IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GLENN M. DAVIS,

Petitioner, ORDER

v. 05-C-374-C

JAMES E. DOYLE, Governor, State of Wisconsin;
E. MICHAEL McCANN, Milwaukee District Attorney;
ROBERT D. DONOHOO, Deputy District Attorney, Milwaukee;
MATTHEW J. FRANK, Secretary of Dept. of Corrections;
CATHERINE J. FARRY, Warden of New Lisbon Corr. Inst.;
LARRY FUCHS, Security Director of New Lisbon Corr. Inst.;
RUDOLPH T. RANDA, Eastern District of Wisconsin Chief Judge;
TED E. WEDEMEYER, Presiding Appellate Court Judge, Milwaukee;
CAPTAIN HAREL, staff, New Lisbon Corr. Inst.;
SARGENT CORAN, staff, New Lisbon Corr. Inst.;
STEPHANIE G. ROTHSTEIN, Assistant District Attorney, Milwaukee;
SHIRLEY S. ABRAHAMSON, Wisconsin Supreme Court Chief Judge;
CHRISTOPHER PAULSEN, Wisconsin Supreme Court Chief Deputy Clerk;
NIKOLA KOSTICH, Public Defender, Milwaukee;
CONTROLLING PERSONNEL OF THE COUNTY OF MILWAUKEE;
CONTROLLING PERSONNEL OF THE CITY OF MILWAUKEE;
STAFF AND PERSONNEL OF THE NEW LISBON CORR. INST. MAIL ROOM

Respondents.

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This is a proposed civil action for monetary and injunctive relief, and to vacate a prior conviction, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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). 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 respondents violated his rights under the First Amendment by interfering with his legal mail, and violated his rights under the Fourteenth Amendment

by providing an inadequate law library which resulted in his lack of access to the courts. Petitioner also makes allegations regarding the validity of his conviction.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Glenn M. Davis is a Wisconsin state inmate housed at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondent James E. Doyle is governor of the State of Wisconsin; respondent E. Michael McCann is Milwaukee District Attorney; respondent Robert D. Donohoo is Milwaukee Deputy District Attorney; respondent Matthew J. Frank is Secretary of the Department of Corrections; respondent Catherine J. Farry is Warden at New Lisbon Correctional Institution; respondent Larry Fuchs is Security Director of the New Lisbon Correctional Institution; respondent Rudolph T. Randa is Chief Judge of the Eastern District of Wisconsin; respondent Ted E. Wedemeyer is Presiding Appellate Court Judge in Milwaukee; respondent Captain Harel is on the staff of the New Lisbon Correctional Institution; Sargent Coran is on the staff of the New Lisbon Correctional Institution; respondent Stephanie G. Rothstein is Assistant District Attorney for Milwaukee County; respondent Shirley S. Abrahamson is Chief Justice of the Wisconsin Supreme Court; respondent Christopher Paulsen is Chief Deputy Clerk of the Wisconsin Supreme Court; and respondent Nikola Kostich is a Milwaukee public defender. The

following were also included as respondents: the controlling personnel of the County of Milwaukee; the controlling personnel of the City of Milwaukee; and the staff and personnel of the New Lisbon Correctional Institute Mail Room/Property Room.

Petitioner was convicted in 1997 and has been incarcerated at the New Lisbon facility since December 2004. In the past two years, petitioner has filed several motions in state court challenging his conviction. In March 2005, petitioner submitted a motion for postconviction relief. The motion was denied. In April 2005, petitioner submitted a motion to supplement his March 2005 motion, but that also was denied. Petitioner wanted to appeal the April 2005 denial, but he was unable to prepare the appeal documents by the deadline, because the New Lisbon library did not have all the information he needed to adequately prepare.

Petitioner has been convicted of the sexual assault of a child. He is innocent of the charges. The Milwaukee County District Attorney's office has been lying to everyone about plaintiff's innocence. Petitioner's legal counsel was "worthless." Petitioner wrote Chief Justice Shirley Abrahamson and Chief Deputy Clerk Christopher Paulsen about the matter but they failed to help him.

There are five computers set up for legal research in the New Lisbon library, two of which are used by the law clerks, leaving only three for use by the inmates. Inmates have library access for one hour a day. Petitioner suffers from joint problems and cannot run to

the library as quickly as other inmates, so by the time petitioner arrives at the library all the computers are taken. He attempted to obtain a public defender to represent him in his postconviction motions, but the state did not appoint him one.

Since petitioner's arrival at the New Lisbon facility in December 2004, the mail room staff has opened seven pieces of petitioner's legal correspondence outside his presence, although all seven pieces were clearly labeled as "legal mail." The mail room staff includes respondents Harel and Coran. Petitioner complained about this practice through internal channels at New Lisbon, but the practice was not discontinued. In addition, petitioner wrote to respondents Randa and Wedemeyer about these problems but they failed to correct them.

DISCUSSION

A. Habeas Corpus

At the outset, I note that petitioner alleges that respondents E. Michael McCann, Robert Donohoo, Stephanie Rothstein, Nikola Kostich, Justice Shirley Abrahamson, Christopher Paulsen, Controlling Personnel of the County of Milwaukee and Controlling Personnel of the City of Milwaukee prosecuted petitioner or failed to move for dismissal of the criminal charges or properly defend petitioner and illegally imprisoned an innocent man. Petitioner asks that this court "dismiss with prejudice all of the charges that the State of

Wisconsin has and had in his criminal conviction of the case number 97CR972482, due to the lack of any credible evidence in the plaintiff's criminal conviction, the evidence that proves him innocent and the violations in this case." Petitioner also seeks a cash settlement of ten million dollars for the ruination of his life.

Petitioner's claim that he has been imprisoned illegally is not cognizable in a civil action under 42 U.S.C. § 1983. 28 U.S.C. § 2254 provides a remedy to persons contending that they are "in custody" in violation of the Constitution; § 1983 authorizes civil actions for deprivations of constitutional rights. Although the potential exists for a substantial overlap between the two statutes, the Supreme Court has held on multiple occasions that when a person can obtain relief for a violation of federal law through a petition for a writ of habeas corpus, he may not bring a claim under § 1983 until he has prevailed under § 2254. Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks only damages and not release, habeas corpus remains the sole federal remedy when a ruling in the petitioner's favor would call into question the validity of his confinement. Heck v. Humphrey, 512 U.S. 477 (1994). Because petitioner does not allege that he has obtained a ruling in his favor on the question of the validity of his conviction, he cannot proceed in this court on this claim. He may raise challenges to the fact or validity of his confinement only in a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 and only after he exhausts all state court remedies available to him.

B. First Amendment

I construe petitioner's allegations that his legal mail is being opened outside his presence as a claim that mail room staff are violating his First Amendment rights and respondents Randa and Wedemeyer are doing nothing about it. Prisoners have a limited liberty interest in their mail under the First and Fourteenth Amendments. Procunier v. Martinez, 416 U.S. 396, 413, 414 (1974). The inspection of personal mail for contraband is a legitimate prison practice, justified by the important governmental interest in prison security. Gaines v. Lane, 790 F.2d at 1304; see also Royse v. The Superior Court of the State of Washington, 779 F.2d 573, 575 (9th Cir. 1986) (inspection of inmate mail for contraband does not constitute mail censorship). Further interference with an inmate's personal mail must be reasonably related to legitimate prison interests in security and order. Turner v. Safley, 482 U.S. 78, 89 (1987).

Legal mail is subject to somewhat greater protection than personal mail, in part because the Sixth Amendment right of access to the courts is involved and must be zealously and solicitously safeguarded. Campbell v. Miller, 787 F.2d at 225, n.14; see also Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973) (all other rights of an inmate are illusory without right of access). To guard against the chilling of an inmate's access to the courts that could result if guards were able to read legal mail, legal mail may be inspected only in the

presence of the inmate to ensure that it is not read by prison officials. Wolff v. McDonnell, 418 U.S. at 577; see also Gaines v. Lane, 790 F.2d at 1306; see also Bach v. People of the State of Illinois, 504 F.2d 1100, 1102 (7th Cir. 1974) (opportunity to communicate privately is a vital ingredient of access to the courts). However, "isolated incidents of interference with legal mail . . . (do) not show a systematic pattern or practice of interference" and do not violate the Constitution. Bruscino v. Carlson, 654 F. Supp. 609, 618 (S.D. Ill. 1987), aff'd, 854 F. 2d 162 (7th Cir. 1988).

Additionally, not all inspection of legal mail necessarily implicates either the right of access to the courts or the concern that such access could be chilled by improper inspection. Martin v. Brewer, 830 F.2d 76, 78 (7th Cir. 1987); see also Harrod v. Halford, 773 F.2d 234 (8th Cir. 1985). For example, most correspondence from a court to a litigant consists of public documents, which prison personnel could inspect in the court's files. Martin, 830 F.2d at 78. The inspection or reading of such correspondence would not chill a litigant's communication with either the court or his attorney or otherwise inhibit the prosecution of his cases and so would not deprive the inmate of his rights. Hossman v. Spradlin, 812 F.2d 1019, 1022 (7th Cir. 1987); see also Sanders v. Department of Corrections, 1993 U.S. Dist. LEXIS 3231 (N.D. Ill. 1993)(opening and reading letter from deputy clerk of court acknowledging receipt of document not a violation of constitutional rights).

Petitioner alleges that in a period of less than 8 months the New Lisbon mail room

staff opened and read seven pieces of his mail that were clearly marked as "legal mail." Some of these letters were to and from attorneys with whom petitioner was discussing his case. Because it does not appear from the allegations that the mail room actions were inadvertent or isolated, petitioner's allegations are sufficient at this stage to permit the drawing of an inference that some New Lisbon staff violated petitioner's First Amendment rights. Reneer v. Sewell, 975 F.2d 258, 260 (6th Cir. 1992) (arbitrary opening and reading of prisoner's legal mail with no justification other than harassment may violate First Amendment) (citing Parrish v. Johnson, 800 F.2d 600, 604 (6th Cir. 1986)).

Petitioner does not allege any facts to suggest how any of the respondents he identifies by name in the caption of his complaint might have been involved personally in repeatedly opening his legal mail. Instead, he sues "the staff and personnel of the New Lisbon Correctional Institute Mail Room/Property Room" and respondents Harel and Coran, who he alleges are "personnel of the New Lisbon Correctional Institution mail room."

It is not likely that every member of the staff of the mail room was personally involved in opening petitioner's legal mail. Therefore, I will deny petitioner's request for leave to proceed in forma pauperis against "the staff and personnel of the New Lisbon Correctional Institute Mail Room/Property Room." Moreover, petitioner does not allege that either respondent Harel or respondent Coran or both personally opened his legal mail. Knowledge or consent is an essential element of a § 1983 action. The Court of Appeals for

the Seventh Circuit has held that to recover damages under § 1983, a petitioner must establish each respondent's personal responsibility for the claimed constitutional deprivation. Although a respondent's direct participation in the deprivation is not required, an official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). Because petitioner does not allege any facts from which an inference may be drawn that respondents Harel and Coran were personally involved in opening his legal mail, I will deny petitioner's request for leave to proceed in forma pauperis against them.

However, where, as here, a high official is named as a respondent, petitioner can proceed against that high official if for no other reason than to allow him to conduct formal discovery to uncover the names of the persons directly responsible for violating his constitutional rights. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (pro se complaint should not suffer dismissal of a defendant high official for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know person or persons directly responsible absent formal discovery). It appears that petitioner did not name the culpable individuals because he does not know their names or identities. Therefore, I will grant

petitioner leave to proceed in forma pauperis against respondent Catherine Farry, the warden of the New Lisbon Correctional Institution, for the sole purpose of allowing petitioner to conduct discovery to learn the names of the individuals who opened his legal mail. Petitioner should be aware that early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed respondents and will set a deadline within which petitioner is to amend his complaint to include them.

C. Fourteenth Amendment

I understand petitioner to allege that respondents Doyle, Frank, Farry and Fuchs have impeded his constitutional right of access to the courts by failing to insure that he had access to an adequate law library and by limiting the number of hours he can use the library. 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)); see also 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 insure meaningful access, 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.

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." Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial." Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. 343). At a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." 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).

Petitioner missed the deadline to appeal the denial of his motion to supplement a motion for postconviction relief in state court that had already been denied. He alleges that he was not able to prepare the appeal because the New Lisbon library is inadequate, because it lacks the type and amount of legal information that he believes he is entitled to by law. Petitioner explains that he can use the library only for one hour a day, and that the library has five computers, two of which are routinely occupied by two law clerks, leaving only three computers for all the inmates. Petitioner’s allegations are not sufficient to make out a claim of a violation of his constitutional right of access to courts.

Under the Constitution, prison officials are required to give inmates a reasonable

opportunity to present claimed violations of fundamental rights to the court, Bounds v. Smith, 430 U.S. 817, 825 (1977), but the law is settled that inmates do not have an unlimited right to court access. Lewis v. Casey, 518 U.S. 343 (1996) (holding no abstract constitutional right to law libraries or legal assistance); see also Bounds, 430 U.S. at 825 (recognizing that prison officials may consider economic factors "in choosing the methods used to provide meaningful access").

The New Lisbon library is not required to provide computers for legal research, so the fact that petitioner is not able to conduct research electronically (either because there are too few computers or because petitioner cannot run to the library as quickly as other inmates) does not amount to lack of access to the courts. According to petitioner, the New Lisbon facility provides two law clerks. Petitioner does not suggest that he could not ask for help from those clerks and receive their assistance. Also, petitioner does not suggest that there were no books he could have consulted, rather than relying solely on the computers. Moreover, it is not atypical for inmates to have only one hour of daily access to the library. I cannot deem the New Lisbon library inadequate on those grounds.

Petitioner has been confined at the New Lisbon facility since December 2004. Since then, he has had the opportunity to file two post-conviction motions in state court. He suggests no reason why the New Lisbon law library was adequate to allow him to pursue those motions but not adequate to allow him to meet his deadline to appeal the denial of his

motion to supplement a motion for post-conviction relief. Because petitioner has failed to state a claim upon which relief may be granted, he will be denied leave to proceed in forma pauperis on his claim that the inadequacy of the library at the New Lisbon facility violates his right of access to the courts.

D. Other Matters

Plaintiff has moved for the appointment of counsel to represent him in this case. That request will be denied as premature. In considering whether counsel should be appointed, I first must determine whether plaintiff made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Ordinarily, before the court will find that the petitioner has made reasonable efforts to secure counsel it requires a petitioner to provide the names and addresses of at least three lawyers that he has asked to represent him and who have declined to take the case. Petitioner has not submitted any documentation to show that he has made a reasonable effort to find a lawyer on his own.

Also, petitioner has requested a writ of habeas corpus ad testificandum so that he can testify in connection with this case. This request, too, will be denied as premature. If petitioner's presence in this court is necessary for trial or for any other matter requiring live testimony, the court will issue the necessary writ to secure his attendance at the appropriate

time.

Finally, petitioner has filed a document titled "Notice of Motion and Motion in Plaintiff's Demand for Production of Documents." Such a demand is properly addressed to counsel for respondent Farry after petitioner's complaint has been served on her and she has had an opportunity to respond to the complaint, and should be limited to matters relating to the sole issue on which petitioner has been granted leave to proceed. Because petitioner's demand has not been served on defense counsel and includes a request for production of documents related to claims that are being dismissed from this action, no consideration will be given to it.

ORDER

IT IS ORDERED that

1. Petitioner Glenn M. Davis' request for leave to proceed in forma pauperis on his First Amendment claim against respondent Farry is GRANTED.

2. Petitioner Glenn M. Davis' request for leave to proceed in forma pauperis on his Fourteenth Amendment claim that he has been denied access to the courts is DENIED for petitioner's failure to state a claim upon which relief may be granted;

3. Petitioner's claim that his custody is illegal is DISMISSED on the ground that the claim must be raised in a habeas corpus action pursuant to 28 U.S.C. § 2254;

4. All of the respondents except respondent Farry are DISMISSED from this case;

5. 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 has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

6. Petitioner should keep 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.

7. The unpaid balance of petitioner's filing fee is $208.46; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

8. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state respondent.

Entered this 29th day of August, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge