IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STERLING HARDAWAY,

Petitioner,

v.

ROCK COUNTY SHERIFF DEPT. and
ERIC RUNAAS,

Respondents.

ORDER

05-C-064-C

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Respondents are the Rock County Sheriff Department and Eric Runaas, who is a captain at the Rock County Sheriff Department.

In 2004, petitioner was sentenced to 10 years in prison, four years in prison and six years out of prison. At trial, petitioner did not testify against Larry March. Elaine Hardaway was involved in petitioner's case. As a result, the district attorney prosecuted

petitioner with "avenge" because petitioner had a conflict of interest with the prosecutor and the judge in the case. In addition, petitioner should have had a change of venue.

During the trial, petitioner stayed at the Rock County jail in Janesville, Wisconsin, which is operated by respondent Rock County Sheriff Department. On January 17, 2005, the Rock County law library was closed. When petitioner arrived at the Kettle Moraine Correctional Institution, he learned that he could have his sentence overturned because of his conflict of interest with the district attorney and judge and of his right to a change of venue. If the law library had been open on January 17, 2005, petitioner would have learned these things earlier and would have been able to prevent his 10-year sentence.

DISCUSSION

I understand petitioner to argue that respondents violated his constitutional rights when they closed the law library at the Rock County jail on January 17, 2005. 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. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To ensure 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.

Petitioner's claim fails for several reasons. First, it is unclear whether by suing "the Rock County Sheriff Department" petitioner intends to sue the Rock County jail, Rock County or the sheriff of Rock County. If petitioner intends to sue the Rock County jail, the jail is not a suable entity. Wis. Stat. § 302.30-37 governs jails and does not authorize jails to sue or be sued. The Rock County jail is incapable of accepting service of petitioner's complaint or responding to it.

Rock County is a suable entity. Wis. Stat. § 59.01. In addition, because the sheriff of a county is responsible for a county jail's policies and practices, petitioner could sue the sheriff. However, it is unnecessary for me to guess what petitioner means when he states that he wishes to sue the "Rock County Sheriff Department." This is because petitioner's claim fails on its merits. It is preposterous for petitioner to suggest that a one-day closing of the law library on January 17, 2005 stifled any meaningful access to the courts for him. Petitioner does not allege that the law library was closed on any other days or that was not represented by counsel at his trial and during his stay at the Rock County jail.

More important, however, petitioner admits that his lawsuit is really an attempt to overturn his 10-year sentence. Heck v. Humphrey, 512 U.S. 477 (1994), forbids a convicted person from seeking damages on any theory that implies the invalidity of his

conviction without first getting the conviction set aside. The Court of Appeals for the Seventh Circuit has had two occasions to apply the rule stated in Heck to claims that the petitioners had been denied access to the courts resulting in obstruction of their challenges to their criminal convictions. In both Nance v. Vieregge, 147 F.3d 589 (7th Cir. 1998), and Hoard v. Reddy, 175 F.3d 531 (7th Cir. 1999), the court concluded that Heck barred the inmate's claims for money damages. However, in both cases the court recognized that if there was an on-going obstruction, an inmate might obtain prospective injunctive relief under § 1983 to clear the blockage. Nance, 147 F.3d at 591; Hoard, 175 F.3d at 533. Nonetheless, this exception does not apply in this case because petitioner is not seeking prospective injunctive relief. Because petitioner's allegations do not suggest that he has been deprived of meaningful access to the courts and because his claim would be barred under Heck in any event, I will deny him leave to proceed on his claim.

ORDER

IT IS ORDERED that:

1. Petitioner Sterling Hardaway's request for leave to proceed in forma pauperis on his claim that he has been denied access to the courts is DENIED and this case is DISMISSED with prejudice as legally frivolous;

2. The unpaid balance of petitioner's filing fee is $129.21; this amount is to be paid in

monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 3rd day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge