**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of March, two thousand twenty.

Before: ROBERT D. SACK,
BARRINGTON D. PARKER,
DENNY CHIN,

Circuit Judges.

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John S. Kaminski,

Plaintiff - Appellant,

v.

Semple, Commissioner, of Dept. of Corrections, Declaratory Only, George Jepsen, Attorney General(formerly), State of Connecticut, Declaratory Only, Walter Charles Bansley, IV, Attorney, of Bansley, Anthony & Burdo (Inmate Legal Assistance Contractor)(ILAP), Individual/Corporate,

Defendants - Appellees.

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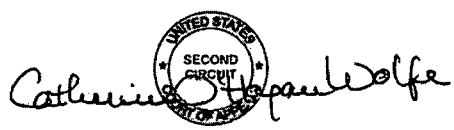
**ORDER**
Docket No. 19-973

Appellant John S. Kaminski having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



19-973-cv
*Kaminski v. Semple*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**



At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of December, two thousand nineteen.

PRESENT: ROBERT D. SACK,
BARRINGTON D. PARKER,
DENNY CHIN,
*Circuit Judges.*

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JOHN S. KAMINSKI,
*Plaintiff-Appellant,*

v. 19-973-cv

SEMPLE, COMMISSIONER OF DEPT. OF CORRECTIONS, DECLARATORY ONLY, GEORGE JEPSEN, ATTORNEY GENERAL (FORMERLY), STATE OF CONNECTICUT, DECLARATORY ONLY, WALTER CHARLES BANSLEY, IV, ATTORNEY, OF BANSLEY, ANTHONY & BURDO (INMATE LEGAL ASSISTANCE CONTRACTOR) (ILAP), INDIVIDUAL/CORPORATE,
*Defendants-Appellees.*

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FOR PLAINTIFF-APPELLANT: JOHN S. KAMINSKI, *pro se*, Suffield, Connecticut.

FOR DEFENDANTS-APPELLEES: No appearance.

Appeal from a judgment of the United States District Court for the District of Connecticut (Underhill, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Plaintiff-appellant John Kaminski, *pro se*, appeals the judgment of the district court, entered April 15, 2019, dismissing his complaint *sua sponte* for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The complaint, filed pursuant to 42 U.S.C. § 1983, alleged that Scott Semple, the former commissioner of the Connecticut Department of Corrections ("DOC"), George Jepsen, the former Connecticut Attorney General, and Walter Scott Bansley IV, a private attorney who was hired by the DOC to provide legal services to inmates in a legal assistance program, violated his rights by denying him access to the courts. Specifically, he alleges that after he elected to proceed *pro se* in his habeas proceeding, DOC denied him legal assistance and access to the law library. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review the *sua sponte* dismissal of a complaint *de novo*. *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004). *Pro se* submissions are reviewed with

"special solicitude," and "must be construed liberally and interpreted to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (internal quotation marks and citations omitted).

The district court properly dismissed Kaminski's claims against Semple and Jepsen to the extent he sought retrospective relief. If a complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," the Eleventh Amendment cannot bar it. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotation marks omitted); *see also In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007) ("[A] plaintiff may sue a state official acting in his official capacity -- notwithstanding the Eleventh Amendment -- for prospective injunctive relief from violations of federal law." (internal quotation marks and citations omitted)). But a declaration dealing only with past events would be retrospective and barred. *See Ward v. Thomas*, 207 F.3d 114, 120 (2d Cir. 2000) ("Any declaration could say no more than that Connecticut had violated federal law in the past . . . [and] would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment." (internal quotation marks omitted)). Here, Kaminski sought only a declaration that Semple and Jepsen violated his right to access the courts. Both defendants are no longer state officials; they are therefore no longer denying him a right to access the law library.

The district court correctly held that claims against Semple and Jensen for retroactive relief are barred by the Eleventh Amendment. *See id.*

To the extent that Kaminski's complaint may be construed as seeking prospective relief, his claim for denial of access to the courts also fails.[1] While the Supreme Court has long recognized that prisoners have a right to meaningful access to the courts and that prison officials are barred from "actively interfering with inmates' attempts to prepare legal documents," *Lewis v. Casey*, 518 U.S. 343, 350 (1996) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)), prisoners do not have an abstract right to a law library or legal assistance. *Id.* To state a denial-of-access-to-the-courts claim, a prisoner must show that: (1) he suffered an "actual injury," *id.* at 349, (2) to a non-frivolous legal claim, (3) concerning his criminal conviction, habeas corpus petition, or conditions of confinement. *Id.* at 352–54. Actual injuries include the dismissal of a complaint for a technical deficiency that would have been cured with appropriate legal facilities, or that a prisoner was "stymied" from bringing an arguably actionable claim by the "inadequacies of the law library." *Id.* at 351.

Here, Kaminski has failed to allege that the denial of access to a law library resulted in any actual injury relating to his habeas corpus petition. Kaminski alleged that he discovered a dismissed criminal charge on his own, when none of his

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[1] Where a public officer sued in his official capacity "resigns, or otherwise ceases to hold office while the action is pending," the action continues, and "[t]he officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25 (d).

appointed attorneys caught the issue. Further, he was able to file and prosecute a petition for a writ of mandamus without access to a law library. His complaint suggests that his habeas proceeding was not hindered by his lack of access to a library. Indeed, the state court forgave a technical error (mislabeling of a motion) that Kaminski attributed to his lack of access to a law library or legal services.

Although Kaminski acknowledges that his individual claims do not establish a denial of access to the courts, he asserts that Connecticut's legal services for prisoners are worse than the system addressed in *Lewis*. But *Lewis* makes clear that "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." 518 U.S. at 351. Kaminski therefore cannot show any actual injury and he does not state a plausible claim for denial of access to the courts.

The district court also properly dismissed the claims against Bansley. To be liable under § 1983, a defendant must be a state actor. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). Generally, a court-appointed attorney "performing a lawyer's traditional functions as counsel" to a party is not a state actor under § 1983. *Rodriguez v. Weprin*, 116 F.3d 62, 65–66 (2d Cir. 1997). We have also held that legal aid agencies are not state actors, "notwithstanding the receipt of substantial government funds," as long as the State does not "exercise control or supervision over the internal operations" of the agency. *See Graseck v. Mauceri*, 582 F.2d 203, 208 (2d Cir. 1978); *see also*

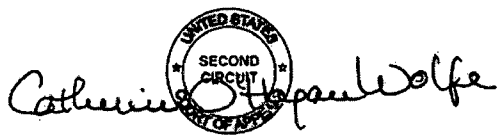
*Schnabel v. Abramson*, 232 F.3d 83, 87 (2d Cir. 2000) (reaffirming *Graseck*'s holding that "a legal aid society ordinarily is not a state actor amenable to suit under § 1983"). Bansley, as the Inmate Legal Assistance Program contractor, acted in the capacity of a legal aid society by performing legal services on behalf of Connecticut state prisoners. Because Kaminski offered no allegation that Bansley performed duties outside the traditional counsel's role, or that DOC controlled or supervised Bansley, he failed to sufficiently allege that Bansley was a state actor. *See Rodriguez*, 116 F.3d 65–66; *Graseck*, 582 F.2d at 208.

Finally, the district court also did not err in denying Kaminski leave to amend his complaint. A *pro se* plaintiff should be afforded leave to amend following dismissal "when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (internal quotation marks omitted). Here, however, amendment would have been futile because Bansley is not a state actor and Kaminski cannot allege that his habeas proceeding was harmed by any of the defendants' actions. Accordingly, the district court properly dismissed Kaminski's complaint.

* * *

We have considered Kaminski's remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | | |
|---|---|---|
| JOHN S. KAMINSKI,<br>Plaintiff, | : | No. 3:19-cv-143 (SRU) |
| v. | : | |
| SEMPLE, et al.,<br>Defendants. | : | |

**INITIAL REVIEW ORDER**

John S. Kaminski ("Kaminski"), currently confined at MacDougall-Walker Correctional Institution in Suffield, Connecticut, filed this complaint *pro se* under 42 U.S.C. § 1983 challenging the provision of legal assistance to Connecticut inmates. He names three defendants: former Commissioner Semple; former Attorney General George Jepsen; and Attorney Walter Bansley IV, the Inmate Legal Assistance Contractor. Kaminski seeks declaratory relief only. ECF No. 1 at 30. Kaminski asserts a claim for denial of due process and violation of his right of access to the courts through the denial of access to legal resources. Kaminski's complaint was received on January 31, 2019, and his motion to proceed *in forma pauperis* was granted on February 6, 2019.

Under section 1915A of Title 28 of the United States Code, I must review prisoner civil complaints and dismiss any portion of the complaint that is frivolous or malicious, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Although detailed allegations are not required, the complaint must include sufficient facts to afford the defendants fair notice of the

claims and the grounds upon which they are based and to demonstrate a plausible right to relief. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-56 (2007). Conclusory allegations are not sufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Nevertheless, it is well-established that "[*p*]*ro se* complaints 'must be construed liberally and interpreted to raise the strongest arguments that they suggest.'" *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir. 2013) (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006)); *see also Tracy v. Freshwater*, 623 F.3d 90, 101-02 (2d Cir. 2010) (discussing special rules of solicitude for *pro se* litigants).

I. Allegations

Kaminski does not include in his complaint a concise statement of the facts underlying his claims. A state criminal matter, #04-0214486, was nolled shortly after Kaminski was sentenced in another matter in 2004. The nolle was entered through an agreement between Kaminski's attorney, Martin Rizzi, and the prosecutor, Paul Rotiroti. ECF No. 1 at 9, 33. Kaminski believes that the nolled case supports his challenge to his conviction.

The nolled case was overlooked by appointed appellate counsel, Arthur Ledford; first appointed habeas counsel, John Drapp; and second appointed habeas counsel, Jennifer Smith. *Id.* at 33. Kaminski filed a motion for removal of second habeas counsel. *Id.* at 8. The court permitted counsel to file an *Anders* brief and withdraw her representation. *Id.* Proceeding *pro se*, Kaminski discovered the nolled case. *Id.* at 15.

While proceeding *pro se*, Kaminski filed a petition for writ of mandamus in state court to obtain access to legal research materials. The petition was denied. *Id.* at 17, 19-21.



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II. Analysis

A. Declaratory Relief

Kaminski states that he sues defendants Semple and Jepsen on his claims for denial of access to the courts and denial of due process only for declaratory relief. ECF No. 1 at 1, 30.

Declaratory relief operates prospectively. It is intended to enable parties to adjudicate claims before either party suffers significant damages. *Orr v. Waterbury Police Dep't*, 2018 WL 780218, at *7 (D. Conn. Feb. 8, 2018) (citations omitted). In *Orr*, the court dismissed the request for declaratory relief because the request related only to past actions; the plaintiff had not identified any legal issue that could be resolved by declaratory relief. *Id.*

Kaminski states that he has named defendants Semple and Jepsen because they were serving as Commissioner of Correction and Attorney General during the relevant period. *Id.* at 26-27. This indicates that Kaminski is seeking declaratory relief relating to past actions. Thus, the request is inappropriate and the claims against defendants Semple and Jepsen are dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

B. Defendant Bansley

Kaminski names Attorney Walter Bansley IV, in his capacity as the Inmate Legal Assistance Contractor. In that capacity, Attorney Bansley provides legal assistance to inmates in civil cases just as the public defender provides assistance in criminal and state habeas cases.

To state a claim under section 1983, Kaminski must allege facts showing that the defendant acted under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). A defendant acts under color of state law when he exercises "some right or privilege created by the State ... or by a person for whom the State is responsible," and is "a person who may fairly be

said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The plaintiff must identify a "*sufficiently* close nexus between the State and the challenged action" so the actions of the private defendant may fairly be attributed to the State. *Chan v. City of New York*, 1 F.3d 96, 106 (2d. Cir. 1993) (citation and internal quotation marks omitted), *cert. denied*, 510 U.S. 978 (1993).

The Supreme Court has identified several factors relevant to an attribution of private activity as state action.

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operated as a "willful participant in joint activity with the State or its agents." We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State, when it is "entwined with government policies," or when government is "entwined in [its] management of control."

*Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (internal citations omitted).

None of the enumerated factors supports a finding that Attorney Bansley is a state actor. A private attorney, or law firm, does not become a state actor merely because he is an officer of the court or has been appointed to represent an indigent litigant. *See Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981) (holding that lawyer does not act under color of state law merely because he is an officer of the court). Nor does a public defender or court-appointed attorney act under color of state law. *Brown v. Legal Aid Soc'y*, 367 F. App'x 230, 231 (2d Cir. 2010) ("A 'public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding'") (quoting *Dodson*, 454 U.S. at 325);



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*Schnabel v. Abramson*, 232 F.3d 83, 87 (2d Cir. 2000) ("a legal aid society ordinarily is not a state actor amenable to suit under § 1983"); *Lefcourt v. Legal Aid Soc'y*, 445 F2d 1150, 1157 (2d Cir. 1971) (although Legal Aid Society provides services that otherwise would be provided by the State, it does not act under color of state law).

Kaminski alleges that Attorney Bansley and his firm provide legal assistance to Connecticut inmates under contract with the Department of Correction. In that capacity, they act as the State's adversary, not its advocate. Kaminski fails to allege facts suggesting that the actions taken by Attorney Bansley are orchestrated by the State or the Department of Correction, or that any state official coerced him into representing any inmate in a particular manner. Thus, Attorney Bansley is not a state actor and all claims against him are dismissed. *See Hannon v. Schulman and Associates*, No. 13-CV-583 (JAM), 2015 WL 3466847, at *3 (D. Conn. June 1, 2015) (dismissing complaint on initial review because attorneys working for the firm providing legal assistance to Connecticut inmates under a prior contract with the Department of Correction were not state actors).

C. Right of Access to the Courts and Due Process

To the extent that the request for declaratory relief may operate prospectively to require provision of access to legal materials in the future, the claim is not cognizable.

Kaminski asserts claims for violation of his right of access to the courts and for denial of due process. Kaminski's focus appears to be his inability to obtain legal research materials to pursue his state habeas action once he decided to forgo representation by the appointed special public defender. It is well settled that inmates have a constitutional right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 350 (1996) (citing *Bounds v. Smith*, 430 U.S. 817, 821, 828

(1977)). That right "may not be unreasonably obstructed by the actions of prison officials." *Baker v. Weir*, No. 3:16-cv-166 (JAM), 2016 WL 7441064, at *2 (D. Conn. Dec. 27, 2016) (citing *Washington v. James*, 782 F.2d 1134, 1138 (2d Cir. 1986)); *see also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) ("constitutional right of access to the courts is violated where government officials obstruct legitimate efforts to seek judicial redress").

To state a claim for denial of access to the courts, Kaminski must show that he suffered an actual injury as a result of the conduct of the defendants. *Id.*.at 351-55. To establish an actual injury, Kaminski must allege facts showing that the defendant took actions or was responsible for actions that "deprived him ... of an opportunity to press some nonfrivolous and arguable legal claim in court." *Brown v. Choinski*, No. 09-cv-1631 (MRK), 2011 WL 1106232, at *5 (D. Conn. Mar. 23, 2011). The Supreme Court has rejected, however, the idea that the prisoner must be afforded the means to litigate effectively once his case is filed. *Lewis,* 518 U.S. at 354. In addition, Kaminski must show that the defendants acted deliberately and maliciously. *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003).

In Connecticut, legal assistance in state criminal matters and habeas corpus actions is provided by the Office of the Public Defender and legal assistance in civil matters relating to conditions of confinement is provided by Inmate Legal Aid Program. If an inmate chooses to forgo that assistance and represent himself, the Department of Correction has no obligation to provide other legal services to assist the inmate. *Santiago v. Whidden*, No. 3:10-cv-1839 (VLB), 2012 WL 668996, at *4 (D. Conn. Feb. 29, 2012) (citing *United States v. Sykes,* 614 F.3d 303, 311 (7th Cir. 2010) ("a defendants who declines appointed counsel and instead invokes his

constitutional right to self-representation ... 'does not have a right to access to a law library'"); *State v. Fernandez,* 254 Conn. 637, 658 (2000) (criminal defendant who waives right to counsel and has been appointed standby counsel is not constitutionally entitled to access to law library)); *see also United States v. Chatman,* 584 F.2d 1258, 1360 (4th Cir. 1978) (in considering claim of prisoner who complained of lack of materials in prison library after electing to proceed without assistance of counsel, court concluded that government had no obligation to provide legal materials and declined to read *Bounds* to give prisoner option regarding form of legal assistance he receives).

In *Spates v. Manson,* 644 F.2d 80 (2d Cir. 1981), the Second Circuit considered claims challenging the adequacy of the prison law library. The court held that the Sixth Amendment right to self-representation in a criminal proceeding "does not carry with it a right to state-financed library resources where state-financed legal assistance is available." *Id.* at 84–85. Kaminski is a convicted prisoner. His claim involves a state habeas action, not a criminal trial. Kaminski has no constitutional right to an attorney in a state post-conviction proceeding. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Thus, any argument that Kaminski was deprived of his right to assistance of counsel through the denial of access to legal research materials fails.

Kaminski was proceeding *pro se* because he was not satisfied with his appointed attorney's performance. Because Kaminski's ability to file his state habeas action was not impeded, the claim appears to allege that he is unable to litigate effectively, a claim not cognizable under *Lewis.* Kaminski has not shown that he was denied the ability to file a



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potentially successful claim in court, so he has not alleged a cognizable claim for denial of access to the courts regarding his state habeas action.

Kaminski generally asserts a claim for denial of due process. He does not specify whether his claim is for violation of his right to substantive or procedural due process. Because he has not identified any process he was denied, the Court assumes that Kaminski asserts a substantive due process claim.

"Substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against a government action that is 'incorrect or ill-advised.'" *Cunney v. Board of Trustees of Village of Grand View, N.Y.*, 660 F.3d 612, 626 (2d Cir. 2011) (citing *Kaluczky v. City of White Plains,* 57 F.3d 202, 211 (2d Cir. 1995)). Thus, "[s]ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Id.* (quoting *Natale v. Town of Ridgefield,* 170 F.3d 258, 263 (2d Cir. 1999) (internal quotation marks omitted).

Kaminski has no federal constitutional right to a law library or representation in a state post-conviction proceeding. The court can discern no government action so egregious that it rises to the level of a substantive due process violation.

## CONCLUSION

The complaint is **DISMISSED** pursuant to 28 U.S.C. § 1915A(b) for failure to state plausible claims for relief. The Clerk is directed to enter judgment and close this case.

In light of the dismissal of this case, Kaminski's motion for appointment of counsel **[ECF No. 3]** is **DENIED** as moot.



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Kaminski does not identify any facts or law that I overlooked in dismissing the complaint as he is required to do when filing a motion for reconsideration. In addition, Kaminski does not identify any basis for awarding declaratory relief, the only relief requested in the Complaint. Thus, his motion for reconsideration is denied. If Kaminski believes that there are facts that give rise to a valid cause of action or declaratory judgment, however, he may file an amended complaint within 30 days of this order.

Kaminski's motion for reconsideration **[ECF No. 12]** is **DENIED.**

So ordered.

Dated at Bridgeport, Connecticut, this 7th day of May 2019.

/s/ STEFAN R. UNDERHILL
Stefan R. Underhill
United States District Judge



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