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United States District Court,
W.D. Wisconsin.

Dennis E. JONES 'EL, and Micha 'El Johnson, and all similarly situated, Petitioners,
v.
Gerald BERGE, James Parisi, Linda Tripp, Vicki Sharpe, Randy Hepp, Ted Harig, Laura Harding, David Hautamaki, Bruce Muraski and Gary R. McCaughtry, Respondents.

No. 00–C–421–C. | Sept. 25, 2000.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

CRABB, J.

***1** This is a proposed civil action for injunctive, monetary and declaratory relief, brought pursuant to 42 U.S.C. § 1983. Petitioners Dennis E. Jones 'El and Micha'el Johnson are presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, but petitioner Jones 'El was confined at the Waupun Correctional Institution in Waupun, Wisconsin, at some times relevant to this complaint. They seek leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavits of indigency accompanying petitioners' proposed complaint, I conclude that petitioners are unable to prepay the full fees and costs of instituting this lawsuit. Both petitioners have submitted the initial partial payment required under § 1915(b)(1). Subject matter jurisdiction is present. *See* 28 U.S.C. § 1331.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally, *see Haines v. Kerner,* 404 U.S. 519, 521, 92 S.Ct. 594, 30 L.Ed.2d 652 (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 on three or more previous occasions had a suit 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 seeks money damages from a defendant who is immune from such relief. In addition, under most circumstances, a prisoner's request for leave to proceed must be denied if the prisoner has failed to exhaust available administrative remedies.

Initially, I note that petitioners seek to bring this action on behalf of themselves and on behalf of all similarly situated inmates. I understand petitioners to be seeking to litigate this case on behalf of a class. In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). I cannot make this finding in the present action for two reasons.

First, petitioners are not represented by an attorney, and it appears from the complaint and from the circumstances that the named petitioners are not attorneys. 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 Ethnic Awareness Org. v. Gagnon,* 568 F.Supp. 1186, 1187 (E.D.Wis.1983); *Huddleston v. Duckworth,* 97 F.R.D. 512, 51415 (N.D.Ind.1983) (prisoner proceeding *pro se* not allowed to act as class representative). Second, even lawyers may not act both as class representative and as attorney for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the attorney on behalf of the class members. *See, e.g., Sweet v. Bermingham,* 65 F.R.D. 551, 552 (1975); *Graybeal v. American Sav. & Loan Ass'n,* 59 F.R.D. 7, 13–14 (D.D.C.1973); *see also Susman v. Lincoln Am. Corp.,* 561 F.2d 86, 90 n. 5 (7th Cir.1977), *appeal after remand,* 587 F.2d 866 (1978); *Conway v. City of Kenosha,* 409 F.Supp. 344, 349 (E.D.Wis.1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, class certification will be denied.

***2** In their complaint, petitioners make the following allegations of fact.

ALLEGATIONS OF FACT

I. SUPERMAX CORRECTIONAL INSTITUTION

A. *Parties*

Petitioners Dennis E. Jones 'El and Micha'el Johnson are inmates at the Supermax Correctional Institution. The following respondents are employees of the Supermax Correctional Institution: respondent Gerald Berge is the warden; respondent James Parisi is the security director; respondents Linda Tripp and Vicki Sharpe are unit managers; respondent Randy Hepp was the program director; and respondent Ted Harig is in the education department.

B. *Conditions of Confinement*

1. *Cell*

a. Light
A fluorescent light is kept on in petitioners' cells 24 hours a day. Petitioners have complained that the lighting has caused them excruciating eye aches, headaches and sleeplessness. Petitioners have taken ibuprofen for their eye and headaches but the ibuprofen does little when the aches are severe. Petitioner Jones 'El sought a medical slip so that the light could be turned off. Petitioner Johnson was prescribed eye coverings with elastic but he was not allowed to use them for security reasons; instead, he was given two small pieces of cotton gauze with no way of keeping the gauze in place.

Staff could count inmates with flashlights rather than illuminating the cell 24 hours a day. Respondent Parisi is in charge of security and has enforced the 24–hour illumination policy. Respondents Berge, Sharpe, Tripp and Hepp are aware of the complaints of light on their units.

b. Lack of sleep
Respondents have directed the institution's staff to wake up petitioners at least once an hour throughout the night to make them move. Petitioners are not allowed to place anything over their heads and are directed to sleep at the end of the bed directly beneath the light.

c. Physical conditions
Petitioners are confined to their cells 24 hours a day. The cells are made of four concrete prefabricated walls and one box car door. Each cell has a shower. The ventilation reflects the temperature outside. There are no windows to the outside.

d. Visiting restrictions
Petitioners are not allowed to visit with their visitors through the window booths used for visits with their lawyers; instead, they must visit on a distorted video screen. The window booths are divided from floor to ceiling by concrete, steel and plexiglass. Visits on video screens lack personalization and distort images.

Petitioners are allowed one or two six-minute phone calls each month. This does not allow petitioner Jones 'El enough time to speak with each of his three children.

e. Monitoring
There are cameras in petitioners' cells 24 hours a day, allowing respondents to watch petitioners shower, urinate, defecate, wash-up and masturbate. Female staff have monitored inmates by using these cameras and have commented on inmates' private parts on occasion. It is possible that videotapes of inmates in compromising positions could be televised.

f. Clothing
***3** Petitioners exchange their underwear and socks twice a week only and may have one pair of underwear and socks in their cells at a time. They are not allowed to have athletic shoes.

2. *Recreation*
Respondents do not provide any physical recreation or opportunity to be outside. The "recreation" area consists of four empty concrete slabs. There is no exercise apparatus, pull-up bar, weights, bike or basketball hoop. As a result, the inmates use this area rarely. Twenty-four inmates share two recreation cages.

Petitioners are supposed to be allowed recreation time four times a week. It is counted as physical recreation if petitioners go to the legal room.

3. *Harm*
These conditions are physically and mentally painful. Petitioners find it hard to focus and concentrate. Petitioner Jones 'El has received psychological treatment.

C. *Inadequate Medical Treatment*

1. *Dental care*

When petitioners arrived at the institution, their files indicated that they needed dental care but the institution has not had dentists for several months. Instead of toothbrushes, each petitioner was given a contraption that is placed on the tip of the finger and has small plastic spikes.

While trying to use the contraption, petitioner Johnson suffered bleeding gums, choking and lacerations. As a result of the lack of dental treatment, petitioner Johnson suffered extreme oral pain and developed a dental condition known as pericoronitis.

Petitioner Jones 'El suffered bleeding gums and had problems using the contraption to clean his teeth. At times, petitioner Jones 'El was in a lot of pain because he had two large cavities and one abscess and did not receive treatment for several months. The dentist told petitioner Jones 'El that the abscess was poisonous, that the poison was leaking throughout his body and that the poison could kill him if left untreated. Eventually, the abscessed tooth was pulled and the cavities filled. If the abscessed tooth had been treated earlier, it might have been saved.

2. ***Petitioner Jones 'El's leg surgery***

When petitioner Jones 'El arrived at the institution, he was recovering from leg surgery. He was prescribed physical therapy and was supposed to use leg machines. Because he did not have access to any machines or any recreation at all, petitioner Jones 'El's recovery has been prolonged. Since his arrival at Supermax, petitioner has seen Dr. Lang, the orthopedic specialist who operated on him. Dr. Lang noted that petitioner's left leg showed muscle atrophy and recommended that petitioner participate in physical recreation, particularly some form of weight-lifting. Respondents have not provided petitioner any recreation to assist him in his recovery.

D. *Privacy*

Respondents subject petitioners to constant cell searches, including full body strip searches and anal cavity searches. Petitioner Jones 'El has been subjected to at least 10 strip searches, including three times in one month. Petitioner Johnson has been subjected to at least 22 strip searches, including four times in one month. These searches are routine and not prompted by cause.

E. *Denial of Access to the Courts*

1. ***Mail***

***4** Petitioners are not allowed to purchase stamps. They are limited to 10 stamped envelopes to use for mail to family, friends and courts. This is the rule even if an inmate has 3 or 4 cases pending and needs two stamped envelopes for each mailing to send a copy to the court and to his lawyer. The policy of the Wisconsin Department of Corrections allows inmates to purchase 25 stamps each week.

2. ***Legal room***

The institution's legal room has a set of annotated Wisconsin statutes (with certain volumes missing), a set of annotated federal statutes (with 42 U.S.C. § 1983 missing), a self-help litigation manual, a book of forms, a set of federal digests and a set of the Department of Corrections' rules and policies. The legal room does not have any Supreme Court reporters or federal or state reporters. To request a case, petitioners have to give respondents the exact case cite. Respondents then order the case from another institution, receiving it a month later sometimes. The Department of Corrections' policy requires that institutions have case law books.

While in the legal room, petitioners are kept in leg and wrist restraints, making it very difficult to do meaningful research.

Respondents do not allow petitioners to photocopy the department's policies or any of the law books. Petitioners are allowed to bring one sheet of paper and pen only into the legal room. They are allowed one manila envelope and three carbon sheets each week. When more than one brief is due in the same week, it is impossible to file both if the inmate is indigent and must get the manilla envelope and carbon paper through a legal loan.

F. *Religion*

Petitioners are Muslim. They are not allowed to use their prayer rugs or extra blankets to pray on as required by Islamic law or ordinarily allowed by the department's policy. As a result, petitioners had to pray informally or uncleanly, meaning they had to pray on the same blanket on which they sleep, a practice forbidden by Islamic law. It is mandatory to pray in proper form. Also, petitioners are not allowed their kufis (an Islamic sacred head covering) or their hardcover Korans. Respondents have refused to distribute Islamic literature that petitioner Jones 'El gave them. Islamic faith requires one to study and follow the Koran, Injil, Torah, Sunnah and other literature about things such as how to pray and which acts are prohibited. Petitioners are allowed hard soap, a hard

brush, television and hard hygiene containers but not hardcover Korans. It is not as easy to find a soft cover Koran or Torah as it is to find a soft cover Bible. Petitioners have not found a soft cover Koran with commentary that explains the scriptures.

Respondents control the television stations; the institution's television has two educational channels, one Catholic mass channel and one CNN news channel. Petitioners must use 13–inch color televisions that are issued by the institution. They are not allowed to have their own televisions and as a result, they do not have access to channels that show Islamic programming, African–American music, movies, sitcoms, local news or sports.

G. *Due Process*

***5** Respondents have treated petitioners differently from other inmates in the same disciplinary status. At times, an inmate confined in segregation will not be allowed to have a real toothbrush or a hairbrush, to make more than one phone call each month, to participate in any educational or other programs, to watch television or listen to a radio, to read magazines or newspapers, to have papers with Internet addresses, to have food items from the canteen, to have more than three personal books or one library book, while another inmate in the same status will be allowed these things. The treatment an inmate receives depends on whether respondents like the inmate's attitude, even if no disciplinary rules have been violated. Respondent Sharpe deprived petitioner Jones 'El of books, television, radio, toothbrush, hairbrush and access to programs because petitioner asserted his right to have "real" recreation and refused to go to the "cellar" recreation area after he had signed up for recreation time and because petitioner filed complaints against respondents.

H. *Other*

Petitioners have been denied magazines, newspapers and other periodicals. They do not get mail on Saturdays. Petitioners are required to use state-issued head phones and are responsible for any wear and tear on the head phones and televisions.

II. WAUPUN CORRECTIONAL INSTITUTION

A. *Parties*

Petitioner Jones 'El was an inmate at Waupun Correctional Institution at the times relevant to these allegations. The following respondents are employees of Waupun Correctional Institution: respondent Laura Harding is a social worker; respondent David Hautamaki is a hearing committee member; respondent Gary McCaughtry is the warden; and respondent Bruce Muraski is the security captain.

B. *Disciplinary Report*

1. *Due Process*

On September 30, 1998, petitioner was put in solitary confinement because of a charge of a disciplinary violation. On October 6, 1998, petitioner was charged with group resistance and petitions. Respondent Muraski refused to provide copies of the letter petitioner allegedly wrote.

On October 20, 1998, petitioner appeared at a hearing conducted by respondent Hautamaki on his disciplinary charge. At the hearing, petitioner argued that he was prevented from presenting a complete defense because he was denied the chance to review the evidence in the report. Respondent Hautamaki ignored petitioner's argument, did not allow petitioner to review any of the evidence against petitioner and found petitioner guilty. Respondent Hautamaki sentenced petitioner Jones 'El to 184 days of segregation and 30 days' loss of recreation even though petitioner told him that he had had a leg cast removed recently and needed to have physical therapy.

Petitioner appealed respondent Hautamaki's finding to respondent McCaughtry. Respondent McCaughtry affirmed the finding of petitioner's guilt and the sentence imposed. Petitioner served 184 days in segregation and 30 days' loss of recreation even though most inmates sentenced to fewer than 360 days serve half of their disciplinary sentence if charged with something other than battery. Petitioner's mandatory release date was extended by 92 days. Petitioner was in segregation until February 8, 2000. On April 5, 2000, a Dodge County circuit court reversed the finding of petitioner's guilt and his sentence. Petitioner spent $160 bringing the certiorari action.

2. *Inadequate medical treatment*

***6** While petitioner was in the general population at Waupun, he had been going to therapeutic recreation six days each week to recover from his leg surgery. As a

result of losing recreation privileges and being placed in segregation, he suffered a prolonged recovery, muscle atrophy in his leg and decreased chances of a full recovery. While in segregation, he was not allowed to have his leg brace.

Petitioner's psychological well-being began to decline because of his punishment.

3. ***Conditions of Confinement***

a. Hygiene products
While in segregation, petitioner was not allowed to have deodorant, shaving cream, hair products, lotions, face or skin cream, his own toothpaste or toothbrush. He received a prescription for a skin condition that was causing him cracked skin.

b. Cold
Petitioner was not allowed to wear his own clothes or winter underclothes. He had a thin short sleeved tee-shirt, khaki shirts and pants and thin cloth slippers. It was so cold that petitioner could not work on his concrete desk in his cell because it felt like a slab of ice. Petitioner's cell had no insulation from the outside.

c. Light
The light in petitioner's cell was kept on 24 hours a day.

4. ***Visitors***
Because petitioner was allowed to see only three visitors at a time, his visits with his children declined. He was not allowed any contact during visits because he was cuffed to the wall in a partitioned booth.

5. ***Other***
While in segregation, petitioner was not allowed any phone calls, photographs, newspapers, personal writing, religious literature or apparel except for his Holy Book or personal books. He was not allowed to buy any canteen items other than writing supplies, participate in any programs, work an institution job, watch television, listen to the radio, use a typewriter or be outside. He had no window in his cell.

C. ***Access to the Courts***

On August 17, 1999, petitioner Jones 'El filed a motion in Racine County Court to correct an erroneous child support order. On August 19, 1999, petitioner received a court notice that a hearing would be held on September 23, 1999, and that it was petitioner's responsibility to make arrangements to appear at the hearing by phone. Between August 17, 1999 and September 23, 1999, petitioner was in Waupun's segregation unit and was allowed phone calls for legal and emergency purposes with the authorization of respondent Harding.

On August 20, 1999, petitioner showed respondent Harding his court notice and asked her to arrange a call to the court at the appropriate time. Respondent Harding refused to arrange the call and told petitioner that the court would have to contact her. On August 22, 1999, petitioner wrote the court to explain that the court had to contact respondent Harding. On September 23, 1999, petitioner was not allowed to call the court for the hearing; as a result, his case was dismissed. On October 15, 1999, petitioner received a letter from the court, informing him that his case was dismissed and that it was his responsibility to arrange calls to the court. The letter also informed petitioner that if he re-filed his case, it would be his responsibility to have respondent Harding arrange the call. On October 25, 1999, petitioner wrote respondent Harding, asking her to arrange a call to the court regarding his child support case and explaining that the court said it was his responsibility to arrange the call. Respondent Harding refused to arrange the call.

***7** On August 20, 1999, the court called Waupun twice to allow petitioner to appear by phone in a different case. Because respondent Harding had petitioner brought to the phone late for both phone calls, the hearing was postponed to a later date. Correctional staff told petitioner the new date of the hearing.

On November 4, 1999, petitioner wrote respondent Harding, explaining to her that she was denying him access to the court and had caused one of his cases to be dismissed. In the letter, he asked if he could contact the court by phone. Respondent Harding did not respond.

Petitioner re-filed his case challenging the child support order. No hearing has been scheduled in the case. As a result of his child support obligations, petitioner has had to borrow thousands of dollars and has been unable to send his children gifts or cards or buy stamps.

OPINION

A. ***Administrative Exhaustion***

Under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." *Perez v. Wisconsin Dept. of Corrections,* 182 F.3d 532, 535 (7th Cir.1999); *see also Massey v. Helman,* 196 F.3d 727 (7th Cir.1999).

Wis. Admin. Code § DOC 310.04 requires that "[b]efore an inmate may commence a civil action ..., the inmate shall file a complaint under §§ DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310.12, have an adverse decision reviewed under § DOC 310.13 and be advised of the secretary's decision under § DOC 310.14 ."

B. *Eighth Amendment: Conditions of Confinement*

In order to state a claim under the Eighth Amendment, petitioners' allegations about prison conditions must satisfy a test that involves both a subjective and objective component. *See Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." *Lunsford v. Bennett,* 17 F.3d 1574, 1579 (7th Cir.1994) (citing *Jackson v. Duckworth,* 955 F.2d 21, 22 (7th Cir.1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." *Lunsford,* 17 F.3d at 1579. In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." *Farmer,* 511 U.S. at 834. Deliberate indifference " 'implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." ' *Dixon v. Godinez,* 114 F.3d 640, 645 (7th Cir.1997) (quoting *Duckworth v. Franzen,* 780 F.2d 645, 653 (7th Cir.1985)).

***8** The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. *See Dixon,* 114 F.3d at 642. In order to violate the Eighth Amendment, deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981).

1. ***Supermax***

Petitioners contend that respondents have violated their Eighth Amendment rights by subjecting them to constant illumination; hourly bed checks throughout the night; extreme temperatures; confinement in their cells for 24 hours a day; a lack of windows in their cells; limited use of the phone; visits by video screen; constant monitoring; insufficient time in recreational facilities and inadequate recreational facilities. Petitioners have alleged that they have suffered physically and mentally as a result of the totality of these conditions.

Prisoners are entitled to "the minimal civilized measure of life's necessities." *Rhodes,* 452 U.S. at 347. Regardless of the merit of petitioners' claims individually, the determination whether prison conditions violate the Eighth Amendment requires a court to consider the totality of the conditions of confinement, considering things such as security and feasibility as well as the length of confinement. *See Gutierrez v. Peters,* 111 F.3d 1364, 1374 (7th Cir.1997); *DeMallory v. Cullen,* 855 F.2d 442, 445 (7th Cir.1988). The rationale for examining the prisoner's conditions as a whole is that "[*s]ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Wilson v. Seiter,* 501 U.S. 294, 304, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

Petitioner Johnson has filed and appealed several inmate complaints about his conditions of confinement, *see* complaints2000–1594 and 2000–10919 (light); 2000–13292 (hourly bed checks); 2000–2921 (cold); 2000–780 (constant monitoring); and 2000–11514 and 2000–9943 (recreation). Although petitioner Johnson did not file an inmate complaint about every single condition of his confinement, I find that the proof of administrative exhaustion he has submitted is sufficient under § 1997e(a) to constitute exhaustion on a totality of the circumstances claim under the Eighth Amendment. It is not necessary that he complain to the institution about things such as the lack of windows in his cell. Because petitioner Johnson's allegations of total isolation and sensory deprivation coupled with inadequate physical activity may violate

"contemporary standards of decency," *see Caldwell v. Miller,* 790 F.2d 589, 600 (7th Cir.1986), petitioner Johnson may proceed *in forma pauperis* on a totality of the circumstances claim against respondent Berge. As the warden of Supermax, respondent Berge is presumed to be aware of the conditions of Supermax's inmates' confinement.

***9** Petitioner Jones 'El has failed to exhaust his administrative remedies on a totality of the circumstances claim under the Eighth Amendment. Although petitioner Jones 'El filed a complaint in which he challenged many of the conditions at Supermax, *see* complaint1999–64177, his appeal was rejected as untimely. However, petitioner Jones 'El has submitted proof that he exhausted his administrative remedies on his claim that he was not provided with adequate shoes, socks and underwear, *see* complaint # 2000–3842, and that he was subjected to hot and cold temperatures, *see* complaint # 2000–9697. Petitioner Jones 'El will be granted leave to proceed *in forma pauperis* on his claim that he was subjected to extreme temperatures as a result of a faulty ventilation system in violation of his Eighth Amendment rights. *See Dixon,* 114 F.3d at 642, 644 (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment, stating "[c]old temperatures need not imminently threaten inmates' health to violate the Eighth Amendment"). Petitioner will be denied leave to proceed on his claim that he was denied adequate underwear, socks and shoes for failure to state a claim upon which relief may be granted. That petitioner Jones 'El could exchange his underwear and socks twice a week and was not allowed to possess athletic shoes does not rise to the level of an Eighth Amendment violation. *See, e.g., Johnson v. Pelker,* 891 F.2d 136, 138–39 (7th Cir.1989) (inmate's request for dry clothing and bedding, which was ignored for three days, did not rise to the level of a constitutional violation because it was a temporary inconvenience and not compounded by a deprivation of other necessities).

Section 1983 creates a federal cause of action for " 'the deprivation under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States." ' *Gossmeyer v. McDonald,* 128 F.3d 481, 489 (7th Cir.1997) (citations omitted). To prevail on a § 1983 claim, a plaintiff must prove that (1) the defendant deprived him of a right secured by the Constitution and laws of the United States; and (2) the defendant acted under color of state law. *See Adickes v. S .H. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). To establish individual liability under § 1983, petitioner must allege that the individual respondents were involved personally in the alleged constitutional deprivation or discrimination. Under § 1983, individual defendants cannot be held liable under a theory of respondeat superior. *See Hearne v. Board of Education of City of Chicago,* 185 F.3d 770, 776 (7th Cir.1999). " 'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation." ' *Vance v. Peters,* 97 F.3d 987, 991 (7th Cir.1996) (quoting *Sheik–Abdi v. McClellan,* 37 F.3d 1240, 1248 (7th Cir.1994)); *see also Wolf–Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir.1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). It is not necessary that the respondent participate directly in the deprivation. The official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Smith v. Rowe,* 761 F.2d 360, 369 (7th Cir.1985). *See also Kelly v. Municipal Courts of Marion County, Indiana,* 97 F.3d 902, 908 (7th Cir.1996); *Gentry v. Duckworth,* 65 F.3d 555, 561 (7th Cir.1995). At this stage of the proceedings, I will allow petitioner Jones 'El to proceed against respondent Berge until it is determined who was personally involved in subjecting him to cold temperatures. *See Duncan v. Duckworth,* 644 F.2d 653, 655–56 (7th Cir.1981) (explaining that a prisoner may name a high-level prison official as a defendant to uncover through discovery the names of persons directly responsible).

2. *Waupun*

***10** Petitioner Jones 'El contends that the following conditions of his confinement at Waupun violated his Eighth Amendment rights: denying him certain hygiene items; subjecting him to cold temperatures in his cell; and subjecting him to constant illumination. I need not determine whether petitioner Jones 'El has stated a claim upon which relief may be granted against respondents McCaughtry and Muraski, both employees of Waupun, because petitioner has failed to submit any proof that he exhausted his administrative remedies on these claims.

C. *Inadequate Medical Treatment*

The Eighth Amendment requires the government "to provide medical care for those whom it is punishing by incarceration." ' *Snipes v. Detella,* 95 F.3d 586, 590 (7th Cir.1996) (quoting *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). To state a claim warranting constitutional protection, a plaintiff must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). *See Estelle,* 429 U.S. at 104; *see also Gutierrez,* 111 F.3d at 1369. Attempting to define

"serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. *See id.* at 1371. The Supreme Court has held that deliberate indifference requires that "the official must be both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837.

To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle,* 429 U.S. at 106. Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. *See Vance,* 97 F.3d at 992; *see also Snipes,* 95 F.3d at 590–91; *Franzen,* 780 F.2d at 652–53.

1. ***Petitioner Johnson (at Supermax)***

Petitioner Johnson alleges that he suffered extreme oral pain and developed pericoronitis because he did not receive needed dental care and that he suffered bleeding gums, choking and lacerations because he was given some sort of contraption with small plastic spikes instead of a toothbrush. *See* Stedman's Medical Dictionary 1347 (27th ed.2000) (defining pericoronitis as "Inflammation around the crown of a tooth, usually one that is incompletely erupted into the oral cavity"). Petitioner submitted proof of administrative exhaustion on this claim, *see* complaints2000–11762; 2000–6485; and 2000–10891. Petitioner Johnson's allegations of dental problems are sufficient to establish that he had a serious medical need. At this stage of the proceedings, he will be allowed to proceed against respondent Berge until it can be determined who was responsible for providing petitioner with appropriate medical care. *See Duncan,* 644 F.2d at 655–56.

2. ***Petitioner Jones 'El (at Supermax and Waupun)***

***11** Petitioner Jones' El contends that he suffered bleeding gums and pain because he did not receive treatment for several months for two large cavities and one abscess and that he was denied access to adequate physical therapy at Supermax and Waupun. Even though oral pain coupled with two cavities and an abscess could constitute a serious medical need, petitioner Jones 'El has failed to exhaust his administrative remedies at either institution on his claim of denial of medical and dental treatment. Rather than complaining of the delay in attending to his dental needs, petitioner Jones 'El complained about the department of corrections' policy on abscesses, *see* complaint # 2000–7070, which does not demonstrate the requisite exhaustion under § 1997e(a).

D. ***Privacy***

Petitioners contend that they are subjected to routine cell searches, strip searches and body cavity searches and that such searches are not prompted by cause. In *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), pretrial detainees at a New York City facility alleged that the policy of conducting body cavity searches following visits from outsiders violated their Fourth Amendment rights. On the merits, the Supreme Court found that the searches were reasonable in light of the circumstances. *See id.* at 558–60. The Court held that reasonableness must be determined by balancing the need for the search against the invasion of personal rights, as revealed by four factors: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *See id.* at 559. The court held that the danger of contraband entering the facility was so significant that it outweighed the intrusive nature of the search. *See id.* at 560. It may be that petitioners have been searched following visits with visitors or visits to the law library or recreation area. However, from the allegations in petitioners' complaint, I cannot determine whether the cell and strip searches are reasonable.

Although petitioner Jones 'El will be denied leave proceed because he failed to submit proof of administrative exhaustion on this claim, petitioner Johnson will be granted leave to proceed *in forma pauperis* against respondent Berge (until it is determined who was responsible for the searches) because he has submitted the necessary proof of exhaustion, *see* complaints2000–7960 and 2000–883.

E. ***Denial of Access to the Courts***

I understand petitioners to be alleging that respondents have impeded their constitutional right of access to the courts. It is well established that inmates have a fundamental constitutional right of access to the courts. *See Bounds v. Smith,* 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). To state a claim, the prisoner must allege facts from which an inference can be drawn of "actual injury." *See Lewis v. Casey,* 518 U.S. 343, 349, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). This rule is derived from the doctrine of standing, *see id.,* and requires the prisoner to demonstrate that a non-frivolous legal claim has been frustrated or impeded. *See id.* at 353–54

nn. 3–4 and related text. In light of *Lewis,* a plaintiff must plead at least general factual allegations of injury resulting from defendants' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted.

1. *Supermax*

***12** Petitioners contend that they were denied meaningful access to the courts for a variety of reasons, including their allegations that they were not allowed to buy an adequate number of stamps, that the institution's legal room has inadequate legal books, that they are kept in restraints while in the library and that they are limited in their office supplies. Petitioners' claim that they were denied access to the courts at Supermax fails because they have failed to present any evidence of actual injury. *See Lewis,* 518 U.S. at 322. None of petitioners' allegations support an inference that they were prejudiced because of the actions of jail staff, including respondents' limit on the number of stamps or pieces of carbon paper. Petitioners have failed to identify a case in which their ability to defend or prosecute a claim was affected by prison staff's alleged obstruction of their access to the courts. Because petitioners fail to state a claim upon which relief may be granted, they will be denied leave to proceed *in forma pauperis* on this claim. Even if petitioners had stated a claim for denial of legal access, petitioner Jones 'El would be denied leave to proceed because he failed to submit proof of administrative exhaustion on this claim with the exception of his complaint about the institution's limitation on stamps, *see* complaint # 2000–1462. (Petitioner Johnson submitted the necessary proof, *see* complaints2000–2910, 2000–11505, 2000–9943 and 2000–9885.)

2. *Waupun*

Petitioner Jones 'El contends that respondent Harding denied him access to Racine County Court by refusing to arrange for petitioner to appear by phone at a time set by the court even though he requested that she do so. Although petitioner Jones 'El's case was dismissed because he failed to call the court at the specified time, he has failed to state a claim of denial of access to the courts upon which relief may be granted. Under certain circumstances, dismissal of a case may constitute the requisite injury under *Lewis.* In this case, however, petitioner has not suffered the requisite injury because he was allowed to refile his child support case without prejudice.

Similarly, petitioner's allegation that respondent Harding brought him to the phone late for a hearing in a different case that was postponed because of his tardiness fails to state a claim upon which relief may be granted. Petitioner's allegation that his hearing was postponed does not establish that he suffered the type of actual injury required by *Lewis.* Even if petitioner had stated a viable claim, it is unclear whether he exhausted his administrative remedies on this claim because of an untimely appeal, *see* complaint # 1999–62884. Regardless whether petitioner exhausted, he will be denied leave to proceed *in forma pauperis* on this claim for his failure to state a claim upon which relief may be granted.

F. *Free Exercise*

Petitioners contend that respondents violated their First Amendment rights by depriving them use of their prayer rugs, kufis, hardcover Korans or access to Islamic television programming. Also, petitioners contend that respondents have refused to distribute Islamic literature. In *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), the Supreme Court enunciated the proper standards to be applied in considering prisoners' free exercise claims. The Court held that prison restrictions that infringe on an inmate's exercise of his religion will be upheld if they are reasonably related to a legitimate penological interest. *See id.* at 349 (applying same standard to free exercise claims that applies where prison regulations impinge on inmates' constitutional rights). *See also Sasnett v. Litscher,* 197 F.3d 290, 292 (7th Cir.1999) ("Nothing in [*Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)] authorizes the government to pick and choose between religions without any justification."). The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard:

> ***13** 1. whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule;
>
> 2. whether there are alternative means of exercising the right in question that remain available to prisoners;
>
> 3. the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
>
> 4. although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al–Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir.1991) (quoting *Williams v. Lane,* 851 F.2d 867, 877 (7th Cir.1988)) (additional quotation marks omitted). Although there may be a reasonable relation between the regulations relating to prayer rugs, kufis and hardcover

Korans and a legitimate penological interest, I will allow petitioners to proceed with this claim because I cannot make that determination from the allegations in petitioners' complaint. Petitioners have filed inmate grievances regarding the denial of access to certain religious items, *see* complaints1999–64976 (petitioner Jones 'El) and 2000–4926 (petitioner Johnson). However, because petitioners have failed to submit proof regarding exhaustion of their claim that they lack access to Muslim television programming, they will be denied leave to proceed *in forma pauperis* on this claim.

G. *Procedural Due Process*

1. *Supermax*

I understand petitioner Jones 'El to allege that respondent Sharpe has violated his Fourteenth Amendment rights by depriving him of books, television, radio, toothbrush, hairbrush and access to programs without procedural due process. The Fourteenth Amendment prevents the state from depriving someone of life, liberty or property without due process of law—usually in the form of notice and some kind of hearing by an impartial decision maker. A procedural due process violation against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. *See Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). In *Sandin v. Conner,* 515 U.S. 472, 483–484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which ... imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After *Sandin,* in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. *See Wagner v. Hanks,* 128 F.3d 1173, 1176 (7th Cir.1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, *Sandin* does not allow suit complaining about deprivation of liberty). Petitioner Jones El's allegations that he was deprived of certain items and access to programs do not amount to "atypical, significant deprivations." Although it appears that petitioner exhausted his administrative remedies on this claim, *see* complaint # 2000–5861, he will be denied leave to proceed *in forma pauperis* on this claim for failure to state a claim upon which relief may be granted.

2. *Waupun*

***14** Petitioenr Jones 'El contends that respondents Muraski, Hautamaki and McCaughtry violated his rights under the Fourteenth Amendment because they issued him a conduct report, denied him the opportunity to review the evidence in the conduct report, found him guilty, required him to spend 184 days in segregation and lose 30 days of recreation and extended his mandatory release date by 92 days. Petitioner's sanctions of time in segregation and a loss of recreation privileges do not constitute "atypical, significant deprivations" implicating Fourteenth Amendment protection of petitioner's due process rights. To the extent that petitioner Jones 'El's mandatory release date was extended, his procedural due process claim fails because according to petitioner's own allegations, a state court reversed the finding of his guilt after he filed a petition for a writ of certiorari. Whatever liberty interest petitioner had in the duration of his confinement disappeared once the state court reversed the prison disciplinary decision. Petitioner Jones 'El will be denied leave to proceed *in forma pauperis* on his Fourteenth Amendment claim for failure to state a claim upon which relief may be granted.

H. *Other*

1. *Supermax*

a. Periodicals

Petitioners contend that it violates their First Amendment rights that respondents deny them access to certain magazines, newspapers and other periodicals. Prison actions that affect an inmate's receipt of non-legal mail must be "reasonably related to legitimate penological interests." *Thornburgh v. Abbott,* 490 U.S. 401, 409, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *see also Turner v. Safley,* 482 U.S. 78, 89–90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (setting forth four factor test); *Bell,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447. In petitioner Johnson's inmate complaint # 2000–11763, he complains that respondents require him to "earn" items such as newspapers and magazines. Therefore, to the extent that petitioners are contending that they are being deprived of certain periodicals as part of an incentive program, they will be denied leave to proceed because behavior modification is a legitimate penological interest. To the extent that petitioners are challenging the policy of the Wisconsin Department of Corrections prohibiting access to allegedly sexually explicit materials, they will be denied leave to proceed because they are members of the class of prisoners who are challenging the policy in another case in this court, *Aiello v. Litscher,* Case No. # 98–C–0791–C. Even if petitioners had stated a viable claim, petitioner Jones 'El would be denied leave to proceed because he failed submit proof of administrative exhaustion on this claim. (Petitioner Johnson exhausted

his administrative remedies, *see* complaints2000–5728 and 2000–11763.)

b. Mail

Petitioners allege that Supermax's failure to deliver mail on Saturdays violates their constitutional rights. I am aware of no provision in the Constitution that gives a person a right to receive mail on Saturdays. "The Courts are clear that an administrative decision by prison officials to withhold or delay the distribution of uncensored mail to prisoners simply does not rise to the level of a constitutional violation so long as the delay is a reasonable one." *Odom v. Tripp,* 575 F.Supp. 1491, 1943 (E.D.Mo.1983). *See also Azania v. Bayh,* No. 93–2094, 1994 WL 143005, at *1 (7th Cir.1994) ("We are unaware of any precedent establishing that inmates have a constitutional right to send mail on Saturdays. Many people who do not reside in prison are also unable to send mail on Saturdays or have substantial difficulty doing so. [Footnote in original]. The alleged failure to send mail on Saturdays is reasonably related to legitimate administrative concerns and thus is constitutional.") Petitioners will be denied leave to proceed *in forma pauperis* on this claim. Even if they had stated a viable claim, petitioner Johnson failed to submit proof of administrative exhaustion. (Petitioner Jones 'El has submitted such proof, *see* complaint # 2000–2972.)

2. *Waupun*

***15** Petitioner Jones 'El contends that respondents McCaughtry and Muraski violated his constitutional rights in other ways, ranging from denying him more than three visitors at a time to denying him certain privileges while he was in segregation. Because petitioner Jones 'El has failed to present any proof that he exhausted his administrative remedies on his these claims, he will be denied leave to proceed *in forma pauperis* with respect to them.

ORDER

IT IS ORDERED that

(1) Petitioner Micha'el Johnson's request for leave to proceed *in forma pauperis* on his Eighth Amendment totality of conditions of confinement claim, Eighth Amendment inadequate medical treatment claim and denial of privacy claim against respondent Gerald Berge is GRANTED;

(2) Petitioner Dennis E. Jones 'El's request for leave to proceed *in forma pauperis* on his claim against respondent Berge that he was subjected to extreme temperatures in violation of the Eighth Amendment is GRANTED;

(3) Petitioners' request for leave to proceed *in forma pauperis* on their claim against respondent Berge that they were denied certain religious items at Supermax Correctional Institution in violation of the First Amendment is GRANTED;

(3) Petitioners' request for leave to proceed *in forma pauperis* on their claims of interference with access to the courts at Supermax; denial of certain periodicals in violation of the First Amendment at Supermax; and denial of mail on Saturdays at Supermax is DENIED pursuant to 28 U.S.C. § 1915(e)(2)(B) for their failure to state a claim upon which relief may be granted;

(4) Petitioners' request for leave to proceed *in forma pauperis* on their claim that they did not have access to Muslim programming in violation of the First Amendment is DENIED pursuant to 42 U.S.C. § 1997e(a) for their failure to exhaust their administrative remedies;

(5) Petitioner Jones 'El's request for leave to proceed *in forma pauperis* on his access to the courts claims against respondent Harding; his procedural due process claims against respondents Sharpe, Muraski, Hautamaki and McCaughtry; and his Eighth Amendment claim of inadequate shoes, socks and underwear is DENIED pursuant to 28 U.S.C. § 1915(e)(2)(B) for his failure to state a claim upon which relief may be granted;

(6) Petitioner Jones 'El request for leave to proceed *in forma pauperis* on his claims of conditions of confinement at Waupun Correctional Institution; inadequate medical treatment at Waupun and Supermax; denial of privacy at Supermax; denial of visitors claim at Waupun; loss of privileges while in segregation at Waupun; and any remaining claims against respondents Laura Harding, David Hautamaki, Gary McCaughtry and Bruce Muraski is DENIED pursuant to 42 U.S.C. § 1997e(a) for his failure to exhaust his administrative remedies; and

(7) The unpaid balance of petitioners' filing fee is $99.80; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2). Petitioners are jointly and severally liable for this amount.

***16** (8) Service of this complaint will be made promptly after petitioner submits to the clerk of court one (1) completed marshals service forms and two (2) completed summonses, one for respondent Berge and one for the court. Enclosed with a copy of this order is a set of the necessary forms. If petitioners fail to submit the completed marshals service and summons forms before

October 3, 2000, their complaint will be subject to dismissal for failure to prosecute; and

(9) Petitioners should be aware of the requirement that they send respondent Berge a copy of every paper or document that they file with the court. Once petitioners have learned the identity of the lawyer who will be representing respondent, they should serve the lawyer directly rather than respondent. Petitioners should retain a copy of all documents for their own files. The court will disregard any papers or documents submitted by petitioners unless the court’s copy shows that a copy has gone to respondent or to respondent’s attorney.