

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

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AUG 23 2017

**U.S. DISTRICT COURT
MID. DIST. TENN.**

ROBERT ZENAS WHIPPLE, III,)
Plaintiff,)

v.)

REBECCA MILLAY, et al.,)
Defendants.)

No. 1:14-cv-117

MOTION FOR COUNSEL, ABEYANCE, AND/OR INJUNCTION

COMES NOW, Plaintiff, pro se, and moves the Court to appoint counsel, hold this matter in abeyance until Plaintiff's release, and/or issue an injunction requiring prison officials to permit Plaintiff meaningful access to the courts. Prison officials are willfully interfering with Plaintiff's ability to access the courts. As additional grounds for this motion, Plaintiff avers:

1. Plaintiff is unable to make copies to properly serve opposing counsel because prison officials read and censor his illegal documents that he submits to be copied. See DE 185.
2. Prison officials have twice seized documents pertaining to this case. The first time by seizing the computer where they were stored (see DE 183) and then again when they recently placed him in segregation briefly as a form of retaliation for his civil rights cases, including this one (see DE 189). After the second seizure, Plaintiff's case file in this matter no longer includes any of the discovery provided by defendants and most of the filings are missing as well.

3. On July 12, 2017, Plaintiff mailed a settlement offer to opposing counsel (with a copy to TDOC's General Counsel), offering to settle this case if TDOC would accept Plaintiff into a work-release program. On July 24, 2017, prison officials suddenly agreed to allow Plaintiff into the program. Therefore, Plaintiff believed that this case would soon settle, and did not pursue the issue of the seized documents, assuming that the issue would soon be mooted.
4. On August 9, 2017, Plaintiff was informed by his counselor, Juanita Stone, that TDOC officials had changed their minds and he would not be allowed into the program. Plaintiff now concludes that the state does not wish to settle under the proffered terms, and asks that prison officials be ordered to return all documents seized to Plaintiff.

DENIAL OF LAW LIBRARY ACCESS

5. Plaintiff is currently housed at the Bledsoe County Correctional Complex annex (hereinafter, "annex"), a minimum-security housing area.
6. The annex contains a small library, but the legal volumes are neither constitutionally adequate nor up-to-date. See Exhibit A, Inventory of Annex Legal Materials. The collection lacks federal reporters and statutes.
7. Since Plaintiff arrived at the annex in February 2017 (and for the prior thirty (30) years, according to staff), this shortcoming was remedied by allowing annex inmates to go to Site 2 and use the Westlaw computer in that library.

8. Annex inmates also go to Site 2 to use their clinic, as the facilities at the annex are inadequate.
9. On July 23, 2017, Plaintiff obtained permission to go to the Site 2 law library to do some legal research from both his unit officers (Troglin and Chancey) as well as the librarian (CCO Hickey).
10. While waiting to enter Site 2, Lt. Delong came out and told Plaintiff that per a memo from Associate Warden Cobble (who is a defendant in a newly-filed case in the Eastern District), annex inmates can no longer go to the Site 2 law library.
11. This directive is only being enforced as to Plaintiff. On July 31, 2017 and again on August 7, 2017, other annex inmates were permitted to access the Site 2 law library. Plaintiff has requested logs through a Public Records Act request that will verify this and will provide them to the Court once TDOC produces the records.
12. Prison officials claim that this change was made because of "security," but Plaintiff asserts this reason is pretextual, as annex inmates, including Plaintiff, regularly go to the clinic at Site 2, where they interact freely with inmates housed at Site 2.
13. Plaintiff wrote to Associate Warden Cobble on August 2, 2017, seeking clarification. Associate Warden Cobble replied that, "Annex inmates send a written request to the Law Library for desired legal material. That material will be sent to them from the library."

14. Plaintiff then sent written requests to the library, per Associate Warden Cobble's instruction.
15. Responses took five (5) days, on average, to arrive at the annex, and the only cases provided were those which were identified by the exact case citation. Any requests that required a text search of Westlaw or a key numbers search of Westlaw, were ignored. The problem with that is, that if Plaintiff already has the exact case citation required to get a copy of the case, he likely already has some idea what the case says, but cases he has never been exposed to, including newly-decided cases, he will never be able to access with this system.
16. Plaintiff later learned that these requests are being routed to Associate Warden Cobble, who is a defendant in another civil rights case Plaintiff has filed, who must first approve the request before materials are produced, creating a clear conflict-of-interest.
17. Plaintiff will attempt to provide some authority and legal argument for this motion in the next section, but it comes from a legal reference volume more than twenty (20) years old. Plaintiff apologizes in advance for the lack of up-to-date authorities and cases from this circuit.

LAW AND ARGUMENT

18. "'(A)n inmate's right to unfettered access to the courts is as fundamental a right as any other he may hold.... All other rights are illusory without it.'" Rights of Prison

ers, 2nd ed., Section 11.01; Mushlin, Michael (1993) (quoting Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973)). Accord McCarthy v. Madigan, 112 S.Ct. 1081, 1091 (1992) (holding that the right to file a court action is "fundamental" because it is preservative of all rights.).

19. In Ex parte Hull (312 U.S. 546 (1941)), "Michigan prison officials promulgated a regulation requiring that prisoners submit all legal documents for approval to the prison's institutional welfare office and then to the parole board's legal investigator. Under the regulation, legal papers that were not approved as 'properly drawn' by the prison were not sent to the courts but were instead returned for 'correction.' The Supreme Court held that the regulation was invalid on the ground that 'the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.' The Court held that the propriety of legal papers submitted to a court 'are questions for that court alone to determine.' Ex parte Hull established, without elaborate analysis, that prison officials cannot impose themselves as barriers between prisoners and the courts." Rights of Prisoners, 2nd ed., Section 11.01; Mushlin, Michael (1993). Cobble is attempting to impose himself as just such a barrier.
20. Associate Warden Cobble's rule requiring that he "approve" legal research and production of legal materials is eerily similar to the Ex parte Hull rule, and should be found unlawful by the same reasoning.

21. "In Bounds v. Smith (430 U.S. 817 (1977)), the (Supreme) Court for the first time squarely held that the right of access to courts is so fundamental that prison officials are under an affirmative obligation to ensure that it is maintained. Bounds involved a claim by North Carolina inmates that they were deprived of the right of access to courts by the failure to provide legal research facilities at the prisons. The state's defense was that right of access did not require them to 'expend state funds.' The Court disagreed, holding that access to courts requires states 'to shoulder affirmative obligations to assure all prisoners meaningful access to courts.'" Rights of Prisoners, 2nd ed., Section 11.01; Mushlin, Michael (1993).
22. In this case, prison officials provide a Westlaw computer for Site 1, Site 2, and the Women's Site, but not at the annex, in order to save money, just as in Bounds. Prior to Cobble's recent change in policy, it was a non-issue, since annex inmates could simply go to Site 2, but now they only allow access to legal material with "approval" and then only if the prisoner can provide an exact case citation.
23. As will be readily apparent to the Court, it is impossible to provide adequate authorities using only the annex library.
24. "(T)he range of options available to the state to meet the right of access to the courts ... include access to inmate assistance, provision of law libraries, and provision of assistance from persons trained in the law." Rights

- of Prisoners, 2nd ed., Section 11.02; Mushlin, Michael (1993).
25. TDOC Policy § 501.04, Legal Assistance by Inmates, provides in Section V. that, "Inmates may request and receive the assistance of inmate legal helpers in preparing and filing legal papers with the courts." Annex inmates have no access to such assistance, as the person assigned to assist, Richard King, has no legal knowledge and refuse to assist other inmates.
26. "(T)he Supreme Court, in Johnson v. Avery (393 U.S. 483 (1969)), held that, absent the provision of an adequate substitute, inmates ... are entitled to the services of jailhouse lawyers." Rights of Prisoners, 2nd ed., Section 11.03; Mushlin, Michael (1993)
27. The annex library does not include federal statutes or law reporters. "(I)t is now fairly well established that (law libraries) must, at a minimum, include state and federal law reporters from the past thirty or so years." Rights of Prisoners, 2nd ed., Section 11.04; Mushlin, Michael (1993) (citing Corgain v. Miller, 708 F.2d 1241 (7th Cir. 1983); Cruz v. Hauck, 627 F.2d 710, 720 (5th Cir. 1980) (holding that the absence of Federal Supplements was considered a violation of the right to an adequate library because 'many important prisoner rights cases are decided in and go no further than the district court')). Therefore, the annex library is not constitutionally adequate.
28. Annex inmates cannot directly access the law library, and

are relegated to a "paging system." "A majority of courts have found that these book paging systems, when not supplemented by other measures, do not satisfy the constitutional right of access to courts." Rights of Prisoners, 2nd ed., Section 11.04; Mushlin, Michael (1993).

29. "(C)ourts have pointed out that a book paging system, even if run properly, so severely limits the legal materials available to inmates that the system cannot realistically be called a method of legal research." Rights of Prisoners, 2nd ed., Section 11.04; Muslin, Michael (1993) (citing Abdul-Akbar v. Watson, 775 F.Supp 735 (D.Del 1991), vacated, 1993 WL 301527 (3d Cir. 1993); United States ex rel Paraprofessional Law Clinic v. Kane, 656 F.Supp 1099, 1108 (E.D.Pa. 1986), aff'd, 835 F.2d 285 (3d Cir. 1987), cert denied, 485 U.S. 993 (1988)).
30. "Chief Judge Haynsworth best expressed the inherent inadequacy of the book paging system when he wrote that:

Simply providing a prisoner with books in his cell, if he requests them, gives a prisoner no meaningful chance to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of chance discovery of an obscure or forgotten case. Certainly, a prisoner, unversed in the law and the methods of legal research will need more time or more assistance than a trained lawyer exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what material he needs to consult."

Rights of Prisoners, 2nd ed., Section 11.04; Mushlin, Michael (1993) (quoting Williams v. Leeks, 584 F.2d 1336,

1339 (4th Cir. 1978), cert denied, 442 U.S. 911 (1979)).

31. The third method listed in paragraph 24, above, is not offered at all for TDOC inmates ("assistance from persons trained in the law.") Therefore, annex inmates have only a "paging system," without any additional assistance.
32. Given that the system of going to Site 2's law library was only altered by Associate Warden Cobble after he learned he had been sued, it seems a clear inference that Plaintiff is his intended target, in order to retaliate against him for his legal actions. Further evidence of Cobble's malicious intent is found in that other inmates are still being permitted ~~to use~~ ^{to access} the law library at Site 2.

WHEREFORE, premises considered, Plaintiff prays that this Court will order some form of relief from prison officials' interference with his ability to access the court by:

- (A) Appointing counsel;
- (B) Holding this matter in abeyance until Plaintiff's release; and/or
- (C) Issuing an injunction to prison officials requiring them to provide a Westlaw computer for the annex (or federal reporters and statutes) and the return of seized legal documents.

Respectfully submitted the 21st day of August, 2017



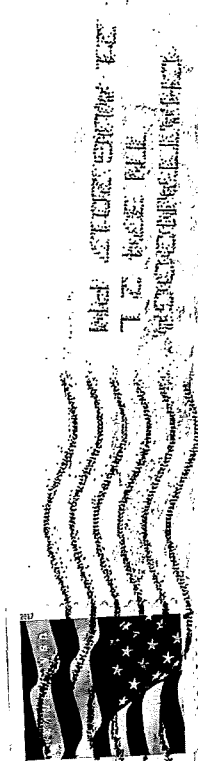
Robert Z. Whipple, III
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1045 Horsehead Road
Pikeville, TN 37367

Exhibit A

INVENTORY OF ANNEX LEGAL MATERIALS

TITLE	AUTHOR(S)	YEAR
S.W.2d (Volumes 1-943)		1996
Tennessee Digest 2d		1986
Tennessee Practice (Volumes 7-11 only)		1988
Tennessee Code Annotated		2013
Rights of Prisoners 2nd Ed.	Mushlin	1993
Tennessee Jurisprudence (Volume 20 only)		1985
Federal Criminal Code and Rules		2013
Federal Criminal Code and Rules		2014
Federal Criminal Code and Rules		2015
Federal Civil Judicial Procedure and Rules		2013
Federal Civil Judicial Procedure and Rules		2015
Federal Civil Rules Handbook		2014
Federal Civil Rules Handbook		2015
Federal Civil Rules Handbook		2016
Post-Conviction Remedies: A Self-Help... Manville, Brezna		1993
McCormick et al on Evidence 2nd Ed.		1954
Postconviction Remedies 2nd Ed.	Means	2013
Postconviction Remedies 2nd Ed.	Means	2014
Postconviction Remedies	Means	2015
Black's Law Dictionary 6th Ed.		1990
Black's Law Dictionary 7th Ed.		1999
Black's Law Dictionary 8th Ed.		2005
The Winning Brief 2nd Ed.	Garner	2004
The Georgetown Law Journal: 39th Annual Review of Crim. Pro.		2010
West's Analysis of American Law		2000
Wharton's Criminal Law 15th Ed. (Volume 3 only)		1995
Police Misconduct: Law and Litigation 2nd Nat'l Lawyers Guild		1994
How to Find the Law 8th Ed.	Cohen, et al	1983
Supreme Court Reporter Interim Edition Volume 116		1995
West's Federal Forms: Supreme Court 3d Ed.		1982
Reference Manual on Scientific Evidence		1995
Federal Habeas Corpus Practice and Procedure 2nd Ed.		2007
Criminal Law Defenses	Robinson	1994
Federal Immigration Laws and Regulations		2017
United States Supreme Court Decisions 1778-1998		1998
West's Tennessee Law Finder		1998
Tennessee Attorneys Memo: Permanent Edition (Vol 16-17)		1993
Tennessee Rules of Court: KeyRules Volume IIIA-Local		2013
Tennessee Rules of Court: KeyRules Volume IIIA-Local		2014
Tennessee Rules of Court Volume III-Local		2013
Tennessee Rules of Court Volume III-Local		2014
Tennessee Rules of Court Volume II-Federal		2013
Tennessee Rules of Court Volume II-Federal		2014
Tennessee Rules of Court: KeyRules Volume IIA-Federal		2014
Tennessee Rules of Court Volume I-State		2013
Tennessee Practice (Volumes 7-11 only)		1984

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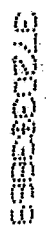
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