IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-01792-CNS-STV

BERNARD JONES,

Plaintiff,

v.

YVETTE BROWN, and
KRISTI MOORE,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Defendants' Partial Motion to Dismiss Amended Complaint Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Motion") [#93] which has been referred to the Court [#95]. This Court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the instant Motion. For the following reasons, the Court respectfully **RECOMMENDS** that the Motion be **DENIED**.

I. FACTUAL BACKGROUND[1]

Plaintiff is an inmate currently residing at the Arkansas Valley Correctional Facility ("AVCF"). [#88 at 2] Plaintiff is currently serving a ninety-six year prison sentence on a controlled substance conviction and a sixty-four year prison sentence on a sexual assault conviction and sentence imposed by the District Court for El Paso County, Colorado (the "El Paso County Case"). [*Jones v. Archuleta*, No. 16-cv-03048-PAB (the "3048 Case"), #54 at 2; *see also* 3048 Case, #10-12 at 2] On December 12, 2016, Plaintiff filed an Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (the "Application") in this district challenging his convictions in the El Paso County Case. [3048 Case, #1] On April 26, 2018, United States District Court Judge Philip A. Brimmer issued an order denying the Application. [3048 Case, #54]

On June 8, 2018, Plaintiff appealed Judge Brimmer's order. [3048 Case, #64; *Jones v. Archuleta*, No. 18-1228 (the "1228 Appeal")] On December 17, 2018, the Tenth Circuit issued an opinion denying Plaintiff's certificate of appealability and dismissing the appeal. [1228 Appeal] On February 18, 2019, Plaintiff filed an application to extend the time to file a petition for writ of certiorari with the United States Supreme Court.[2] [*Jones v. Archuleta*, No. 18A1047 (the "18A1047 Certiorari Petition")]

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[1] The facts are drawn from the allegations in the Amended Complaint (the "Complaint") [#88], which must be taken as true when considering a motion to dismiss. *See Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)). The Court also cites directly to certain filings that are accessible from other federal court dockets. *Bunn v. Perdue*, 966 F.3d 1094, 1096 n.4 (10th Cir. 2020) (recognizing that a court may take judicial notice of docket information from another court). Because the Motion only seeks to dismiss Plaintiff's denial of access to courts claim, the Court limits its recitation of facts to those relevant to that claim.

[2] According to the Complaint, on March 8, 2019, Plaintiff filed a petition for writ of certiorari with the Supreme Court, but the Supreme Court returned the petition to Plaintiff due to numerous deficiencies. [#88, ¶¶ 13-14] The Supreme Court's docket

On April 10, 2019, Justice Sonia Sotomayor granted that application and extended Plaintiff's time to file a petition for writ of certiorari until May 16, 2019. [*Id.*]

During the time that Plaintiff was preparing his Supreme Court petition he was located at the Fremont Correctional Facility ("FCF"). [*See* #88 at 2, ¶ 17] According to the Complaint, Plaintiff explained to Defendant Yvette Brown, the legal assistant at FCF, that he needed to complete his petition by the May 16 deadline provided by the Supreme Court.[3] [*Id.* at 2, ¶¶ 17, 26] Nonetheless, Defendant Brown limited Plaintiff to two-hour sessions at the prison law library and did not assist Plaintiff in the preparation of his legal documents. [*Id.* at ¶¶ 18-19, 25, 35, 41] She did this despite having the authority to schedule Plaintiff for both morning and afternoon law library sessions. [*Id.* at ¶ 36]

Plaintiff alleges that Defendant Brown is not a "trained and credentialed paralegal" and that, despite the fact that the FCF does not provide an attorney to assist inmates with their legal documents, she prohibited inmate law library clerks from assisting other inmates in preparing legal documents. [*Id.* at ¶¶ 32, 40, 42-44] Plaintiff was thus "completely dependent on another [inmate]" for help and that inmate had never before prepared a petition for writ of certiorari to the Supreme Court. [*Id.* at ¶ 20] Moreover, the computer in the law library did not contain samples of other Supreme Court petitions that Plaintiff could have used in preparing his petition. [*Id.* at ¶ 45]

Plaintiff further alleges that Defendant Brown informed Plaintiff that "there were no Federal Rules available in the [l]aw [l]ibrary that specifically described how to

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does not reflect either of those filings. [18A1047 Certiorari Petition] This discrepancy does not impact the Court's analysis of the instant Motion.

[3] Plaintiff attempted to seek a further extension of time from the Supreme Court, but that request was denied. [*Id.* at ¶¶ 18, 24] Plaintiff informed Defendant Brown of that denial. [*Id.* at ¶ 25]

prepare the [p]etition to the U.S. Supreme Court." [*Id.* at ¶ 20 (emphasis omitted)] This statement was not true. [*Id.* at ¶ 22] As a result, Plaintiff was forced to write to the Supreme Court to get a copy of its rules and procedures. [*Id.*]

By May 15, 2019, Plaintiff was "near the completion" of his petition. [*Id.* at ¶ 27] That day, Defendant Brown closed the prison's law library early, even though she knew Plaintiff had been using the computer inside the law library to prepare his petition. [*Id.*] Because Plaintiff had informed Defendant Brown on multiple occasions of his May 16 deadline, he asked her if he could attend the afternoon session to complete his petition. [*Id.* at ¶ 28] Defendant Brown denied this request but informed Plaintiff that he could complete his petition the very next day as she had scheduled him a law library appointment for May 16. [*Id.*] Nonetheless, on May 16, the deadline for Plaintiff to file his petition, Defendant Brown refused to open the prison library. [*Id.* at ¶ 29] Plaintiff asked his housing officer to ask Defendant Brown to allow Plaintiff to go to the law library to complete his petition because his petition needed to be filed that day, yet Defendant Brown still refused to allow Plaintiff access to the law library. [*Id.* at ¶ 30] As a result, Plaintiff could not complete and print off his petition, and he missed the deadline for filing his petition. [*Id.* at ¶¶ 31-33]

Had Plaintiff been able to timely file his petition, he would have brought two challenges to his convictions in the El Paso County Case. [*Id.* at ¶¶ 37-38] First, he would have presented the question: "Whether the federal courts erred by denying [an] ineffective assistance of counsel claim when [the] state courts fail to provide a petitioner with a constitutionally adequate opportunity to present evidence that was outside of the record?" [*Id.* at ¶ 37] Second, he would have presented the question: "Whether federal

courts erred by denying [an] ineffective assistance of counsel claim based on a conflict of interest as [Plaintiff] was denied [the] opportunity to properly weigh his right to testify at trial?" [*Id.* at ¶ 38]

Plaintiff initiated this action on June 30, 2021. [#1] Plaintiff's Amended Complaint, brought pursuant to 42 U.S.C. § 1983, asserts two claims: (1) denial of meaningful access to the courts by Defendant Brown (Count One), and (2) unlawful retaliation against Plaintiff for his filing of grievances by Defendants Brown and Moore (Count Two). [*Id.*] On August 29, 2022, Defendants filed the instant Motion seeking to dismiss Count One. [#93] Plaintiff has responded to the Motion [#111] and Defendants have replied [#122].

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they

encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting *Twombly*, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The Court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. ANALYSIS

Defendants argue that Plaintiff has failed to plausibly plead an access to courts claim. [#93] The right of access to the courts does not guarantee access to a law library or to legal assistance, but rather establishes the right to "the means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[4] *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996)

[4] To state a denial of right of access claim, in addition to showing a denial of access to the courts, a plaintiff must also "demonstrate actual injury from interference with his access to the courts—that is, that the [plaintiff] was frustrated or impeded in his efforts to pursue a nonfrivolous legal claim concerning his conviction or conditions of

(quotation omitted). Thus, the right of access to the courts "guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id.* at 356.

Here, liberally construed, Plaintiff alleges that he was denied meaningful access to the courts because Defendant Brown: (1) refused to help Plaintiff with his petition and, in any event, was not qualified to help him with his petition, and did not allow prison law clerks to assist him despite the fact that the prison did not provide an attorney for assistance and the computer did not have sample petitions for review, (2) wrongfully told Plaintiff that there were no federal rules available in the law library, thus requiring Plaintiff to obtain a copy of the rules from the Supreme Court, (3) only allowed Plaintiff two hours per day in the law library, (4) closed the law library early the day before she knew Plaintiff's petition for writ of certiorari was due, and (5) did not reopen the law library on the day she knew Plaintiff's petition was due. [#1, ¶¶ 20-25]

The Court agrees with Defendant that many of these allegations do not support a denial of access claim. The fact that Defendant Brown refused to assist Plaintiff in preparing his legal documents, standing alone, does not establish a denial of access to

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confinement." *Gee v. Pacheco*, 627 F.3d 1178, 1191 (10th Cir. 2010) (citing *Lewis*, 518 U.S. at 351-55). "The plaintiff 'need not show,' however, that he or she would have prevailed on the interfered-with claim, 'only that it was not frivolous.'" *Leek v. Androski*, No. 21-3165, 2022 WL 1134967, at *3 (10th Cir. Apr. 18, 2022) (unpublished) (quoting *Simkins v. Bruce*, 406 F.3d 1239, 1244 (10th Cir. 2005)). "To be nonfrivolous, the plaintiff's underlying claim must be 'described well enough . . . to show that the "arguable" nature of the underlying claim is more than hope.'" *Leek*, 2022 WL 1134967, at *3 (quoting *Christopher v. Harbury*, 536 U.S. 403, 416 (2002)). "Conclusory allegations of injury in this respect will not suffice." *Wardell v. Duncan*, 470 F.3d 954, 959 (10th Cir. 2006)) (citing *Cosco v. Uphoff*, 195 F.3d 1221, 1224 (10th Cir. 1999)). Defendants have not challenged this prong of Plaintiff's access to courts claim [#93], and the Court therefore does not address whether Plaintiff's petition would have raised non-frivolous claims.

the courts claim. *Lewis*, 518 U.S. at 350-51 (describing that no independent right to legal assistance exists); *Leek v. Androski*, No. 21-3165, 2022 WL 1134967, at *3 (10th Cir. Apr. 18, 2022) (same) (unpublished). With respect to the two-hour limitation, Plaintiff fails to allege any facts that plausibly explain how this two-hour daily limitation "hindered his efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351. Indeed, elsewhere in the Complaint Plaintiff alleges that his petition was "near . . . completion" the day before the petition was due. [#88 at ¶ 27] And the Tenth Circuit has made clear that "[p]risoners are not entitled to unlimited access to the law library" and has affirmed the dismissal of an access to courts claim in which the inmate was only allowed two hours *per week* in the law library. *White v. Gregory*, 87 F.3d 429, 430 (10th Cir. 1996). Similarly, with respect to Defendant Brown wrongfully telling Plaintiff that the law library did not have a copy of the Supreme Court's rules, Plaintiff was ultimately able to obtain a copy of those rules and, again, alleges that his petition was "near . . . completion" the day before the petition was due. [#88 at ¶ 27] Thus, Plaintiff has failed to plausibly allege that Defendant Brown's statement "hindered [Plaintiff's] efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351.

Plaintiff's allegations that Defendant Brown closed the law library early the day before Plaintiff's petition was due and then did not reopen it until after the filing deadline had passed, however, adequately alleges a denial of access to the courts claim. Plaintiff alleges that he had informed Defendant Brown of the May 16 deadline on numerous occasions. [#88 at ¶ 28] He further alleges that he reminded Defendant Brown that he needed to complete the petition when she closed the law library early on May 15, and she assured him that he would be able to use the law library the next day.

[*Id.*] Nonetheless, Defendant Brown refused to open the law library on May 16, despite being reminded of Plaintiff's deadline by Plaintiff's housing officer. [*Id.* at ¶¶ 29-30] Because Plaintiff was unable to access his petition which was on the computer in the law library, he was unable to timely file the petition with the Supreme Court. [*Id.* at ¶¶ 28-30] The Court concludes that through these assertions Plaintiff has plausibly alleged that Defendant Brown interfered with Plaintiff's ability to "bring[] [a] contemplated challenge[] to [his El Paso County Case] sentence[]." *Lewis*, 518 U.S. at 356; *cf. Howard v. Webster*, 339 F. App'x 616, 618 (7th Cir. 2009) (plaintiff did not plausibly allege an access to courts claim where he alleged that the law librarian unexpectedly closed the law library for ten days seven days before plaintiff's petition was due and plaintiff's petition was on a disc in the law library, but plaintiff did not allege that he asked anyone for access to the disc or even that anyone knew that plaintiff had not finished his petition or that the disc with the petition was locked in the library).

In their Motion, Defendants barely address the allegations concerning Defendant Jones' actions on May 15 and 16.[5] [##93 at 11-12; 122 at 9] Indeed, the only substantive analysis of Defendant Jones' actions on May 15 and 16 involves the statements that: (1) "[e]ven considering the two-day law library closure in the final days prior to his deadline, the most conservative estimates show that [Plaintiff] spent a substantial amount of time in the law library, during which he had access to computer resources for legal research" [#93 at 11]; and (2) "these allegations [concerning the library closing] cannot support a plausible denial of meaningful access to courts claim standing alone because the Amended Complaint shows the full scope of [Plaintiff's]

[5] Defendants state that Plaintiff "acknowledges that he could have prepared his writ of certiorari outside of the . . . law library," but the portions of the Complaint they cite do not contain any such acknowledgment. [#93 at 8 (citing #88 at ¶¶ 21, 27)]

legal access at FCF [and] negate[s] any plausible inference of causation" [#122 at 9]. But these statements ignore the fact that Defendant Brown denied Plaintiff access to the law library the day the petition was due, despite knowing that the petition was unfinished and saved on a computer inside the law library, thereby prohibiting Plaintiff from filing the petition (*i.e.*, causation). And while it is true that Plaintiff may have had sufficient time—including time in the law library—to have completed his petition prior to the May 16 deadline, nobody informed him that he would need to complete it early or that the law library would be closed on May 16. Indeed, on May 15, Plaintiff was told that he would be permitted access to the law library the next day [#88 at ¶ 28], and thus he would have had no reason to try to print out his petition and finish it by hand. *cf. Howard*, 339 F. App'x at 618 (relying, in part, on fact that prisoner could have asked for the disc containing a draft of the petition and "put pen to paper" in the seven days between the library closure and the deadline to file the petition). Accordingly, because Plaintiff has plausibly alleged that Defendant Brown knowingly denied Plaintiff access to his petition the day the petition was due, and that Plaintiff thereby missed the deadline to file his petition, the Court respectfully RECOMMENDS that the Motion be DENIED.

IV. CONCLUSION

For the foregoing reasons, this Court respectfully **RECOMMENDS** that Defendants' Partial Motion to Dismiss Amended Complaint Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Motion") [#93] be **DENIED**.[6]

[6] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection

DATED: December 2, 2022

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

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for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).