sabotage his chance to obtain redress in court, the defendants' uncooperative approach is not an independent constitutional tort; there is no duty to assist in an effort to obtain private redress."). Petitioners' claim that respondents violated their due process rights by failing to grant them relief on their inmate complaints and offering them a better inmate complaint system will be dismissed as legally frivolous.

B. Access to the Courts

Although 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), petitioners must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). This principle derives ultimately from the doctrine of standing and requires that a petitioner demonstrate that he is or was prevented from litigating a non-frivolous case. Id. at 352-53; Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). Petitioners do not allege that the limitations on their time in the law library, the lack of updated materials and the restraints on their wrists and ankles prevented them from litigating a non-frivolous case. Because petitioners fail to allege that they sustained an actual legal injury as a result of the limitations imposed upon them, their claim that they have been deprived of their constitutional right of access to the courts will be dismissed as legally frivolous.

C. Jones'El Settlement Agreement Violations and Eighth Amendment Violations

Petitioners do not have a constitutional right under the Fourteenth Amendment equal protection clause to the same treatment and privileges as prisoners in other maximum

security institutions. By virtue of their separate housing they are not similarly situated. So long as the particular conditions to which they are subjected in their particular institution do not offend the Constitution, the individuals in charge of their institution may impose the behavior incentives and security measures deemed appropriate for the inmate population they govern.

Petitioners do not have an independent constitutional right to seal their outgoing mail to the public, Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987) (inmate mail can be opened and read outside inmate's presence); Gaines v. Laine, 790 F.2d 1299, 1304 (7th Cir. 1986) (inspection of personal mail for contraband is legitimate prison practice, justified by important governmental interest in prison security). They have no independent constitutional right to wages, e.g., Wendt v. Lynaugh, 841 F.2d 619, 620 (5th Cir. 1988) (requirement that incarcerated prisoners work without pay does not constitute involuntary servitude in violation of Thirteenth Amendment); see also United States v. Drefke, 707 F.2d 978 (8th Cir.) ("the Thirteenth Amendment . . . is inapplicable where involuntary servitude is imposed as punishment for crime"); to a television, Murphy v. Walker, 51 F.3d 714, 718 n. 8 (7th Cir.1995); or to canteen privileges, Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir.1996). Although petitioners allege that they are limited to 15-minute "televisits," they do not suggest that their First Amendment rights are being violated, e.g., Overton v. Bazzetta, 539 U.S. 126 (2003) (loss of all visitation for two years or more for security

reasons constitutional where alternatives to association such as letters and telephone permitted); Block v. Rutherford, 468 U.S. 576 (1984) (lack of contact visitation for pretrial detainees not "punishment" in constitutional sense). In a previous case, I have held that the level system at the Boscobel facility does not violate the Constitution. Lindell v. Litscher, 02-C-21-C (May 28, 2002, at 26-27) (level system does not implicate liberty interest triggering need for due process protections). To the extent that petitioners are contending that respondents' failure to provide them with the same amenities as prisoners in other maximum security institutions violates the settlement agreement in Jones'El v. Berge, 00-C-421-C, they will have to direct their concerns to the monitor in that case.

The Jones'El settlement agreement restricts petitioners' ability to litigate their claims that respondents are violating their Eighth Amendment rights by requiring them to sleep under 24-hour illumination, denying them outside recreation and subjecting them to extreme temperatures in their cells in the summer and spring.

None of the petitioners may proceed on these claims for alleged injuries occurring after March 28, 2002, the date of the settlement agreement in Jones'El, because their claims are barred by the doctrine of res judicata. As inmates now confined at the facility, petitioners are members of the class in Jones'El, Order dated Feb. 15, 2001, dkt. #37, slip op. at 13) (defining class members as "all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin"). When I

approved the agreement, I approved the fairness, reasonableness and legality of the modifications respondents agreed to make to the conditions petitioners are challenging as violative of their Eighth Amendment rights. Jones El' v. Litscher, 00-C-421-C, Order dated Mar. 28, 2002, dkt. #207, at 8. Petitioners are bound by that agreement. They cannot obtain injunctive or declaratory relief for those issues covered by the settlement agreement or recover money damages for conditions addressed by the agreement that occurred after the settlement agreement was approved. United States v. Fisher, 864 F.2d 434, 439 (7th Cir. 1988) (internal citations omitted) ("A consent decree is res judicata and thus bars either party from reopening the dispute by filing a fresh lawsuit. Alternatively, it is a contract in which the parties deal away their right to litigate over the subject matter.") As noted above, to the extent petitioners believe that respondents are not complying with the settlement agreement since it was approved, they will have to direct their concerns to the monitor.

This court has confirmed with the Division of Corrections that petitioner Boriboune was transferred to the Boscobel facility on March 6, 2003. Because Boriboune did not arrive at the facility until after the settlement agreement was reached, his claims under the Eighth Amendment will be dismissed for failure to state a claim upon which relief may be granted.

Also, the Division of Corrections has confirmed that petitioner Campos has been housed at the facility since January 24, 2002 (apparently petitioners were mistaken when they alleged that Campos has been at the facility for "two years or close"). Petitioner

Stevens'El alleges he was confined at the facility from September 3, 2001 to November 19, 2001 and from January 26, 2002 until now. Neither of these petitioners is barred by the doctrine of res judicata from seeking money damages for alleged violations of their Eighth Amendment rights for conditions they endured at the Boscobel facility before March 28, 2002. Nevertheless, I must deny both petitioners leave to proceed on their claims that they were subject to constant cell illumination, because I have already found that respondents are entitled to qualified immunity from claims for money damages with respect to allegations that inmates suffered deleterious effects from 24-hour cell illumination. Moreover, I conclude that petitioners have not alleged facts from which an inference may be drawn that the lack of outdoor exercise rises to the level of an Eighth Amendment violation.

Addressing the latter subject, the Court of Appeals for the Seventh Circuit has held the prisoners do not have a constitutional right to receive their recreation outside. Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997); but see Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (outdoor exercise required under Eighth Amendment). Although inmates have a constitutional right to maintain their health, which includes a right to adequate exercise, e.g., Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988), neither petitioner Campos nor petitioner Stevens'El alleges that his opportunities for indoor exercise were insufficient during the times he was incarcerated at the Boscobel facility prior to March 28, 2002. Although petitioners may prefer more space and some work out equipment in an exercise

cell, nothing in their complaint suggests that they are unable to exercise. Therefore, their claims that the outdoor exercise facilities were inadequate before March 28, 2002 will be dismissed as legally meritless.

With respect to petitioners' claim that they endured constant illumination in their cells before March 28, 2002, I found in Pozo v. Hompe, No. 02-C-12-C (W.D. Wis. Apr. 8, 2003), that during 1999, 2000 and most of 2001, the nightlight at the facility consisted of a 7-watt, twin tube fluorescent light mounted in the center of the ceiling; that near the end of 2001, prison officials began replacing the 7-watt bulbs with 5-watt bulbs; and that now all bulbs are 5 watts. I concluded in that case that, by itself, such constant low-light illumination does not constitute cruel and unusual punishment in violation of the Eighth Amendment.

Even if petitioners could produce evidence that they suffered serious health effects as a result of their exposure to constant low lighting, they cannot proceed on their claim. In Warren v. Litscher, No. 02-C-0093-C (W.D. Wis. Dec. 4, 2002), I concluded that respondents are entitled to qualified immunity on claims for money damages against them for alleged sleep deprivation allegedly caused by constant illumination before March 28, 2002, because the law existing at the time did not clearly establish a constitutional right to be free from constant illumination. Because petitioners cannot obtain any form of relief for this claim, the claim will be dismissed.

Turning to petitioners Campos's and Stevens'El's claims that they were subjected to extreme temperatures during the summer and spring, I conclude that both petitioners' claims are legally frivolous. Neither petitioner was incarcerated at the Boscobel facility during any summer or spring before March 28, 2002. Petitioner Stevens'El arrived in September 2001, and petitioner Campos arrived on January 24, 2002. Neither petitioner can claim an injury allegedly caused by extreme temperatures during the summer and spring of 2001 or any other year.

D. Religious Freedom

Petitioner Boriboune's allegations pertaining to his First Amendment right to freely exercise his religion as a Muslim do not satisfy the notice provisions of Fed. R. Civ. P. 8. "The primary purpose of [Rule 8] is rooted in fair notice: a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.'" Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 775 (7th Cir. 1994) (119-page, 385-paragraph complaint "violated the letter and spirit of Rule 8(a)"). Because it is not clear whom petitioner is suing for an alleged violation of his First Amendment rights or when and how the alleged violation occurred, I will dismiss this claim without prejudice to petitioner Boriboune's amending his complaint to 1) amend the caption to name the person or persons responsible for denying him attendance at

Ramadan; 2) set out his claim against each respondents in short but plain statements concerning the incident made in numbered paragraphs; and 3) identify the relief he wants from the court. If petitioner submits an amended complaint that complies with Rule 8, I will examine it to determine whether petitioner has stated a claim of a violation of his First Amendment rights against the respondents he has named. If petitioner fails to submit a complaint alleging his First Amendment claim that complies with Rule 8, I will dismiss this case in its entirety.

Petitioner Boriboune is cautioned that he is not to revive in his proposed amended complaint any claim that is being dismissed in this order or any other new claim and that he is not to add additional petitioners to his proposed amended complaint. His opportunity to amend the complaint in this action is limited to curing the Rule 8 defect in his First Amendment claim.

ORDER

IT IS ORDERED that

1. Petitioner Dondras House is DENIED leave to proceed in forma pauperis in this action because he has not shown that he is financially eligible to proceed under the in forma pauperis statute.

2. Petitioners Souvannaseng Boriboune, Anthony Caliph Stevens'El and Efrain

Campos are DENIED leave to proceed in forma pauperis on their claim that the denial of their group complaints and the inadequacy of the inmate complaint review system deprives them of their due process rights and this claim is DISMISSED as legally frivolous.

3. Petitioners Souvannaseng Boriboune, Anthony Caliph Stevens'El and Efrain Campos are DENIED leave to proceed in forma pauperis on their claim that their constitutional right of access to the courts is being denied because they do not have regular access to the library and updated case law and are in handcuffs and shackles when they use the library and this claim is DISMISSED as legally frivolous.

4. Petitioners Souvannaseng Boriboune, Anthony Caliph Stevens'El and Efrain Campos are DENIED leave to proceed in forma pauperis on their claims that respondents are violating the settlement agreement or their constitutional rights by failing to treat them similarly to inmates in other maximum security prisons and by returning petitioner Stevens'El to the Wisconsin Secure Program Facility are DENIED and these claims are DISMISSED for failure to state a claim upon which relief may be granted.

5. Petitioners Souvannaseng Boriboune, Anthony Caliph Stevens'El and Efrain Campos are DENIED leave to proceed in forma pauperis on their claims that respondents violated their Eighth Amendment rights by requiring them to sleep with 24-hour illumination, denying them outside recreation and subjecting them to extreme temperatures in their cells in the summer and spring and these claims are DISMISSED for failure to state

a claim upon which relief may be granted.

6. Petitioners Anthony Caliph Stevens'El and Efrain Campos are DISMISSED from this action. A strike is recorded against each of them pursuant to 28 U.S.C. § 1915(g).

7. A decision whether petitioner Souvannaseng Boriboune may proceed in forma pauperis on his claim that his First Amendment rights were violated when he could not participate in Ramazdan is STAYED. Petitioner Boriboune may have until April 21, 2005, in which to submit a proposed amended complaint in which he 1) amends the caption to name the person or persons responsible for denying him attendance at Ramadan; 2) sets out his claim against each respondents in short but plain statements concerning the incident made in numbered paragraphs; and 3) identifies the relief he wants from the court. If, by April 21, 2005, petitioner fails to submit a complaint that complies with Rule 8 alleging his First Amendment claim, I will deny petitioner leave to proceed in forma pauperis on the claim and record a strike against him. Petitioner's amended complaint is to be limited to curing the Rule 8 defect in his First Amendment claim and is not to include additional petitioners or any claims that are new or that have been dismissed in this order.

Entered this 11th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge