IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRADLEY ALAN JONES,

OPINION and ORDER

Petitioner,

3:07-cv-00594-bbc

v.

JUDY BIELKE, MELANIE MCLAUGHLIN, JACOB BESCUP SHERIFF DENNIS RICHARDS, ROBERTS, SUSAN BARTON, COLUMBIA COUNTY JAIL, STATE OF WISCONSIN and FEDERAL MARSHALLS/ OXFORD FEDERAL PRISON,

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner Bradley Alan Jones alleges that jail officials were deliberately indifferent to his safety by failing to protect him from dangerous inmates and exposing him to a risk of HIV infection. Petitioner requests leave to proceed in forma pauperis under 28 U.S.C. § 1915 and has made the initial partial payment required under the statute.

In addressing any pro se litigant's complaint, the court must read the allegations of

the complaint generously. 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 has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's 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. 28 U.S.C. § 1915(e)(2).

In his complaint, plaintiff included a detailed description of the events that occurred. Plaintiff attached to his complaint several documents commonly referred to as "administrative exhaustion materials" and several "exhibits." Plaintiff's declarations, exhibits and the exhaustion materials may be considered a part of the complaint for all purposes. Fed. R. Civ. P. 10(c); Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Bradley Alan Jones is an inmate at the Columbia County jail in Portage, Wisconsin. Respondent Melanie McLaughlin is a deputy jail guard at the jail. Respondents Judy Bielke, Susan Barton, Jacob Bescup and Roberts are jail guards. Dennis Richards is

Sheriff. In addition, petitioner has named as defendants the Columbia County jail, the State of Wisconsin, federal marshals (unnamed) and "Oxford Prison" (which I understand to be the Federal Correctional Institution in Oxford, Wisconsin).

B. Temporary Transfer of Bruce Withorn

The Columbia County jail has an arrangement with prisons and other jails to house their inmates when an inmate is awaiting a trial in federal court in Madison, Wisconsin. At the end of May 2007, federal inmate Bruce Withorn was transferred to the jail from FCI-Oxford to await trial. At the time he was transferred, Withorn was serving a 25-year sentence for shooting someone and had been in solitary lockdown since December 2006 for stabbing another inmate's face. Withorn was placed in general population at the jail. While he was in general population, Withorn attacked petitioner.

Later, petitioner asked Sergeant Kuhl why Withorn had been placed in general population at the jail, given his violent history and disciplinary status at Oxford. Sergeant Kuhl stated that "in all fairness to us, Oxford Prison did not alert us as to why Withorn was brought here or to the status of how dangerous he is. When Withorn arrived he was very cordial and polite. He never gave any indication that he was a threat to anyone." Petitioner "has heard" that state, federal and county inmates are to be housed separately.

C. The "Attack"

Withorn and petitioner would play chess every day. During the chess games, Withorn told petitioner that he was in prison for shooting someone, and being at the Columbia County Jail was "like a vacation" because at Oxford prison he had been kept in solitary lockdown since December 2006 because he is dangerous. In addition, Withorn told petitioner that he had a "shank" made out of a sharpened toothbrush and would use it on anyone who disrespected him.

Petitioner did not believe him at first because Withorn did not act threatening or intimidating. One night two inmates that had been in the jail for a while came to petitioner's cell and asked petitioner what he knew about Withorn. Petitioner told them of his conversations with Withorn and the two inmates told petitioner that Withorn had already been threatening other inmates with the shank. After the other inmates left, petitioner's cell mate, Ralph Shannon, and petitioner turned in a request alerting the staff (guards) to Withorn's actions.

After lights out lockdown that night, a guard entered the "pod" (an area where individual cells are grouped together) where petitioner and Withorn were housed and removed Withorn and his cell mate and searched their cell for "maybe five minutes." The guards found nothing and returned Withorn and his cell mate. A few days later, on June 6, 2007, petitioner was playing chess with another inmate named Ryan when Withorn came

to the end of the table and began to "coach" Ryan, telling him where to move his pieces. Petitioner lost the game. He stood up and said, "Good game, Ryan. It's easier for two people to beat one at chess" and walked away to look at books.

Petitioner's cell mate was sitting on the table by the books, which were on the floor. He asked petitioner who won and petitioner told him what happened. Petitioner bent down and looked at a couple of books. When he stood up, Withorn was standing there with the sharpened toothbrush in his hand. He asked petitioner what he had said when petitioner stood up after the game and petitioner told him. Petitioner looked at the toothbrush the whole time, expecting Withorn to come at him at any moment. Petitioner asked Withorn what the toothbrush was for and Withorn replied, "To teach you respect."

Petitioner said "F__k that dude I'm almost done here. I'm not going to lose my chances of getting my leg bracelet back," and walked quickly to his cell. Petitioner stood beside his bed for a few minutes and kept looking over his shoulder expecting Withorn to come after him. Petitioner walked to his cell door to see where Withorn was and saw him at a table playing cards and staring at petitioner. Petitioner looked away at the television and stood there watching it. Withorn was seated near the television and petitioner looked back at him. Withorn was still staring at petitioner. Petitioner shook his head, hoping to communicate that he could not believe Withorn had threatened him after they had got along so well.

Withorn stood up immediately and came toward petitioner. Petitioner did not want to be caught in his cell, so he started out of his cell toward Withorn. Withorn still had the shank. Petitioner yelled, "Drop the weapon!" and continued yelling it. Withorn kept coming at petitioner and when he got close he raised the shank up to stab at petitioner. Petitioner hit Withorn in the face. Then petitioner and Withorn started to wrestle. Withorn was stabbing at petitioner but petitioner blocked the stabs as well as he could. Petitioner heard a guard over the intercom yell for people to get in their cells. Withorn kept stabbing and petitioner kept blocking. Withorn and petitioner continued wrestling, bouncing off metal tables. Petitioner could hear guards outside yelling for Withorn and petitioner to stop. Petitioner heard a sound like that of a window being hit.

Eventually, petitioner was able to "take Withorn down" by the entrance door to the pod. Through a five-inch space between the floor and the bottom of the door petitioner heard respondent Bielke say that she was going to pepper spray under the door. Petitioner jumped up and put his back against the wall, holding his hands up, looking at the guards and telling them he had been trying to stop and was only defending himself.

Withorn attacked again. He stabbed at petitioner's eye. Petitioner blocked the stab just in time so it missed his eye and caught just the outer edge. Withorn punched at petitioner, hitting him in the face. Petitioner punched back a few times. The guards were yelling but did not enter. Withorn and petitioner began wrestling around again. Petitioner

got Withorn down in almost the same spot by the door. Withorn began slicing petitioner's neck and stabbing at his mouth, saying, "I'm going to kill you!" Petitioner was trying to block while yelling to the guards, "Get in here, he's stabbing me!" The guards still did not enter.

Finally, petitioner heard the door start to open so he jumped up off Withorn and stepped out of the door immediately with his hands raised, saying repeatedly, "I was only defending myself." Withorn ran up the stairs and walked back down staring at him. Later, petitioner spoke with other inmates, who told him that when detectives were asked why the guards did not come in to help him or break up the attack, their answer was that the guards were not trained "for that type of situation." According to the other inmates, there were six guards outside the pod during the fight, and they looked scared and confused.

D. Medical Treatment

Petitioner was taken downstairs and "pictures were taken." Petitioner saw Withorn's blood on his uniform and respondent Bielke got him a new uniform. When petitioner took off his shoes and changed he noticed Withorn's blood all over his left foot. He asked to wash it off but was told to wait because he needed to go to the hospital. He was handcuffed and put in a police cruiser and taken to the emergency room at the hospital in Portage, Wisconsin.

At the hospital, petitioner was given three or four stitches inside his mouth and the doctor used "some kind of glue" to put over the wounds on his neck. When petitioner returned to jail he asked if he could shower and was told, "NO! You're on 24 hour lock down for fighting." Petitioner explained that Withorn's blood was on his foot and that his foot had open athlete's foot sores on it. He was told to use the sink and water provided in the "hole" (the lockdown unit). There was no soap in the "hole" and petitioner was given none. Nor was he given any washcloth, sheet or blanket. Instead, he used plain water and toilet paper to clean the blood off his foot. Guards would pass by on hourly rounds and petitioner would ask for a shower or at least soap and a washcloth. Each time he was given an excuse and told he needed to wait. Petitioner was not given soap or an opportunity to shower during his 24 hour lockdown. He was allowed to shower when he was returned to A-pod.

Since the attack, petitioner has been suffering various physical ailments. He finds it painful to swallow and there is a permanent lump inside his lip from a cut that rakes across his teeth when he talks. If petitioner stands for more than five minutes without sitting down or if he turns without moving his feet, his lower spine "feels like there are millions of needles in it." Petitioner suffers from horrible pain in his lower back. His left knee feels "like it wants to buckle" every time it bends when he walks. If petitioner is sitting with elbows on a table and arms bent with his hands in the air or if he lies on his back and bends his elbows

and puts his hands on his chest, his pinky and ring finger and the palm below them go completely numb after about five to eight minutes of no movement. The feeling does not return very quickly if he moves after that. Petitioner has noticed a sharp pain in his neck that happens on occasion. Moreover, petitioner has had ongoing psychological problems, including nightmares, flashbacks, sleep disturbances, blackouts, short term memory loss, paranoia, anxiety and depression.

E. Transfer of Other Inmates

A couple of days after the attack, the staff brought two large Native Americans to A-pod where petitioner was housed. Petitioner was scared. Bruce Withorn had previously told petitioner that he knew lots of people in prison and lots of Native American "brothers" on the outside who knew "how to get things done" for him.

Both petitioner and his cell mate turned in request slips to inform a sergeant of his concerns. Petitioner was called downstairs by sergeant Kuhl, who questioned him about his complaint and concerns. Petitioner was told that the jail does not place inmates according to race. Petitioner told him he was not racist but was concerned for his safety and suggested that tensions would be "high" between inmates in A-pod and Native Americans.

F. Subsequent Temporary Transfers of Withorn

On several occasions since the attack, petitioner has expressed a fear of Withorn to jail officials. Withorn has been placed in Columbia County Jail on multiple occasions since the attack.

Petitioner filled out a packet from the Victim/Witness program in which he stated the psychological impact that Withorn's attack had on him, expressed his desire to testify in Withorn's trial and asked to be alerted of all upcoming court dates and Withorn's final sentence.

Withorn had a trial on July 23, 2007. After court, Withorn was housed three doors away from petitioner in D-pod, a separate pod in general population. Inmates from A, B, C and D-pods are allowed to attend haircuts, church, Bible study and recreation together. That date was a haircut night. Inmates from A-pod returned from haircuts and told petitioner that inmates from D-pod were nervous because a "crazy federal inmate that stabbed an inmate at this jail is in their pod with his shirt rolled up and has a toothbrush stuck in the waistband of his pants." Had petitioner not heard this news, he "could have easily" run into Withorn in the hallway or at one of the events.

Petitioner wrote a letter to Teresa Lutey, telling her that he had not been notified of the court hearing or of Withorn's placement. Three days later, sergeant Brian Kjorlie called petitioner downstairs and told him he could relax because Withorn was now gone. Sergeant

Kjorlie indicated that in the future he should ask staff if he wants to know whether an inmate is in the jail instead of contacting Victim/Witness people.

On October 12, 2007 and October 18, 2007, Withorn was at the Columbia County jail once again. Petitioner filed an inmate request to be notified of Withorn's placement. Sergeant Kuhl responded that Withorn was in a different block and the parties had a no contact order between them that the jail was enforcing.

Petitioner was subpoenaed to testify against Withorn on November 8, 2007. Withorn and petitioner were both housed at the Columbia County Jail at that time, and were taken from the jail in separate cars. Petitioner could see Withorn in the car next to him. Withorn stared at petitioner "very threateningly" and mouthed something to petitioner. Petitioner grew short of breath and felt his heart race.

When petitioner reached the courthouse, he was placed on a bench in the courtroom. They seated Withorn on a bench the next row up from him, not more than six feet away, within "inches" of the path from petitioner to the witness stand. As soon as the two transport deputies, deputy Korovsky and Terri Pulvermacher, walked away and started talking, Withorn turned around and held up a piece of paper pointing at it, whispering threats to petitioner, calling him a "snitch" for being there to testify, saying he would "get" petitioner. Pulvermacher turned around with a smile and told Withorn to turn around because Withorn and petitioner had a no contact order. Withorn took a plea bargain, and

petitioner was not required to testify.

DISCUSSION

A. Dismissal of Certain Defendants

Several respondents that petitioner names must be dismissed. Petitioner names the State of Wisconsin, the Columbia County jail, the Oxford prison and "federal marshals." Neither a state nor a state agency may be sued under § 1983 because neither is a "person" for purposes of that statute. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). Furthermore, prisons are not suable entities because they are not persons capable of accepting service of plaintiff's complaints or responding to them. Therefore, respondents the State of Wisconsin, the Columbia County Jail and the Oxford Prison must be dismissed. Regarding "federal marshals," petitioner never identifies any person in his complaint as a federal marshal or describes actions taken by "federal marshals." Therefore, respondents "federal marshals" will be dismissed as well.

B. Eighth Amendment Claims

The Eighth Amendment imposes duties upon prison officials, such as the duty to "take reasonable measures to guarantee" the inmates' safety, Farmer v. Brennan, 511 U.S.

825, 833 (1994), and "ensure that inmates receive adequate . . . medical care." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Under both duties, a prison official may not act with "deliberate indifference" to a prisoner's health and safety needs. Farmer, 511 U.S. at 834. Petitioner contends that respondents acted with deliberate indifference when they failed to protect him from the risk of assault by other inmates and denied him cleaning materials he intended to use to lower his risk of contracting an infectious disease.

A petitioner states a claim of deliberate indifference against a respondent if he alleges that (1) petitioner faced a substantial risk of serious harm or had a serious medical need and (2) the respondent knew of that risk, or was aware of facts from which that substantial risk of serious harm could be inferred and drew that inference and (3) respondent disregarded that risk nonetheless. Brown v. Budz, 398 F.3d 904, 913 (7th Cir. 2005) (citing Farmer, 511 U.S. at 838); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

1. Failure to protect plaintiff from Withorn's attack

Petitioner asserts several distinct claims based on various officials' failure to protect him from an attack he suffered at the hands of inmate Bruce Withorn.

a. Substantial risk of serious harm

Under the first prong of the test for determining "deliberate indifference," petitioner

must allege facts from which an inference may be drawn that he faced a "substantial risk of serious harm." Violent prison assaults constitute "serious harm." Brown, 398 F.3d at 910-11 (quoting Farmer, 511 U.S. at 837) ("[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society'"). However, a petitioner must allege "not only that he or she experienced, or was exposed to, a serious harm, but also that there was a substantial risk beforehand that that serious harm might occur." Brown v. Budz, 398 F.3d 904, 910 (7th Cir. 2005). The substantial risk must be something more specific than "general risks of violence in a [detention facility]." Id. at 913. At the same time, the pre-existing substantial risk need not be one specifically "personal to" or directed at a petitioner. Id. at 912. A particularly violent inmate's access to other inmates in an unsupervised area may be a sufficiently substantial risk of serious harm to satisfy the requirements of the Eighth Amendment. Id. at 913 (Caucasian inmate faced substantial risk when assailant with known propensity for attacking Caucasians had unsupervised access to shared space where inmate was lounging); see also Billman v. Indiana Dept. of Corrections (inmate faced substantial risk when assigned a cell with HIV positive inmate with known "propensity" for raping cell mates).

In his complaint, petitioner alleges that before Withorn arrived at the Columbia County jail and was placed in general population with plaintiff, Withorn was serving a 25-year sentence for shooting someone and had stabbed an inmate in the face in December

2006. From these allegations, it is possible to infer that Withorn's propensity to violence was so high that he posed a substantial risk of serious harm to other inmates.

b. Deliberate indifference of the risk

Under the second prong of the deliberate indifference standard, each prison or jail official involved must have been aware of facts from which an inference could be drawn that petitioner faced substantial risk of serious harm and have drawn that inference. Brown, 398 F.3d at 910-911 (7th Cir. 2005). Under the third prong, each prison or jail official must have "disregarded" that risk by failing to take reasonable measures to abate it. Farmer, 511 U.S. at 847; Peate v. McCann, 294 F.3d 879, 882 (7th Cir. 2002). Construing petitioner's allegations "[f]airly" and "with proper allowance for the fact that [petitioner] is not a lawyer," Billman v. Indiana Dept. of Corrections, 56 F.3d 785, 788 (7th Cir. 1995), petitioner contends that different officials knew of and disregarded the substantial risk of serious harm during different stages leading up to the attack.

1) Oxford officials who transferred Withorn to the Columbia County jail

Read broadly, petitioner's complaint alleges that officials at FCI-Oxford were deliberately indifferent to his safety when they transferred Withorn to the Columbia County without regard for his propensity for violence. In an ordinary failure to protect case,

deliberate indifference arises from a custodial official's knowledge of a specific threat to a specific inmate's safety, often drawn from complaints by that inmate. McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991); Brown, 398 F.3d at 914-15 (typically, "victim and assailant are readily identifiable" and risk is "clearly particularized"). However, deliberate indifference may be shown even when the specific identity of a potential victim is not known to an official where the official knows that "an assailant's [known] predatory nature" poses a "heightened risk of assault to even a large class of [inmates]." Brown, 398 F.3d at 915.

The FCI-Oxford officials were quite removed from the attack. To state a claim of deliberate indifference against FCI-Oxford officials, petitioner had to allege facts sufficient to allow an inference that the officials involved in transferring Withorn to the Columbia County jail knowingly withheld his violent history from jail officials. Nothing in petitioner's complaint allows for this inference to be drawn. Therefore, petitioner will be denied leave to proceed on his claim that FCI-Oxford officials were deliberately indifferent to his safety.

2) Columbia County Jail officials who created a "random placement" policy

Second, petitioner alleges that Columbia County Jail officials were deliberately indifferent to his safety when they created a policy of "random placement" that requires placement of inmates without taking the inmates' violent history into account. A deliberate indifference claim predicated on jail or prison policy requires more than mere "knowledge

of general risks of violence in prison." Weiss v. Cooley, 230 F.3d 1027, 1033 (7th Cir. 2000). The prison official responsible for failing to implement an adequate policy must have done so "with the motive of allowing or helping prisoners to injure one another," knowing of a high risk that "certain inmates would face extreme and unusual risks." Id. Petitioner fails to allege any facts that would suggest that the person implementing a policy at the Columbia County jail knew of a high risk of "extreme and unusual risks" to all jail inmates in general population from inmates placed "randomly." At most, it can be inferred that the official knew of a "general risk of violence" and failed to take this into account. Such knowledge and failure to act do not reach the requisite level of culpability under Weiss. Therefore, I will deny petitioner leave to proceed on his claim that the officials at the Columbia County jail implementing policy were deliberately indifferent to his safety.

3) Columbia County Jail officials who placed Withorn in general population

Turning to a third group, petitioner alleges that the Columbia County Jail officials who placed Withorn in general population in spite of his propensity for violence were deliberately indifferent to petitioner's safety. To proceed against this third group, petitioner would have to allege facts from which an inference could be drawn that the responsible jail officials knew of Withorn's violent history when they placed him in general population. Petitioner does not allege that anyone at the Columbia County jail was aware of Withorn's

propensity for violence until after his placement in general population when petitioner and his cell mate, Ralph Shannon, alerted staff that threatening inmates with a shank. Indeed, petitioner alleges that Sergeant Kuhl said the jail did *not* know of Withorn's history; and even petitioner alleged that he could not believe Withorn's threat at first because "Withorn did not act threateningly or intimidating."

Because petitioner's complaint does not allow an inference that responsible Columbia County jail officials knew of Withorn's violent history when they placed him in general population, petitioner will be denied leave to proceed on his claim that the jail officials were deliberately indifferent to petitioner's safety.

4) Response to complaint that Withorn had a shank

The fourth group of officials alleged to have been deliberately indifferent to petitioner's safety consists of those officials involved in responding to petitioner's request alerting the guards about Withorn's possessing a "shank" and threatening to use it on anyone who did not respect him.

Once again, petitioner's complaint fails to identify the individual who received his request alerting the guards or the guards who responded to the request. It is not enough for a petitioner to allege that he informed "staff" or filed a report to alert "jail guards" of the presence of a substantial risk and name several individuals identified as "jail guards" or

"staff." However, even if petitioner had identified properly those officials who allegedly were "alerted" to Withorn's threatening behavior or responded to it, this claim would fail. Deliberate indifference requires that the official both knew of a substantial risk and "disregarded" the risk. Brown, 398 F.3d at 913. An officer who "respond[s] reasonably" to a known risk does not "disregard" the risk and should be "free from liability . . . even if the harm ultimately was not averted." Peate, 294 F.3d at 882 (citing Farmer, 511 U.S. at 844).

Petitioner's allegation allows the drawing of an inference that the "alerted" officials knew of a substantial risk that Withorn would attack with a shank because he claimed to have a shank and would use it if he was not respected. However, officials responded to that risk by performing a search of Withorn's cell. Even though petitioner alleges that in response to his report, officials searched Withorn's cell for a shank "for like five minutes," the brief duration of the search does not mean that the officials were deliberately indifferent. At most, the allegations suggest that officials could have responded more effectively to petitioner's request, perhaps by removing Withorn or performing a more thorough search. Inmates are not constitutionally entitled to the "best course of action" by officials acting to prevent a substantial risk of serious harm. Id. In the face of allegations by one inmate that another inmate had a shank and threatened to use it if not respected, the officials' decision to search Withorn's cell, even briefly, was a reasonable response. Thus, at the time the officials "knew" of a risk, they did not "disregard" it.

Because the allegations do not allow for an inference to be drawn that any official both knew of a risk that Withorn had a shank and would use it and disregarded that risk, petitioner will be denied leave to proceed on his claim that "jail guards" and "staff" were deliberately indifferent to petitioner's safety needs.

5) Failure to intervene during the attack

The last group of officials petitioner alleges failed to protect him from Withorn's attack include those present and nearby when Withorn attacked petitioner. To state a claim against jail officials for failure to protect from an inmate attack, the allegations of fact must suggest that the officials "effectively condone[d] the attack by allowing it to happen." Borello v. Allison, 446 F.3d 742, 749 (7th Cir. 2006).

I note again that in the body of his complaint, petitioner fails to identify five of the six guards he alleges were involved in a delayed response to the attack. However, he does identify respondent Bielke, and through attachments to his complaint I can assume that respondents Barton, McLaughlin, Bescup and Roberts were involved.

Petitioner alleges that after he and Withorn started to wrestle, a guard "yelled" for people to get in their cells, that petitioner could hear guards outside yelling for them to stop and that at one point he heard respondent Bielke threaten to pepper spray under the door, which delayed further fighting between the parties as petitioner jumped up and separated

himself from Withorn. Petitioner alleges further that after Withorn renewed his attack on petitioner, guards delayed some more but finally opened the door.

Petitioner's allegations show the guards did not "effectively condone" the fight. The only respondent specifically identified, respondent Bielke, attempted to break up the altercation by threatening pepper spray. In the meantime, guards yelled repeatedly for Withorn and petitioner to stop and ultimately came in after the parties broke up the fight on their own. Although it is possible that petitioner may have been better protected had the guards not delayed entry, he is not entitled to the "best course of action." Peate, 249 F.3d at 882. The guards' response was sufficient to conform with their duty to protect inmates under the Eighth Amendment. Therefore, petitioner will be denied leave to proceed on his claim that respondents Bielke, McLaughlin, Bescup, Barton and Roberts violated his Eighth Amendment rights by failing to intervene more quickly when Withorn attacked him.

2. Subsequent placements of Withorn in general population and near petitioner

Petitioner contends that the Columbia County jail's subsequent placements of Withorn in general population in other cell "pods" and placement of Withorn near petitioner when both went to court violated his Eighth Amendment rights by exposing him to a substantial risk of harm. For a risk to be "substantial," it must be highly likely to materialize, if not "almost certain." Brown, 398 F.3d 904, 911 (7th Cir. 2005)

("Substantial risk" where assailant has known "propensities" of violence, where attack is "highly probable" or where inmate poses a "heightened risk of assault" to plaintiff).

First, petitioner contends that the officials involved in assigning Withorn's housing at the jail were deliberately indifferent to his safety needs when, in October 2007, Withorn was brought back to the jail and placed in general population in a separate pod at least twice. Petitioner alleges that inmates from different pods may run into each other during haircuts, church, Bible study and recreation, and that at least once Withorn was present in another pod during "haircut night" and that he possessed what appeared to be a shank at some time while staying in the other pod. However, the mere fact that Withorn was dangerous and that petitioner could "run into" Withorn during shared events does not mean that he was exposed to a substantial risk of serious harm. The allegations simply cannot establish that the chance that Withorn could attack petitioner again is "highly probable."

Next, petitioner contends that deputy Korovsky and Terri Pulvermacher were deliberately indifferent to his safety when Withorn was left in close proximity to petitioner at a court hearing. Once again, petitioner does not name either Korovsky or Pulvermacher as a respondent. However, even assuming he had named them as parties, his claim against them could not go forward. Petitioner alleges that he and Withorn were brought to court together and that because Withorn was placed within six feet of him, Withorn "could have" jumped up and stabbed him easily with the lawyer's pen Withorn was using, However,

petitioner alleges also that Withorn was handcuffed and shackled, guards Pulvermacher and Korovsky escorted the pair and Withorn was in the row of benches in front of him. Thus, to stab petitioner, Withorn would have to jump up, twist around (while shackled), lunge six feet at petitioner and stab him with the pen in his handcuffed hands. This does not sound like an easy feat. Moreover, because petitioner could move as well and because the pair was escorted by two guards who were alert and responsive to Withorn's behavior, any successful attack was quite unlikely.

Because neither Withorn's presence in another pod at the jail nor Withorn's placement near petitioner at court can be said to have placed petitioner as substantial risk of serious harm, petitioner will be denied leave to proceed on his claims that officials were deliberately indifferent to his safety when they placed Withorn in a different pod at the Columbia County Jail or that officials not named in his complaint, Korovsky and Pulvermacher, were deliberately indifferent to his safety when they left Withorn in close proximity to petitioner at a court hearing.

3. Failure to segregate other Native Americans

Petitioner contends also that officials involved in placing other Native Americans in general population with him after the attack were deliberately indifferent to his safety. Petitioner alleges that Withorn warned that he was affiliated with Native American

"brothers" who knew "how to get things done," and that petitioner warned officials that tensions might be high between Native Americans and others in the pod. However, petitioner does not suggest that the "large" Native Americans placed in general population with him ever harmed him or threatened to do so or indicated that they were affiliated with Withorn. Petitioner's belief that he faced a substantial risk of serious harm simply because other Native Americans were placed in general population after he was attacked by Withorn is sheer speculation. Petitioner will be denied leave to proceed on his claim that jail officials were deliberately indifferent to his safety when they placed two large Native Americans in general population with him because that claim is legally frivolous.

C. Medical Treatment

Petitioner contends that respondent Bielke and other jail officials acted with deliberate indifference to his safety when they refused to allow him to clean Withorn's blood off his foot with soapy water. As with many other claims, petitioner has failed to identify the officials who refused to give him soap after his return from the hospital. Even if he had, I could not grant him leave to proceed on this claim.

Petitioner alleges that he had Withorn's blood "all over" his left foot and that respondent Bielke did not allow him to wash it off before he was taken to the hospital. When petitioner returned from the hospital (where he apparently did not have the blood

washed off for one reason or another), unnamed jail officials refused to allow him to shower or to have soap and a washcloth, instead sending him directly to 24 hour lockdown, where he had access to water, but not soap. Petitioner informed at least one official that had an open athlete's foot sore on his foot and wanted to clean Withorn's blood off it, but was not given soap. He asked for soap several times but was not provided it during lock down. While in lockdown, petitioner used water and toilet paper to clean his foot. After leaving lockdown he was able to shower.

The Constitution proscribes officials from denying care in such a way that disregards an "excessive risk to inmate health or safety" or denies "the minimal civilized measure of life's necessities." Snipes v. DeTella, 95 F.3d 586 (7th Cir. 1996) (quoting Farmer, 511 U.S. at 834, 837). In Snipes, the Seventh Circuit held that a prisoner's exposure to an inch or two of standing water in the shower was not a constitutional violation, even though petitioner feared he might contract AIDS or some other communicable disease through a sore on his toe. Petitioner has not alleged that jail officials had any reason to believe that Withorn had an infectious disease or that the blood was certainly Withorn's and not petitioner's. Because there was no reason to believe that petitioner was exposed an excessive risk to his safety or that any respondent was aware of such a risk, petitioner fails to state a claim of a constitutional violation. Therefore, I will deny petitioner leave to proceed on his claim that jail officials were deliberately indifferent to his medical needs by refusing to allow

him to timely clean Withorn's blood off his foot with soap and a washcloth.

D. Additional Requests

Petitioner has requested a temporary restraining order forbidding Withorn from possessing a long toothbrush at the Columbia County jail, which I construe as a motion for emergency injunctive relief. In addition, petitioner has filed a motion for appointment of counsel with his complaint. Because petitioner will be denied leave to proceed on all claims, both of these motions will be denied as moot.

E. Negligence

One final point. Although petitioner has brought this suit under 42 U.S.C. § 1983, at times he appears to allege that the officials at FCI-Oxford and the Columbia County Jail were negligent, that if they did not know of his violent propensities, they "should have." To the extent that petitioner wishes to raise a negligence claim against the officials at the Columbia County jail, he must do so in state court. 28 U.S.C. § 1367. To the extent that petitioner wishes to raise a negligence claim against officials at FCI-Oxford, he must follow the requirements of the Federal Tort Claims Act, 28 U.S.C.§ 2671-2680, which allows a suit against the United States for negligent acts of federal employees, 28 U.S.C. § 1346(b)(1); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477 (1994) (describing the six elements

of FTCA claim). Under the FTCA, petitioner must exhaust any administrative remedies he might have with FCI-Oxford before bringing suit. Deloria v. Veterans Administration, 927 F.2d 1009, 1011 (7th Cir. 1991) (concluding without discussion that exhaustion under FTCA is "jurisdictional prerequisite" to federal lawsuit).

ORDER

IT IS ORDERED that

1. Petitioner Bradley Alan Jones's request for leave to proceed in forma pauperis on his Eighth Amendment claims is DENIED; and the case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $ 270.02; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 26th day of December, 2007.

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