IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

OPINION and ORDER

Petitioner,

06-C-608-C

v.

MATTHEW J. FRANK, STEPHEN CASPERSON, STEPHEN PUCKETT, RICHARD SCHNEITER, J. HRUDKRA, GARY BOUGHTON, PETER HUIBREGTSE, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, RICK RAEMISCH, SANDRA HAUTAMAKI, ELLEN RAY, CATHERINE BEERKIRCHER, KELLY TRUMM, GERALD BERGE, CAPTAIN JILL HORNER, CAPTAIN TIMOTHY HAINES, VICKI SEBASTIAN, BRIAN KOOL, CAPTAIN GARY BLACKBOURN, CAPTAIN BOYLE, CAPTAIN GARDNER, T. CRAVENS, MS. HARPER, MS. WALTERS, MS. TRACY GERBER, C. O. FRIEDRICK, C.O. JUERGENS, C. O. MORRIS, C. O. KARNOPP, SGT. WRIGHT and JOHN RAY,

Respondents.

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Originally, petitioner Nathaniel Lindell, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, filed this proposed civil action for declaratory, injunctive and monetary relief in the United States District Court for the Eastern District of

Wisconsin. Petitioner requests leave to proceed in forma pauperis on his claims that respondent prison officials violated his rights under the Eighth and Fourteenth Amendments by (1) depriving him of access to sufficient outdoor recreation; (2) forcing him to wear unsanitary clothing; (3) refusing to admit him to the facility's High Risk Offender Program in retaliation for his filing lawsuits and grievances; (4) placing him in long-term administrative confinement without a prior hearing; (5) refusing to promote him to Level 4 of the facility's level system; and (6) retaining him at the facility without adequate review procedures.

After petitioner submitted an initial partial payment, as required under 28 U.S.C. § 1915(b)(1), but before his complaint was screened under 28 U.S.C. § 1915A, the court transferred the case sua sponte to this district, concluding that the proper venue for this lawsuit was the Western District of Wisconsin. In this order, I will screen petitioner's complaint to determine whether any of his claims must be dismissed because they are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

Because it is possible to infer from petitioner's allegations that respondents Wright, Berge, Ellen Ray, Huibregtse, Hautamaki and Raemisch exhibited deliberate indifference to his health by denying him access to adequate amounts of sunlight and respondents Schneiter, Ellen Ray, Huibregtse, Hautamaki and Raemisch exhibited deliberate indifference

to his health by promulgating and enforcing policies that require him to wear clothing contaminated with other inmates' bodily fluids, petitioner will be granted leave to proceed on these claims. In addition, petitioner will be granted leave to proceed on his claim that respondents Horner, Cravens, Boughton and Huibregtse violated his rights under the First Amendment by refusing temporarily to admit him to the High Risk Offender Program in retaliation for his filing lawsuits and grievances.

However, because petitioner had no liberty interest in remaining free from administrative segregation or in being promoted through the Wisconsin Secure Program Facility's level system, he will be denied leave to proceed on his claims that his due process rights were violated when respondents Horner, Ellen Ray, John Ray, Huibregtse and Raemisch failed to promote him to level 4 and respondents Blackbourn, Kool, Morris, Walters, Huibregtse, John Doe ##1 & 2, Ellen Ray, John Ray, Raemisch, Gardner, Haines, Karnopp and Schneiter placed him in administrative segregation without a hearing. Finally, because petitioner received adequate process in connection with his retention at the Wisconsin Secure Program Facility, he will be denied leave to proceed on his claim that respondents Hrudka, Cravens, Boyle, Horner and John Doe #3 violated his right to due process by refusing to transfer him out of the facility.

I draw the following facts from the allegations of petitioner's amended complaint.

ALLEGATIONS OF FACT

A. Parties

Petitioner Nathaniel Lindell is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin.

Respondent Stephen Casperson is administrator of the Wisconsin Department of Corrections's Division of Adult Institutions.

Respondent Stephen Puckett is director of the Wisconsin Department of Corrections's Office of Offender Classification.

Respondent Gerald Berge is former warden of the Wisconsin Secure Program Facility.

Respondent Richard Schneiter is warden of the Wisconsin Secure Program Facility.

Respondent J. Hrudka is manager of the Wisconsin Secure Program Facility's Program Review Committee.

Respondent Gary Boughton is security director of the Wisconsin Secure Program Facility.

Respondent Peter Huibregtse is deputy warden of the Wisconsin Secure Program Facility.

Respondents Sandra Hautamaki and John Ray are Corrections Complaint Examiners.

Respondents Ellen Ray, Kelly Trumm and Catherine Beerkircher are inmate complaint examiners.

Respondents Jill Horner[1], Gary Blackbourn, Boyle, Gardner and Timothy Haines are or have been employed as captains at the Wisconsin Secure Program Facility. Respondent Haines is employed currently at the Prairie du Chien Correctional Institution in Prairie du Chien, Wisconsin.

Respondent Vicki Sebastian is program director of the Wisconsin Secure Program Facility.

Respondent Brian Kool is a unit manager at the Wisconsin Secure Program Facility.

Respondent T. Cravens is a social worker at the Wisconsin Secure Program Facility.

Respondents Ms. Harper, Ms. Walters, Ms. Tracy Gerber, C. O. Karnopp, C. O. Friedrick, C. O. Juergens., C. O. Morris and Sergeant Wright are all employed as staff members of the Wisconsin Secure Program Facility.

Respondents John Doe #1 and John Doe #2 were authorized by respondent Casperson to deny petitioner's appeals of his placement in administrative confinement in October 2005 and May 2006.

Respondent John Doe #3 was authorized by respondent Puckett to deny petitioner's appeal of a program review committee decision in September 2005.

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[1]Elsewhere in the complaint, petitioner refers to this respondent as "S. Horner."

B. Sunlight Deprivation

Jones 'El v. Litscher, Case No. 00-C-421-C, is a class action lawsuit that challenged the conditions of confinement at the Wisconsin Secure Program Facility. On March 28, 2002, the plaintiffs and defendants in Jones 'El entered into a settlement agreement that provides in part that "there will be an outdoor recreation area available to all inmates at levels 3, 4, and 5 [of the Wisconsin Secure Program Facility]. The prisoners' preference for indoor or outdoor exercise shall be considered." The agreement states also that inmates on levels 1, 2, and 3 "shall receive not less than 5 hours out of cell per week which my be used for exercise."

From "at least May 2005" until he was placed on administrative confinement in September 2005, petitioner was held on level 3. (Elsewhere in his complaint, petitioner alleges that he was confined on level 3 for "years." It unclear how this might be so given the dates he has provided.) On May 13, 2005, respondent Wright told petitioner and the approximately 100 other inmates on level 3 that they would receive no more than 2½ hours of outside recreation weekly. Respondent Wright explained that inmates confined at other levels had complained that level 3 inmates were receiving 5 hours of outdoor exercise while the other inmates were receiving only 2½ hours of outdoor exercise. In response, respondent Berge implemented a policy limiting all inmates use of outdoor recreation to 2½ hours each week.

Inmates at the Wisconsin Secure Program Facility do not receive sunlight or fresh air except when they participate in outdoor recreation. Medical professionals have long recognized that solitary confinement and lack of exposure to sunlight can cause psychopathic behavior in prisoners. When sunlight reacts with human skin, fatty tissue and eyes, the human body produces certain hormones that are necessary for physical and mental health. People need a minimum of 15 minutes of sun exposure each day in order to maintain optimum health.

Being denied outdoor recreation for all but 2 ½ hours each week has caused petitioner to become depressed, anxious and paranoid, have trouble falling asleep and lose control over his emotions. Since being placed at the facility and being denied access to sunlight, petitioner has begun to experience symptoms of bipolar disorder. Respondents Berge, Wright and many other respondents know that denying petitioner access to sunlight exacerbates his mental health problems.

Petitioner filed an inmate complaint numbered WSPF-2005-15293 regarding his limited access to sunlight. The complaint was denied by respondents Ellen Ray, Huibregtse, Hautamaki and Raemisch.

C. Unsanitary Outdoor Clothing

Prisons are a breeding ground for contagious and treatment-resistant bacteria and

viruses. When petitioner and other inmates on his living unit go outside for recreation, they are required to wear gloves, hats and orange vests. These items are shared among inmates and are washed only once each month. The unwashed hats, gloves and vests contain sweat, mucus, blood and other bodily fluids; wearing them exposes petitioner to the danger of contracting hepatitis, influenza, staph infections and HIV.

Petitioner filed an inmate complaint numbered WSPF-2006-3794 regarding the prisons's failure to wash inmate outer clothes each time they are worn. He pointed out that inmates on other living units are given freshly laundered clothes to wear during their outdoor recreation time. The complaint was denied by respondents Ellen Ray, Huibregtse, Hautamaki and Raemisch.

D. Retention at the Wisconsin Secure Program Facility

On June 15, 2005, a prison program review committee evaluated petitioner's institutional placement. At that time, respondent Cravens recommended that petitioner remain confined at the Wisconsin Secure Program Facility because he had not progressed fully through the facility's 5-level system. On July 6, 2005, respondents Hrudka and Boyle decided to keep petitioner at the facility until he completed the level system. Petitioner appealed this decision; respondent John Doe #3 denied the appeal. Respondents kept petitioner at the facility merely because they wanted to "torment [petitioner] and harass him

due to his Eurocentric beliefs/litigation."

Again, on April 10, 2006, a program review committee convened to evaluate petitioner's institutional placement. Respondent Cravens recommended that petitioner remain confined at the Wisconsin Secure Program Facility because he had not been chosen to participate in the facility's new High Risk Offender Program, which had replaced the old level system). On April 28, 2006, respondents Hrudka and Horner decided to keep petitioner at the facility until he completed the High Risk Offender Program. (Respondent Horner was the person who had recommended that petitioner be kept out of the new program, even though his behavior had been good.) Petitioner was not given notice or a hearing in connection with the program review committee's decision.

E. Administrative Confinement

On August 20, 2005, respondent Blackbourn recommended that petitioner be removed from the level program and placed in administrative confinement because he posed a risk to staff and inmates and might cause a riot or major disturbance if he were placed in the general population of a less secure prison. Attached to respondent Blackbourn's recommendation was a copy of the program review committee's July 6, 2005 decision, which indicated that petitioner had not progressed through all five levels of the level system. Petitioner objected to respondent Blackbourn's recommendation, contending that it was an

exaggeration and unfairly harassed petitioner because of his white separatist beliefs.

Nevertheless, on September 14, 2005, respondents Kool, Morris and Walters placed petitioner in administrative confinement because they concluded that his presence in general population would create a danger to staff and inmates. Petitioner appealed the decision. In October 2005, respondents Huibregtse and John Doe #1 denied the appeal.

Petitioner filed an inmate complaint numbered WSPF-2005-33890 regarding his placement in administrative confinement. Respondents Ellen Ray, Huibregtse, John Ray and Raemisch dismissed his complaint and appeals of the dismissal.

On February 2, 2006, respondent Gardner recommended that petitioner remain in administrative confinement because his presence in the general population would result in a riot or major disturbance and he remained a threat to security. On March 22, 2006, respondents Haines, Walters and Karnopp decided that petitioner should remain in administrative confinement. On April 17, 2006, respondent Schneiter denied petitioner's appeal, and on May 5, 2006, respondent John Doe #2 denied petitioner's appeal of Schneiter's decision.

Petitioner filed an inmate complaint numbered WSPF-2006-14042 regarding his retention in administrative confinement. Respondents Ellen Ray, Huibregtse, John Ray and Raemisch dismissed his grievance and his appeal of the dismissal.

The decision to place petitioner in administrative confinement was arbitrary and

discriminatory. Petitioner's white separatist beliefs are non-violent; there was no evidence that he posed any danger. Respondents Blackbourn and Haines "revealed" that petitioner would never be released from administrative segregation because they believed petitioner was affiliated with the "Aryan Circle," a white supremacist group.

There are many Wisconsin inmates in the general prison population who are more dangerous and violent than petitioner.

F. The Level System

Until some time in early 2006, the Wisconsin Secure Program Facility employed a five level system, in which prisoners "earned" additional privileges by good behavior and participation in recommended programming. Prison officials provided no procedural safeguards to inmates when deciding the level to which the inmates would be assigned.

On October 16, 2005, petitioner wrote to respondent Horner, who was then the manager of the prison's Delta unit. Petitioner asked to be promoted to level 4; respondent Horner denied his request. Petitioner filed an inmate complaint numbered WSPF-2005-30988, regarding Horner's refusal to promote him to level 4. Respondents Ellen Ray, John Ray, Huibregtse and Raemisch dismissed the complaint and petitioner's appeal from the dismissal.

There was no reason to retain petitioner on level 4. Petitioner has had years of

"problem-free/non-dangerous behavior." Had petitioner been promoted to levels 4 and 5, by now he would have been released from the Wisconsin Secure Program Facility.

G. The High Risk Offender Program

Recently, the Wisconsin Secure Program Facility abandoned the level system and adopted a new behavioral modification program called the High Risk Offender Program. Respondent Schneiter implemented and approved this new program. The High Risk Offender Program uses a color-coded three-phase system: red, yellow and green. Participants may earn additional privileges and advance through each phase by demonstrating good behavior and participating in programs. When an offender completes the program, he is eligible to return to the general prison population at a less secure facility. Inmates may complete the program in as few as twelve months.

Not all inmates at the facility are allowed to participate in the High Risk Offender Program; some are held in long-term administrative confinement. Inmates are not given a hearing or any opportunity to influence the decision how to classify them. Classification is "wholly arbitrary" and staff members make decisions relying on "gossip, hearsay and prejudices of other staff" when deciding whether to permit inmates to participate in the High Risk Offender Program.

For three years before the High Risk Offender Program was created, petitioner was

classified as "level three." On February 14, 2006, just before the High Risk Offender Program was implemented, petitioner received a memorandum from the facility's warden stating that petitioner would be placed on Phase Yellow. However, on March 3, 2006, respondents Horner, Cravens and a "unit team" misrepresented petitioner's conduct and activities in order to have him placed in long-term administrative confinement instead of in the High Risk Offender Program.

On March 6, 2006, respondents Boughton and Huibregtse approved the decision to place petitioner in long term administrative confinement. Two of the reasons given for the decision were that petitioner "complains consistently" and "spends most of his time to do [sic] legal work."

Inmates placed in long term administrative confinement must wait a minimum of two years before they will be considered for placement in the High Risk Offender Program. Even if inmates have perfect behavior during these two years, they will not be released from administrative confinement.

DISCUSSION

A. Class Certification

In his complaint, petitioner asserts that his lawsuit involves a petitioner class, consisting of all inmates imprisoned at the Wisconsin Secure Program Facility. He alleges

that the rights and interests common to all members of his self-styled class include the rights to adequate exposure to sunlight, to hygenic outdoor clothing and to procedural due process in connection with placement in administrative segregation and the High Risk Offender Program. I construe petitioner's assertions as a request for certification of this lawsuit as a class action. Before the court may certify a class action, four prerequisites must be met:

> (1) The class [must be] so numerous that joinder of all members is impracticable, (2) there [must be] questions of law or fact common to the class, (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class, and (4) the representative parties [must] fairly and adequate protect the interests of the class.

Fed. R. Civ. P. 23(a).

Petitioner proposes to name all inmates in the custody of the Wisconsin Secure Program Facility as petitioners in this lawsuit. Although it would not be impracticable to join the approximately 400 inmates currently incarcerated at the facility, State of Wisconsin Department of Corrections Wisconsin Secure Program Facility FY05 Annual Report, available online at http://www.wi-doc.com/WSPF.htm (last visited Oct. 31, 2006), and petitioner has shown that the claims he raises in this lawsuit are either common to at least some members of his proposed class, petitioner is not represented by a lawyer. Since absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also King v. Frank, 328 F. Supp. 2d

940, 950 (W.D. Wis. 2004); Huddleston v. Duckworth, 97 F.R.D. 512, 514-15 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Because petitioner is not represented by a lawyer, his request for class certification will be denied.

B. Deliberate Indifference

Petitioner contends that respondents are exhibiting deliberate indifference to his health and safety by (1) depriving him of adequate access to natural sunlight and (2) forcing him to wear outdoor clothing that is contaminated with other inmates' bodily fluids. In Helling v. McKinney, 509 U.S. 25, 33 (1993), the Supreme Court rejected an argument that the Eighth Amendment did not protect inmates against risks to their future health, stating:

> We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. In Hutto v. Finney, 437 U.S. 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

Petitioner contends that respondents are deliberately indifferent to the risk that he might

be harmed; he need not allege that he has been harmed already in order to state a claim under the Eighth Amendment. (I note, however, that petitioner will have to demonstrate physical harm before he can obtain monetary relief for his claims under 42 U.S.C. § 1997e(e).)

In order to state a claim under the Eighth Amendment, petitioner must allege acts from which it may be inferred that prison officials subjected him to conditions that were "sufficiently serious" to endanger his health or safety and the respondents were deliberately indifferent to that harm. Farmer v. Brennan, 511 U.S. 825, 834 (1994). Deliberate indifference requires that a prison official "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and actually "draw the inference." Id. at 837. Deliberate indifference is evidenced by a respondent's actual intent or reckless disregard for a prisoner's health or safety, and must amount to highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985). With that high standard in mind, I turn to petitioner's allegations.

1. Sunlight deprivation

Petitioner alleges that although the consent decree in Jones 'El requires prison officials to provide inmates with access to outdoor recreation, respondents Wright and Berge have

limited each inmate's outdoor recreation time to 2½ hours each week. Although petitioner refers to the consent decree, he is not challenging its enforcement; if he were, his claims in this lawsuit would be barred. What petitioner contends here is that by depriving him of *either* outdoor recreation or some other source of sunlight, prison officials are endangering his physical and mental health.

Courts considering the question whether the Eighth Amendment entitles prisoners to sunlight have reached differing conclusions. Contrast Boyd v. Anderson, 265 F. Supp. 2d 952, 966 (N.D. Ind. 2003) and Richard v. Reed, 49 F. Supp. 2d 485 (E.D. Va.) (claim that jail officials deprived prisoner of direct sunlight for more than 100 days did not state an Eighth Amendment claim) with Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996) (holding that deprivation of outdoor exercise violated Eighth Amendment rights of inmates confined to continuous and long-term segregation); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir.1979) (holding that denial of fresh air and outdoor recreation, while not per se violation of the Eighth Amendment, constituted cruel and unusual punishment as applied to inmates confined for a period of years in continuous segregation with meager out of cell movements and minimal contact with others); Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979) (stating in dicta that confinement without outdoor exercise may violate Eighth Amendment if inmate has serious medical need for such exercise). As the district court explained in Richard, 49 F. Supp. 2d at 488:

> While there is no controlling precedent on th[e] issue [of access to sunlight] . . . authority from this circuit and elsewhere . . . . points to the conclusion that whether an inmate's deprivation of sunlight claim meets the Eighth Amendment standard is a matter of degree, but the degree must be quite severe before it assumes constitutional significance.

In this case, petitioner alleges that he has been confined for many years at the Wisconsin Secure Program Facility, where he receives, at most, 2½ hours of sunlight exposure each week. Petitioner alleges that his limited sunlight exposure has adverse effects on his physical and mental well-being, a claim that may be supported by at least some medical evidence. See, e.g., M. F. Hollick, Vitamin D: Importance in the Prevention of Cancers, Type 1 Diabetes, Heart Disease and Osteoporosis, Am. J. Clin. Nutr. 79(3): 362-71 (Mar. 2004); WB Grant, An Estimate of Premature Cancer Mortality in the United States Due to Inadequate Doses of Solar Ultraviolet-B Radiation, Cancer 94:1867-75 (2002); A. L. Ponsonby, A. McMichael & I. van der Mei, Ultraviolet Radiation and Autoimmune Disease: Insights from Epidemiological Research, Toxicology 181-182:71-8 (2002). Although petitioner faces an uphill battle, I conclude that he has stated a claim under the Eighth Amendment. Consequently, petitioner will be granted leave to proceed on his claim that respondents Wright, Berge, Ellen Ray, Huibregtse, Hautamaki and Raemisch exhibited deliberate indifference to his health by denying him access to adequate amounts of sunlight.

2. Unsanitary outdoor clothing

Although the Eighth Amendment is not violated when prisoners are provided with clothing that is merely dirty, it may be violated when prison officials provide inmates with clothing that has been contaminated, Shannon v. Graves, 257 F.3d 1164, 1169 (alleged fecal contamination of blankets and clothing raised material issue of fact as to the objective component of Eighth Amendment claim). Petitioner alleges that prison policy requires him to wear outdoor clothing that is washed infrequently and contaminated by blood and other bodily fluids. Although petitioner brought the risks of this practice to the attention of prison officials, he alleges that they refused to change their policies in deliberate indifference to his health and safety. Petitioner's allegations are sufficient to state a claim under the Eighth Amendment. Consequently, petitioner will be granted leave to proceed on his claim that respondents Schneiter, Ellen Ray, Huibregtse, Hautamaki and Raemisch violated his rights under the Eighth Amendment by promulgating and enforcing policies that require him to wear clothing contaminated with other inmates' bodily fluids.

C. Retaliation

To state a retaliation claim, a prisoner must provide information in his complaint from which it may be inferred that he engaged in constitutionally protected conduct and that his protected actions prompted one or more prison officials to take adverse action against

him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003). An inmate is not required to allege a chronology of events from which retaliation may be inferred but must allege the retaliatory act and describe the protected act that prompted the retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). These minimal facts are necessary to give prison officials adequate notice of the claim against them. Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856, 863 (7th Cir. 2002).

Petitioner contends that respondents Horner, Cravens, Boughton and Huibregtse denied him entry into the High Risk Offender Program because he "complains consistently" and "spends most of his time [doing] legal work." Inmates have a right of access to the courts, Lewis v. Casey, 518 U.S. 343, 351 (1996), and numerous appellate court decisions have held that inmates have a right to file complaints regarding the conditions of their confinement, see, e.g., Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005) ("Prisoners are entitled to utilize available grievance procedures without threat of recrimination."); Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002) (grievances may be protected by right to petition, right to free speech or right to access courts); Babcock v. White, 102 F.3d 267, 275 (7th Cir.1996) (assuming that filing prison grievance implicated prisoner's right of access to courts). When prison officials take action against prisoners for filing lawsuits and grievances, they violate the First Amendment, even if their actions do not independently

violate the Constitution. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.").

Although petitioner had no independent right to participate in the High Risk Offender Program, it would be improper for prison officials to exclude him from participating in the program on the ground that he had engaged in constitutionally protected activities. Therefore, petitioner will be granted leave to proceed on his claim that respondents Horner, Cravens, Boughton and Huibregtse violated his rights under the First Amendment by refusing temporarily to admit him to the High Risk Offender Program in retaliation for his filing lawsuits and grievances.

D. Due Process

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. A procedural due process claim against government officials requires proof of inadequate procedures as well as 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." In the prison context, these protected liberty interests are essentially limited to the loss of good time credits or placement for an indeterminate period of time in one of this country's super-maximum security prisons, such as the Wisconsin Secure Program Facility.

Therefore, the first question in any due process analysis is whether a protected liberty or property interest has been infringed. In the prison context, 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, 515 U.S. at 484. In other words, liberty interests are implicated when a prisoner's sentence is prolonged or he is subjected to conditions that are not the typical ones encountered by prisoners. In the absence of liberty interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). In this case, petitioner contends that prison officials violated his due process rights in three ways: by (1) refusing to promote him to level 4 of the facility's old level system; (2) placing him in administrative confinement on numerous occasions without a hearing; and (3) retaining him at the facility without adequate

process.

Petitioner contends that the United States Supreme Court's recent decision in Wilkinson v. Austin, 545 U.S. 353 (2005), opens the door to his due process claims by recognizing that prisoners in super-maximum security prisons have a due process right to avoid being retained in the prison, and by extension, to access programs or avoid punishments that might prolong their confinement in such institutions. Petitioner's reading of Wilkinson is overly expansive.

In Wilkinson v. Austin, 545 U.S. 209, 221 (2005), the United States Supreme Court held that inmates have a protected liberty interest in avoiding confinement in certain highly restrictive, super-maximum security prisons. The Wisconsin Secure Program Facility may qualify as such an institution. Lagerstrom v. Kingston, 463 F.3d 621, 623 (7th Cir. 2006). In Wilkinson, the Supreme Court held that when determining whether sufficient due process has been given to inmates imprisoned in a super-maximum security facility, courts should apply the balancing test set forth in Matthews v. Eldridge, 424 U.S. 319, 335 (1976), which requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Here, petitioner does not appear to be contesting the initial decision to confine him in the Wisconsin Secure Program Facility, but rather the decision to retain him there. He frames this argument in three different ways, but the crux of his complaint is the same: if he cannot complete the level system and avoid administrative confinement, he will not be transferred out of the facility. Therefore, petitioner contends that he must have a due process right not only to avoiding retention but to accessing programs which serve as pre-cursors to transfer.

There are several problems with petitioner's argument. First, it is far from clear that Wilkinson recognize a due process right in avoiding retention at a super-maximum security facility, as opposed to a due process right in avoiding initial placement only. Lagerstrom, 463 F.3d at 623 ("[T]he liberty interest recognized in Wilkinson is derived from the drastic change in the conditions of confinement. That kind of change might not be present if, for example, the inmate was already confined to segregation."). Second, with respect to the decision to retain him at the facility, petitioner has pleaded himself out of court because he alleges he was given more than adequate process in connection with the decision to retain him at the facility.

In Wilkinson, 545 U.S. at 224 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)), the Court recognized that "the requirements of due process are 'flexible and call for such procedural protections as the particular situation demands.'" Moreover, the Court

noted that "informal, non-adversary procedures" such as those employed in Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979) and Hewitt v. Helms, 459 U.S. 460 (1983), provide sufficient process in the context of transfer to a super-maximum security institutions. The Court of Appeals for the Seventh Circuit has suggested that so long as a "prisoner [i]s given sufficient notice of the reasons for his transfer to afford meaningful opportunity to challenge his placement," his placement in such an institution will satisfy due process under Wilkinson. Westefer v. Snyder, 422 F.3d 570, 588 (7th Cir. 2005).

Petitioner admits that in the summer of 2005, respondents Hrudka, Cravens and Boyle served on a program review committee that issued a written recommendation to retain him at the facility because he had failed to advance through all five levels of the level system then in place at the facility. Petitioner was able to appeal the decision to respondent John Doe #3, who denied the appeal. In the winter of 2005, respondents Cravens, Hrudka and Horner served on a program review committee that recommended petitioner be retained at the facility because he had not completed the High Risk Offender Program. It is not clear whether petitioner appealed that decision, but there is no suggestion that he was unable to do so. In short, petitioner was given all the process he may have been due in connection with the decision to retain him at the Wisconsin Secure Program Facility. He may disagree with the outcome but he was provide with more than adequate process. Consequently, he

will be denied leave to proceed on his claim that respondents Hrudka, Cravens, Boyle, Horner and John Doe #3 violated his right to due process when they refused to transfer him out of the facility.

With respect to petitioner's claim that he has a due process right in being promoted through the level system, I have ruled on more than one occasion that the level system and the related increase or decrease in privileges and property do not implicate a liberty interest. E.g. Henderson v. Huibregtse, 05-C-157-C (W.D. Wis. April 25, 2005); Garrett v. Berge, 04-C-226-C (W.D. Wis. Sept. 26, 2001); Irby v. Thompson, 03-C-346-C (W.D. Wis. Sept. 2, 2003); Lindell v. Litscher, 02-C-21-C (W.D. Wis. May 28, 2002). Nothing in the Wilkinson decision undermines my confidence in the soundness of these previous holdings. Because petitioner's allegations do not suggest that he was deprived of a protected liberty interest, I will deny him leave to proceed on his claim that respondents Horner, Ellen Ray, John Ray, Huibregtse and Raemisch failed to promote him to level 4.

Finally, petitioner's claim that he had a liberty interest in avoiding his placement in administrative segregation is foreclosed by Sandin itself, 515 U.S. at 486. Administrative segregation is, by definition, non- punitive; detainees or inmates may be placed there before they are assigned a security classification or because they have a contagious disease, present an escape risk or have been threatened by other detainees or inmates. Wagner v. Hanks, 128 F.3d 1173, 1174 (7th Cir. 1997). In short, placement in administrative segregation is

not itself an atypical and significant hardship. What petitioner is really challenging here is not his placement in administrative segregation, but his placement in administrative segregation at the Wisconsin Secure Program Facility. As discussed above, petitioner has already received the process he was due in connection with his retention at the facility and under Sandin, was not due any process in connection with his placement in administrative segregation. Because petitioner had no liberty interest in remaining free from administrative confinement, he will be denied leave to proceed on his claim that respondents Blackbourn, Kool, Morris, Walters, Huibregtse, John Doe ##1 & 2, Ellen Ray, John Ray, Raemisch, Gardner, Haines, Karnopp and Schneiter violated his right to due process by placing him in administrative segregation without a hearing.

ORDER

IT IS ORDERED that petitioner Nathaniel Lindell's request to proceed in forma pauperis is

1. GRANTED with respect to his claims that

a) respondents Wright, Berge, Ellen Ray, Huibregtse, Hautamaki and Raemisch exhibited deliberate indifference to his health by denying him access to adequate amounts of sunlight;

b) respondents Schneiter, Ellen Ray, Huibregtse, Hautamaki and Raemisch

exhibited deliberate indifference to his health by promulgating and enforcing policies that require him to wear clothing contaminated with other inmates' bodily fluids; and

c) respondents Horner, Cravens, Boughton and Huibregtse violated his rights under the First Amendment by refusing temporarily to admit him to the High Risk Offender Program in retaliation for his filing lawsuits and grievances;

2. DENIED with respect to his claims that his right to due process was violated when

a) respondents Horner, Ellen Ray, John Ray, Huibregtse and Raemisch failed to promote him to level 4;

b) respondents Blackbourn, Kool, Morris, Walters, Huibregtse, John Doe ##1 & 2, Ellen Ray, John Ray, Raemisch, Gardner, Haines, Karnopp and Schneiter placed him in administrative segregation without a hearing;

c) respondents Hrudka, Cravens, Boyle, Horner and John Doe #3 refused to transfer him out of the Wisconsin Secure Program Facility.

FURTHER, IT IS ORDERED that

3. Respondents Frank, Puckett, Casperson, Hrudka, John Does #1-3, Beerkircher, Trumm, Haines, Sebastian, Blackbourn, Boyle, Gardner, Harper, Walters, Gerber, Friedrick, Juergens, Morris, Karnopp, John Ray and Kool are DISMISSED from this lawsuit.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will

be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents' attorney.

5. Petitioner should keep 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.

6. The unpaid balance of petitioner's filing fee is $348.51; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order will be sent to the Attorney General for service on respondents.

Entered this 13th day of November, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge