IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAREN E. MARON, #7165182,

Petitioner,

v.

KENNETH M. SCHOPEN, Clerk of Court, Jefferson County; COURT STENOGRAPHER,

Respondents.

ORDER

01-C-161-C

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This is a proposed civil action for injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Daren Maron, who is presently confined at the Oregon Correctional Institution in Oregon, Wisconsin, seeks 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 affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a

prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has 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. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner contends that he has been unable to exercise his constitutional right to appeal his convictions and sentences because respondents have failed to give him copies of his trial transcripts. Petitioner will be denied leave to proceed in forma pauperis because he has failed to state a claim upon which relief may be granted under § 1983.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

On February 27, 1996, petitioner was sentenced to probation, which was

subsequently revoked. On August 13, 1998, petitioner was sentenced in case numbers 95CF-426, 95CF-427 and 96CF-80. The Department of Corrections does not have the sentencing transcripts on file. Legal Assistance to Institutionalized Persons Project tried to obtain the trial transcripts for petitioner from the court reporter who reported the August 13 proceedings and was unsuccessful. The Department of Corrections also tried on two occasions to obtain sentencing transcripts from the Jefferson County Clerk of Court. As of at least December 8, 2000, the court reporter had not prepared the transcripts and filed them with the circuit court as required under Wisconsin law. On January 9, 2001, the Circuit Court of Jefferson County ordered the "Jefferson County Courthouse" to release petitioner's transcripts from "13 September 1998." As of February 16, 2001, petitioner has not been provided with the sentencing and pretrial transcripts in these cases.

In 1999 and 2000, Judge Erwin denied petitioner's motion for sentence modification and withdrawal of his guilty pleas.

DISCUSSION

I. ACCESS TO THE COURTS

Petitioner contends that his inability to obtain his sentencing transcripts has prevented him from exercising his constitutional right to appeal. The relief petitioner asks for is that this court order respondent Schopen, Clerk of the Circuit Court for Jefferson

County, to produce the transcripts and that petitioner be awarded monetary damages. Although petitioner alleges that the circuit court ordered the production of the transcripts, the order states the date of the sentencing as September 13, 1998, instead of August 13, 1998, and therefore is probably ineffective.

Petitioner has not alleged that his inability to obtain transcripts prevented him from filing a notice of appeal or from pursuing an appeal. To the extent that transcripts are necessary to his appeal, the state appellate court is the proper court to enter an injunction requiring that the transcripts be produced. If petitioner has already pursued his state court remedies, he may file a writ of habeas corpus in this court seeking to overturn his conviction or sentence. However, as discussed below, he may not proceed on a civil rights claim under § 1983 until he has succeeded in having his conviction reversed or sentence modified. In any event, respondent Schopen does not appear to have a copy of the requested transcripts and cannot be sued for money damages for failing to turn over something he does not have. Similarly, it would be impossible for respondent Schopen to comply with an injunction ordering him to send petitioner the transcripts.

To succeed on a claim that he was denied access to the courts, petitioner must show that he has suffered actual injury. See Lewis v. Casey, 518 U.S. 343, 349 (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. However, petitioner may not pursue his claim in this case under 42 U.S.C. § 1983 because a judgment in petitioner's favor would imply the invalidity of his conviction or sentence. A civil rights suit may not be used to attack a conviction collaterally, regardless whether injunctive relief or damages are sought. See Hoard v. Reddy, 175 F.3d 531, 533 (7th Cir. 1999). In Hoard, a prisoner sued various county officials seeking damages for their having violated his constitutional right of access to the courts by hindering his efforts to litigate a state court collateral attack on his conviction. See id. at 532. The court of appeals affirmed the district court's dismissal of the suit on the ground that a convicted person may not seek damages on a theory that implies the invalidity of his conviction without first getting the conviction set aside. As in this case, the prisoner sought both damages and injunctive relief. The injunctions sought are similar in the two cases: plaintiff asks for an order that his transcripts be produced and Hoard sought an injunction ordering the state court to reopen his postconviction proceeding. The court of appeals distinguished such injunctive relief from the situation in which a prisoner seeks an injunction against blocking his access to the courts. See id. at 533. The court explained why § 1983 is not the appropriate avenue for relief in this situation:

> If a prisoner whose access to the courts is being blocked in violation of the Constitution cannot prove that, had it not been for the blockage, he would have won his case or at least settled it for more than $0 (the point emphasized in Lewis), he cannot get damages but he can get an injunction. In a case such as Heck [v. Humphrey, 512 U.S. 477 (1994)], where the prisoner is

> complaining about being hindered in his efforts to get his conviction set aside, the hindrance is of no consequence if the conviction was valid, and so he cannot get damages until the conviction is invalidated. . . . Since it is well known (and emphasized in [] Lewis []) that colorable claims have a settlement value, the prisoner may be able to show that had he not been hindered in prosecuting his claim he might have gotten some money for it, even if it wasn't a sure winner. . . . In the setting of Heck, there is nothing corresponding to a colorable claim; either the conviction was invalid, in which case the defendant suffered a legally cognizable harm, or it is not and he did not.

Id. at 533-534.

In the situation in which a prisoner alleges that he is being denied access to the courts to challenge the conditions of his confinement, he need not show that he would definitely have succeeded on his claim. In this case, however, petitioner was not injured by being unable to appeal unless he would have won his criminal appeal. See id. For the same reason, the District Court for the Northern District of Illinois has concluded that "[a] claim for interference with access to the courts in a criminal case is barred by Heck as applied by Hoard." Cappas v. Dobbins, No. 2000 C 8227, 2001 WL 322000 (N.D. Ill. Apr. 2, 2001).

To summarize, petitioner has no stand-alone constitutional right to obtain copies of his trial transcripts. The only way denial of his transcripts might rise to the level of a constitutional violation is if his inability to obtain transcripts prevents him from exercising his constitutional right to gain access to the courts. Because petitioner has a cognizable claim that he was denied access to the courts only if his appeal would have resulted in a reversal of his conviction or the shortening of his sentence, a judgment in his favor by this

court would imply that his current conviction or sentence is illegal. Such a finding is barred by Heck, 512 U.S. 477, and Hoard, 175 F.3d 531. Therefore, petitioner has failed to state a claim upon which relief may be granted that respondents denied him access to the courts by failing to provide him with his sentencing and pretrial transcripts.

II. STATE LAW CLAIM

Wis. Stat. § 973.08 requires a court officer to prepare a transcript within 120 days of a defendant's sentencing and to forward a copy to the Department of Corrections. Petitioner's allegations suggest that respondents have violated § 973.08 by failing to provide the Department of Corrections with petitioner's sentencing transcript. Because I will deny petitioner leave to proceed on his federal constitutional claim, I will decline to exercise supplemental jurisdiction over his state law claim. However, this ruling does not preclude petitioner from bringing that claim in state court.

The 1996 Prison Litigation Reform Act requires that "strikes" be recorded against inmates for every "action" that is filed which is "frivolous, malicious, or fails to state a claim upon which relief may be granted." See 28 U.S.C. § 1915(g). I have found that petitioner fails to state a federal law claim upon which relief may be granted. However, because petitioner asserted an additional state law claim in this action, a strike will not be recorded against him because it cannot be said that his action is without merit.

ORDER

IT IS ORDERED that

1. Petitioner Daren E. Maron's request for leave to proceed in forma pauperis on his claim that he was denied access to the courts is DENIED and this action is DISMISSED for his failure to state a claim upon which relief may be granted;

2. A strike will not be recorded against petitioner pursuant to § 1915(g);

3. Petitioner's motion for the appointment of counsel is DENIED;

4. The unpaid balance of petitioner's filing fee is $129.52; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2); and

5. This action is DISMISSED. The clerk of court is directed to enter judgment and close the file.

Entered this 24th day of May, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge