

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSHUA HOWARD,

Plaintiff,

v.

NEVIN WEBSTER and  
AMY REID,

Defendant.

ORDER

08-cv-500-slc

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Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

This is a proposed civil action for monetary relief brought under 42 U.S.C. § 1983.

Petitioner Joshua Howard, a prisoner who is housed at the Waupun Correctional Institution in Waupun, Wisconsin, requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner alleges that respondents Nevin Webster and Amy Reid denied him his right to gain access to the courts in violation of his First Amendment rights. Petitioner's request will be denied and his complaint will be dismissed for failure to state a claim upon which relief may be granted.

Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915. However, because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. 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).

In his complaint and attached materials, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner Joshua Howard is an inmate who at all times relevant to this suit was housed at Waupun Correctional Institution in Waupun, Wisconsin. Respondent Nevin Webster was the librarian and respondent Amy Reid was the educational director at the

Waupun Correctional Institution during the times relevant to this suit.

In July 2006, the Wisconsin Supreme Court denied petitioner's petition to review the court of appeals' dismissal of his criminal appeal. Petitioner sought to file a petition for a writ of certiorari in the United States Supreme Court. The filing deadline for his petition was October 23, 2006.

Petitioner requested and was allowed daily use of the library from September 11, 2006 to October 23, 2006 to prepare his petition. Starting September 11, 2006, he began researching and writing his petition every day. Petitioner saved all his work on a computer disk. Then, without notice, respondent Webster closed the law library on October 16, 2006 and did not reopen it until October 25, 2006. No temporary librarian was appointed during this time by respondent Reid. Because the law library was closed, petitioner had no access to his legal materials, the word processor or his computer disk and for these reasons was unable to file his petition.

Petitioner filed an inmate complaint and an appeal. Both were dismissed.

## DISCUSSION

Prisoners have an absolute right of access to the courts but not necessarily an absolute right to a law library or legal assistance. Lewis v. Casey, 518 U.S. 343, 351 (1996). The constitutional right of access to the courts is actionable only if "the plaintiff has suffered an

injury over and above the denial.” Walters v. Edgar, 163 F.3d 430, 433-34 (7th Cir. 1998). A simple denial of access to legal materials will not violate a prisoner’s rights unless the prisoner can show that he had a meritorious challenge to his conviction. Marshall v. Knight, 445 F.3d 965, 968 (7th Cir. 2006). Thus, to succeed on claim for a denial of access to the courts, an inmate must demonstrate that his inability to use the prison library caused him an “actual injury.” Lewis, 518 U.S. at 351.

In the present case, petitioner had access to the prison library for 35 days, during which time he did legal research and began drafting his petition. Nonetheless, he contends that being denied access for nine days leading up to the submission of his petition constitutes a violation of his right of access to the court. Difficult as this situation must have been for petitioner, he has failed to show that he was actually denied from submitting a petition on October 23, 2006. Despite not having access to the library, petitioner still had the opportunity to draft a petition outlining his claims and arguments with pen and paper. (The Supreme Court does not require that petitions be typed or electronically filed. Sup. Ct. R. 14.) Petitioner chose to save and store all his materials on computer disks, without keeping any physical copies of his research or writing. This decision cannot be blamed on defendants. Petitioner has failed to state a claim upon which relief may be granted.

In addition, petitioner has failed to allege that he had a meritorious petition. It is not enough that a prisoner is prevented from challenging his conviction. He must also show that

his claim had merit.

## ORDER

IT IS ORDERED that

1. Petitioner Joshua Howard's request for leave to proceed in forma pauperis on his claim is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted.

2. A strike will be recorded against petitioner pursuant to § 1915(g).

3. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at Waupun Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

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

Entered this 22<sup>nd</sup> day of October, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge