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United States District Court,
W.D. Wisconsin.

Dennis E. JONES ‘EL and Micha‘el Johnson, and all others similarly situated, Plaintiffs,
v.
Gerald BERGE, Defendant.

No. 00–C–421–C. | Aug. 14, 2001.

Attorneys and Law Firms

Stephen P. Hurley, Edward R. Garvey, for Plaintiffs.

James E. McCambridge, Assistant Attorney General, Madison, WI, for Defendants.

Opinion

OPINION AND ORDER

CRABB, J.

***1** This is a civil action for injunctive, monetary and declaratory relief, brought pursuant to 42 U.S.C. § 1983. Plaintiffs Dennis E. Jones ‘El and Micha‘el Johnson are presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin. In an order entered on September 25, 2000, I granted plaintiffs’ request for leave to proceed *in forma pauperis* on plaintiff Johnson’s Eighth Amendment conditions of confinement claim and inadequate medical treatment claim and his Fourth Amendment denial of privacy claim; plaintiff Jones ‘El’s Eighth Amendment claim that he was subjected to extreme temperatures; and plaintiffs’ First Amendment claim that they were denied certain religious items. These individual claims will not be affected by this opinion. I denied plaintiffs’ request to proceed on all other claims. In an order entered February 16, 2001, I granted plaintiffs’ motion for class certification under Fed.R.Civ.P. 23(b)(2) and defined the class as “all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin.” In the same order, I granted plaintiffs’ motion for class certification as to plaintiffs’ Eighth Amendment conditions of confinement claim and Fourth Amendment privacy claim and denied plaintiffs’ motion as to their claims for denial of religious items and adequate medical care because it was unclear from plaintiffs’ original complaint that these claims affected the class as a whole.

Now plaintiffs have filed a proposed amended complaint in which they seek to add new plaintiffs who will represent the class, new defendants Jon Litscher and Does I–100 and additional claims for denial of adequate medical, dental and mental health care, use of excessive force, denial of religious items and violations of due process. I conclude that plaintiffs’ claims for denial of adequate medical, dental and mental health care and excessive force by use of the stun gun and stun shield affect the class as a whole. Therefore, I will grant plaintiffs’ motion for class certification as to these claims. However, I conclude that the claim for denial of religious items does not affect the class as a whole. The motion for class certification as to this claim will be denied. Also, I will dismiss plaintiffs’ due process claim because it fails to state a claim upon which relief may be granted. Because the claims certified for class action involve practices or policies of the Department of Corrections for which Jon Litscher is responsible, I will grant plaintiffs’ request to add him as a defendant. Because Does 1–100 are not necessary defendants and adding them as defendants would delay resolution of this case unnecessarily, I will deny plaintiffs’ request to add Does 1–100 as defendants.

Because plaintiffs are prisoners, I will screen their proposed complaint pursuant to the 1996 Prisoner Litigation Reform Act, identify cognizable claims and dismiss any claim that is frivolous, malicious or is not a claim upon which relief may be granted. 28 U.S .C. §§ 1915A(a), (b). The screening obligation applies at all stages of the lawsuit; therefore, each new claim must pass the failure to state a claim standard in order to be considered for class certification.

***2** In their proposed amended complaint, plaintiffs allege the following facts.

ALLEGATIONS OF FACT

A. *Parties*

Plaintiffs Dennis E. Jones ‘El and Micha‘el Johnson are inmates at the Supermax Correctional Institution. Additional proposed plaintiffs De‘Ondre Conquest, Luis Nieves, Scott Seal, Alex Figueroa, Robert Sallie, Chad Goetsch, Edward Piscitello, Quinton L’Minggio, Lorenzo Balli, Donald Brown, Christopher Scarver, Benjamin

Biese, Lashawn Logan, Jason Pagliarini and Andrew Collette are also inmates at Supermax. Defendant Gerald Berge is the warden at Supermax. Additional proposed defendants are Jon Litscher, Secretary of the Wisconsin Department of Corrections, and Does 1–100, individuals who participated in the alleged violations and whose identities are unknown at this time.

B. *Background*

Supermax opened in November 1999 in order to house "the worst of the worst" prisoners. Supermax is a 509–bed facility that currently houses approximately 365 inmates. The institution is located in Boscobel, a rural town in southwestern Wisconsin that is approximately two hours from Madison and three and one-half hours from Milwaukee. More than half of the inmates at Supermax are from southeastern Wisconsin. There is no public transportation to Boscobel and it is difficult for many families to visit inmates at Supermax.

According to Supermax's mission statement, it is designed to house inmates who demonstrate "serious behavioral problems" and to provide them the opportunity to acquire skills needed for their integration into the general prison population. Most of the inmates at Supermax have not demonstrated "serious behavioral problems." Many non-violent inmates have been transferred to Supermax to separate those with alleged gang affiliations, to ease overcrowding at other institutions, to build up population at Supermax in order to reduce the per capita cost of confining inmates there or for no apparent reason. For inmates who have demonstrated serious behavioral problems, Supermax offers no programs that teach the skills necessary to reintegrate into other institutions.

C. *Conditions of Confinement*

Physical conditions at Supermax are designed to subject prisoners to almost total social isolation and sensory deprivation. Inmates are locked in their cells for 24 hours a day, although some inmates leave their cells up to four hours a week. The cells are made of concrete walls and a solid "boxcar" door. The cells have no windows. Inmates do not see the outdoors during their entire incarceration at Supermax.

Inmates at Supermax receive no outdoor exercise and are not permitted to go outside at all. The only exercise space accessible to inmates is a windowless concrete cell in which the temperature is the same as that of the outside air. This cell contains little or no exercise equipment. Before inmates enter and after they exit the recreation cell, they are subjected to a strip search. Because conditions are so harsh, many inmates choose not to use the recreation cell and simply remain locked in their cells 24 hours a day.

***3** Many inmates at Supermax are allowed only one 6–minute telephone call each month. Inmates at Supermax are permitted no family or other personal visits, other than "video visits" in which the inmate and his visitor see each other only on a video screen, which provides distorted, delayed and poor quality images. Because of the remote location of Supermax and the burdensome requirements imposed on visitors, many inmates do not even receive these "video visits." The Department of Corrections has the technology to provide distance visiting by video, which would allow families to visit an inmate without traveling to Supermax, but has failed to provide that option to families.

Inmates' cells are illuminated 24 hours a day and inmates are instructed to sleep without covering their heads. Those who do not comply are awakened hourly throughout the night by security staff. These conditions result in chronic sleep deprivation that manifest themselves in physical symptoms, including chronic headaches and eye pain, and psychological symptoms, including confusion and depression.

Inmates are monitored 24 hours a day by security staff both in person and by video camera. As a result, male inmates are sometimes watched at close range by female security staff as they undress, shower, masturbate, urinate and defecate. Female security staff have sometimes commented on inmates' genitals within the hearing of inmates.

Like all other inmates at Supermax, plaintiff Johnson has been subjected to all of these conditions of confinement and has suffered physical and psychological pain and physical injury as a result.

Because of poor temperature control at Supermax, inmates are subjected to both extreme heat and extreme cold. Like all other inmates at Supermax, plaintiffs Jones 'El and Johnson have been subjected to these extreme temperatures and have suffered physical and psychological pain and physical injury as a result.

D. *Cell Searches and Strip Searches*

Inmates at Supermax are subjected to searches of their cells, as well as strip searches and body cavity searches on a frequent basis. Often searches are not conducted for

legitimate security purposes but for the purpose of humiliating and harassing inmates. Like all other inmates at Supermax, plaintiff Johnson has been subjected to these searches. He has undergone at least 22 of these searches, including four in a single month.

E. *Medical, Dental and Mental Health Care*

Inmates at Supermax do not receive adequate medical, dental and mental health care. An October 2000 report by the National Commission on Correctional Health Care noted a "backlog of mental health and dental requests." The report noted that there were many grievances filed by inmates "due to serious issues regarding delayed dental and psychiatric services and in general [they are] being denied medical treatment." The report also noted a "great deal of nursing staff turnover," and observed that there was no continuous "quality improvement program" for health services at Supermax.

1. *Medical care*

***4** Medical care at Supermax is provided by a private, for-profit contractor. According to a May 2001 report by the Wisconsin Legislative Audit Bureau, this contractor has not provided the medical services contracted for at Supermax. Inmates at Supermax do not receive necessary treatment for painful, debilitating and sometimes life-threatening conditions. The Legislative Audit Bureau concluded that over one-quarter of Supermax inmates suffer from chronic illnesses. Defendant has failed to provide medical staff and other resources to care properly for the serious medical needs of these chronically ill inmates.

Plaintiff De'Ondre Conquest suffers from terminal stomach cancer. Since entering Supermax, he has lost 56 pounds. He requires catheterization with the assistance of medical staff personnel in order to urinate. On one occasion, no one came to catheterize him all day. He also must take strong medication to control pain caused by his disease. One of the medications, Oxycodone, is to be taken as needed, up to once every three hours. He often fails to receive his Oxycodone as needed and as a result, he suffers severe pain.

Plaintiff Luis Nieves suffers from epilepsy. On July 31, 2000 at 4:00 pm, he told a nurse that he felt the initial symptoms of a seizure but the nurse did nothing. He then pushed the emergency call button; a nurse arrived at his cell fifteen minutes later. The nurse told Nieves that she would inform Dr. Jones about his problem and had Nieves fill out some paperwork. No other medical staff came to his cell until 9:45 p.m. when the nurse returned to deliver medication. By that time, Nieves had already suffered a seizure. On September 28, 2000, Nieves felt another seizure coming on. He was refused medical attention because the video camera in his cell was covered. The next morning, he suffered a seizure.

Plaintiff Scott Seal has a torn rotator cuff in his shoulder. Dr. Jones told him to rest the shoulder and take anti-inflammatory drugs. Seal did this for several months but the pain continued. Dr. Riley examined Seal's shoulder for surface defects but did not conduct any further exams or tests. It has been nine months since Seal reported the shoulder injury. His pain continues but he has received no other medical treatment for his injury.

Plaintiff Alex Figueroa was transported from Supermax to the University of Wisconsin–Madison Hospital in January 2001 to have a kidney stone removed. During the procedure, his kidney was punctured. On the ride back to Supermax, he was vomiting and bleeding out of a tube that drained from his kidneys. After returning to Supermax, he was in severe pain, saw blood in his urine and broke out in hives from his medication. On January 23 and 24, 2001, he pressed his emergency call button because he was in severe pain. On both days, no one responded for an hour and a half. When staff did respond, they treated his pain but did nothing about the blood in his urine.

2. *Dental care*

***5** Although it was originally planned that Supermax would have at least one full-time dentist, it now has only four hours a week of dentist time. Even inmates with painful and debilitating dental conditions must wait months for treatment.

Plaintiff Johnson was denied access to a toothbrush at Supermax. Instead, he was instructed to brush his teeth with a contraption that is fitted on the end of the finger and has small plastic spikes rather than bristles. When he tried to brush his back teeth, the device slipped off his finger and choked him. The use of this device has also caused him to suffer bleeding gums and lacerations. As a result of the use of this device and the denial of needed dental care, Johnson suffered extreme pain and developed a dental condition known as pericoronitis. This suffering was not unique to Johnson; the October 2000 report by the National Commission on Correctional Health Care noted "a number of complaints regarding the inadequacy of the toothbrush" provided to Supermax inmates.

Plaintiff Jones 'El suffered an abscess after medical staff would not provide him with a needed root canal. Because of delays in dental care, he has suffered extreme pain, bleeding gums and cavities.

Plaintiff Robert Sallie has only canines and one back molar and has been directed by his dentist to wear a denture to enable him to eat solid foods. Beginning in December 1999, his denture needed repair but Supermax staff refused to have the work done. As a result, he was unable to use his denture to chew his food and suffered painful gums from eating without his denture. On July 13, 2000, Sallie again asked staff to repair his denture. He was told that because the dentist is at Supermax for a limited number of hours, he sees only inmates with emergencies. Sallie's problem was not considered an emergency, so he was placed on a waiting list. He made an additional complaint on August 29, 2000 and was again told that the dentist works on an emergency basis only.

Plaintiff Luis Nieves has tried to receive dental services since he arrived at Supermax but his requests have been denied. He was told that the dentist has a limited schedule and was on a three-week vacation. Nieves could not be seen because his condition was not an emergency. No dental personnel examined him to make that determination.

Plaintiff Chad Goetsch has asked to have his teeth cleaned but his requests have been refused. He complained after waiting eighteen months but was told that because the dentist sees patients on a priority basis only, he can clean teeth only if he has time.

3. ***Mental health care***

Initially, the Department of Corrections had a policy that no mentally ill inmates would be transferred to Supermax. That policy has been abandoned, if it was ever in effect. Although the Department of Corrections maintains no statistics on the number of inmates who have been diagnosed with a mental illness, the Legislative Audit Bureau concluded that at least 15% of Supermax inmates are mentally ill. Numerous inmates at Supermax hear voices and are obsessed with suicidal thoughts; others smear feces, swallow metal objects, cut their flesh, attempt suicide by drug overdose, try to hang themselves and otherwise try to harm or kill themselves.

***6** The October 2000 National Commission on Correctional Health Care report noted that two out of three psychologist positions, as well as the only psychiatrist position, were vacant. As Supermax was planned, it was to have a full-time psychiatrist. Currently it has only four hours of psychiatrist time each week; as recently as October 2000, it had two hours of psychiatrist time each week. Because defendants failed to provide adequate qualified staff and other mental health resources, the needs of inmates with serious mental illnesses have gone untreated.

Plaintiff Christopher Scarver has been incarcerated at Supermax since April 11, 2000. He has suffered from mental health problems such as anxiety and hearing voices for many years and in 1992 was diagnosed as having either schizophrenia or bipolar disorder. Since his transfer to Supermax, his mental health problems have worsened. He has begun to feel suicidal. On May 12, 2001, Scarver attempted suicide by swallowing 30 tablets of Thorazine. He is not receiving adequate psychiatric treatment at Supermax and is unable to advance through the level system because of his illness.

Plaintiff Scott Seal suffers from severe depression and anxiety. At Supermax, Dr. Hagen gave him a book to enhance his mental health but it was confiscated by guards because Seal's level at the time (level one) did not allow any programming. He had also taken the drug Paxil to control his symptoms but the medication was switched as a cost-saving measure.

Plaintiff Benjamin Biese has been diagnosed with multiple mental illnesses, including bipolar disorder, obsessive compulsive disorder and severe personality disorder. Biese has been in poor mental health since the age of six. He has received treatment for these conditions at Mendota Mental Health Institute. As a result of lengthy waiting periods to see the psychiatrist at Supermax, Biese has not received appropriate psychiatric care. His symptoms, including impulsiveness and drastic mood swings, have intensified since his placement at Supermax.

F. ***Excessive Force***

Physical force is an everyday occurrence at Supermax. This force is directed disproportionately at mentally ill inmates, although not exclusively. Because of the sensory deprivation, social isolation and lack of adequate mental health services at Supermax, many inmates become mentally ill or their pre-existing mental illnesses worsen. Custodial staff are not properly trained in the identification and management of mentally ill inmates. When inmates manifest their illness by self harm or other disruptive behaviors, Supermax staff often respond with force rather than with appropriate mental health interventions.

Custodial staff at Supermax shock inmates with electroshock weapons, including the "Ultron II." The Ultron II is an electroshock weapon that emits a powerful and painful electric shock, often leaving burn marks on the skin. Use of the Ultron II constitutes potentially lethal force, particularly with inmates who have heart trouble or other chronic health conditions. Recently the Virginia Department of Corrections suspended use of the Ultron II after it was implicated in the death of an inmate.

***7** Plaintiff Andrew Collette has many chronic mental health problems, including impulse control disorder, antisocial personality disorder and hearing voices. He was prescribed medication for bipolar disorder in August 2000. He has had the Ultron II stun gun and “stun shield” used on him on numerous occasions. On October 27, 2000, guards came to his cell because he had covered his cell windows and video camera. When Collette would not comply with orders, he was stunned 10–15 times with the stun shield. A nurse refused to provide treatment for the pain and injuries caused by the stun shield.

Plaintiff Christopher Scarver has a serious mental illness. On December 10, 2000, a guard observed Scarver trying to cut himself with a razor. The guard sprayed mace at him. Scarver was given a citation for destruction of property, referring to the razor.

Upon returning to his cell, plaintiff Luis Nieves noticed that some of his property was missing and asked to see a supervisory officer. The guard shoved Nieves into his cell forcefully and shut the door, without removing his handcuffs. On another occasion, while Nieves was being strip searched, a guard grabbed Nieves’s head roughly and pressed a finger into his neck in an effort to force Nieves to open his mouth. Nieves received a bruise on his neck from the incident and had to take pain medication. On September 16, 2000, Nieves was told that he was going to be “placed in control.” While he was kneeling down, a “cell extraction team” entered his cell to restrain him. They slammed his head against the wall and Nieves lost consciousness briefly. When he regained consciousness, he was being handcuffed and taken out of the cell.

G. *Denial of Religious Items*

The Department of Corrections and Supermax receive federal financial assistance. At Supermax, inmates of various religious faiths are denied access to sacred texts and objects that are necessary to their religious exercise.

Plaintiffs Jones ‘El and Johnson are Muslim. They have been denied hardcover Korans (holy books), kufis (head coverings) and prayer rugs. These objects are necessary for their religious observance.

Plaintiff Edward Piscitello asked to participate in a Bible correspondence course but was told that Supermax does not allow inmates to participate in any correspondence courses. He was told to view this restriction as an incentive to behave and get transferred back to a less restrictive facility. Because Piscitello has been placed at Supermax ostensibly for his own protection, rather than for any behavioral problems, it is highly unlikely that he would be released from Supermax for good behavior.

Plaintiff Quinton L’Minggio has been a Muslim since 1988 and speaks and writes Arabic. He was denied access to certain religious materials, including Muslim books, that he needed for his study of Islam and for daily prayers. He was not allowed to participate in a Muslim feast held at the end of Ramadan because he complained that it was not being held at the correct time. The fact that female officers can see him nude when he is showering violates his religious beliefs.

***8** Plaintiff Lorenzo Balli is Native American. He asked to keep sacred Native American items in his cell, such as eagle feathers, a headband, a drum, sage, cider and sweet grass, which are necessary to his religious practice and which he believes pose no threat to security. Balli was denied these items.

Plaintiff Donald Brown is a devout Christian. On December 14, 1999, Supermax officers told him he would not receive dinner unless he submitted to a cell search because he was going on paper restriction, under which inmates are allowed to keep only one paper item in their cell at a time. He submitted to the search. When he returned to his cell, he discovered that the officers had not removed a large stack of legal papers and a full roll of toilet paper but had removed his Bible.

H. *Due Process*

At Supermax, inmates are subjected to a regime of deprivation and enforced idleness that is unique in the Department of Corrections. Plaintiffs are subjected to denial of privileges, restrictions on protected and discretionary activities and limitations on educational and employment opportunities that are more strict than those at any other Wisconsin prison. Access to legal materials and legal counsel is far more restricted at Supermax than at any other Wisconsin prison. Supermax inmates are also subject to a unique behavior modification program, known as the “level system.”

For plaintiffs who are or will be eligible for discretionary release, placement at Supermax results inevitably in plaintiffs’ spending more time in confinement than had they not been placed at Supermax. This is because of the length of time required to complete the program at Supermax, the stigma that attaches to any inmate who has been confined at Supermax for any reason and the resulting reluctance of defendants and other Department of Corrections officials to grant discretionary release to persons who have been confined at Supermax.

Through its legislature and governor, the State of Wisconsin intended that Supermax house only the “worst” and most dangerous inmates in the Wisconsin prison system. The majority of plaintiffs do not meet these mandatory criteria for placement at Supermax. Before being placed at Supermax, plaintiffs were denied due process hearings to determine whether they met the criteria for placement at Supermax and whether the decision to transfer to Supermax was based on credible and reliable evidence.

Plaintiff Donald Brown has been incarcerated at Supermax since December 12, 1999. In November 1994, he was placed in administrative confinement. He participated in many counseling programs and became a devout Christian. He regretted his past mistakes and believed he had turned his life around. On May 11, 1999 at an administrative confinement hearing, the committee unanimously recommended release from administrative confinement pending completion of a clinical treatment program at the Wisconsin Resource Center, a mental health treatment facility for inmates. The committee recommended unanimously that Brown be transferred to the Wisconsin Resource Center in medium security and noted that he had not misbehaved since November 1994. Nevertheless, Brown was transferred to Supermax on December 12, 1999. Records from the Department of Corrections Social Services state that he was supposed to go to the Wisconsin Resource Center but instead was transferred to Supermax when it opened. A note in his Supermax file dated October 10, 2000 states that “no one knows why he’s here” and a note dated October 24, 2000 states that there are “no good explanations” for why he is at Supermax.

***9** Plaintiff De‘Ondre Conquest is a non-violent offender imprisoned for a drug charge, with no history of violence in or out of the prison system. In addition, he has terminal cancer. He was transferred to Supermax because he allegedly sold his pain medication to another inmate.

Plaintiff Scott Seal is incarcerated for driving after his license was revoked. He has no history of violence in or out of custody. He was transferred to Supermax because he had a consensual sexual relationship with a female guard at Oshkosh Correctional Institution, causing him to be erroneously labeled “predatory to staff.”

Plaintiff Lashawn Logan was transferred to Supermax on January 10, 2001, when he was only 17 years old. He was incarcerated for car theft and possession of THC with intent to deliver. He has no history of violent behavior but was transferred to Supermax for possible gang affiliation.

Plaintiff Edward Piscitello is housed at Supermax ostensibly for his own protection. Since his incarceration in 1991, he has committed no violent acts and exhibited no behavioral problems in the prison system. He has had no problems with other inmates and does not believe placement at Supermax is necessary for his protection. He was told by the Program Review Committee that he would be transferred to Supermax; no incident preceded that determination.

Plaintiff Benjamin Biese was incarcerated at Supermax from February 16, 2000 to February 15, 2001. He was then transferred to Mendota Mental Health Institute to receive treatment for his multiple mental illnesses, including bipolar, obsessive compulsive and severe personality disorders. On June 25, 2001, Mendota staff told him that he was being transferred back to Supermax. He was given no explanation for the transfer.

Plaintiff Jason Pagliarini is a non-violent offender, having been convicted of auto theft and burglary when he was 18 years old. On October 10, 2000, he was transferred to Supermax from Jackson Correctional Institution, a medium security facility, for accepting money from the girlfriend of another inmate. At his program review committee hearing, the committee denied him the opportunity to speak on his own behalf and told him that the decision to transfer him had been made two weeks prior to the hearing. Pagliarini has no history of violent behavior while incarcerated and no prior juvenile record.

OPINION

A. *Additional Plaintiffs*

In their amended complaint, plaintiffs Jones ‘El and Johnson add several named plaintiffs to the action: De‘Ondre Conquest, Luis Nieves, Scott Seal, Alex Figueroa, Robert Sallie, Chad Goetsch, Edward Piscitello, Quinton L’Minggio, Lorenzo Balli, Donald Brown, Christopher Scarver, Benjamin Biese, Lashawn Logan, Jason Pagliarini and Andrew Collette. These plaintiffs are not seeking damages on an individual basis. Instead, the additional named plaintiffs are inmates at Supermax and are functioning as representatives of the class. Although plaintiffs do not allege facts relating to each of the additional proposed plaintiffs regarding each claim that will be certified for class action, these individuals are members of the class by virtue of being inmates at Supermax and will be added as plaintiffs.

B. *Additional Defendants*

***10** In the amended complaint, plaintiffs bring suit against an additional defendant, Jon Litscher, in his

official capacity. As Secretary of the Department of Corrections, Litscher is responsible for the administration of the entire department; he has the authority and duty to change any policy, practice or custom employed by the department and its agents that violates plaintiffs' constitutional rights. Plaintiffs' allegations allow an inference to be drawn that the alleged violations resulted from a policy, pattern, practice or custom of the Department of Corrections. *See Baxter v. Vigo County School Corp.,* 26 F.3d 728, 735 (7th Cir.1994). Accordingly, Litscher will be added as a defendant.

Plaintiffs also bring suit against Does 1–100, individuals whose identities are currently unknown to plaintiffs. Plaintiffs allege that these individuals are personally liable for the alleged violations. *Vance v. Peters,* 97 F.3d 987, 991 (7th Cir.1996) (quoting *Sheik–Abdi v. McClellan,* 37 F.3d 1240, 1248 (7th Cir.1994)) (" '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." '). However, Does 1–100 are not necessary defendants. Because the claims involve practices and policies of the Department of Corrections, an injunction directed at defendants Berge and Litscher would satisfy plaintiffs' request for injunctive relief. Moreover, the addition of Does 1–100 would require further amended complaints and delay resolution of this case unnecessarily. Accordingly, I will deny plaintiffs' request to add Does 1–100 as defendants.

C. *Standard for Class Action*

Fed.R.Civ.P. 23 requires a two-step analysis to determine whether class certification is appropriate. *Rosario v. Livaditis,* 963 F.2d 1013, 1017 (7th Cir.1992). Plaintiffs bear the burden of showing that these requirements have been met. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Retired Chicago Police Association v. City of Chicago,* 7 F.3d 584, 596 (7th Cir.1993). Plaintiffs must satisfy the four prerequisites in Rule 23(a) as to each of their claims: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequate representation). *Id.* Plaintiffs must also demonstrate that the additional claims are suitable for treatment as a class action under subdivision (b)(2), which is invoked when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2).

***11** Rule 23(b)(2) requires the presence of two factors: "(1) the opposing party's conduct or refusal to act must be 'generally applicable' to the class and (2) final injunctive or corresponding declaratory relief must be requested for the class." 7A Charles Wright et al., *Federal Practice and Procedure* § 1775, at 447–48 (2d ed.1986, Supp.2000). The first factor is met when "the party opposing the class has acted in a consistent manner toward members of the class so that his actions may be viewed as part of a pattern or activity, or has established or acted pursuant to a regulatory scheme common to all class members." *Id.* at 449. Rule 23(b)(2) requires that the challenged conduct be premised on a ground that is applicable to the entire class, but it is not necessary that all the class members be aggrieved by or desire to challenge defendants' conduct in order for some of them to seek relief under Rule 23(b)(2). *Id.; see also* Fed.R.Civ.P. 23 Advisory Committee's Note.

The second requirement of Rule 23(b)(2) is satisfied because plaintiffs have requested the court to enjoin defendants from continuing to violate their constitutional rights and to declare that defendants have violated their constitutional rights. The fact that plaintiffs Jones 'El and Johnson seek to recover monetary damages for themselves does not defeat certification under Rule 23(b)(2). *Jefferson v. Ingersoll International Inc.,* 195 F.3d 894, 897 (7th Cir.1999) ("It is an open question in this circuit-and in the Supreme Court-whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue.") (internal citations omitted).

D. *Claims Certified in Previous Order*

In the order entered February 16, 2001, I determined that plaintiffs' conditions of confinement and privacy claims satisfy the requirements of Rule 23(a) and (b)(2); the policies and practices of the prison that are the subject of these claims affect all inmates at the institution in a "generally applicable" manner. The allegations of fact underlying these claims have changed slightly in the amended complaint.

1. *Conditions of confinement*

In the September 25 order, this court summarized plaintiffs' conditions of confinement claim as including the following allegations:

> 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.

I noted that prisoners are entitled 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). Regardless of the merit of plaintiffs' 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. *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).

***12** In the amended complaint, in addition to reiterating the claims making up the totality of circumstances claim in their original complaint, plaintiffs allege further that they are monitored by female security staff 24 hours a day who have sometimes commented on inmates' genitals within the hearing of inmates. This additional fact will not be considered part of plaintiffs' conditions of confinement claim for several reasons. First, it does not relate to the over-arching concern behind the totality claim, the sensory deprivation and social isolation imposed upon inmates. Second, if plaintiffs are arguing that monitoring by female guards causes them humiliation and mental anguish, this claim would be a claim in tort for monetary relief that is not available under the Prison Reform Litigation Act. 42 U.S.C. § 1997e(c). Finally, the Seventh Circuit has held that a female guard's monitoring of a naked inmate neither violates the inmate's right of privacy nor constitutes cruel and unusual punishment, as long as the monitoring policy was not adopted to embarrass or humiliate the inmate. *Johnson v. Phelan,* 69 F.3d 144 (7th Cir.1995). There are no allegations supporting an inference that female guards were hired at Supermax for the purpose of embarrassing and humiliating inmates. Therefore, the facts underlying the totality of the circumstances claim remain identical to the ones alleged in plaintiffs' original complaint.

2. ***Privacy***

In the order of February 16, 2000, I certified for class action plaintiffs' claim for privacy under the Fourth Amendment. The allegations in the amended complaint are almost identical to those in plaintiffs' original complaint: inmates are subjected to cell, strip and body cavity searches on a frequent basis and not always for legitimate security purposes but rather to humiliate and harass inmates. In addition, under the liberal pleading requirements of Fed.R.Civ.P. 8(a), I construe plaintiffs' allegations regarding monitoring by female guards to relate to their privacy claim as well. However, as noted above, that plaintiffs are observed by female correctional officers does not state a violation under the Fourth Amendment. *Id.* Therefore, plaintiffs' motion to amend their complaint to add a claim that their right to privacy is being violated by the presence of female guards will be denied. The facts underlying the privacy claim remain identical to the ones alleged in plaintiffs' original complaint.

E. *Eighth Amendment: Inadequate Medical, Dental and Mental Health Care*

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). *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. *Id.* at 1371. The Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837.

***13** 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. *Vance,* 97 F.3d at 992; *see also Snipes,* 95 F.3d at 590–91; *Franzen,* 780 F.2d at 652–53.

In the order of September 25, 2000, I granted plaintiff Johnson leave to proceed on his claim that he received inadequate dental care for his oral pain, pericoronitis and bleeding gums. In the order of February 16, 2001, I determined that the allegations of fact in the original complaint regarding the claims for inadequate medical and dental care were specific to the named plaintiffs and did not certify the claim for class action. In their amended complaint, plaintiffs allege that Supermax provides inadequate medical, dental and mental health care on a systemic level.

Plaintiffs allege that the medical care at Supermax is provided by a private, for-profit contractor that does not provide medical staffing sufficient to treat inmates at Supermax. Plaintiffs give examples in their amended complaint of situations in which inmates with serious medical needs, such as pain resulting from stomach cancer and from kidney stones, did not receive prompt medical attention despite the inmates' having asked medical staff for treatment. Similarly, plaintiffs with serious dental and mental health needs, such as abscesses in need of root canals and suicidal tendencies, have not received medical attention despite their requests for treatment. (For the purpose of determining class certification, I am considering the individual problems as examples of a systemic problem but not as a basis for any action as to the particular inmate alleging a cause of action based on his problem.) Plaintiffs have alleged facts sufficient to establish that defendants are deliberately indifferent to their serious medical needs.

This claim for deliberate indifference to serious medical needs involves factual and legal issues that are common to all members of the class. Fed.R.Civ.P. 23(a). The question whether defendants' inadequate staffing violates plaintiffs' rights under the Eighth Amendment is generally applicable to the class. Fed.R.Civ.P. 23(b)(2). Therefore, plaintiffs' claim for inadequate medical, dental and mental health care will be certified as part of the class action.

F. *Eighth Amendment: Excessive Force*

Plaintiffs' claim of the use of excessive force is new in the proposed amended complaint. The central inquiry in analyzing an excessive force claim for constitutional validity is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian,* 503 U.S. 1, 6–7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. *Whitley v. Albers,* 475 U.S. 312, 321, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). In their amended complaint, plaintiffs allege that security guards regularly control inmates by using electroshock devices known as the "Ultron II" and the "stun shield" rather than by utilizing less harmful behavior control methods. In addition, plaintiffs allege that guards use inappropriate physical force when responding to self-harm and disruptive behavior of mentally ill inmates. Plaintiffs have alleged facts regarding use of the Ultron II and the stun shield sufficient to state a claim against defendants.

***14** Plaintiffs' allegation that defendants use physical force inappropriately with respect to mentally ill inmates is not amenable for consideration in a class action. Claims of excessive physical force require a case-by-case analysis of the circumstances in order to determine whether the amount of force used in each scenario was commensurate with the perceived need for force, taking into consideration the extent of the inmate's injury and the effort made by the officers to mitigate the force. *Whitley,* 475 U.S. at 321. Because the inquiry is highly individualized, plaintiffs' claim that the physical force used against mentally ill inmates at Supermax is excessive does not pass the typicality or commonality prerequisites to class certification under Fed.R.Civ.P. 23(a).

In contrast, plaintiffs' excessive force claim is suitable for class action as to defendants' use of the Ultron II stun gun and the stun shield. Although the distinction between these devices is not clear from the complaint, I assume that both are electroshock devices capable of emitting potentially lethal force. Plaintiffs allege that these electroshock devices cause great pain and often leave burn marks on the skin. Without examining the details of each class member's experience with the stun gun and the stun shield, I will certify this claim for class action only as to the question whether use of the stun gun and stun shield constitutes excessive force under any circumstances.

G. *First Amendment: Denial of Religious Items and Religious Land Use and Institutionalized Persons Act*

In the order of September 25, 2000, I granted plaintiffs Jones 'El and Johnson leave to proceed on their free exercise of religion claim in which they alleged that defendants denied them use of various religious items. In the amended complaint, plaintiffs allege that the

restriction on religion is systemic at Supermax in violation of both the free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act, 42 U.S .C. § 2000cc.

I find that this claim is not appropriate for treatment in a class action because it does not satisfy the prerequisites of numerosity, commonality and typicality under Fed.R.Civ.P. 23(a). 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. *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 which can be used in applying the "reasonableness" standard:

***15** 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).

In the amended complaint, plaintiffs allege that defendants do not allow them to keep various religious items in their cells, including hardcover Korans, kufis (head coverings), prayer rugs, Bibles, Bible correspondence materials, Muslim books, eagle feathers, headbands, drums, sage, cider and sweet grass. If this claim were certified for class action, it would be necessary to perform an individual analysis of each factor applied to each of these items, defeating the prerequisites of typicality and commonality. These items represent several different religions practiced by inmates at Supermax. However, there has been no showing that the religions represent those of the entire class or that a sufficient number of inmates practice a form of these religions that require these items, defeating the numerosity prerequisite. This claim requires too much individualized analysis to be certified for class action.

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, holds the government to a higher standard than the free exercise clause of the First Amendment. The act states that

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -
>
> (1) is in furtherance of a compelling state interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a). For each religious item listed in the amended complaint, this court would have to determine whether the burden is substantial, whether the state has a compelling interest in denying its use and whether the means of denying its use is the least restrictive. Despite the fact that these inquiries are not identical to those under the First Amendment, the nature of the inquiry under the Religious Land Use act is just as individualized. For the same reasons as those stated above, I find that plaintiffs' claim for denial of religious items fails to satisfy the prerequisites of commonality and typicality under Rule 23(a).

H. *Fourteenth Amendment: Due Process*

***16** 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. *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).

In their amended complaint, plaintiffs allege that the solitary confinement, denial of privileges, additional regulations and restrictions on protected and discretionary activities, the limitation on educational and employment opportunities, the lack of access to legal materials and legal counsel and the behavior modification program at Supermax impose an atypical and significant hardship on plaintiffs in relation to the ordinary incidents of prison life in the Wisconsin prison system. In short, plaintiffs contend that they have a liberty interest in remaining out of Supermax and that they were denied due process hearings before their placement there.

Although the conditions of confinement may violate plaintiffs' right to be free from cruel and unusual punishment, the conditions do not implicate a liberty interest under the Fourteenth Amendment. Plaintiffs allege that prisoners who are placed at Supermax serve more time in confinement than had they not been placed at Supermax. However, prisoners do not have a liberty interest in remaining out of segregation status so long as that period of confinement does not exceed the remaining term of their incarceration. *Wagner,* 128 F.3d at 1176. Plaintiffs also allege that the majority of inmates at Supermax do not meet the mandatory criteria for placement there: those who have demonstrated that they pose a high risk of escape, assaultive misconduct or other conduct likely to cause harm to themselves or others. Although defendant may not be following a Department of Corrections policy, this conduct does not infringe upon a liberty interest. Plaintiffs do not allege that they are held at Supermax beyond the term of their incarceration or that they have lost good time credits because of their placement at Supermax. *Id.* Plaintiffs have not alleged facts sufficient to establish that remaining out of Supermax implicates a liberty interest under *Sandin.* This claim will be dismissed for failed to state a claim upon which relief may be granted.

I. ***Notice to the Class***

***17** Pursuant to Rule 23(d)(2) and in accordance with the February 16, 2001 order, notice of the amendment to this class action must be provided because the allegations certified for class action have changed. The following amended notice is consistent with this order and will be distributed to inmates and posted in accordance with this order.

The United States District Court determined on August 14, 2001, that this action is a class action brought on behalf of all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin. The defendants in this case are Supermax Warden Gerald Berge and Department of Corrections Secretary Jon Litscher.

The complaint in this action alleges as follows:

1. That the totality of the conditions at Supermax constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Such conditions include constant illumination; hourly bed checks throughout the night; extreme temperatures; confinement of prisoners in their cells for 24 hours a day; a lack of windows in cells; limited use of the phone; visits by video screen; constant monitoring; insufficient time in recreational facilities and inadequate recreational facilities.

2. That Supermax prisoners are subjected to cell searches, strip searches and body cavity searches without cause in violation of the Fourth Amendment to the United States Constitution.

3. That the systemic inadequacies of the provision of medical, dental and mental health care at Supermax constitutes deliberate indifference to serious medical needs in violation of the Eighth Amendment to the United States Constitution.

4. That use of the stun gun and the stun shield constitutes excessive force in violation of the Eighth Amendment to the United States Constitution.

The United States District Court has not yet decided whether these allegations are true or to what relief, if any, the plaintiffs are entitled.

This suit seeks a judgment declaring that the alleged conditions at Supermax are unconstitutional and enjoining the defendant from engaging in the policies and practices that cause such conditions. Because the relief sought by plaintiffs is injunctive, class members may not opt out of the class. At the same time, this case does not prevent inmates from bringing separate lawsuits to present their claims for damages. However, except under exceptional circumstances, most such cases will likely be stayed until after the court has ruled on the constitutionality of the alleged practices and procedures at issue in this case.

The class is represented by Edward Garvey and Pamela McGillivray of Garvey & Stoddard; David C. Fathi of the National Prison Project of the ACLU Foundation; Howard Eisenberg, Dean and Professor of Law at Marquette University Law School; Micabil Diaz Martinez, Legal Director of the ACLU of Wisconsin; and Robin Shellow of the Shellow Group. All correspondence should be addressed to:

***18** Garvey & Stoddard, S.C.

634 W. Main Street, Suite 101

Madison, WI 53703

Every inmate may write to Judge Barbara Crabb if he has concerns about how the case is being handled by the attorneys for the class. Such correspondence should be addressed to:

The Honorable Barbara B. Crabb

United States District Court, Western District of Wisconsin

U.S. Courthouse

120 N. Henry Street

Madison, WI 53703

This notice must remain posted at Supermax Correctional Institution and will be distributed to prisoners upon their admission to Supermax until this action has ended.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion for class certification under Fed.R.Civ.P. 23(b)(2) is GRANTED as to their claims for deliberate indifference to serious medical needs, including medical, dental and mental health care, and for excessive force by use of the stun gun and stun shield.

2. De'Ondre Conquest, Luis Nieves, Scott Seal, Alex Figueroa, Robert Sallie, Chad Goetsch, Edward Piscitello, Quinton L'Minggio, Lorenzo Balli, Donald Brown, Christopher Scarver, Benjamin Biese, Lashawn Logan, Jason Pagliarini and Andrew Collette are added as plaintiffs.

3. Jon Litscher is added as a defendant.

4. In all other respects, plaintiffs' motion to amend their complaint is DENIED.

5. Defendants must distribute a copy of the notice set forth in this order to all current inmates at Supermax Correctional Institution by September 1, 2001, and to all incoming inmates upon their arrival at Supermax. Also, defendants must post notice in the law library or libraries in the institution no later than September 1, 2001.