IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSEPH D. KOUTNIK,

Petitioner, ORDER

v. 03-C-345-C

GERALD BERGE, JON E. LITSCHER,
CAPTAIN LINJER, CAPTAIN BLACKBOURN
and C.O. LEIN,

Respondents.

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This is a proposed civil action for declaratory, monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Joseph Koutnik, who is currently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, requests leave to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915. He alleges that respondents violated his First Amendment right to free speech when they confiscated and a destroyed a letter he sent to his brother and then disciplined him because he signed the letter, "KUJO."

From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the 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, on three or more previous occasions, the prisoner has 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.

I conclude that petitioner has stated a claim upon which relief may be granted. Because respondents' decision concerns censorship of outgoing mail, they will have to show that their decision furthers a substantial governmental interest and that the decision was necessary to further that government interest.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Joseph Koutnik is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. On March 6, 2002, he attempted to mail a letter to his brother, Jared Koutnik, who lives in East Lansing, Michigan. Respondent Lein, a correctional officer at the prison, intercepted the letter and refused to mail it. The following day, petitioner received a "notice of non-delivery of mail" from respondent Linjer, another correctional officer. The

form stated that the letter "concerns an activity, which, if completed, would violate the laws of Wisconsin, the United States, or the Administrative Rules of the Department of Corrections." On March 8, 2002, Lein issued a conduct report to petitioner. In the report, Lein alleged that petitioner had violated Wis. Admin. Code §§ DOC 303.31("False Names and Titles") and DOC 303.20 ("Group Resistance and Petitions") because he signed the letter with the name "KUJO, " which Lein believed was petitioner's nickname in a gang. Kujo is petitioner's "childhood nickname."

Wis. Admin. Code § DOC 303.31 provides:

> Any inmate who uses any of the following is guilty of an offense:
>
> (1) A title for the inmate other than Mr., Ms., Miss, or Mrs., as appropriate.
>
> (2) A name other than the name by which the inmate was committed to the department unless the name was legally changed.

Wis. Admin. Code § DOC 303.20 provides:

> (1) Any inmate who participates in group activity which is not approved under s. DOC 309.365 or is contrary to provisions of this chapter is guilty of an offense.
>
> (2) Any inmate who joins in or solicits another to join in any group petition or statement is guilty of an offense, except that the following activities are not prohibited:
>
> (a) Group complaints in the inmate complaint review system.
>
> (b) Group petitions to courts.
>
> (c) Authorized activity by groups approved by the warden under s. DOC

309.365 or legitimate activities required to submit a request under s. DOC 309.365(3) or (4).

(d) Group petitions to government bodies, legislators, courts or newspapers.

(3) Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02(11), or possesses any gang literature, creed symbols or symbolism is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolism is an act which shows the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

(Although the conduct report does not specify which provisions petitioner violated, presumably, petitioner was disciplined under §§ DOC 303.31(2) and 303.20(3).)

Petitioner received a disciplinary hearing on March 25, 2002. Respondent Blackbourn was the hearing officer. Respondent Linjer submitted a statement that his "training and experience in the Department of Corrections indicates the material suspected of violating DOC 303.20(3) is consistent with gang literature, creed(s) symbols or symbolism's. . . . Inmate Koutnik is identified as an active member of this non-sanctioned group [the Simon City Royals]." Linjer's allegation is incorrect; the letter contained no gang literature, creed or symbols. Respondent Lein admitted that petitioner's letter did not mention gang activity or membership in a gang.

Respondent Blackbourn found petitioner guilty of violating Wis. Admin. Code §§ DOC 303.20 and 303.31. With respect to § DOC 303.31, Blackbourn wrote that by signing the letter "KUJO," which was not petitioner's "given name," petitioner violated the

regulation. With respect to § DOC 303.20, he relied on respondent Linjer's statement that petitioner is an "identified member" of a gang and his gang nickname is "Kujo." In addition, Blackbourn wrote that petitioner was "continuing to acknowledge his participation by continual usage of his gang nickname." He sentenced petitioner to 360 days of program segregation and 30 days of cell confinement. In addition, he ordered that petitioner's letter to his brother be destroyed. Petitioner could not earn good time credits or advance through the prison's level system for the 360 days he was on program segregation.

Petitioner appealed the decision of the disciplinary committee to respondent Gerald Berge, the prison's warden, who affirmed respondent Blackbourn's decision. Petitioner then filed an inmate complaint challenging the disciplinary decision, but his complaint was dismissed and affirmed on appeal by the office of Jon Litscher, Secretary of the Wisconsin Department of Corrections.

On July 18, 2002, petitioner filed a petition for a writ of certiorari in the Circuit Court for Dane County, Wisconsin, naming respondent Berge as the defendant. In a decision dated March 31, 2003, the circuit court reversed the findings of guilt for both §§ DOC 303.31 and 303.20. With respect to § DOC 303.31, the court concluded that "there is no evidence, much less substantial evidence, that Koutnik's use of 'Kujo' to sign the letter to his brother in the circumstances here was the use of a 'false name or title.'" With respect to § DOC 303.20, the court found that there was insufficient evidence to prove that

petitioner was a member of a gang, that he participated in a gang or that he possessed gang-related items. The court went on to conclude that even if there had been sufficient evidence to support a finding of guilt under either regulation, the decisions would have to be reversed nevertheless because they violated the First Amendment. Applying the standard articulated in Procunier v. Martinez, 416 U.S. 396 (1974), for outgoing mail, the court concluded that the prohibition on petitioner's use of the name "Kujo" in letters was "greater than necessary" to protect the government's substantial interest in limiting gang activity and preventing inmates from misleading others.

DISCUSSION

I understand petitioner to allege that respondents violated his right to free speech under the First Amendment when they confiscated and destroyed his letter to his brother and disciplined him for signing the letter "KUJO" instead of his real name. As noted above, petitioner raised this issue before the circuit court in his petition for a writ of certiorari and the court found in petitioner's favor. Perhaps because damages may not be awarded on certiorari, Coleman v. Percy, 86 Wis. 2d 336, 341, 272 N.W.2d 118, 121 (Ct. App. 1978), petitioner has now filed an action in this court under 42 U.S.C. § 1983, seeking compensatory and punitive damages. (Petitioner also requests a declaration that Wis. Admin. §§ DOC 303.31 and DOC 303.20 are unconstitutional, a question the circuit court

did not reach, and an injunction requiring respondents "to allow prisoners to seal all purely outgoing [mail]."")

An initial question that must be addressed is whether petitioner's decision to seek a remedy in state court prevents him from seeking further relief in federal court. Generally, a party may not bring the same claim in different forums. Although claim preclusion is an affirmative defense, the court of appeals has held that a court may raise an affirmative defense on its own if it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002).

In some cases a prisoner *must* have his sentence invalidated through a petition for a writ of habeas corpus or other means before he may pursue an action under § 1983. However, this is only when the inmate's claim calls into question the validity or duration of his confinement. Heck v. Humphrey, 512 U.S. 477 (1994). In this case, however, the punishment petitioner received did not extend the length of his confinement. Although petitioner alleges that he could not accumulate good time credits while he was in program segregation, the disciplinary decision did not *take away* any credits. The disciplinary decision may have inhibited petitioner's ability to *shorten* his sentence, but it did not extend his sentence beyond what it was at the time. Therefore, petitioner's success on his claim would not call into question the fact or duration of his confinement and he did not need to invalidate his disciplinary decision before filing a suit under § 1983. See DeWalt v. Carter,

224 F.3d 607, 617 (7th Cir. 2000) (rule of Heck applies only when prisoner is challenging fact or duration of confinement).

Although petitioner could have filed a § 1983 claim in the first instance, I conclude that his failure to do so does not mean that his case in this court must be dismissed. The court of appeals has held recently that claim preclusion "does not ordinarily apply" to certiorari actions because "'certiorari is a limited form of review, while a claim under § 1983 exists as a uniquely federal remedy that is to be accorded a sweep as broad as its language.'" Wilhelm v. County of Milwaukee, 325 F.3d 843, 846 (7th Cir. 2003) (quoting Hanlon v. Town of Milton, 235 Wis. 2d 597, 612 N.W.2d 44 (2000)). Although Wilhelm and Hanlon did not involve claims brought by prisoners, there is no compelling reason why the rule of those cases should not apply here.

The next question is whether the doctrine of issue preclusion applies so that the circuit court's conclusion that petitioner's First Amendment rights were violated controls in this case. Federal courts are required to give prior state court judgments the same preclusive effect as they would have in that state. 28 U.S.C. § 1738. In Wisconsin, "the doctrine of issue preclusion forecloses relitigation of an issue that was litigated in a previous proceeding involving the same parties or their privies." Masko v. City of Madison, 2003 WI App 124, ¶4. To have preclusive effect, the issue must have been "actually litigated" in the first action *and* be"necessary" to its outcome. May v. Tri-County Trails Commission, 220 Wis. 2d 729,

734, 583 N.W.2d 878, 880 (Ct. App. 1998).

In this case, it is clear from the decision of the circuit court, which is attached to petitioner's complaint, that the parties litigated the issue whether the disciplinary decision violated the First Amendment. Whether the issue was "necessary" to the circuit court's decision is not as clear. Before discussing the First Amendment issue, the circuit court concluded that the disciplinary decision must be reversed because there was insufficient evidence to support it. The court addressed petitioner's First Amendment claim in the alternative, writing, "Even if there had been sufficient evidence to support a finding of Koutnik's guilt under either of the rule provisions, this court would nonetheless reverse the decision of the disciplinary board because the disciplinary rules, as applied, violate Koutnik's rights under the First Amendment to the United States Constitution." Thus, there is an argument that the circuit court's discussion of the First Amendment issue was dicta and not necessary to its judgment.

It does not appear that there is any Wisconsin case law that discusses the preclusive effect of alternate holdings. Other authority is not completely uniform on this issue. 18 Charles Alan Wright, et al., Federal Practice & Procedure § 4421 (2d ed. 2002) (citing cases that hold that *all* holdings should have preclusive effect and other cases holding that *no* holdings should have preclusive effect when the first court's decision included alternative holdings). However, the trend appears to be that neither holding has preclusive effect if

either would have been sufficient to support the result. See Peabody Coal Co. v. Spese, 117 F.3d 1001, 1008 (7th 1997) (citing authorities).

I conclude that there is no preclusive effect to the circuit court's decision that petitioner's First Amendment rights were violated. The general rule is that courts should avoid unnecessary questions of constitutional law. Clinton v. Jones, 520 U.S. 681, 690 n.11 (1997) ("If there is one doctrine more deeply rooted than any other in process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). In this case, the circuit court could have avoided the constitutional question by basing its decision on the evidentiary issue alone. To the extent that one of the circuit court's holdings should have preclusive effect, it is the state law determination regarding sufficiency of the evidence. Therefore, I will analyze petitioner's claim independently. (Because I have concluded that the circuit court's discussion of the First Amendment issue was not necessary to its holding, I need not decide whether the respondents in this case other than Berge have a "sufficient identity of interest" with Berge or whether applying issue preclusion in this case would be consistent with "fundamental fairness," two additional requirements that would have to be met before issue preclusion could be applied. Paige K.B. ex rel. Peterson v. Steven G.B., 226 Wis. 2d 210, 594 N.W.2d 370 (1999).)

The circuit court concluded that petitioner's First Amendment claim should be

analyzed under the standard of Procunier v. Martinez, 416 U.S. 396 (1974), rather than Turner v. Safley, 482 U.S. 78 (1987), because the issue concerned censorship of outgoing rather than incoming mail. I agree. Generally, when an inmate contends that prison officials have violated his constitutional rights, the question is whether the defendants' conduct is reasonably related to a legitimate penological interest. However, because the interest in prison security is diminished for outgoing mail, the Supreme Court has applied a heightened standard of review for censorship of outgoing mail. See Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude that the implications of incoming materials."). Specifically, the question is whether the censorship furthers "one or more of the substantial governmental interests of security, order, and rehabilitation" and is "no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier, 416 U.S. at 413. Particularly in light of the circuit court's conclusion, I cannot conclude at this stage of the litigation that respondents were furthering a substantial government interest when they made their decision to confiscate petitioner's letter because he signed it KUJO. Therefore, petitioner will be granted leave to proceed on this claim. Respondents will have an opportunity at trial or on a motion for summary judgment to demonstrate that their action complied with the First Amendment. If petitioner believes that §§ DOC 303.31 and DOC 303.20 are unconstitutional on their face, it will be his burden to prove this in later

stages of the litigation.

ORDER

IT IS ORDERED that

1. Petitioner Joseph Koutnik's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondents Gerald Berge, Jon Litscher, Captain Linjer, Captain Blackbourn and C.O. Lein violated his First Amendment right of free speech when they destroyed his letter to his brother and disciplined him under Wis. Admin. Code §§ DOC 303.31 and 303.20 for signing his name "KUJO" in the letter.

2. The unpaid balance of petitioner's filing fee is $140.42; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to defendant or to defendant's attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his

documents.

Entered this 25th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge