IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM FREDERICK WILLIAMS,

Petitioner, ORDER

v. 02-C-0472-C

CAPTAIN DAVID LISTUG; SERGEANT JONES; SERGEANT MEUER; DEPUTY NICHOLAS GOLDBERGER; DEPUTY MARK HORSTMANN; DEPUTY WILLIAM A. HENDRICKSON; DEPUTY J. BRIGHAM; DEPUTY PATTY; DEPUTY LINGUARD; DEPUTY BURCHETTE; DEPUTY B. HANEY; DEPUTY BOWERS; DEPUTY SURING; DEPUTY EHRLER (phonetically spelled); KARIANNE KUNDERT and DEPUTY BETTY (of subpoena department); ALL OF DANE COUNTY SHERIFF'S DEPARTMENT; TRACI ROBERTS; and DEPUTY PLENTY,

Respondents.

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This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner William Frederick Williams, an inmate at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, alleges that he was denied due process, retaliated against, subjected to cruel and unusual punishment, subjected to excessive force, denied access to the courts and misled about the service of a witness subpoena. Petitioner has submitted the initial partial payment required under 28 U.S.C. §

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, the prisoner's complaint must be dismissed if, even under a liberal construction, it is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a respondent who is immune from such relief. See 42 U.S.C. § 1915e.

Petitioner's request for leave to proceed in forma pauperis will be granted as to two claims: (a) respondent Kundert retaliated against him on May 19, 1996, by failing to conducting an impartial hearing and forging respondent Listug's signature on his appeal form because he had named her as a defendant in a § 1983 complaint; and (b) respondent Linguard subjected him to cruel and unusual punishment on April 29, 1996, by telling inmate Polk to turn up the volume on the television to inflict pain on him because he suffers from tinnitus. As to one of his access to the court claims, petitioner may have until October 11, 2002, to provide this court with a copy of his direct appeal in case 95-CF-2235 and the court's response in which it concluded that his appeal was untimely. Other than these three claims, petitioner's request for leave to proceed will be denied as to all claims.

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

ALLEGATIONS OF FACT

Petitioner William Frederick Williams is an inmate at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. At all times relevant to this complaint, petitioner was an inmate at the Dane

County jail. All respondents are deputies at the Dane County Sheriff's Department except for respondents Karianne Kundert and Traci Roberts, who are classification personnel.

On March 1, 1996, petitioner asked respondent Brigham for a bed located away from the television because he suffers from tinnitus and that a loud television has an adverse affect on this condition. (Tinnitus is defined as ringing or buzzing in the ear.) Respondent Brigham told petitioner that "you need to be where we can keep an eye on you." Respondent Brigham assigned petitioner the bed closest to the television. Petitioner asked respondent Brigham whether he could turn the volume down on the television. Respondent Brigham told petitioner that the other inmates might not want the volume lowered. No one was watching television so petitioner asked the two inmates who were standing closest to it whether he could turn down the volume. The inmates stated that they did not care. Petitioner turned the volume down from 32 to 25. Respondent Brigham called petitioner immediately to the front desk and told him he would be returning to the main jail (petitioner was currently in the Huber area) and into segregation. Petitioner became aware of the "exaggerated fabrication of the facts" when respondent Roberts read the incident report (#96003541) to him while he was in segregation. Respondent Roberts asked petitioner to sign a disciplinary hearing/determination form that was partially filled out and he did so. Respondent Roberts found petitioner guilty of "violating 1b, 15A, 22 and 22j" and recommended revocation of petitioner's Huber privileges. Petitioner was transferred to a non-Huber cell block.

On March 13, 1996, there were several vacant cells on the cell block. Respondent Goldberger approved petitioner's request to move to cell C. Respondent Goldberger opened the door to cell C for

petitioner so that he could move his property into that cell. Respondent Horstmann told respondent Goldberger that they wanted petitioner in cell A because it was near the food slot and television. Respondent Horstmann moved petitioner to cell A. Respondent Horstmann told petitioner that he was being locked down for 24 hours for lying to respondent Burchette about which cell he was assigned. Petitioner told respondent Horstmann that respondent Goldberger approved his move to cell C, but Horstmann told petitioner he was lying.

That same day, while transferring petitioner to segregation, respondent Horstmann "applied unnecessary and excessive force by twisting and pulling up on petitioner's wrist and hands with handcuffs tightly closed around the wrist."

Petitioner informed respondent Meuer of his tinnitus and the adverse affect that the loud volume of the television had on his condition. Respondent Meuer placed petitioner in segregation for 10 days and, on return, under the television.

On April 28, 1996, petitioner asked several inmates to turn down the volume on the television. The inmates made racial remarks about what they would do to petitioner's relatives. Petitioner was threatened several times and called racial names. Petitioner told the inmates that he would defend himself and an argument ensued. Respondent Hendrickson asked petitioner why he attempted to hit the inmates. Although petitioner tried to explain, respondent Hendrickson stated that he did not believe petitioner and took him to segregation. Petitioner had legal books and materials in his cell because he was attempting to appeal his conviction. Respondent Hendrickson took petitioner's legal materials and did not allow petitioner to have access to them.

On April 29, 1996, petitioner had a disciplinary hearing. Petitioner asked to be placed in administrative segregation so that he would not have to be under the loud television; he also asked for his legal materials. The hearing officer granted his request. Respondents Jones, Meuer, Horstmann and Kundert did not agree and moved petitioner under the television as punishment and encouraged inmates to turn up the volume. Respondent Linguard told inmate Omar Polk to turn up the volume in order to inflict pain on petitioner. Polk did so, causing petitioner to suffer intense ringing in the ears, mental anguish, emotional distress and an excruciating migraine headache.

On May 16, 1996, Deputy Wagner and Respondent Goldberger began going through petitioner's legal books and Wagner began ripping up legal documents, notes and personal mail. Petitioner told Deputy Wagner and respondent Goldberger that he was attempting to appeal his conviction in case 95-CF-2235. Deputy Wagner told petitioner that he could not appeal his case because he was not a lawyer. At the time, the sheriff's department "did not have an adequate grievance system (at least known to [petitioner])."

On May 17, 1996, petitioner filed a three-page complaint with the sheriff's department about the "harassment, discrimination, deprivation of legal materials/documents and due process." The sheriff's department refused to answer the complaint. That same day, petitioner went to the Dane County Circuit Court to have his Huber privileges reinstated. While petitioner was at court, Deputy Wagner confiscated his legal materials, including a § 1983 complaint against the same respondents listed in this complaint.

On May 17, 1996, respondent Goldberger took away petitioner's visitation privileges for a week without a hearing.

On May 19, 1996, Deputy Wagner told petitioner that he had received an incident report (#96008274). That same day, respondent Kundert served petitioner with a notice of disciplinary hearing. Petitioner told respondent Kundert that he had prepared a § 1983 civil rights complaint in which she was named as a defendant. Petitioner requested that someone other than respondent Kundert conduct the hearing because he believed that she could not be impartial. The request was denied. At the hearing, petitioner was denied witnesses and a staff advocate. Petitioner appealed the hearing to respondent Listug. Respondent Kundert forged respondent Listug's signature on his appeal, which affirmed the outcome of Kundert's hearing. Respondent Kundert retaliated against petitioner because he had named her as a defendant in the § 1983 civil rights complaint that was confiscated by Deputy Wagner.

On May 19, 1996, petitioner informed Deputy Wagner that he was appealing his conviction in another case (#95-CF-2235) and that he needed his legal materials. Deputy Wagner told petitioner to hire a lawyer and refused to return his legal materials. That same day, petitioner asked respondent Listug for his legal materials. Respondent Listug refused to direct the deputies to return these materials.

On May 20, 1996, petitioner asked respondent Jones for his legal materials. Respondent Jones told petitioner that he could have one case at a time. That same day, Deputy Wagner told inmate Severn Anderson that he would be in trouble if he let petitioner read the legal books he (Anderson) had requested. On May 21, 1996, Deputy Wagner placed petitioner in segregation and would not give him his legal materials.

On June 28, 1996, petitioner wrote a letter to respondent Jones regarding the "above claims" and

his suffering from being subjected to a loud television. Respondent Jones denied all requests.

The deprivation of petitioner's legal materials caused him to lose his right to a direct appeal under Wis. Stat. § 808.03(1) and he failed to meet a 20-day deadline. Petitioner was sentenced to four years' probation.

Petitioner's trial counsel delivered a subpoena to the Dane County Sheriff's Department for the appearance of a witness (Michael A. Shea) at petitioner's criminal trial (case 97-CF-725), which was held November 19 and 20, 1997. One week before trial, respondent Betty told petitioner's trial counsel that Shea had been served. On the day of trial, Shea did not appear. Petitioner's trial counsel contacted respondent Betty and was told that the subpoena had not been served because they were unable to locate Shea. At trial, petitioner was convicted of violating a domestic abuse order and disorderly conduct. Shea's testimony was essential and could have exonerated petitioner.

DISCUSSION

A. Due Process

I understand petitioner to allege that his due process rights were violated when: (1) he was denied witnesses or a staff advocate at a disciplinary hearing (2) respondent Kundert allegedly forged respondent Listug's signature, affirming the outcome of a disciplinary hearing on appeal; and (3) respondent Goldberger took away visitation privileges for a week without a hearing.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before plaintiff is entitled to

Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted).

Prisoners do not have a liberty interest in remaining out of segregation so long as that period of confinement does not exceed the remaining term of their incarceration. 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 Sandin, 515 U.S. at 486, the Supreme Court held that an inmate's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Petitioner does not have a liberty interest in remaining free of segregation or being confined without visitation privileges for a week because such confinement does not impose an atypical and significant hardship on him in light of "the ordinary incidents of prison life." Id. at 484.

To the extent petitioner is alleging that he was not given due process protections at his hearings (including the allegedly forged signature on his disciplinary hearing appeal), such procedures are not warranted in the absence of a liberty interest. See Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (in absence of liberty interest, "the state is free to use any procedures it chooses, or no procedures

at all."). Accordingly, petitioner will be denied leave to proceed on all of his due process claims.

B. Retaliation

I understand petitioner to allege that respondent Kundert retaliated against him on May 19, 1996, because he had named her as a defendant in a § 1983 civil rights complaint. The alleged acts of retaliation include failing to conduct an impartial hearing and forging respondent Listug's signature on his disciplinary hearing appeal. At this early stage of the proceedings, petitioner has stated a claim of retaliation because his allegations set forth the minimum facts necessary for the respondent to file an answer. See Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). Accordingly, petitioner will be granted leave to proceed on this claim.

C. Cruel and Unusual Punishment

Petitioner alleges that respondents Brigham (on March 1, 1996) and Meuer (on or about March 23, 1996) subjected him to cruel and unusual punishment in violation of the Eighth Amendment by placing him near a television after he informed them that he suffered from tinnitus, a condition that is adversely affected by a loud television. In addition, petitioner alleges that on April 29, 1996, respondents Jones, Meuer, Horstmann and Kundert encouraged unnamed inmates to turn up the volume on the television and that respondent Linguard told inmate Omar Polk to turn up the volume to inflict pain on petitioner; Polk did as instructed, causing petitioner to suffer intense ringing in the ear, mental anguish, emotional distress and an excruciating migraine headache.

As to respondent Brigham, plaintiff's own allegations indicate that Brigham allowed him to turn down the television "from 32 to 25" and that he was told that he was placed near the television so Brigham could "keep an eye on him." As to respondent Meuer, petitioner alleges that this respondent placed him near the television, not that the television was too loud or that it caused him pain. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain"). As to respondents Jones, Meuer, Horstmann and Kundert, petitioner alleges that they encouraged inmates to turn up the volume, but does not say that any inmate did so. As to respondent Linguard, petitioner alleges that Linguard told inmate Omar Polk to turn up the volume to inflict pain on petitioner; Polk did as instructed, causing petitioner to suffer intense ringing in the ear, mental anguish, emotional distress and an excruciating migraine headache. Accordingly, petitioner will be granted leave to proceed on his claim against respondent Linguard only. Because petitioner fails to allege unnecessary infliction of pain with respect to the other alleged television incidents, he will be denied leave to proceed as to those events.

D. Excessive Force

I understand petitioner to allege that on March 13, 1996, respondent Horstmann used excessive force in violation of the Fourth Amendment by twisting and pulling up on petitioner's wrist with handcuffs. Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim 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 (1992). "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated . . . whether or not significant injury is evident." Id. at 9 (citations omitted). 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 (1986).

Petitioner's nominal allegations of "twisting and pulling" do not indicate force beyond that which is needed to handcuff a prisoner. See Graham v. Connor, 490 U.S. 386, 396 (1989) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."). Accordingly, petitioner will be denied leave to proceed on this claim.

F. Access to the Courts

I understand petitioner to allege that he was denied access to the courts when respondents Hendrickson (on April 28, 1996) and Listug (on May 19, 1996) denied him access to his legal materials. Petitioner alleges further that as a result of these acts he was unable to file a § 1983 civil rights claim and that he lost his right to a direct appeal on his criminal conviction in case 95-CF-2235. (Although petitioner alleges acts committed by Deputy Wagner in his complaint, he failed to name Wagner as a party in this proposed lawsuit.)

It is well established that prisoners have a constitutional right of access to the courts for pursuing

post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez, 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989).

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial." See Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. 343). At a minimum, a plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." See id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint). This principle derives from the doctrine of standing and requires that plaintiff demonstrate that a non-frivolous legal claim has been or is being frustrated or impeded. Lewis, 518 U.S. at 353.

Petitioner's alleged delay in his ability to file this § 1983 claim does not establish an actual injury. See Gentry v. Duckworth, 65 F. 3d 555, 559 (7th Cir. 1995) (mere delay without more does not establish actual injury). Therefore, he will be denied leave to proceed on this claim. As to petitioner's alleged loss of his right to direct appeal on his criminal conviction, petitioner fails to allege whether he had counsel on appeal. To insure meaningful access to the courts, states have the affirmative obligation to provide inmates with "adequate law libraries *or* adequate assistance from persons trained in the law."

Bounds, 430 U.S. at 828 (emphasis added). Thus, if petitioner had appointed counsel on appeal, the fact that he was denied access to his legal materials, even if true, would be not mean he had been denied access to the courts. On the other hand, if petitioner proceeded pro se on appeal because, for example, his appointed counsel opted to file a no merit report, see Wis. Stat. § 809.32(1)(b), he must nevertheless establish that the alleged denial of access to legal materials prevented him from litigating a *non-frivolous* case. Petitioner may have until October 11, 2002, to provide this court with a copy of his direct appeal and the court's response in which it concluded that his appeal was untimely. If petitioner fails to submit the requested materials, he will be denied leave to proceed on this claim.

G. Witness Subpoena

I understand petitioner to allege that respondent Betty told petitioner's trial counsel mistakenly that a critical witness, Michael A. Shea, had been served a subpoena ordering him to appear at trial when in fact Shea had not been served. Petitioner alleges that Shea's testimony was essential and "could have exonerated" him and that he was convicted of violating a domestic abuse order and disorderly conduct. This allegation does not state a constitutional violation, merely an act of negligence. Accordingly, petitioner will be denied leave to proceed on this claim.

ORDER

IT IS ORDERED that

1. Petitioner William Frederick Williams's request for leave to proceed in forma pauperis is

GRANTED as to two claims: (a) respondent Karianne Kundert retaliated against him on May 19, 1996, by failing to conducting an impartial hearing and forging respondent Listug's signature on his appeal form because he had named her as a defendant in a § 1983 complaint; and (b) respondent Deputy Linguard subjected him to cruel and unusual punishment on April 29, 1996, by telling inmate Polk to turn up the volume on the television to inflict pain on petitioner because he suffers from tinnitus;

2. A ruling will be reserved on petitioner's denial of access to the courts claim to allow petitioner until October 11, 2002, to provide this court with a copy of his direct appeal in case 95-CF-2235 and the court's response in which it concluded that his appeal was untimely. If he fails to do so, he will be denied leave to proceed on his claim that respondents William A. Hendrickson and David Listug denied him access to the courts by withholding his legal materials and these two respondents will be dismissed from this case.

3. Other than the three claims set forth above, petitioner request for leave to proceed in forma pauperis is DENIED as to all claims because they are legally frivolous;

4. All respondents except respondents Karianne Kundert, Deputy Linguard, William A. Hendrickson and David Listug are DISMISSED;

5. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will

disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or respondents' lawyers; and

6. The unpaid balance of petitioner's filing fee is $148.51; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 27th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge