IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LARRY J DUANE SPENCER,

ORDER

Plaintiff,

10-cv-288-bbc

v.

JOSEPH L. SOMMERS, ANN SAYLES,
STUART A. SCHWARTZ, DAVID KNOLL,
CHRISTOPHER DUREN, PAUL NESSON JR,
TIMOTHY DAVID EDWARDS, JENNIFER HARPER,
GREGORY DUTCH, STAN KAUFMAN,
JAY LAUFENBERG, MARY JONES,
FRANK EARL RADCLIFF, ROY U. SCHENK,
CINDY S. GEOFFREY, MELISSA HARNESS,
JOHN RADOVAN, ROSA I AGUILU,
BRIAN BLANCHARD, GARY H. HAMBLIN,
JOHN PIER ROEMER, KAREN KRUGGER,
MARIANNE SIMPSON, ANA M. BOATWRIGHT,
TAMMY J. SIME, MS BURNS, MS RICHARDSON,
RANDALL HEPP, NANCEY GANTHER,
CAPT. KANNANBERG, CAPT GUARCEAU,
MR JAEGER, MS TEGELS, C.O. KRATKY,
SANDY K. MAGUIR-PETKE, C.O. RYBUCK, MS RICK,
TERRY L. SHUK, C.O. CORBIN, DAWON JONES,
JAMES ISAACSON, ROY LA BARTON GAY,
D.O. WATSON, TODD E. MEURER,
PEGGY L. NICHOLES, STACEY A. BIRCH,
BRENDA L. PETERSON, SHEILA D. PATTEN,
DOCTOR HANNULA, MR SWEENEY, GOVERNOR
DOYLE, Sec. RICK RAEMISCH, Atty. General J.B. VAN
HOLLEN, JEFFREY PUGH and JOHN DOE,

Defendants.[1]

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This is a prisoner civil rights case in which plaintiff Larry J. Duane Spencer identifies an assortment of problems he has had with prison officials at two different prisons. Plaintiff has filed a third amended complaint after I explained for a second time the requirements of Fed. R. Civ. P. 8. As I explain below, plaintiff's third attempt continues to have gaps and inconsistencies that prevent him from stating a claim upon which relief may be granted. As I warned plaintiff, this was his last try. Because he failed once again to provide enough detail to allow an inference that defendants have violated his constitutional rights, his complaint will be dismissed with prejudice for failure to state a claim upon which relief may be granted and his many pending motions for miscellaneous relief will be denied. From plaintiff's proposed third amended complaint, I draw the following allegations of fact.

ALLEGATIONS OF FACT

A. Interference with State Court Cases

[1] In his third amended complaint, plaintiff's caption lists as defendants "Mr. Jaeger, Doctor Hannula et al and all others," apparently assuming that he did not need to list all the defendants he identified in his second amended complaint. He also describes the document as a "response" to the order dismissing his second amended complaint although he then proceeds to simply list the allegations he is now asserting. However, plaintiff was told to file a standalone third amended complaint and he should have properly labeled it and listed all the defendants he now intends to sue. Nonetheless, I will overlook these mistakes and construe his "response" as a third amended complaint that incorporates the caption of his second amended complaint.

Plaintiff wrote defendant Ms. Tegels about a prisoner named Andra Wingo in connection with another prisoner named Steve Zastrow. Plaintiff wanted Zastrow to help him write a lawsuit and Zastrow started helping plaintiff in a civil case he had brought in the Circuit Court of Dane County, Case No. 07-CV-3458. Defendants Tegels and Karen Krugger wrote Wingo and told them that plaintiff had "snitched" on Wingo. Wingo passed this letter around to about 500 inmates, some of whom started saying that they paid plaintiff to perform legal work. Within 24 hours, plaintiff was put in segregation. Plaintiff wrote both Tegels and Krugger to tell them that his lawsuit was being impeded.

On March 24, 2008, plaintiff filed Case No. 08-AP-770, an appeal of the dismissal of Case No. 07-CV-3458. Online court records show that on June 19, 2008, plaintiff's original brief was rejected because it failed to minimally comply with the court's rules of appellate procedure. Http://www.wcca.wicourts.gov. Within days, plaintiff moved for extension of additional legal loans, for voluntary dismissal until he could get a lawyer, for appointment of counsel and for excuse from his noncompliance with the briefing requirements. Id. The court of appeals denied that motion. Id. Three months after the court rejected his brief and one month after that, plaintiff moved for extensions of time and those motions were granted. Id. Four months after those deadlines had lapsed, plaintiff moved again to dismiss the appeal but the motion was denied and he was given another extension of time, making his brief due April 14, 2009. Id. Plaintiff sought another extension of time of that deadline on April 6, 2009 but the court of appeals denied that

motion. Id.

Plaintiff showed the April 14 deadline to defendant Marianne Simpson to provide to Jaeger, who was head of the legal loan office. Plaintiff wrote Mr. Jaeger twice on April 8, 2009, once on April 16, 2009, once on April 23, 2009 and once on May 28, 2009 concerning his "legal loan cases." In addition, the Circuit Court for Dane County served Jaeger's office. Plaintiff also wrote defendant Ana Boatwright, who stamped "received" on the letter and returned it, telling plaintiff to write Jaeger again. Plaintiff did that and wrote the unit manager. Jaeger refused to allow a legal loan for copying and mailing related to the deadline and he told his officers not to copy or mail plaintiff's response "so [plaintiff] would miss [his] deadline and [his] cases would be dismissed."

Boatwright knew plaintiff was writing to the Circuit Court for Dane County and the Wisconsin Supreme Court regarding cases he had filed in those courts because plaintiff provided the correspondence to defendants and showed Jaeger and his officers nearly all correspondence. Nonetheless, Boatwright told Simpson that plaintiff's cases were closed so Simpson would deny copies and postage and plaintiff would miss his deadlines. Krugger and Simpson may have believed "Boatwright's lies [that plaintiff's cases were closed]" and refused to disburse funds as a result of that, despite the fact that plaintiff gave these defendants responses from the court "to prove [his] cases are or were" actually "alive."

On April 27, 2009, plaintiff filed Case No. 09-IP-28 in the Circuit Court of Dane County to complain about defendants' interference with Case No. 08-AP-770. Online

records show that that case was dismissed on June 15, 2009 after plaintiff was found to have three or more dismissals under Wisconsin's "three strikes" statute, Wis. Stat. § 801.02(7)(d), and the court ruled on his request to waive the requirement that he prepay fees and costs. Http://www.wcca.wicourts.gov.

Jaeger wrote plaintiff a conduct report, C.R. 1638055, alleging that plaintiff had lied about writing him four letters. Simpson told plaintiff to send in his documents containing stamped received notices to Jaeger, so plaintiff sent "500 original documents" with his appeal of Jaeger's conduct report, documents showing Jaeger had notice of plaintiff's lawsuit. (In earlier filings, plaintiff stated that he lost a total of 200 pages.) These documents, however, were also the original documents used in plaintiff's cases, and plaintiff did not send in copies instead of the originals because Simpson told plaintiff that he could not copy the documents but that all his documents would be returned. As a result of the documents plaintiff submitted, Jaeger, Boatwright and Tegels all saw the four original "stamped and received" letters to Jaeger as well as court notices and letters to other officers. The 500 documents have not been returned. Plaintiff has lost "years of time" writing the documents that were stolen or destroyed.

On June 9, 2009, plaintiff wrote Boatwright about his staff advocate, Sergeant Raymer, who was telling officers not to let plaintiff off lightly and saying that he would make plaintiff lose at his conduct report hearing. Plaintiff asked Boatwright to let plaintiff "fire" Raymer and represent himself because he saw Raymer lying about him, mixing up his files

and withholding exculpatory evidence. Plaintiff was not assigned a different advocate, and when he went to the hearing, he was required to give Raymer the four letters he wanted to use at the hearing. At Jaeger's direction, Raymer "took" at least one of the letters and withheld it. This led to a finding that only three letters were written and plaintiff was found guilty of lying, put in segregation for four and one half months and transferred to the Stanley Correctional Institution. (Plaintiff alleges two conflicting durations. He alleges repeatedly that he was put in segregation only for four and one half months, Third Am. Cpt., dkt. #53, at 2 and 7, but elsewhere he alleges that he was put in segregation for 180 days for the incident, id. at 11. Plaintiff has had plenty of time and opportunities to get his story straight. The shorter duration will be considered the true allegation rather than the longer one. Cf. Pugel v. Board of Trustees of University of Illinois, 378 F.3d 659, 665 (7th Cir. 2004) (facing contradictory allegations, court of appeals applied facts undermining plaintiff's claim rather than ones saving it).) Plaintiff also had his early release taken away; when the parole board considered the matter, they called him a liar. On June 17, 2009, plaintiff's appeal of his civil case was dismissed for his failure to file a compliant brief as a result of his missing the April 23, 2009 deadline.

At some point before plaintiff was transferred, at Jaeger's direction, Raymer pulled out the staples from plaintiff's files and mixed them up and sent them to Boatwright to "mail out," stating the cases are closed. (Plaintiff does not explain what he means by "mail out," but he seems to be talking about the mailing of his files to the prison to which he was

transferred, the Stanley Correctional Institution.)

Plaintiff received his files at the Stanley Correctional Institution nine months later. His files were out of order, so he spent 5,000 hours "partly" resorting his files. (If true, this means that plaintiff has sorted about 16 hours a day every day since he received the files until the present date.) In addition, plaintiff discovered that his "law cite books" were missing, so he wrote a grievance. Defendant Tammy Sime refused to "forward" that grievance. (Plaintiff does not explain what he means by "forward.") The "theft" of the books likely occurred at the New Lisbon Correctional Institution before the materials were shipped to the Stanley Correctional Institution when plaintiff was transferred.

On July 4, 2009, plaintiff filed successive post conviction motions in the two criminal cases for which he is in prison, Cases Nos. 01-CF-1125 and 01-CF-1242. Plaintiff sent Sime an order from this court and directions from a lawyer on how to prepare plaintiff's successive motion for post conviction relief. Plaintiff had friends copy about 500 pages for filing in the circuit court and asked Sime to copy a set for the district attorney. Sime refused, stating that plaintiff's cases were closed and no further action was warranted in the cases. Sime continues to refuse to allow "anything sent anywhere for these . . . cases." (Plaintiff alleges that defendant's actions "caused the dismissal" of plaintiff's July 4, 2009 successive post conviction motion. In his original complaint, he alleged that Sime's refusal to copy a set to the lawyer meant that the motion was not served on all appropriate parties.)

B. Interference with Grievances

Plaintiff wrote grievances "to be forwarded (plaintiff does not say where) but Sime refused and "instead mailed them" (plaintiff does not explain how this is different from forwarding them) and all of plaintiff's grievances were dismissed. For example, on July 17, 2009, plaintiff wrote a grievance to "challenge procedural errors" in a conduct report but Sime refused to forward the grievance so it was dismissed. The conduct report was used to void plaintiff's early release and put plaintiff in the hole 180 days where plaintiff's wrists were cut. Plaintiff also filed a grievance complaining that defendant Simpson had not returned the 300-500 pages of exhibits he had filed.

C. Excessive force, Lack of Medical Care and other Mistreatment

When plaintiff was put in segregation, he was"roughed up" by an officer called "Big Show" while handcuffed and bent over backwards, causing cut wrists and bruises, "then not allowed medical for about a week until the cuts had scabbed over."

Plaintiff's wrists were cut and bruised 25 times. He has even been "hog tied" in bed in the emergency room in the Stanley Correctional Institution. Some of the dates of the incidents causing him injury "are in the files destroyed" and others "were stated in past complaints." Some of the incidents occurred around June 25 (plaintiff does not say of which year). At one point, plaintiff was transported to the emergency room for treatment. The

emergency medical technician was not able to take plaintiff's pulse because the hard small cuffs were used and they pinched too much to allow a pulse to be taken.

After plaintiff was transferred to the Stanley Correctional Institution, he told defendant C.O. Rybuck that he had prescriptions for soft cuffs and his wrists were too large for small hard cuffs, which pinch, cut and bruise him. Nonetheless, Rybuck ordered plaintiff to let him put plaintiff in hard small cuffs and the hard cuffs cut plaintiff. Plaintiff showed Rybuck that he had been cut. Even after being shown the cut, Rybuck ordered plaintiff to continue "working" with the small hard cuffs on. The cuffs continued cutting plaintiff.

Plaintiff was told to lift his four tubs and boxes of his legal files and take what he wanted. Plaintiff told Rybuck that the cuffs were too small and tight and were cutting his wrists, but Rybuck just told plaintiff to hurry, and that if he stopped, he would not get another chance to get his files for a month or two. He also told plaintiff that "no one gets soft cuffs in the hole." Plaintiff showed Rybuck the blood and cuts caused by the hard cuffs but Rybuck turned his eyes away. Plaintiff waited and showed the nurse twice. She told plaintiff to write the Health Services Unit.

When plaintiff saw Dr. Hannula, she told plaintiff that she gets paid extra money from the prison to deny prescriptions. She also told plaintiff that the prison does not follow outside doctor's prescriptions so he would not be allowed to have soft handcuffs or double mattresses at the Stanley Correctional Institution. After plaintiff wrote several grievances about the effect of hard cuffs on his wrists, he was finally given a prescription for soft cuffs

at Stanley. However, his "prescriptions existed while Stanley was using small hard cuffs and cutting [his] wrists."

Plaintiff has also asked Hannula for a double mattress and foam pad, which had been prescribed to him at the New Lisbon Correctional Institution. Hannula has refused to provide those items. In September and December 2010, U.W. Cardiologist Kemp told plaintiff that he had an "extraordinary health condition" and needed a double mattress and foam pad and will likely die within three months or one or two years. Both Kemp and Hannula signed affidavits in support of plaintiff's early release, but Hannula continues to refuse a double mattress and foam pad. Plaintiff's pain medications have damaged his liver, and if he had a soft bed, he would not need pain medications at all. Plaintiff can barely fill his lungs because his sides hurt. Plaintiff stops breathing while he sleeps and wakes up in a panic. He has come close to dying several times and once he was rushed to the emergency room in an ambulance where he was admitted for about five days. He suffers bad pain in his heart all the time and his sides hurt so much he feels as if he had cracked a rib.

Plaintiff had received an order from a dentist or doctor at New Lisbon Correctional Institution stating that he should eat early because the dentist pulled all of plaintiff's teeth. At the Stanley Correctional institution, plaintiff got permission from defendant Mr. Sweeney, and from others, including Dorf, Jenkins and dentist Sears, to eat early and sit at the front tables with others who eat early. On February 2, 2010, defendant C.O. Corbin replaced Jenkins. During plaintiff's meal at 6:30 a.m., Corbin asked plaintiff whether he had

permission to eat early and plaintiff said he did. He provided Corbin a lot of information showing Corbin that he was allowed to eat early.

On February 4, 2010, Corbin gave plaintiff two conduct reports, one dated for two days earlier and one dated for the day before, for his "disobeying orders." In particular, Corbin said that she told plaintiff not to eat early but he did anyway. In fact, Corbin did not tell plaintiff not to eat early. After issuing the conduct reports, Corbin unlocked plaintiff's locker and gave his jar of coffee to plaintiff's cellmate and had staff put plaintiff in hard cuffs with his hands behind his back, which hurt his wrists and shoulders. They then put plaintiff in segregation. Corbin has talked about plaintiff to her friends, who then "stop and harass" plaintiff and "write [him] up for non existent violations just like Corbin does herself." She has also told officers to hurt plaintiff or steal more property and has "cause[d] guards to cause [plaintiff] life threatening danger."

Plaintiff is in pain constantly, his pain medications have damaged his liver according to his last liver test and his health is so bad he may be released from prison so that he may die outside of prison.

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D. Post-filing Retaliation

Sime gave plaintiff's amended complaint in this case to Milbeck and Langteau, who called plaintiff into a secure building. Milbeck slammed his fist onto a copy of plaintiff's amended complaint and asked "What's this?"

Milbeck went to plaintiff's Unit and stated in a loud voice at the front officer's desk, "Spencer you are a snitch." All the inmates in the dayroom heard so plaintiff went to his cell "for safety." The officer on duty told plaintiff he needed to give up all his canteen. A couple of days later Milbeck and Sweeney told plaintiff that they were going to keep plaintiff's canteen, and they did. Plaintiff received threats from other prisoners as a result of this until he explained that he had only "snitched" on prison officials. Originally, it was defendant Corbin who "pinned the 'snitch' label" on plaintiff.

In January 2011, plaintiff tried to mail documents to this court related to whether defendants denied him access to the courts but defendant Sime refused a legal loan disbursement. Plaintiff then had his cellmate attempt to mail those documents to the court. Those documents never reached this court.

DISCUSSION

Plaintiff has treated this lawsuit as an opportunity to list all his recent problems with prison officials. Add to this plaintiff's difficulty explaining the problems or providing contact and it becomes particularly difficult to assess whether plaintiff's complaint states a claim, which is what I must do at this point. After careful consideration of plaintiff's allegations,I believe that plaintiff is asserting the following claims:

1. Defendants Ms. Tegels and Karen Krugger interfered with plaintiff's litigation of Case No. 07-CV-3458 by telling a prisoner that plaintiff had snitched on that prisoner.

2. Defendants Mr. Jaeger, Marianne Simpson, Ana Boatwright and Tegels interfered with plaintiff's litigation of Case No. 08-AP-770 by preventing plaintiff from copying or mailing documents to the court and getting him placed in segregation near a deadline.

3. Defendant Jaeger lied and ordered evidence to be destroyed to get plaintiff in trouble. (Plaintiff mentions C.O. Raymer as being involved as well but does not name him as a defendant.)

4. Defendants Boatwright, Karen Krugger and Simpson interfered with his litigation of Case No. 09-IP-28 by denying his requests for copies and postage by treating his case as dismissed.

5. Defendants Simpson, Jaeger, Boatwright and Tegels made him file 500 "original documents" from one or more of his court cases and defendant Simpson did not return those documents.

6. Defendant Jaeger ordered staples to be removed from plaintiff's files, leading to their being disorganized.

7. Defendant Ms. Sime refused to forward a grievance in which plaintiff complained that his "law cite books" were missing.

8. Defendant Sime interfered in plaintiff's litigation of successive post conviction motions in Cases Nos. 01-CF-1125 and 01-CF-1242 by refusing to copy a set of documents filed in the court so that plaintiff could send them to the district attorney.

9. Defendant Sime refused to forward grievances, including a July 17, 2009 grievance challenging procedural errors in a conduct report.

10. Defendants Jaeger and Corbin caused plaintiff to be injured when plaintiff was placed in segregation in separate incidents. (Plaintiff alleges that an officer nicknamed "big show" actually engaged in the acts of excessive force but does not name him as a defendant. Plaintiff also alleges that there were as many as 25 different incidents of excessive force, but does not identify any defendants involved in any of those incidents.)

11. Defendant C.O. Rybuck ignored plaintiff when plaintiff was hurt from the use

of hard cuffs.

12. Defendant C.O. Corbin gave plaintiff an improper conduct report for disobeying orders, took his coffee and has encouraged other prison officials to harass plaintiff.

13. Defendant Hannula refused to prescribe plaintiff soft cuffs for some time and continues to refuse to prescribe him double mattresses.

14. Defendant Sime was involved in post-filing retaliation by giving other officials plaintiff's amended complaint and defendant Corbin was involved by labeling plaintiff a snitch.

15. Nearly every officer retaliated against plaintiff.

A. Claims Related to Access to the Courts

The majority of plaintiff's claims relate to defendants' alleged denial of his access to the courts. In particular, in claims 1, 2, 4-9 and 13, plaintiff identifies some subset of defendants allegedly interfering with his ability to pursue either a state court action or a grievance.

1. Claims not tied to interference of particular lawsuits

A number of plaintiff's claims must be dismissed simply because plaintiff failed to tie these claims to an impediment in any of plaintiff's particular lawsuits. This includes claims 5-7. Plaintiff's allegations that he is missing "original documents" or "law cite books" and had his files disorganized support an inference that it was more difficult for plaintiff to

litigate his cases, but to state a claim for denial of access to the courts, plaintiff had to do more than identify a hassle or a *possible* interference with one or more lawsuits.

As I have told plaintiff already, plaintiff was required to show an "actual injury," either because defendants caused him to lose a meritorious claim or at least impeded his chances of prevailing on his claim. Lewis v. Casey, 518 U.S. 343, 353 (1996); Christopher v. Harbury, 536 U.S. 403, 413-14 (2002). Thus, if plaintiff had alleged that he had his cases dismissed for failing to file "original documents" or for failing to cite any case law after being ordered to do so or by failing to meet a final deadline because he was unable to sort through his now disorganized files, he might be able to proceed on this claims. He did not do this, however. Instead, he simply relies on the fact that defendants' actions may have made it more difficult for him to effectively litigate cases in general.

Claim 9 must be dismissed for similar reasons. In that claim, plaintiff takes issue with defendant Sime's handling of his grievances. However, there is no independent claim for denial of access to the prison's administrative grievance system, and, as I explained to plaintiff in the previous order, to the extent defendants interfered with his ability to exhaust his administrative remedies on a particular claim, that should not amount to a denial of access to the courts because defendants' own acts have made administrative remedies unavailable and thus the underlying claim does not face dismissal for failure to exhaust on that ground. Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006).

2. Claim for post-filing interference with present case

Claim 14 involves plaintiff's allegations that certain defendants have been interfering with his ability to litigate this case since he filed the lawsuit. As I explained in the previous order, post-filing claims generally cannot proceed in the same lawsuit, with the exception of retaliation claims for which "it appears that the alleged retaliation would directly, physically impair the plaintiff's ability to prosecute his lawsuit." Order, dkt. #51. Plaintiff alleges only that certain defendants engaged in acts that led to his being considered a snitch by other prisoners. However, this alone would not support an inference that plaintiff was physically impeded from prosecuting this lawsuit, especially because plaintiff says the matter worked itself out once he explained to prisoners he did not snitch on other prisoners, only prison officials. Plaintiff does not suggest he missed any deadlines or that he otherwise had his litigation of this case impeded because of problems with other prisoners who thought he was a snitch.

3. Claims tied to particular lawsuits

Four other claims relate to denial of access to the courts, which I have labeled claims 1, 2, 4 and 8. For each of these claims, plaintiff identifies a particular case he was litigating and describes defendants' acts against him while he was attempting to litigate the case. Although this brings plaintiff closer to stating a claim, it is still not enough. Plaintiff needs to allege facts suggesting that defendants' acts were what led to his losing his cases.

In claim 1, plaintiff alleges only that certain defendants told a prisoner that plaintiff had snitched on him. It is not clear how plaintiff thinks this could have affected his case, but at most it may have interfered with his attempts to obtain help with his case from a third prisoner. However, plaintiff never bothers to explain how missing this help caused him to lose Case No. 07-CV-3458. Without this, plaintiff has no "actual injury" from the alleged interference with his case.

For claim 4, plaintiff alleges that certain defendants denied his requests for copies and postage in the case and suggests that this led him to miss a deadline in Case No. 09-IP-28. However, he does not specify what deadline he missed or how the court handled his missing the deadline. Online court records show that his case was dismissed after plaintiff was found to have three or more dismissals under Wisconsin's "three strikes" statute, Wis. Stat. § 801.02(7)(d), and after the court ruled on his request to waive the requirement that he prepay fees and costs. Http://www.wcca.wicourts.gov, last accessed April 1, 2011. The allegations are too tenuous to support an inference that the court dismissed his case because he failed to file a document on time after defendants refused to copy documents.

Claim 8 relies on equally tenuous allegations. Plaintiff alleges that his successive post conviction motions in Cases Nos. 01-CF-1125 and 01-CF-1242 were dismissed after defendant Sime refused to copy a large set of documents so plaintiff could send them to the district attorney. Plaintiff even points out that he was required to send those documents. What plaintiff does not say, however, is that the successive post conviction motions were

dismissed on such a technical ground as a pro se prisoner's failure to mail a copy of his filings to the district attorney.

Plaintiff already faced an uphill battle on his motions. Under Wis. Stat. § 974.06(4), plaintiff's successive petition could be successful only if it addressed issues not available to plaintiff in his original motion for post conviction relief. "Any issue not . . . raised [in the original motion] or which has been finally adjudicated on direct appeal may not be the basis of a subsequent motion." State v. Braun, 185 Wis. 2d 152, 164-65, 516 N.W. 2d 740, 745 (Ct. App. 1994). The one exception to this is if the prisoner raises constitutional or jurisdictional questions and there is "sufficient reason" to consider these issues at this juncture, such as lack of foreseeability. Id. Plaintiff does not explain on what grounds he was pursuing a successive petition or allege facts suggesting that he could have met these exceptional requirements. Nonetheless, he asks the court to speculate whether his motions were dismissed on hyper-technical grounds instead.

The claim that comes closest to stating a claim is 2. Plaintiff alleges that certain defendants interfered with his litigation of an appeal by preventing him from copying or mailing documents to the court and getting him placed in segregation near a deadline. Online court records show that plaintiff did indeed lose that appeal for failing to file a brief. The records also suggest that much of the delay was plaintiff's: his original brief was rejected in June 2008 but he waited until April 2009 to bring the matter to defendant Jaeger's attention, after plaintiff had exhausted all extensions of time the court seemed willing to give

and only six days remained before the final deadline. (Plaintiff also alleges that he brought it to Jaeger's attention at least three more times in letters he sent him, but only after the final deadline had lapsed.)

Moreover, despite plaintiff's concerns with defendants' alleged interference with his case, he did not seek relief from the court handling that case. Instead, days after his deadline had passed and the court had ordered that his case be dismissed, plaintiff simply filed a new lawsuit about defendants' interference, Case No. 09-IP-28. This puts plaintiff in a tight spot. If he absolutely had to submit his brief by the final deadline of April 14, 2009, then it is not clear whether plaintiff's letter to Jaeger about his "legal loan cases" would have given defendants enough time to properly address the legal loan issues before the deadline passed and plaintiff lost anyway. On the other hand, if the court would have been willing to accept a slightly late response had Jaeger addressed the legal loan issues and plaintiff been allowed to file a brief, then it should have been willing to accept a slightly late brief filed on the day plaintiff filed Case No. 09-IP-28. Plaintiff does not explain why he declined to seek relief from the court handling his case on appeal in light of the alleged interference of defendants, and instead created another layer of complexity by bringing the problem to another court. Cf. Harbury, 536 U.S. at 415 (suggesting claim for denial of access to the courts not available when remedies could still be pursued in underlying suit).

More important, however, plaintiff does not allege that he needed the legal loans to file the original brief at all. Despite making repeated conclusory assertions that defendants

caused him to miss his deadline, he never says he could not have filed the brief without the loans he was requesting. Plaintiff's allegations focus on whether defendants rejected his requests for copies and postage, not on whether he had any way of filing the brief on his own. Under normal circumstances, an inference could be drawn that plaintiff needed the loans because he alleges that he asked for them. However, in this case, plaintiff filed a new complaint and was able to mail it out within *days* of the deadline on the appeal. Moreover, plaintiff does not suggest that the denial of legal loans on these cases could have been case-by-case. Indeed, he contends that the reason his legal loans were denied in all of his cases was because Jaeger was in charge and was blocking his legal loans to prevent plaintiff from contacting courts and complaining about Jaeger. Third Am. Cpt., dkt. #53, at 4. Because plaintiff was able to mail out and file a new complaint regarding Jaeger around the same time that his appellate brief was due, there is no reason to infer that defendants' refusal to give him postage or copies prevented him from meeting his deadline.

B. Retaliation

In the claim that I have labeled claim 14, plaintiff contends that "Nearly every officer" has retaliated against him. Plaintiff does not provide any further details about which officers retaliated against him or in what way, and he does not name any member of the parole board as a defendant.

C. Due Process

In the claim I have identified as claim 3, plaintiff appears to be asserting a claim for violation of his due process rights. In particular, his contention is that Jaeger created a false conduct report and interfered with plaintiff's presentation of evidence. As a result, plaintiff alleges, he received four and one half months of segregation and was transferred to another prison. (Plaintiff adds that he lost the chance for an early release, but this was not a direct result of his conduct report; as plaintiff alleges, his early release was taken away by a separate entity, the parole board.) In addition, plaintiff contends that defendant C.O. Corbin gave him a conduct report for disobeying orders when he had not been disobeying orders.

Plaintiff does not explain why he believes these acts of defendants violated his constitutional rights, but he appears to be challenging procedural defects in his disciplinary proceedings, which means he could be asserting due process claims. If so, they fail.

Prisoners are not afforded the full panoply of rights in prison disciplinary proceedings. In Sandin v. Conner, 515 U.S. 472, 484 (1995), the Supreme Court held that prisoners are not entitled to any process under the Constitution unless the discipline they receive increases their duration of confinement or subjects them to an "atypical and significant" hardship. In addressing what satisfies the "atypical and significant" hardship standard, the Court of Appeals for the Seventh Circuit recently explained that "a liberty interest *may* arise if the length of segregated confinement is substantial and the record reveals that the conditions of confinement are unusually harsh." Marion v. Columbia Correction Institution, 559 F.3d

693, 697-98 (7th Cir. 2009) (emphasis in original).

Plaintiff fails to describe in any way the discipline that resulted from Corbin's alleged due process violation. He mentions that he had his coffee taken away, but does not suggest that this was part of his discipline. At any rate, the deprivation of coffee could not be considered an "unusually harsh" condition of confinement.

As for the discipline plaintiff received from Jaeger's alleged due process violation, it still falls short of giving rise to a due process violation. Plaintiff's claim falls in between those that the court of appeals allowed to proceed and those it has rejected. Compare Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995) (six months in segregation could be long enough if conditions were sufficiently severe), with Townsend v. Fuchs, 522 F.3d 765, 767 (7th Cir. 2008) (59 days in segregation not long enough to trigger due process clause). However, in Fortney v. Hoffman, 09-cv-192-slc , slip op. at 6 (W.D. Wis. Apr. 24, 2009), I concluded that, under Marion, 120 days in disciplinary segregation does not give rise to a claim under the due process clause. I relied on the court's observation that "periods of confinement that approach or exceed one year may trigger a cognizable liberty interest without any reference to conditions." Marion, 559 F.3d at 699. In addition, I noted that the plaintiff had not included any allegations in his complaint from which it could be inferred that the conditions of confinement he endured in segregation were "unusually harsh." As in Fortney, plaintiff's 135 days in disciplinary segregation falls far short of giving rise to due process concerns, even more so in light of the fact that plaintiff does not suggest

his conditions in disciplinary segregation were unusually harsh.

Plaintiff's allegation that defendant Corbin took his coffee and gave it to his cellmate could be an attempt to raise a due process claim on the ground that he was never given any process at all before Corbin decided to deprive him of his property. If that is plaintiff's position, it too must fail. Petitioner's allegations suggest that Corbin's taking of his property was a random and unauthorized act rather than one carried out pursuant to a policy of the institution or the Department of Corrections. Plaintiff certainly does not allege or suggest that the prison had a policy of giving away prisoners' property to cellmates. For random and unauthorized takings, there is no due process requirement that the prisoner receive process before the taking; in those circumstances, all that is required is that a meaningful remedy exists after the taking occurred. Hudson v. Palmer, 468 U.S. 517 (1984) (no due process claim for random and unauthorized deprivation of property, even if taking is intentional, so long as state provides inmate suitable post-deprivation remedy).

The state of Wisconsin provides post-deprivation procedures for challenging the alleged wrongful taking and destruction of property. Wis. Stat. ch. 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. Because post-deprivation procedures were available to plaintiff in state court, he cannot contend that the state deprived him of due process by taking his coffee. Plaintiff's due process claim against defendant must be dismissed for failure to state a claim upon which relief may be granted.

D. Excessive Force

In claim 10, plaintiff contends that defendants defendants Jaeger and Corbin caused him to be injured in separate incidents, but does not provide enough detail of either of their roles in these incidents to allow an inference that they engaged of acts of excessive force themselves or even could have intervened in an act of excessive force by another. In the first instance, plaintiff alleges only that a guard named "Big Show" hurt him while putting him in segregation and Jaeger had ordered he be put in segregation. He does not say Jaeger directed the harmful activities or could have stepped in when they occurred. Likewise, plaintiff says about Corbin only that she ordered plaintiff be put in segregation, not that she engaged in the harmful acts plaintiff now complains about.

E. Deliberate Indifference

Plaintiff contends that certain defendants ignored his injuries and health care needs. To state a claim under 42 U.S.C. § 1983 for these acts, the defendants must have acted with deliberate indifference to a substantial risk that plaintiff faced serious physical harm, which in the context of health care requires that he had a serious medical need. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

In claim 11, plaintiff alleges that defendant Rybuck ignored the injuries caused by hard cuffs that were placed on him and refused to remove the hard cuffs. As the Court of Appeals for the Seventh Circuit has explained, the Eighth Amendment does not require

prison officials to "dispense bromides for the sniffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue." Reed v. McBride, 178 F.3d 849, 853 (7th Cir. 1999) (quoting Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996)). Although it is unclear what the divide is between "minor aches and pains or . . . tiny scratch[es]" and sufficiently serious pain and cuts, plaintiff's allegations put his injury on the side of not sufficiently serious. Plaintiff alleges that hard cuffs "pinch and cut and bruise" him because he has large wrists and that, during the incident with Rybuck, the cuffs he wore cut him and drew blood. However, plaintiff does not suggest that the cuffs were particularly sharp, only that they were so tight that they pinched, cut and bruised him. Nor does he suggest that the cuts were deep or that more than a minimal amount of blood was drawn. Under the circumstances, it would not be reasonable to infer that plaintiff's alleged "cut" was anything more than a tiny wound caused by the pinching of cuffs too tight for him. This may have been uncomfortable, but it was not sufficiently serious to give rise to an Eighth Amendment claim.

Finally, in claim 13, plaintiff contends that defendant Hannula acted with deliberate indifference to his serious medical needs because he refused to prescribe plaintiff soft cuffs for a while and continued to refuse to prescribe him double mattresses. As for the soft cuffs requirement, although Hannula may have known plaintiff had had a prescription for soft cuffs in the past and had been "cut" by hard cuffs, as explained above, the allegations do not support an inference that plaintiff had suffered more than a discomfort as a result of the hard cuffs. Even if they did, however, they do not support an inference that Hannula was aware

of any serious medical need related to the use of hard cuffs.

As for the double mattresses, plaintiff explains that he is suffering from many health conditions, that another doctor recognized that he needed double mattresses, and that Hannula had recognized that plaintiff had serious health conditions because he submitted an affidavit in support of his early release. Even so, none of these allegations support an inference that defendant Hannula had a reason to believe plaintiff needed a double mattress to treat his health conditions. Plaintiff does not suggest he was receiving *no* treatment; his only contention is that he needed a double mattress as part of that treatment. Assuming he is correct on that point, there is no reason to think Hannula would have known that. Plaintiff never suggests Hannula was aware of the other doctor's conclusions about the double mattress or even that Hannula knew enough about plaintiff's symptoms to be able to connect them to his lack of a double mattress. Regardless whether Hannula knew generally that plaintiff was unwell, as his filing an affidavit for plaintiff's early release would suggest, there is nothing suggesting that Hannula knew plaintiff needed a double mattress as part of his treatment.

F. Conclusion

Plaintiff made several attempts to fix the shortcomings in his complaint but simply could not do it. Some of his claims fail because there is simply no claim for the concerns he describes. However, for others, the problem is that, despite the multiple opportunities,

plaintiff failed to provide the details he needed about the incidents in question. There is likely an easy explanation for this: plaintiff tried for too much. Plaintiff was told repeatedly that his laundry list of discontents against prison officials in two separate prisons could not proceed in a single case, and was told to focus on describing his concerns in enough detail to allow defendants and the court understand exactly what he believed defendants did wrong. Instead of focusing, plaintiff tried to keep in as many claims and as many defendants as he could. By doing so, plaintiff spread his complaint too thin, left his allegations too general or conclusory, and failed to state a claim. Plaintiff was warned that he would not be given another opportunity. Plaintiff's third amended complaint must now be dismissed with prejudice for its failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Larry J. Duane Spencer's complaint is DISMISSED for failure to state a claim upon which relief may be granted.

2. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund account until the filing fees have been paid in full.

3. The assorted motions for miscellaneous relief, dkts. ## 7, 8, 10, 11, 12, 13, 14, 15, 24, 25, 26, 38, 43, 47, 50 and 53, are DENIED as moot or not properly raised in this suit.

Entered this 12th day of April, 2011.

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