No. 19-1237

IN THE

SUPREME COURT OF THE UNITED STATES

LEROY K. WHEELER – PETITIONER

VS.

STATE OF NORTH DAKOTA et al - PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI

TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Do poor pro-se prisoners have a constitutional right to access the courts and to justice that will compel courts to rule on the merits of valid constitutional claims that is above a prejudicial point of view of judges ?

LIST OF PARTIES

All parties do not appear on the cover, the following is also a party:

Doug Burgum, Governor of North Dakota.

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OPINIONS BELOW

In the federal courts below the opinion of the Court of appeals for the Eighth Circuit is unreported at the present and appears at Appendix – A, Appendix page 1, (App. P.).

The opinion of the United States District Court Magistrate's Report and Recommendation (R&R), appears at Appendix – B, App. P.2. and the District Court's Adopting the R&R appears at Appendix –B, App. P. 23.

JURISDICTION

The opinion of the United States Court of Appeals that decided my case was on December 10, 2019. A timely Petition for Rehearing En Banc was denied by the United States Court of Appeals on January 14, 2020, and a copy of the Order denying Rehearing En Banc appears at Appendix – C, App. P. 25.

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment – Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment – No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Eighth Amendment - ...nor cruel and unusual punishments inflicted.

28 USC 1915 (g)- three strikes provision

STATEMENT OF THE CASE

This is a case of a total denial of access to the courts that is adequate, effective and meaningful in North Dakota for all poor pro-se prisoners. This doesn't mean there isn't some form of access, like creating documents and getting some kind of a document into a court file. It does mean that the substance of the petitioner, LeRoy K. Wheeler (Wheeler)'s intended content of his claims is being totally ignored by all state courts, and now also in the federal courts below as well that is denying this access.

There are 3 ways pro-se prisoners are being denied adequate access to the courts: (1) a courts refusal to judge the merits of Wheeler's claims, through recharacterization, etc.; (2) Prison Officials, immunized by the courts, from official interference for altering Wheeler's outgoing legal and official mail contents; and (3) Refusing to appoint Counsel to cure any defects that the courts may have with Wheelers presentation of his claims to the courts. Because accountability of Government and judicial officers is non-existent in North Dakota. The courts in combination with prison officials have turned to personal prejudice to overrule the rule of law by calling all pro-se suits either frivolous or rule on procedural rather than on the merits of the claim.

Under these catagories; involved here is Wheeler's criminal case with a postconviction and 2 civil rights actions that fundamentally the courts refused to even hear the merits, even though they all have substantial merit. .Catagory (1) first, Wheeler's criminal trial was rittled with fundamental errors because Wheeler was forced to act pro-se or have no evidence presented in his behalf. Wheeler had to try, and the state took advantage of that. The state presented false evidence to convict Wheeler on some medical term, Tanner Scale, see trial transcripts (herein after tr. Tr.) on the Tanner Scale from Dr. Schanzenbach (Appendix F p. 83).

Wheeler had requested medical books to meet the state and prepare for trial (App. H p.), but the trial court refused, (App. E p. 52-53). At trial Wheeler objected on unfair surprise and argued. The trial court ruled you can have that for appeal but we are not going to do anything about that now. Wheeler was subsequently convicted. The state altered the trial transcripts and omitted the argument and some other things as well. Wheeler motioned to correct the record in the trial court (App. H p.189) and the trial court denied it (App. E p. 55). The same was filed in the state Supreme Court and the Clerk said it would be heard with the merits on direct appeal. (App. F p. 88). Wheeler's Appellant Brief on direct appeal, followed by 10 pages he was forced to remove because the court would not allow more than 50 pages, (App. H p. 264) and also (Ap. D p. 26). The state Supreme Court in 7 day's declared Wheeler's entire direct appeal frivolous (App. D p. 28). Wheelers petition for Rehearing (App. H p.333), and the state Supreme Court denied (App. D p.31). Wheeler has not seen these Tanner Scale books to this day.

Wheeler filed a postconviction in the state was based misconduct because the juror was the landlord of the Apartments where Wheeler lived with his Uncle and Aunt, but was not on their lease. When Wheeler was arrested the Police checked to see if Wheeler lived there, ~~on juror~~ being a registered sex offender, and the landlord looked and Wheeler was not on the lease, so the juror evicted all the ~~trial court~~ (App. H p.205) ~~and~~ occupants. In voir dire, however, the juror denied any knowledge of Wheeler or his case. Wheeler requested the landlords business records to prove the reason for the eviction. (App. H p.220), and was denied by the trial court (App. E p. 62). The state resisted Wheeler's postconviction (App. G p. 98). The trial court denied his postconviction (App. E p.59). Wheeler appealed to the state Supreme Court (App. H p.223), and the State ersisted(App. G p. 122 The state Supreme Court affirmed the dismissal on different grounds (App. D p.32) and it appears the main reason to deny was because Wheeler elected to proceed pro-

se and said Counsel could have collected the proof Wheeler needed.(App. D p. 32, paragraph 11). Wheeler petitioned for Rehearing (App. H p.254) but the State Supreme Court denied it. (App. D p. 40).

Category (2) Prison Officials were caught altering the contents of Wheeler's outgoing legal mail, and one postconviction was dismissed due to that activity. (App. E p. 64). On many occasions, as well, prison officials confinscated outgoing prisoner mail because they do not approve of the content.

The first civil rights action was based on Prison officials confinscating Wheeler's letter to law enforcement on prison conditions and then retaliating on Wheeler for writing and sending it, by taking his prison job and moving him to another unit. Wheelers brief to state District court (App. H p.). The state District Court granted summary judgement for Defendants (App. E p.71). Wheeler appealed to the state Supreme Court (App. H p.). State Supreme Court affirmed (App. D p. 44).

The second civil rights action was against the Governor of North Dakota, Doug Burgum, because government officials were violating constitutional rights and law violations and were not being held accountable and that he has a state constitutional duty to enforce the law, and to conform prisons within the state to U.S Constitutional mandates. See (App. H p.) Wheeler's brief. The state District court dismissed the case (App. E p. 79). Wheeler appealed to the state Supreme Court, see brief (App. H p.). The State Supreme Court simply affirmed. (App. D p. 46). The state courts simply granted immunity to all Defendants in both cases unjustifiably.

Category (3) All these courts below refused to appoint Counsel to Wheeler on all these causes of action because had Counsel been appointed on all these cases would have been reversed, because Counsel can force the courts to rule on the merits or at least present it in a way to obtain a judgment that the appeal courts would reverse, but pro-se prisoners cannot obtain a proper ruling, due to bias, regardless of instructions

for liberal construction. No one is holding these lower courts accountable for an unjust judgment.

Wheeler then filed a 42 USC 1983, in U.S. District Court based on the denial of adequate access to the courts that is effective and meaningful based on state courts absolute ban on justice for poor pro-se prisoners, No. 1:18-cv-265, and requested Counsel)App. H p 156 The District Court denied Counsel. (App. B p. 21), then the Magistrate entered his Report and Recommendation (R&R)(App. B p. 2). Wheeler filed his Objections to the R&R that called his case frivolous. (App. H p 165).The District Court adopted the R&R (App. B p.). Wheeler appealed to the Court of Appeals for the Eighth Circuit. (App. H p.). The Court of Appeals affirmed. (App. A). Wheeler then filed a Petition to Rehear En Banc. (App. H p. 150). The Court of Appeals denied. (App. C). App 25

REASONS FOR GRANTING THE PETITION

This case is about a total denial of access to the courts for poor pro-se prisoners that is adequate, effective and meaningful, in essence a total denial of access to justice in the courts of North Dakota, and now in the Eighth Circuit. If this Court does not take this case access to justice for all pro-se prisoners will be impossible, and accountability for prison officials and biased judgments is nonexistent. The decision of the Court of Appeals is contrary to the decisions of this Court on the issue of adequate access to the courts for prisoners. Affirmance is the approval of the decision below, and that is that of the Magistrate, and by these judgments gives the Magistrate the authority to overrule this Court in the many cases cited below. The Court of Appeals is intentionally abusing it's discretion on how to assess the facts and how it applies the law to the facts and evidence at issue, and that applying strikes to his meritorious claims has permanent injury, tey ignore the facts of Wheeler's Complaints and that appointing Counsel is necessary to preserve prisoner rights under the circumstances.

Wheeler has been interacting with these courts, fighting for his life, since 2004, and the North Dakota practice is that

unless you have an attorney your documents are considered frivolous, due to poverty, even in the face of evidence of a reversible constitutional magnitude. The courts below have totally denied Wheeler adequate access to the courts in 3 ways: (1) refusal to consider new evidence and/or merits to secure a prisoners ban on acess, and by applying strikes under 28 USC 1915 (g); (2) by allowing Prison Officials to interfere with a prisoners access by altering documents and exibits in the prisoners outgoing mail; and (3) by refusing to appoint Counsel when a prisoner cannot get his argument before the court.

This Court must look into how the federal questions were raised and how those courts in the state and federal have passed on them. *Ulster County N.Y. v. Allen* 442 US 140, n.5 (*Turner v. United States* 396 US 398, 424 (1970)...Although Respondents Memorandum did not cite the provision of the constitution on which it relied, their citation of our leading case applying that provision, in conjunction with the use of the word "unconstitutional", left no doubt they were making a federal constitutional argument). And when those courts have not been willing to consider those federal questions, see *Dey v. Hofbauer* 546 US 1, 3 (2005)(Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it).

Now the 3 catagories of denying access; [1] This Court said prisoner suits filed informa pauperis are not automatically frivolous, but the courts below say they are. See *Bell Atlantic Corp. v. Twomby*550 US 544, 555-56, n.3 (2007)(citing *Neitzke v. Williams* 490 US 319 (1989) " Complaint filed in forma pauperis is not automatically frivolous so as to warrant sua sponte dismissal pursuant to statute because Complaint fails to state a claim...What Rule 12 (b)(6) does not countenance are dismissals based on a judges disbelief of a Complaints factual allegations"). See (App. B p.1). A District courts disbelief in the facts presented by Wheeler is insufficient reason to refuse to apply the appropriate law to the case properly before it. Then the courts applied their denials based on procedural issues or otherwise to deprive a poor pro-se prisoner of justice, rather than the liberal construction of

ruling on the new evidence, merits or on prior erroneous evidentiary rulings. *Murray v. Carrier* 477 US 478, 501 (1986)(28 USC 2243- the statutory mandate to dispose of the matter as law and justice require clearly requires at least some consideration of the character of the constitutional claim). This Court ruled in *Haines v. Kerner* 404 US 519, 520 (1972)(the only issue before us is the petitioner was denied the ability to offer evidence to support his case...pro-se prisoner complaints, however inartfully pleaded, must be held to less stringent standards than that of attorneys). Wheeler has been held to a higher standard than attorneys, and like *Haines*, Wheeler is denied the ability to offer the proof on his Complaint because his case was dismissed in prescreening under 28 USC 1915A, (App. B p.2), even though Wheeler showed substantial support for his claims in his Objections to the R&R (App. H p.165). The District Court Adopted the R&R without discussion, as always. (App. B p.23). A prime example, by this Court, of a proper consideration of a plaintiffs claims on new evidence is displayed in *House v. Bell* 165 LED 2d 1, 9-11 (2006). There, it was discussed the kind of consideration Wheeler needs for his cases that would prove effective, adequate and meaningful, and if this took place, in Wheelers case, as in *House*, Wheeler's case would be reversed, but bias took over. Instead, justice has withered away through the same deference the Magistrate showed in this case, (App. B p.4), and blindly adopted by all reviewing courts, a miscarriage of justice for Wheeler. See *Cruz v. Beto* 405 US 319, 321 (1972)(*Johnson v. Avery*...right of access to the courts must be adequate, effective and meaningful, and must be freely exercisable without hinderence or fear of retaliation). (App. H p.). See also *Harris v. Reed* 489 US 255, 273 (1989)(Ake- meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversarial process). (App. H p.). This shows that just putting a document into a court file is not access as the Magistrate suggests in Wheelers case. (App. B p.16). Adequate access to the courts must mean a proper ruling from the court based on the evidence presented

that was not heard by the jury or on a evidentiary ruling that was improperly made that worked injustice for Wheeler and that if the new unheard evidence was heard by the jury it would produce a different result. See *United States v. Agurs* 427 US 97, 99, 103 (1976)(Prosecutors failure to turn over victims criminal record

> to defendant – the question to the answer depends on: 1). The review of the facts; 2). The significance of the failure of defense Counsel to request the material; and 3). The standard by which the prosecutors failure to volunteer exculpatory material should be judged...the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, (n. 8 many cases), and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury, (n.9 – Giglio & Napue)).

After repeated requests the state failed to turn over the victims criminal record, and the book on the Tanner Scale medical evidence presented by the state, discussed later. Wheeler even requested to continue the trial (App. G p. 91), because the state declared he had medical evidence but did not declare what it was, but the motion was denied, or if the evidentiary ruling was improperly made, on purpose, pursuant to established law, or even prosecutorial misconduct, that the verdict would have been a different result. *United States v. Wadlington* 233 F3d 1067, 1079-80 (8 Cir. 2000)(The plain error Rule is

> Designed to correct only those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Young 470 US 1, 15 (1985)" United States v. Atkinson 297 US 157, 160 (1936). We reverse only if certain that a miscarriage of justice would otherwise result"...Because the cumulative effect of prosecutorial misconduct must be assessed in determining whether the defendant was prejudiced, a finding that each particular instance of misconduct was harmless does not end the inquiry).

Wheeler had multiple claims of prosecutorial misconduct and the cumulative effect would affect the outcome of the trial as will be discussed below. This type of access is what the courts below are ignoring. This courts decision in *Lewis v. Casey* 518 US 343, 355-57 (1996)(In ...Bounds...the tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement...Petitioners brief the claim appears to be that all inmates ...have a right to nothing more than physical access to excellent libraries, plus help from legal assistants and law clerks. Id. At 35. This misreads *Bounds*, which as we have said guarantees no particular methodology but rather the conferral of the capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts. When any inmate...shows that an actionable Claim of this nature which he desires to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the state has failed to furnish adequate law libraries or adequate assistance from persons trained in the law. *Bounds* 430 US at 828).

Lewis describes a similar situation what Wheeler is facing but slightly different, in that case petitioner said inmates was only required access to libraries or help from legal assistants, but this Court disagreed. Here, Wheeler, according to the Magistrate said, Wheeler was allowed to create documents and file them in court and that they ruled against him, and for that reason the Magistrate feels satisfied is access to the courts. Harris (App. B p. 16). This Court in *Williams v. Taylor* 529 US 362, 383 (2000)(O'Conner J. concurring...the maxim that federal courts should give great weight to the considered conclusions of a co-equal state judiciary...does not mean that we have in the past that federal courts must presume the correctness of a state courts legal conclusions on habeas, or that a state courts incorrect legal determination has ever been allowed to stand because it was

reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is).

The District Court below did not do that. Just because the state courts rules against Wheeler does not mean it wasn't based on judicial bias, as this Magistrate is exhibiting here. The *Harris* court, Ante at 7 disagrees, they said a proper functioning of the adversarial process must mean a fair adjudication on the merits of the claim. Wheeler's attempt in the District Court, a review of the rulings complained about, as *Lewis* said at 349,(it is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or immenently will suffer, actual harm). Wheeler has suffered actual harm in all the suits he has filed, but the most concerning is his criminal conviction, which if the evidence he has presented, and the errors impartially viewed, will unquestionably result in an acquittal. He has a life sentence when no crime occurred. *Chambers v. Mississippi*410 US 284 (1973)(holding: that a combination of erroneous evidentiary rulings rose to the level of a due process violation... the right to defend against the states accusation). Wheeler's criminal trial was rattled with a multitude of errors intentionally set up by the state for the purpose to overwhelm Wheeler and to insure he could not succeed on appeal to obtain a reversal, some described below. (App. H p.264.

Wheeler's direct appeal decision was unfair because during the same time Wheeler was forced to sue the Warden because the Warden refused to give Wheeler credit to do his direct appeal in photocopying and postage. See *Wheeler v. Scuetzle* 2006 ND 115, 714 NW2d 829, and had arguments the same day back to back. Wheeler had to hand type 10 copies of both suits, researching and putting the cases together without any money, and no more extentions of time. See the Clerk of state Supreme Court's letter, (App. D p. 27), and their Court Order denying extra pages. (App. D p. 26.

In addition, the state and court reporter, altered Wheeler's trial transcripts. To show an inference of the altering, Wheeler's request to order the transcripts dated 5-10-05, (App. G p. 93), and the docket sheet to prove it, (App. G p. 94), then

the court reporter responded that the transcripts should be done by August 2005, (App. G p. 95; Then the trial judge finally notified Wheeler, (App. G p. 96, because they were altering them and needed more time. The court reporter even requested an extension of time. (App. G p. 97). Wheeler never received the transcripts until 11-1-05. If this Court chooses to not correct the transcripts, no one else will correct this miscarriage of justice, then the plain error rule should still suffice to reverse on the following states introduction of the Tanner Scale, an unfair surprise claim, in which Wheeler's objection was removed from the transcripts. See *Wadlington* supra. Because Wheeler reserved on unfair surprise claim for appeal and that conversation was omitted from the transcripts, along with other alterings, to avoid an inevitable reversal because the state using irrelevant evidence to deceive the court and jury by fraud, that medical term Tanner Scale, was elicited by the state in trial, (App. F p. 83). Wheeler requested pre-trial 3 times to access medical books, because the state claimed of having medical evidence, and was denied saying the state said he wasn't using it, (App. E p. 52-53), but he did anyway. In closing argument, the state told the jury, the Doctor testified that he didn't see any signs of tearing or bruising ...that is normal that when a person is that developed.(App. F p. 86). Now the Doctors testimony is also false (tr.tr. P. 568 L. 19), when he said the Tanner Scale was used to describe the sexual maturation of genitalia, instead of the growth of pubic hair. See *United States v. Pollard* 128 F Supp. 1104, 1121-22 (6 Dist. 2000). This was the states explanation as to why there was no evidence of a crime, or tearing or bruising from the alleged sexual assault. See *Green v. McElroy* 360 US 474, 496 (1959)(The evidence needed to prove the states case must be disclosed to the individual so that he has an opportunity to show that it is untrue – was denied confrontation and cross-examination); *Holmes v. South Carolina* 126 S.Ct 1727, 1735 (2006)(The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt). Still to this date Wheeler has no access to this medical book on this Tanner Scale, and did sue to access it without

success, see *Wheeler v. DeSautel et al* 2:12-cv-45, in U.S. District Court. In *Christopher v. Harbury* 536 US 403, 414 (2002)(The official acts complained

> To have denied access may allegedly have caused the los or inadequate settlement of a meritorious case, e.g. *Foster v. Lake Jackson*28 F3d 425, 429 (C.A. 5 1994); *Bell v. Milwaukee* 746 F2d 1205, 1261 (C.A. 7 1984) "The cover-up and resistence of the investigating Police Officers reduced hollow [the plaintiffs] right to seek redress," the loss of an opportunity to sue, e.g. *Swekel v. River Rouge* 119 F3d 1259, 1261 (C.A. 6 1997) " Police cover-up extended throughout time to file suit...under...statute of limitations," or the loss of an opportunity to seek some particular order of relief).

(App. H p. 162). Here Wheeler still does not have access to the proof of the Tanner Scale book for authentication to file suit in the courts and the courts below refuse to consider the caselaws and the unfairness Wheeler received in trial. Denial of the Tanner Scale book is the cover-up in Wheelers case. However, on direct appeal Wheeler did not know what the Tanner Scale was so he could only argue a denial of due process that he was denied his right to present his version of the complainants medical condition. Years later, because it was unavailable before, Wheeler discovered a case law from the 6th Circuit in a District Court case that this Tanner Scale is only used to measure the growth of pubic hair (they said it was used to guess the age of people depicted in pornographic photos), and not as the state portrayed it in Wheelers case as explaining the absence of tearing or bruising because she was so developed, see the trial transcripts (App. F p. 83 and closing arguments (App. F p. 86, and *Pollard* supra,Ante at 15, without the book for authentication the statute of limitations is not run because the cover-up continues, ,*Harbury* supra, and the and the state courts refused the case law as not qualifying. (App. F p. 89-90). Statute of limitations is 6 years in North Dakota (App. H p.).

After the unsuccess to obtain this book and based solely on the *Pollard* case, Wheeler filed a postconviction relief motion

in state District Court (App. H p.260), and because this bar in state court, Wheeler only received 2 letters from the court Clerk that it was not allowed to be filed. (App. F p. 89-90), see also (App. B p. 7), and the motion was returned so there was nothing in the court file to appeal. (App. D p.47). That biased trial court judge helped create all these problems for Wheeler so it is no surprise that she would not allow any consideration of this claim.

Because Wheeler has received a life sentence, being actually innocent of the crime, Wheeler filed this denial of access to the courts claim because no matter what a pro-se litigant files it's automatically frivolous no matter how much proof he has and because there is no other suit in the future where Wheeler can obtain relief of all of these biased state and federal court rulings to obtain a just determination of all the unjust conduct by the state.

The Magistrate in all his biased assessment states that we can and should take judicial notice of the state court judgments in this case, in otherwords great deference. (App. B p.4). In *Murray v. Carrier* 477 US 478, 518 (1986)(Abstention from the exercise of federal jurisdiction is the exception, not the rule, the doctrine of abstention, under which the District Court may decline to exercise or to postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it). These state court judgments is exactly what caused the denial of access to the courts in the first place. *Harbury* supra, and the Ddistrict Court should refrain from this judicial notice, especially in this type of case, because sex crimes are severely prejudicial and so many, as here, will allow that prejudice to override true justice. In Wheeler's objections to the R&R, he showed that this Court said it is for the federal courts to decide what the law is. *Williams* supra. Ante at 9. The District Court still adopted the R&R. (App. B p. 23). Wheeler made extensive arguments in that document on each claim and supporting laws on how they should go forward and it was all ignored. That's what makes Wheeler believe someone is altering his documents, or they are severely

corrupt. See *Barefoot v. Estelle* 463 US 880, 892-93, n.4 (1983)(in

> Order to make a substantial showing of a denial of a federal right a petitioner who has been relief in a District Court must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further).

Wheeler made this showing, and these courts are ignoring justice. See also *Owens v. Isaac*487 F3d 561, 562-64 (8 Cir. 2007)(District Courts denial of inmates request to Proceed in forma pauperis...was reversed...while the District Court also expressed the view in the first action that the inmates amended Complaint was subject to dismissal under sec. 1915A because it was frivolous or malicious or failed to state a claim, the court disagreed as at least some of the inmates allegations appeared to state some claims against some defendants...Conduct undertaken in retaliation for an inmates exercise of constitutionally protected right is actionable, even if the conduct would have been proper if motivated by different reason).

The District Court below cannot say that none of the cases Wheeler has presented states no claims that have merit, and one of them was a retaliation for the inmates exercise of a constitutional right case and still all was counted frivolous. That is a clear biased determination against pro-se prisoners. All of these cited cases state at least some merit.
The District Court here made no discussion as to why, other than the state Supreme Court judgment, as to any frivolousness of Wheelers claims, and did nothing to protect Wheeler's rights. These decisions below are contrary to this Courts decision in *Shinseki v. Sanders* 173 LED 2d 532, 545 (2009)(In ordinary appeals, for example, the appellant
Will point to rulings by the trial judge that the appellant claims are erroneous, say, a ruling excluding favorable evidence. Often the circumstances of the case will make clear to the

appellate judge that the ruling, if erroneous, was harmful and nothing further need be said).

The Tanner Scale evidence above, alone proves it's not frivolous for the trial court judge to refuse Wheeler access to medical books to defend against the states presented arguments. Some might think that the Tanner Scale evidence doesn't make that much difference, but it does, it's the only evidence the state had against Wheeler and what makes it even more important is that the claim was that the alleged victi was bleeding from what happened the night before, (App. F p. 80 , and also at a pre-trial motion to suppress hearing (App. F p. 81 The trial court order denying that motion. (App. E P. 48 Chambers supra. So this is clear the Magistrate is biased and the following judges adopting the R&R. They are not considering the trial courts erroneous decision. By the Magistrate giving great deference to the state court judgments is to create his own law and deny pro-se prisoner rights. See Jones v. Bock 166 LED 2d 798, 814 (2007)(The judges job is to construe the statute, not make it better. The judge must not read in by way of creation, but instead abide by the duty of restraint, the humility of function as merely the translator of anothers command).

Wheelers Postconviction Relief of 2007.

Wheeler also had an application for postconvition relief on juror bias(App. H p. 197). One juror, Kristine Schantz (Schantz), was landlord of Wheeler's apartments where he lived with his Uncle and Aunt. After Wheeler was arrested the Police went to see if Wheeler actually lived there, 11 months before trial, and when Schantz found out Wheeler was not on the lease, she evicted all the occupants of that apartment because Wheeler was staying there as a registered sex offender. During voir dire Schantz denied ever hearing about Wheeler or his case. Wheeler requested Schantz's business records to prove her knowledge of Wheeler before trial. (App. H p. 56 The trial court denied it as close to the crime of harassment. (App. E p. 58 . The prosecutor opposed Wheeler's motion as being a variation of a claim he used on direct appeal, a denial

of impartial jury. (App. G p. 98). Wheeler filed an extensive Reply brief (App. H p. 205 Wheeler's direct appeal claim was based on the jury venire was mostly people who were life long friends of state actors. See Wheelers appeal brief and the attached 10 pages he was forced to remove to meet the deadline. (App. H p. 264 The trial court denied Wheelers postconviction based on the states request. (App. E p. 55

Wheeler appealed to the state Supreme Court (App. H p. 254), and the state resisted, (App. G p. 122). The state Supreme Court affirmed the dismissal but on the ground that Wheeler chose to act pro-se, where Counsel could have collected the proof he needed to support his claim. (App. D p. 32 at 11)> The state courts denial of the business records is contrary to *Anderson v. Maryland* 427 US 463, 477 (1976)(we hold that the search of an individuals office for business records, their seizure, and subsequent introduction into evidence do not offend the 5th Amendments proscription that no person...shall be compelled in any criminal case to be a witness against himself). See also *Warger v. Shavers* 190 LED 2d 422, 428, 431-32, n.3 (2014)(applies to any proceeding in which

> the juries verdict might be invalidated, including efforts to demonstrate that a juror lied during voir dire (many cases) ... If a juror was dishonest during voir dire and an honest response would have provided a valid basis to challenge the juror for cause, the verdict must be invalidated...It simply applies during an inquiry into the invalidity of the verdict – that is, during a proceeding in which the verdict may be rendered invalid, whether or not a jurors alleged misconduct during voir dire had a direct affect on the juries verdict. The motion for a new trial requires a court to determine whether the verdict can stand...There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process... Generally speaking, information is deemed extraneous if it derives from a source external to the jury. *Tanner* supra, at 117. External matters include publicity and information related specifically to the case the jurors

> are meant to decide, while internal maters include the general body of experiences that jurors are understood to bring with them to the jury room. Id. At 117-119).

Well Wheeler's case here is such a case that juror bias is so extreme that this Court needs to check the safeguards to protect the integrity of the process when, as here, Wheeler had a prior sex crime conviction and was lawfully registered but the juror lied to hide the fact that she knew Wheelers criminal background history, probably to make sure she could put him in jail. *Irvin v. Dowd* 366 US 717, 722 (1961). Wheeler's background history was not allowed for the jurors consideration because he did not testify at trial. Because Wheeler is still denied access to those business records of juror Schantz, the statute of limitations has not run because this activity is a cover-up to block access. See *Harbury* supra, Ante at 12 (citing *Swekel*).

On Wheeler's claim of actual innocence has some cotravercial problems, as shown above, because with the shown District Court bias, how can Wheeler convice this District Court with the new evidence, no juror would have voted to convict him when the District Court here refuses to even consider the gravity of Wheelers evidence, because bias against pro-se prisoners is so extreme no law can compare. See *McQuiggin V. Perkins* 185 LED 2d 1019 (2013)(Held: Actual innocence, if proven, held to be gateway through

> which state prisoner petitioning for federal habeas corpus relief might pass, regardless of whether impeded by procedural bar or expiration of 28 USC 2244 (d)(1); limitations period [1 year]...A petitioner does not meet the threshold requirement unless he persuades the District Court, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt).

This District Court exibits a strong denial of access to the courts, as if, in North Dakota, no prisoner has credibility or any constitutional rights once convicted. *Glebe v. frost*190 LED 2d 317, 320 (2014)(most constitutional mistakes call for reversal

only if the Government cannot demonstrate harmlessness. *Nedar v. United States* 527 US 1, 8 (1999). Only the rare type of error – in general, one that "infects the entire trial process" and "necessarily renders it fundamentally unfair" – requires automatic reversal). Wheeler's cases have errors that rendered his trial fundamentally unfair and therefore require automatic reversal.

Even within the 8th Circuit the law tends to be clear on access to the courts, but the courts below ignore their existence. *Earl v. Fabian* 556 F3d 717, 726-28 (8 Cir. 2008)(Access to the courts is a constitutional right whose basis is unsettled. *Scheeler v. City of St. Cloud* 402 F3d 826, 830 (8 Cir. 2005). We conclude that a right of access to the courts can be derived from the 1st Amendment.id. To prevail from the 1st Amendment a claimant typically bears the burden of proving that the defendants intentionally restricted his access...On the other hand, "due process requires, at a minimum, that absent a countervailing state interest, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut* 401 US 371, 377 (1971)...Supreme Court has noted that sec. 2244 (d)(1)(B) "requires claim by claim consideration." Pace 549 US at 416, n.6).

There is no overriding state interest, and none of Wheeler's claims are heard because the District Court wants to bar all pro-se prisoners, denying due process. Here, the District Court only applied due process to one claim, a claim that shouldn't even been considered. (App. B p. 13), all claims deserve due process consideration. Even within the state, see *Claire v. St. Claire* 2004 ND 39, P6, 675 NW2d 175 (Although prisoners have diminished constitutional protections, they maintain a due process right to reasonable access to the courts). Here, reasonable usually means even more diminished, but no other definition as to what extent they allow, nor any mention of the 1st Amendment right as *Earl* supra. In Wheeler's cases there is no right of access, reasonable or otherwise, according to state.

Wheelers Civil Rights Actions Denying Access.

Wheeler filed 2 civil rights actions against state officials and the Magistrate says that Wheeler created documents, filed them in court and they denied him, and he feels that should be the end of story. (App. B p. 17). But that does not satisfy adequate access to the courts, there will be a more lengthy discussion on this issue below.

The first civil rights action was *Wheeler v. Schmalenberger et al.* 08-2016-cv-01114, (call this one Wheeler II). In (App. B p. 5), Magistrate cites this case as No. 20160361, which is the state Supreme Court No. Where Wheeler wrote the state attorney on prison conditions and he responded that you should write the North Dakota Highway Patrol (NDHP) because they have the jurisdiction inside the prison. Wheeler didn't know that the state attorney also wrote the Warden of North Dakota State Prison (NDSP) and gave all the same information. Wheeler then wrote the NDHP and sent the same 10 page letter about the prison conditions. Well the Warden was aware and when Wheeler gave it to his case manager to mail it, because Guards were interfering with his mail, and Wheeler wanted it to go out uncensored. Well the NDHP never received that letter. When the letter was confinscated the Deputy Warden called Wheeler to his office and scalded him about this letter, and showed it to him, then pulled his job and later that night moved Wheeler to another unit. An extensive record of this activity is in the US District Court in Bismarck, N.D. under case No. 1-11-cv-079, under the same names. There is nothing in the letter would justify their action on Wheeler. (Call this one Wheeler I), and because Wheeler exposed criminal activity the Deputy Warden said, I'm going to silence you. (App. H p.). In the state District Court, he granted summary judgment for the defendants, on favoritism, not because Wheeler didn't have a claim. It's clear that race discrimination was at issue, and retaliation for the exercise of a constitutional right was actionable. (App. E p. 75), and (App. H p.). Wheeler appealed to the state Supreme Court and it was affirmed (App. D p. 44

The 2nd civil rights action was against the Governor, Doug Burgum, No. 08-2017-cv-2892, S Ct. No. 20170444, (call it Wheeler III). (App. H p.) & (App. B p.), because

Burgum has a state constitutional duty to enforce the law, Art. V sec. 7, " thr Governor, as chief executive ...shall faithfully enforce the law..." even within the prison as an entity that he governs because the suit above no one was held accountable for their unconstitutional conduct. (App. H p. 165. The state District Court never once made a communication, in that case, directly to Wheeler. Basically, a denial to entertain a federal cause of action. See Wheelers Objections for an extensive argument. All communications from Burgums attorney, even the court dismissal that was drafted by Burgums attorney, (App. E p. 79), because Wheeler received an unsigned copy before the judge electronically signed it. This is not even close to adequate access to the courts. Wheeler appealed to the state Supreme Court and it was affirmed (App. D p. 46., just to ignore Wheelers rights and the law, a denial of access. North Dakota does have a statute that appears to immunize state officials from any actions brought by prisoners, see NDCC 32-12.2-02 (3), but no court seems to cite it,rely on it for denial so Wheeler can challenge it, *Haywood v. Drown* 173 LED 2d 920 (2009), but Wheeler believes it is behind the scenes what supports their judgment in their own mind.

With these decisions from the courts below have offered the state absolute immunity without justification contrary to *Harlow v. Fritzgerald*457 US 800, 819 (1982)(we provide no license for lawless conduct). (App. H p. 162). See also *Will v. Hallock* 546 US 345, 353 (2006)(Qualified immunity is not the law simply to save trouble for the Government and its employees, it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was).

The law here has been clear for a long time.

To prove it is the District Courts attempt to eliminate pro-se prisoner suits is, without hesitation or fair consideration of Wheelers need for justice, have applied these strikes against Wheeler on his meritorious claims under 28 USC 1915 (g), (App. Bp.19). They were made available for those who really

have frivolous, malicious or fails to state a claim...but should not be used simply because a person is labeled a prisoner. See *Owens* supra, (the dismissal was reversed because... at least some of the allegations appeared to state claims against some defendants). However, the Magistrate made mention of the definition of frivolousness in (App. B p. 10), said, "frivolous claims are those that are clearly baseless, fanciful, fantastic or delusional." None of Wheelers claims fall under this category, and clearly have merit based on those caselaws provided. Wheelers claims are meritorious and no impartial person could say that all of those claims are frivolous, it's just pure bias. The District Courts application here, to apply a strike is a malicious attack on poor pro-se prisoners, (App. B p. 18), that they no longer protect prisoners constitutional rights contrary to, *Overton v. Bazzetta* 539 US 126, 137 (2003)(Our

> decision today is faithful to the principle that federal courts must take cognizance of valid constitutional of prison inmates, Prison walls do not form a barrier separating prison inmates from the protections of the constitution. Hence, for example, prisoners retain the constitutional right to petition the government for the redress of grievances. *Johnson v. Avery* 393 US 483 (1969). When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. *Procunier v. Martinez*416 US at 405-06).

Wheeler's Constitutional rights, even his right to seek redress. When the courts give immunity to prison officials, like in this case, the Guards become gang members for their favorite class of inmates, and the less favored classes are denied their 8th & 14th Amendment,The federal courts here refuse to discharge their duty to protect rights. Even with video proof of staffs wrong doing it's impossible to get redress. See the grievances (App. G p. 143), and *Wheeler v. Schalenberger et al* 1;11-cv-079 (Wheeler I).

[2] **Prison Officials Preventing Wheeler's Access.**

Wheeler has consistently complained to the courts that he needed an attorney appointed because prison officials were altering the contents of his mail &/or confinscating it altogether, (Wheeler I & Wheeler II), so the court could receive what Wheeler's true intentions were that his claims are meritorious and not frivolous. Wheeler had a postconviction motion dismissed because prison officials removed several documents from the envelope before mailing. (App. E p. 64. Wheeler has had legal mail completely disappear on many occasions. He cannot write Attorney's because he never gets responses, he tries to call them and the phone numbers are blocked. Another example is the civil rights actions shown above in Wheeler I, II & III. Because the lower courts have refused to hold them accountable they have not ceized. All of those problems above and in combination deny access to the courts and to justice. *Chambers v. Mississippi* 410 US of a due process violation). Wheeler is denied due process because he cannot get a fair hearing. See also *Garner v. United States* 424 US 648, 653 (1976)(to preserve our adversary system of criminal justice by preventing the government from circumventing that system by abusing it's powers).

[3] **Courts refusal to Appoint Counsel can Cause Denial of Access.**

Wheeler requested Counsel in every court and was denied. In Wheeler's criminal case he did not waive Counsel on direct appeal, see (App. H p.333), & (App. H p. 153). In civil rights actions, Wheeler II in the state District Court, its denial (App. E p. 78). In Wheeler III, in state District Court and their denial (App. E p. 79, and in the state Supreme Court Wheeler II denial (App. D p. 45, and Wheeler III denied (App. D p. 51. The federal District Court denied (App. B p. 19), then again in the Court of Apeals (App. H p. , and their denial was the affirmance, (App A). These decisions are contrary to this courts decisions in (App. H p.165), and *Evitts v. Lucey* 469 US 387, 396, 399-400 (1985)(A party whose Counsel is unable to provide effective representation is in no

> Better position than one who has no Counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the

> effective assistance of an attorney... A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed...The right to appeal would be unique among state actions if it could be with drawn without consideration of applicable due process norms. For instance, though a state may choose whether it will institute any given welfare program, it must operate whatever program it does establish subject to the protections of the due process clause).

of jail, and some, not all, get out and get another charge, and Public Defenders won't do their job effectively for the same reason. Those who are falsely accused, such as Wheeler, get lost in this practice and innocence is impossible, when you are poor, in this new law of a lot of attorney's don't want to take a case on sexual offenses because they fear public ridicule on them getting a sex offender out prejudice as controlling. My whole life has been screwed up because of this conduct, not because I did wrong, I have the evidence of innocence but I just can't get an effective attorney who will do their job, in this case Wheeler cannot get an attorney at all. Because of the level of prejudice in these types of cases a strict scrutiny standard needs to apply. Retribution should not be the sole end in punishing, but it is here in North Dakota. *Furman v. Georgia* 408 US 238, 343 (1972)(Retaliation, vengeance and retribution have been roundly condemned as intolerable asperations for a Government in a free society).

The U.S. District Court below is only trying to eliminate pro-se prisoner suits, because if they appointed Counsel it would hinder their efforts to lighten their caseload, eliminate prisoner complaints, and also by these bars being applied. In the Court of Appeals they have followed suit with the District Court and quickly affirmed the District Court decision to dismiss (App. A). Wheeler filed an Appellate brief (App. H p.) for the Court of Appeals to consider because Wheeler was pressed for time to file his objections to the R&R, because the Magistrate forced Wheeler to file Objections to 2 separate cases at the same time within 14 day's. See (App. H p.). Wheeler filed

a Petition for rehearing En Banc (App. H p. 150, because these courts are not following a prisoner's right of accessing the courts and the Court of Appeals gave a quick denial (App. C) p. 25 and neither court would provide a statement to understand what they relied on. The Magistrates R&R was clearly an abuse of office.. The state court have put in place barriers on court access to cover their unlawful judgments and to eliminate any future inquiry into them that would expose their level of corruption, and applied them to Wheeler, (App. E p. 69, citing *State v. Holkesvig* 2015 ND 105, P7-12, 862 NW2d 531. Wheeler appealed to the state Supreme Court and that court affirmed and modified the bar slightly, (App. D p. 41. In appearance, it may look lawful, but in practice is unlawful. It becomes a conflict on how they define and apply a frivolous determination. Under the state court judgments poor pro-se prisoner cases, without Counsel, are automatically frivolous, nor have any constitutional protections. See *Hudson v. McMillian* 503 US 1, 15 (1992)(The right file redress in the courts is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner, it is more valuable...). Under all the lower court decisions, unless this Court reverses, it is more valuable for poor pro-se prisoners to be able to file these actions, who have no attorney to force the court to Rule on the merits or evidence.

In this case Wheeler's life is in the hands of this Court, and all pro-se's for that matter, and this innocent man has served 16 years on a life sentence with no evidence that a crime even occurred, and unconsidered evidence of innocence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leroy K. Wheeler

Dated April 13, 2020.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

LeRoy K. Wheeler, Plaintiff, vs. The State of North Dakota and Doug Burgum, Governor, Defendants.	))))))))))	**REPORT AND RECOMMENDATION** Case No. 1:18-cv-265

The plaintiff, LeRoy K. Wheeler ("Wheeler"), is an inmate at the North Dakota State Penitentiary ("NDSP") and frequent filer with this court. He initiated the above-captioned action *pro se* and *in forma pauperis* in December 2018. Chief Judge Hovland referred this matter to the Magistrate Judge for initial review as mandated by 28 U.S.C. § 1915A. For the reasons set forth below, I recommend that Wheeler's complaint be dismissed with prejudice and that he be assessed a "strike."

I. BACKGROUND

A. Wheeler's Complaint

Wheeler is claiming that he has been denied meaningful access to the courts, that the courts have denied him due process, and that Governor Burgum has failed to fulfill the duties of his office. Specifically, he asserts:

> Denial of Access to Courts: The State of North Dakota effectively denied the plaintiff, LeRoy K. Wheeler (hereinafter Wheeler), adequate access to the Courts in both criminal and civil courts proceedings to obtain effective review of his rights guaranteed through the U.S. Constitution. Access to the courts require states to assist inmates in the preparation of meaningful documents to the court that judges can make effective and meaningful judicial determination of the prisoners claims and to provide appropriate relief, and if not, adequate assistance from persons trained in the

law. To the following cases of Wheeler's the state courts have declined to make a judicial determination of his claims and how the evidence presented has denied his Constitutional protections and how it would have had a different outcome. All requests for court to assist were similarly denied without any good excuse, thus banning justice for Wheeler. See the following cases: Burleigh County No. Wheeler v. Burgum, 08-2017-cv-02892, app'd State S. Ct. No. 20170444; Burleigh County No. Wheeler v. Schmalenberger et al 08-2016-cv-01114, app'd State S.Ct. No. 20160361; Grand Forks County No.'s State v. Wheeler 18-04K-01644, 01644, 01645, app'd State S. Ct. No.'s 20050257-20050258, a postconviction motion in Grand Forks County No 18-2015-cv-248, 249 & 50, app'd State S.Ct. No's 20150013-20150015. See also Claim. Wheeler is deprived of his right to challenge his conviction and incorporate by reference all these cases.

* * *

Denial of Due process of law: Due Process is denied with the state courts refusal to entertain a federal cause of action that the U.S. Supreme Court says they cannot deny to entertain, its solely their duty to enforce the law, Howlett v. Rose, to comply with Lewis v. Casey in claim #1.

* * *

Doug Burgum (Burgum)'s failure to exercise his constitutional duty to enforce the law and oversight of the North Dakota State Pen (NDSP): Wheeler has a constitutional right to challenge the conditions of confinement. The U.S. Supreme court has said in Lewis v. Casey that is the political subdivisions of the States duty to align the prisons with constitutional commands. This would be Burgum's oligations in his oversight obligations as Governor. The above named suits in Claim No 1 shows substantial violations of constitutional rights of Wheelers that are being denied without judicial intervention and the burden falls on Burgum to exercise his supervisory authority to realign the prison to respect U.S. Constitutional rights or prisoners because of his constitutional duty to enforce the law, which, after notification of the violations of prisoners rights in the suit against him, above, still refused to exercise his authority to enforce the law that these suits did not cure, as a state act acting under the color of state law. Justice is totally denied to all poor prisoner simply because they cannot afford an attorney. There is also no means for the poor prisoner to hold any state official or judicial officer accountable, especially in a prison that enforces race discrimination and deny access ot the courts that Burgum is supposed to make sure does not exist. Plus staff are giving Wheelers incoming mail to other prisoners.

(Doc. No. 6). He seeks: "an injunction on Burgum to enforce constitutional rights of the U.S. Constitution for prisoners in NDSP, to appoint an attorney to revisit all federal rights claims listed

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in the named suits that were not adequately presented or ruled on to promote justice, a jury trial and monetary relief under the circumstances & if necessary to ~~reserve~~ reverse state dismissal & remand for trial." (Id.).

B. State Cases Referenced in Wheeler's Complaint

This court can and should take judicial notice of the following opinions issued by the North Dakota Supreme Court in the state cases referenced by Wheeler in his Complaint.

1. State v. Wheeler, Nos. 20050257 - 20050259

In State v. Wheeler, the North Dakota Supreme Court upheld Wheeler's convictions in state district court for gross sexual imposition, encouraging the deprivation of a minor, and contributing to the delinquency of a minor.

> [¶ 2] Wheeler argues: (1) there is insufficient evidence to support the conviction; (2) the district court erred in denying his request for a hearing under Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), to suppress evidence seized during a search because the search warrant was based on false statements made to the magistrate; (3) the court erred in denying his motion to dismiss; (4) the court erred in denying his request for a change of judge; (5) his rights were violated by the court's denial of his request to see the random jury draw; (6) his right to an impartial jury was violated when he was forced to keep a predisposed jury panel and he was forced to use his peremptory challenges on jurors who should have been excused for cause; (7) the court erred in denying his request for a directed verdict of acquittal; (8) the court erred in denying his motion for a new trial; (9) the judgments entered were unlawful; and (10) the court erred in denying his request to correct the record. Wheeler also argues he did not receive a fair trial because: (1) he was not allowed to offer an alternative explanation for the victim's medical condition because he was denied access to the medical school and Chester Fritz libraries; (2) he was denied the ability to prepare his witnesses for trial; (3) an ex parte suppression hearing was held; (4) the prosecutor presented undisclosed evidence explaining the victim's medical condition; (5) the prosecutor presented perjured testimony from law enforcement officers; (6) the prosecutor asked leading questions on direct examination; and (7) the prosecutor made improper arguments and comments to the jury.
>
> [¶ 3] Wheeler argues the district court judgments were unlawful because the judgments state Wheeler entered a plea of guilty when he was actually found guilty by a jury. Although Wheeler did not enter a plea of guilty, the judgments are not

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unlawful. See State v. Marshall, 1999 ND 242, ¶ 11-12, 603 N.W.2d 878. Rule 36, N.D.R.Crim.P., provides, "[a]fter giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." The clerical error in the judgments appears to be an oversight by the district court. We remand to allow the court to correct the judgments so that they accurately reflect the proceedings.

[¶ 4] We have considered all other issues Wheeler raised and conclude that they are completely without merit. We summarily affirm under N.D.R.App.P. 35.1(a)(1) and (3).

State v. Wheeler, 2006 ND 95, 719 N.W.2d 384.

2. Wheeler v. State, Nos. 20150013 - 20150115

In Wheeler v. State, the North Dakota Supreme Court upheld a state district court's order dismissing Wheeler's application for post-conviction relief and restricting his ability to file additional documents/applications for post-conviction relief in his criminal case.

[¶ 1] LeRoy Wheeler appeals from an order dismissing his application for post-conviction relief, authorizing the clerk of court for Grand Forks County to refuse to file any further documents in Wheeler's criminal cases and any future applications for post-conviction relief other than documents related to an appeal in this case, and relieving the State from any obligation to respond to any future motions filed in district court unless the court reviews the motion, determines it has merit, and in writing requests a response. We affirm the order as modified.

I

[¶ 2] Wheeler argues the retroactive application of a 2013 amendment to the statute of limitations for post-conviction proceedings in N.D.C.C. § 29–32.1–01(2) is unconstitutional. We conclude the 2013 amendments apply to Wheeler's application for post-conviction relief filed after the effective date of the amendments, and we affirm the order dismissing his application under N.D.R.App.P. 35.1(a)(7) and *Lehman v. State*, 2014 ND 103, ¶¶ 10–14, 847 N.W.2d 119 (holding 2013 amendment to post-conviction relief statute applies to post-conviction relief proceeding filed after effective date of amendment).

[¶ 3] Wheeler also argues the district court abused its discretion in prohibiting him from making additional filings in this case.

[¶ 4] In *State v. Holkesvig*, 2015 ND 105, ¶¶ 7–12, 862 N.W.2d 531, we recently

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modified a similar order prohibiting a litigant from filing motions or pleadings in his criminal cases. We explained the Uniform Postconviction Procedure Act, N.D.C.C. ch. 29–32.1, authorizes a district court to dispose of multiple, frivolous post-conviction relief applications, and we modified a district court order to comport with N.D.C.C. ch. 29–32.1 because he order allowed a clerk of court to refuse any filings and appeared to limit the statutory provisions allowing for post-conviction relief. *Holkesvig*, at ¶ 11.

[¶ 5] We conclude a similar prohibition is proper here. We modify the district court's order to comport with N.D.C.C. ch. 29–32.1 as follows: (1) Wheeler can pursue his right to appeal to the North Dakota Supreme Court as provided by the North Dakota Rules of Appellate Procedure, but he may not file any further motions or pleadings in these cases at the district court level, except after seeking and receiving approval of the presiding judge of the Northeast Central Judicial District, or his designee, to file a proper application under N.D.C.C. § 29–32.1–04 where Wheeler succinctly and concisely establishes an exception to the statute of limitation under N.D.C.C. § 29–32.1–01(3) and is not subject to summary disposition under N.D.C.C. § 29–32.1–09; and (2) the State is relieved from any obligation to respond to any further motions or pleadings filed in district court in these cases, unless the district court reviews the motion or pleading, determines it has merit and, in writing, permits Wheeler's filing and requests a response.

[¶ 6] We affirm the district court order as modified.

II

[¶ 7] We affirm the order denying Wheeler's application for post-conviction relief. We modify the order prohibiting Wheeler from filing any further motions or pleadings in these criminal cases and, as modified, we affirm.

Wheeler v. State, 2015 ND 264, 872 N.W.2d 634.

3. Wheeler v. Schmalenberger, et al., No. 20160361

In Wheeler v. Schmalenberger, et. al., the North Dakota Supreme Court affirmed the dismissal of Wheeler's civil rights action on summary judgment.

[¶ 1] Leroy Wheeler appeals from a district court order granting summary judgment and dismissing his complaint alleging that individuals employed at the North Dakota State Penitentiary violated his constitutional rights by confiscating a letter he had mailed. We conclude there is no genuine issue of material fact. Summary judgment dismissing the action is supported by the record, and the district court did not abuse its discretion in declining to appoint counsel. We summarily affirm under N.D.R.App.P. 35.1(a)(4) and (6).

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Wheeler v. Schmalenberger, et. al., 2017 ND 38, 891 N.W.2d 779.

4. Wheeler v. Burgum, No. 20170444

In Wheeler v. Burgum, the North Dakota Supreme Court affirmed the district court's declination to appoint Wheeler counsel and dismissal of his action against North Dakota Governor Doug Burgum.

> [¶ 1] LeRoy Wheeler appeals a district court judgment granting Governor Doug Burgum's motion to dismiss and denying Wheeler's motion to appoint counsel. We affirm.
>
> I
>
> [¶ 2] Wheeler, an inmate at the North Dakota State Penitentiary ("NDSP"), filed a complaint alleging civil rights violations under 42 U.S.C. § 1983 by Governor Burgum in both his official capacity and his personal capacity. The complaint alleges that Governor Burgum failed to supervise and govern officials and staff at the NDSP. Wheeler claims that NDSP officials and staff interfered with his mail, discriminated against him on the basis of race, denied him access to the courts, prevented him from challenging the conditions of his confinement, and retaliated against him for exercising his rights. Wheeler sent Governor Burgum two letters commenting on the conduct of these individuals. Governor Burgum did not respond to the letters. Wheeler sought injunctive relief against Governor Burgum in his official capacity for failing to supervise the actions of officials and staff at the NDSP. Wheeler also sought punitive damages for Governor Burgum's failure to respond to his letters or otherwise investigate the issues described in his letters. Additionally, Wheeler moved for appointed counsel.
>
> [¶ 3] Governor Burgum moved to dismiss the complaint under N.D.R.Civ.P. 12(b)(6) and opposed Wheeler's motion to appoint counsel. The district court granted Governor Burgum's motion to dismiss and denied Wheeler's motion for appointment of counsel.
>
> II
>
> [¶ 4] Wheeler argues the district court erred by granting Governor Burgum's motion to dismiss under N.D.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. "This Court reviews a district court's decision granting a motion to dismiss under N.D.R.Civ.P. 12(b)(6) de novo." *Nandan, LLP v. City of Fargo*, 2015 ND 37, ¶ 11, 858 N.W.2d 892. A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(6) tests the legal sufficiency of a claim, which we construe in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint. Id. Under N.D.R.Civ.P. 12(b)(6), a complaint should not be

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dismissed unless it is impossible to prove a claim upon which relief can be granted. *Id.*

A. Official Capacity

[¶ 5] Wheeler argues that Governor Burgum failed to supervise individuals working for the NDSP, violating 42 U.S.C. § 1983. Section 1983 provides, in relevant part, that every person who subjects any citizen "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured...." 42 U.S.C. § 1983. The Department of Corrections and Rehabilitation ("DOCR") "is responsible to the governor." N.D.C.C. § 54–23.3–01. The governor appoints the director of the DOCR, who serves at the pleasure of the governor. N.D.C.C. § 54–23.3–03. In addition to appointing the director, the governor "[s]hall supervise the official conduct of all executive and ministerial officers." N.D.C.C. § 54–07–01(1). The DOCR is "responsible for the direction and general administrative supervision, guidance, and planning of adult and juvenile correctional facilities and programs within the state." N.D.C.C. § 54–23.3–01.

[¶ 6] "Neither a state, an entity with Eleventh Amendment immunity, nor state officials sued in their official capacity are 'persons' under 42 U.S.C. § 1983, and neither is subject to suit under the statute in federal or state court." *Perry Center, Inc. v. Heitkamp*, 1998 ND 78, ¶ 37, 576 N.W.2d 505. A claim seeking only injunctive relief may proceed against a state official in his official capacity because official-capacity actions seeking only prospective relief are not treated as actions against the State. *Livingood v. Meece*, 477 N.W.2d 183, 190 (N.D. 1991). Wheeler argues that Governor Burgum should be "enjoined to compel prison officials to respect and enforce prisoners Constitutional rights in his official capacity." However, Wheeler does not cite any authority for his argument that would support § 1983 liability for such a claim.

[¶ 7] Although Governor Burgum is responsible for supervising the DOCR director, who is responsible for the NDSP and its staff, the Governor's supervisory responsibility over the alleged actions Wheeler complains of is too indirect and remote to support § 1983 liability. *See Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014) (stating, "While the doctrine of respondeat superior does not apply to § 1983 cases, a supervisor may still be liable under § 1983 if either his direct action or his 'failure to properly supervise and train the offending employee' caused the constitutional violation at issue."). Because Governor Burgum does not directly supervise or train the officials or staff at the NDSP, he cannot be held liable in his official capacity under § 1983. Thus, the district court did not err by concluding Wheeler failed to state a claim for which relief can be granted against Governor Burgum in his official capacity.

B. Personal Capacity

[¶ 8] Wheeler argues that Governor Burgum's failure to respond to his letters or

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otherwise investigate his allegations was a deprivation of his statutory or constitutional rights under color of law in violation of 42 U.S.C. § 1983. Wheeler has not provided adequate support for his contention that Governor Burgum's failure to respond to his letters or otherwise investigate his allegations violated a constitutional or statutory right. Public officials do not have a free-floating obligation to put things to rights, disregarding rules (such as time limits) along the way. Bureaucracies divide *849 tasks; no prisoner is entitled to insist that one employee do another's job. The division of labor is important not only to bureaucratic organization but also to efficient performance of tasks; people who stay within their roles can get more work done, more effectively, and cannot be hit with damages under § 1983 for not being ombudsmen. Burks's view that everyone who knows about a prisoner's problem must pay damages implies that he could write letters to the Governor of Wisconsin and 999 other public officials, demand that every one of those 1,000 officials drop everything he or she is doing in order to investigate a single prisoner's claims, and then collect damages from all 1,000 recipients if the letter-writing campaign does not lead to better medical care. That can't be right. The Governor, and for that matter the Superintendent of Prisons and the Warden of each prison, is entitled to relegate to the prison's ... staff the [implementation of prison policy]. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). Because Wheeler has not alleged any act or omission by Governor Burgum that deprived him of any legal right, Wheeler has no claim against Burgum in his personal capacity. The district court did not err by concluding Wheeler failed to state a claim for which relief can be granted against Governor Burgum in his personal capacity.

III

[¶ 9] Wheeler argues that the district court erred by denying his motion to appoint counsel. "Generally, there is no right to counsel in civil matters." *Riddle v. Riddle*, 2018 ND 62, ¶ 16, 907 N.W.2d 769; Davis v. Scott, 94 F.3d 444, 447 (8th Cir. 1996) ("Indigent civil litigants do not have a constitutional or statutory right to appointed counsel."). Wheeler provided the district court no citation to statute or other authority authorizing appointed counsel to a civil litigant suing under 42 U.S.C. § 1983. On appeal, he argues his right to reasonable access to the courts requires appointment of counsel, but we have never held reasonable access requires publicly-funded counsel, and we reject the argument here. *See Hamilton v. State*, 2017 ND 54, ¶ 13, 890 N.W.2d 810 (stating that an appearance by telephone or deposition satisfies the right to reasonable access to courts). Where a district court has authority to appoint counsel in non-criminal matters, the Legislature has identified a source of funding and provided that upon a finding of indigency an applicant is entitled to appointed counsel. *See* N.D.C.C. § 25–03.1–13; N.D.C.C. § 27–20–26; N.D.C.C. § 29–32.1–05. Wheeler points to no state statute that would authorize appointed counsel for his § 1983 claims, and his constitutional claims find no support in our precedent. Because the district court was presented with no authority allowing it to appoint counsel, it was not error to deny Wheeler's motion for appointment of

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counsel.

IV

[¶ 10] Because Wheeler has failed to state a claim for which relief can be granted, the district court did not err by granting Governor Burgum's motion to dismiss. Further, the district court did not err by denying Wheeler's motion to appoint counsel. The judgment is affirmed.

Wheeler v. Burgum, 2018 ND 109, 910 N.W.2d 845.

II. STANDARD OF REVIEW

When a prisoner proceeding *in forma pauperis* seeks to sue a governmental entity, officer, or employee, the Prison Litigation Reform Act of 1995 ("PLRA") requires the court to conduct an early screening of the complaint to weed out claims that clearly lack merit with the hope that this will help lessen the burdens imposed by the ever-rising numbers of prisoner suits, which too often are frivolous and without merit. Jones v. Bock, 549 U.S. 199, 202-03 (2007); Woodford v. Ngo, 548 U.S. 81, 83-84 (2006). In conducting the screening required by 28 U.S.C. § 1915A, the court is required to identify any cognizable claims and to dismiss the complaint, or any part of it, that is frivolous, malicious, fails to state a claim, or seeks monetary relief from an immune defendant.

Neither 42 U.S.C. § 1983 nor the PLRA imposes any heightened pleading requirements, however. Jones v. Bock, 549 U.S. at 211-12. Consequently, in order to state a cognizable claim, the complaint need only meet the minimum requirements of Fed. R. Civ. P. 8(a)(2), which are that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam). In addition, when a prisoner is proceeding *pro se*, the court is obligated to construe the complaint liberally and hold it to a less stringent standard than what normally would be required of attorneys. Id.; see also Federal Express Corp. v. Holowecki, 552 U.S. 389, 402 (2008).

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Nevertheless, even though the pleading requirements are minimal and complaints are to be liberally construed in *pro se* cases, this does not mean that the court must accept everything or anything that is filed by *pro se* prisoners. In enacting the screening requirement, Congress obviously expected it to be more than a ritualistic exercise and that courts would only allow to go forward those claims that state a cognizable claim, that seek relief from a non-immune party, and that are not obviously frivolous or malicious.

To meet the minimal pleading requirements of Rule 8(a)(2) for stating a cognizable claim, something more is required than simply expressing a desire for relief and declaring an entitlement to it. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 n.3 (2007) ("Bell Atlantic"). The complaint must state enough to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. at 93 (quoting Bell Atlantic, 550 U.S. at 555). In addition, even though the complaint is to be liberally construed, it must also contain enough to satisfy Bell Atlantic's "plausibility standard." E.g., Ventura-Vera v. Dewitt, 417 Fed. App'x 591, 592, 2011 WL 2184269, at *1 (8th Cir. 2011) (unpublished per curiam) (citing Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) for the appropriate post-Bell Atlantic standard); see also Stone v. Harry, 364 F.3d 912, 914 (8th Cir. 2004) (*pro se* complaints must allege sufficient facts to state a claim). Complaints that offer nothing more than labels and conclusions or a formulaic recitation of the elements are not sufficient. See id. Frivolous claims are those that are clearly baseless, fanciful, fantastic, or delusional. See Denton v. Hernandez, 504 U.S. 25, 32-34 (1992).

To state a cognizable claim under § 1983, a plaintiff must normally allege a violation of a right secured by the Constitution or the laws of the United States and that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988);

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Walker v. Reed, 104 F.3d 156, 157 (8th Cir. 1997). Even under liberal pleading standards, a *pro se* litigant, at the very least, must invoke rights under the Constitution or federal law in order to plead a § 1983 claim. Walker v. Reed, 104 F.3d at 157-58.

Finally, even though the court is obligated to construe *pro se* complaints liberally, the court is not required to ignore facts that are pled by a prisoner when they undermine the prisoner's claim. The court may accept as true all facts pled in the complaint and conclude from them that there is no claim as a matter of law. E.g., Thompson v. Ill. Dep't of Prof'l Reg., 300 F.3d 750, 753-754 (7th Cir. 2002) (citing other cases).

III. DISCUSSION

A. Wheeler's Claims

1. Court Access

Access to the courts is a fundamental constitutional right that "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828 (1977). However, there is no right to a law library or to legal assistance per se, but only "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Lewis v. Casey, 518 U.S. 343, 351, 116 (1996) (quotation omitted).

An inmate asserting an access claim must prove that he has a colorable underlying claim for which he seeks relief. Alvarez v. Attorney General for Fla., 679 F.3d 1257, 1265–66 (11th Cir.2012), quoting Barbour v. Haley, 471 F.3d 1222, 1226 (11th Cir.2006); see also Christopher v. Harbury, 536 U.S. 403, 415 (2002) (recognizing that the right of access to the courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of

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court"). In addition, the inmate must show that he suffered an actual injury. See Lewis v. Casey, 518 U.S. 343, 349 (1996).

Here, Wheeler's claim that he was denied meaningful court access is predicated primarily upon the state courts' denials of his requests for court-appointed counsel in civil litigation that he initiated either by complaint or by application for post-conviction relief. His claim is specious.

First, Wheeler's complaint is devoid of any allegation that the NDSP denied him access to materials or resources such as a law library. Second, it is apparent from the face of the pleadings (and the opinions issued by the North Dakota Supreme Court in the state cases referenced by Wheeler) that Wheeler prepared and filed both civil rights actions and applications for post-conviction relief and, when the state district courts ruled against him and restricted his ability to file additional applications for post-conviction relief in his criminal case, appeal their decisions to the North Dakota Supreme Court.

Third, it is well settled that indigent civil litigants like Wheeler have neither a constitutional or statutory right to court-appointed counsel. Davis v. Scott, 94 F.3d 444, 447 (8th Cir. 1996) (citing Swope v. Cameron, 73 F.3d 850, 851-52 (8th Cir. 1996)); see also Johnson v. Alexander, No. 2:12-CV-429, 2013 WL 915085, at *3 (W.D. Mich. Mar. 8, 2013 ("Bounds did not create an abstract, free-standing right to a law library, litigation tools, or legal assistance."). Thus, Wheeler's bald assertion regarding the state courts' denials of his requests for court-appointed counsel does not constitute the basis for a cognizable constitutional claim.

Fourth, Wheeler has not demonstrated that he had colorable underlying claims for which he sought relief, a prerequisite for establishing a denial of access to the courts claim. See Whitfield v. Thompson, 165 F. Supp. 3d 1227, 1240 (S.D. Fla. 2016). After all, not every claim is protected by

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the right of access to the court. Christopher v. Harbury, 536 U.S. 403, 415 (2002) (reiterating that hindrance of frivolous claim does not result in actual injury and thus cannot give rise to claim for denial of access to the courts).

Fifth, Wheeler has suffered no apparent injury as there is nothing in his pleadings to suggest that his ability to pursue a non-frivolous claim has been frustrated or impeded. The notion that adverse ruling by a state district courts constitutes an injury in the present context flouts all common sense and logic. The pleadings evince that Wheeler was able to initiate civil rights actions and to challenge his underlying criminal conviction. And the North Dakota Supreme Court decisions in the cases cited by Wheeler, which this court can take judicial notice of, belie his assertion that "state courts have declined to make a judicial determination of his claims."

2. Due Process

Wheeler next asserts he was denied due process in state district court presumably with respect to the restrictions on his ability to file in his state criminal case. Insofar as his assertion can be construed as a procedural due process claim, it is clearly frivolous.

Taking judicial notice of the North Dakota Supreme Court's decision in State v. Wheeler, it is abundantly clear that Wheeler received notice of the filing restriction and thereafter was afforded the opportunity to challenge it. The North Dakota Supreme Court upheld the restriction albeit with a slight modification and in so doing gave Wheeler clear instructions on what he must do in order to obtain permission to file in his criminal case. Wheeler v. State, 2015 ND 264 ¶ 5, 872 N.W.2d 634.

Insofar as Wheeler's assertion can be construed as claim that he is being denied court access, it fails. "The right of access to the courts is neither absolute nor unconditional, and there is no

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constitutional right of access to the courts to prosecute an action that is frivolous or malicious." Cauthon v. Rogers, 116 F.3d 1334, 1337 (10th Cir. 1997) (internal quotation marks omitted). Federal courts can and do regulate the activities of litigants by imposing carefully tailored restricts under the appropriate circumstances. Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir. 1989) (citing case law from the First, Second, Fifth, Tenth, and D.C. Circuits for the proposition that courts have the inherent authority to regulate the activities of abusive litigants through imposition of appropriate restrictions); see also In re Winslow, 17 F.3d 314, 315 (10th Cir. 1994) (opining that restrictions are appropriate if a party has engaged in a patter of litigation activity which is manifestly abusive as "[t]he goal of he goal of fairly dispensing justice is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous claims." (alterations and internal quotations omitted)); see e.g., United States v. Reed, Case No. 1:10-cr-041 (D.N.D.) at Docket No. 221 (requiring a pro se defendant to obtain the court's permission before filing). It stands to reason that state courts can too.

Federal habeas litigants are subject to temporal restrictions. See e.g., 28 U.S.C. § 2244(d) (establishing a one-year period of limitation in which to file a § 2254 habeas petition). They are also restricted from filing second or successive habeas petitions unless and until they obtain the appropriate appellate court's permission. See e.g., 18 U.S.C § 2244(b)(3)(A). These restrictions are similar in spirit to filing restrictions that the state courts have imposed upon Wheeler. Absent more, the fact that the state courts have restricted Wheeler from continuing to file applications for post-convictions relief unless and until he demonstrates that such applications fall within an exception to state's statute of limitations does not constitute a cognizable claim.

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3. Gov. Doug Burgum

Wheeler's claim against Governor Burgum is frivolous. The apparent basis of Wheeler's claim against the Governor is that he (the Governor) has failed to adequately supervise the NDSP and its employees to ensure that inmates have the means of challenging the conditions of their confinement.

First, there is a dearth of anything in the pleadings to suggest that the NDSP or those it employs have in any way hindered Wheeler's ability to access the courts. Second, the pleadings are devoid of any alleged omission by the Governor that deprived Wheeler of any right. Finally, the Governor's supervisory responsibility over the alleged actions Wheeler complains of is too indirect and remote to support § 1983 liability. See Jackson v. Nixon, 747 F.3d 537, 543 (8th Cir. 2014) (stating, "While the doctrine of respondeat superior does not apply to § 1983 cases, a supervisor may still be liable under § 1983 if either his direct action or his 'failure to properly supervise and train the offending employee' caused the constitutional violation at issue.").

B. Application of the PLRA's Three Strikes Provision

The PLRA contains what is commonly referred to as the "three strikes" provision. This provision, codified at 28 U.S.C. § 1915(g), effectively bars prisoners from bringing a civil action or appealing a judgment in a civil action in forma pauperis if, on three, more prior occasions, he filed an action or appeal that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim. See 28 U.S.C. § 1915(g); see also Jackson v. Auburn Correctional Facility, Nos. 9:07-CV-0651 and 9:07-CV-0659, 2009 WL 1663986 , at *3 (N.D.N.Y. June 15, 2009) (Peebles, M.J) ("The manifest intent of Congress in enacting this 'three strikes' provision was to curb prison inmate abuses and to deter the filing of multiple, frivolous civil rights suits by prison inmates.")).

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It does make an exception, however, in instances when the prisoner is under imminent danger of serious physical injury. See 28 U.S.C. § 1915(g). "The Court may sua sponte raise the three strikes provision of the PLRA on its own initiative." McCreary v. Cox, No. 07-11478, 2007 WL 2050268, at *1 (E.D. Mich. 2007).

As this action is subject to dismissal on the grounds that it is frivolous and otherwise fails to state a claim, it should be counted as a "strike" for PLRA purposes. See Brannon v. White, No. 4:10-CV-1704-TCM, 2010 WL 4065109, at *2 (E.D. Mo. Oct. 15, 2010).

IV. CONCLUSION AND RECOMMENDATION

There is no arguable legal basis for Wheeler advancing his claims under § 1983. I **RECOMMEND** the dismissal of Wheeler's complaint with prejudice on the grounds that it is frivolous and otherwise fails set forth cognizable constitutional claims. I further **RECOMMEND** that the court assess Wheeler a strike for PLRA purposes.

NOTICE OF RIGHT TO FILE OBJECTIONS

Pursuant to D.N.D. Civil L.R. 72.1(D)(3), any party may object to this recommendation within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to file appropriate objections may result in the recommended action being taken without further notice or opportunity to respond.

Dated this 26th day of July, 2019.

/s/ Clare R. Hochhalter
Clare R. Hochhalter, Magistrate Judge
United States District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

LeRoy K. Wheeler, Plaintiff, vs. The State of North Dakota and Doug Burgum, Governor, Defendants.	)	**ORDER ADOPTING REPORT AND RECOMMENDATION** Case No. 1:18-cv-265

The Plaintiff, LeRoy K. Wheeler, initiated this action in December of 2018. After screening the Complaint as required by 28 U.S.C. § 1915A, Magistrate Judge Clare R. Hochhalter issued a Report and Recommendation, in which he recommended that the Wheeler's complaint be dismissed with prejudice on the grounds that it was frivolous and failed to state claims upon which relief can be granted. See Doc. No. 15. Wheeler filed an objection. See Docket No. 18.

The Court has carefully reviewed the Report and Recommendation, and the entire record, Wheeler's objection, and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 15) in its entirety and **ORDERS** that Wheeler's complaint be **DISMISSED WITH PREJUDICE**. The Court further **ORDERS** that Wheeler be assessed a strike for PLRA purposes. Finally, the Court **FINDS** that any appeal would be frivolous, could not be taken in good faith, and may not be taken *in forma pauperis*.

IT IS SO ORDERED.

Dated this 23rd day of August, 2019.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

Additional material from this filing is available in the Clerk's Office.