

APPENDIX

A

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

No: 21-3679

Abdur-Rashid Muhammad

Plaintiff - Appellant

v.

Scott Frakes, (Current Director) - In thier Individual Capacity; Michelle Wilhelm, (Current
Warden) - In their Individual Capacity; The State of Nebraska; Robert P. Houston, (2013
DIRECTOR)--In their Individual Capacity; Diane Sabatka-Rine, (2013 WARDEN)--In their
Individual Capacity; Scott Isherwood, (2013 Unit Manager) - In their Individual Capacity; John
Doe, 1-2, (Mail Room Employee) - In their Individual Capacity; Jane Doe, 1-2, (Mail Room
Employee) - In their Individual Capacity

Defendants - Appellees

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:21-cv-03096-RGK)

JUDGMENT

Before LOKEN, BENTON, and KELLY, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered
by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit
Rule 47A(a).

December 13, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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

No: 21-3679

Abdur-Rashid Muhammad

Appellant

v.

Scott Frakes, (Current Director) - In thier Individual Capacity, et al.

Appellees

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:21-cv-03096-RGK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 18, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX

B

APPENDIX

C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ABDUR-RASHID MUHAMMAD,

Plaintiff,

vs.

SCOTT FRAKES, et al.,

Defendants.

4:21CV3096

**MEMORANDUM
AND ORDER**

Plaintiff, a prisoner at the Nebraska State Penitentiary, commenced this action on May 10, 2021, and subsequently was granted leave to proceed in forma pauperis. The court conducted an initial review of Plaintiff's Complaint (Filing 1) pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A, and in a Memorandum and Order (Filing 8) entered on July 2, 2021, determined that the Complaint fails to state a claim upon which relief may be granted. The court sua sponte gave Plaintiff leave to amend, which was accomplished in a timely manner on July 28, 2021. The court will now conduct an initial review of Plaintiff's Amended Complaint (Filing 12).

I. STANDARDS ON INITIAL REVIEW

The court is required to conduct an initial review of "a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C.A. § 1915A(a). On such initial review, the court must dismiss the complaint if it: "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C.A. § 1915A(b). *See also* 28 U.S.C. § 1915(e)(2)(B) (requiring dismissal of in forma pauperis complaints "at any time" on the same grounds as § 1915A(b)).

"The essential function of a complaint under the Federal Rules of Civil Procedure is to give the opposing party 'fair notice of the nature and basis or grounds

for a claim, and a general indication of the type of litigation involved.” *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848 (8th Cir. 2014) (quoting *Hopkins v. Saunders*, 199 F.3d 968, 973 (8th Cir. 1999)). Plaintiffs must set forth enough factual allegations to “nudge[] their claims across the line from conceivable to plausible,” or “their complaint must be dismissed.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).

“A pro se complaint must be liberally construed, and pro se litigants are held to a lesser pleading standard than other parties.” *Topchian*, 760 F.3d at 849 (internal quotation marks and citations omitted). This means that “if the essence of an allegation is discernible, even though it is not pleaded with legal nicety, then the district court should construe the complaint in a way that permits the layperson’s claim to be considered within the proper legal framework.” *Stone v. Harry*, 364 F.3d 912, 915 (8th Cir. 2004).

II. SUMMARY OF COMPLAINT

Plaintiff complains his self-prepared notice of appeal from the denial of a motion for postconviction relief, which was placed in the prison mailbox system on April 8, 2013, eight days before the appeal deadline, was dismissed as untimely.¹ Plaintiff sues seven defendants in their individual capacities: (1) Scott R. Frakes, Director of the Nebraska Department of Correctional Services (“NDCS”); (2) Robert R. Houston, who was the NDCS Director in 2013; (3) Michele Wilhelm, Warden of the Nebraska State Penitentiary (“NSP”); (4) Diane Sabatka-Rine, who was the NSP Warden in 2013; (5) Scott Isherwood, Plaintiff’s unit manager at NSP in 2013; (6) John Doe 1-2, an unknown mailroom employee at NSP; and (7) Jane Doe 1-2, another unknown mailroom employee at NSP.

¹ Nebraska has declined to adopt the “prison mailbox rule.” *See State v. Smith*, 834 N.W.2d 799 (Neb. 2013). Plaintiff alleges he did not discover the reason for the untimely filing until November 13, 2017, when speaking with his attorney. (Filing 12, pp. 4-5.)

Plaintiff claims Defendants violated the Fifth and Fourteenth Amendments of the United States Constitution,² as well as the Nebraska Constitution's "Open Courts Clause," Article I, Section 13. (Filing 12, p. 4.) He seeks an award of damages.

III. DISCUSSION

Liberally construing the allegations of Plaintiff's Complaint, this is a civil rights action brought under 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must allege a violation of rights protected by the United States Constitution or created by federal statute and also must show that the alleged deprivation was caused by conduct of a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

The United States Constitution guarantees prisoners a right to access the courts. *White v. Kautzky*, 494 F.3d 677, 679 (8th Cir. 2007). A delay in mailing legal papers can amount to a constitutional violation when it infringes a prisoner's right of access to the courts. *Beers v. Hopkins*, No. 8:98CV470, 2002 WL 412122, at *3 (D. Neb. Mar. 18, 2002) (citing *Cody v. Weber*, 256 F.3d 764, 768 (8th Cir. 2002)).

The right to access the courts emanates from several constitutional provisions, including the First Amendment right to petition the government for a redress of grievances and the Fourteenth Amendment right to due process of law. In cases drawing upon the First Amendment, the plaintiff "must show that the defendants acted with some intentional motivation to restrict their access to the courts." [*Scheeler v. City of St. Cloud*, 402 F.3d 826, 830 (8th Cir. 2005).] In contrast, a plaintiff alleging a violation of the Fourteenth Amendment need only show that the government official's conduct was so egregious that it shocks the conscience. *Wilson v. Lawrence Cnty.*, 260 F.3d 946, 956 (8th Cir. 2001). In the context of denial-of-access claims, an official meets this standard if his actions were subjectively reckless, *id.* at 957 & n. 9, meaning he exhibited deliberate indifference toward the individual's rights. *Scheeler*, 402 F.3d at 831.

² The Fifth Amendment's Due Process Clause applies only to the federal government or federal actions. *Barnes v. City of Omaha*, 574 F.3d 1003, 1006 n. 2 (8th Cir. 2009).

West v. Brankel, No. 13-3237-CV-S-DGK, 2015 WL 225465, at *10 (W.D. Mo. Jan. 16, 2015).

Even assuming that the “deliberate indifference” standard applies in this case, Plaintiff’s allegations fail to show that any Defendant violated his constitutional rights. Indeed, Plaintiff specifically alleges his theory of the case is that he was denied access to the courts “because of the negligence of the Defendant’s [sic] for the losing/holding of the Plaintiff’s legal mail, that contained the Plaintiff’s ‘Notice Of Appeal’ in it.” (Filing 12, p. 8.) Negligence is never enough to show that a defendant’s behavior was conscience shocking. *Braun v. Burke*, 983 F.3d 999 (8th Cir. 2020).

A. Scott Isherwood

Plaintiff alleges his signatures on the notice of appeal and other documents were notarized by his unit manager, Scott Isherwood, on April 8, 2013. (Filing 12, p. 4.) Plaintiff complains Isherwood refused to attest to this fact for purposes of litigation, but does not charge that Isherwood had any personal involvement in or direct responsibility for the delayed mailing. (Filing 12, p. 5.) For a claim to be cognizable under § 1983, a plaintiff must allege that the defendant “was personally involved in or had direct responsibility for incidents that injured him.” *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985).

B. Mailroom Employees

Plaintiff alleges unknown mailroom employees breached their “duty to notify the Plaintiff about his legal mail being lost/held up.” (Filing 12, p. 5.) At best, this is a simple negligence claim.

C. Diane Sabatka-Rine

Plaintiff alleges Warden Sabatka-Rine “had first[-]hand knowledge of the Policy and Procedures pursuant to NDCS AR’s and OM’s # 205.01 and 205.001.101 for Inmate Mail,” which “don’t hold that the Mail Room is allowed to hold any Inmate[’]s legal mail in the mail room, nor does it state that the mail room will not

notify an Inmate if his legal mail is lost/held in the mail room.” (Filing 12, p. 6.) Even if prison policies and procedures were not followed in this instance, the warden cannot be held vicariously liable under § 1983. “[A] warden’s general responsibility for supervising the operations of a prison is insufficient to establish personal involvement.” *Dahl v. Weber*, 580 F.3d 730, 733 (8th Cir. 2009) (quoting *Ouzts v. Cummins*, 825 F.2d 1276, 1277 (8th Cir. 1987)). Prison supervisors cannot be held liable under § 1983 on a theory of respondeat superior. *Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010).

D. Robert Houston

Plaintiff similarly alleges that Director Houston was aware of the mailroom policies and procedures, and that he had a “duty to oversee that all inmates held in the Nebraska Department of Corrections have all there [sic] Constitutional Right’s [sic] upheld by all employees” (Filing 12, p. 6.) To repeat, “it is well settled that § 1983 does not impose respondeat superior liability.” *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978)); see *Iqbal*, 556 U.S., at 676 (because there is no vicarious liability in § 1983 actions, a prisoner “must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution”).

E. Michele Wilhelm

Plaintiff alleges Warden Wilhelm did not respond to a grievance form he submitted on September 17, 2018, and thereby “failed in [her] duty to provide an answer as to why the Plaintiff’s legal mail was lost/held for 8 days before it was mailed off from the Nebraska State Penitentiary.” (Filing 12, pp. 6-7, 23) While the lack of a response to Plaintiff’s grievance may be relevant to the issue of whether his administrative remedies were exhausted, it has nothing to do with the claimed denial of Plaintiff’s right of access to the courts, nor does it provide the basis for a separate constitutional claim.

The Constitution does not require prison officials to furnish any response to prisoner grievances. *Vann v. Smith*, No. 13-CV-1316 SRN/JSM, 2013 WL 5676287, at *7 (D. Minn. Oct. 18, 2013) (citing *Buckley v. Barlow*, 997 F.2d 494, 495 (8th

Cir. 1993) (prisoner's "complaint failed to state a claim because no constitutional right was violated by the defendants' failure, if any, to process all of the grievances he submitted for consideration")); *see also McGrone v. Boyd*, No. 8:18CV233, 2019 WL 2583841, at *3 (D. Neb. June 24, 2019) ("Plaintiff's allegations regarding the mishandling of and inadequate responses to his inmate grievances fail to state a claim for relief under § 1983.").

F. Scott Frakes

Plaintiff alleges that Director Frakes had knowledge of the mailroom policies and procedures, and that he failed to respond to Plaintiff's September 26, 2018 "Step Two" grievances concerning the reason for the delayed mailing. (Filing 12, pp. 7, 36-39.) For the reasons previously stated with reference to claims made against Director Houston and Wardens Sabatka-Rine and Wilhelm, Plaintiff's allegations are insufficient as a matter of law.

IV. CONCLUSION

Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted under 42 U.S.C. § 1983.

Without a viable federal question to decide, the court will not exercise its supplemental jurisdiction in this case. *See* 28 U.S.C. § 1367(c)(3) (providing that when a district court has disposed of all federal claims that conferred original jurisdiction under 28 U.S.C. § 1331, it may decline to exercise supplemental jurisdiction over remaining state-law claims).

Plaintiff will not be given further leave to amend because he failed to correct the pleading deficiencies that were pointed out in the court's Memorandum and Order on initial review of his original Complaint, particularly the need to plead (1) more than negligence and (2) each Defendant's personal involvement in or direct responsibility for the alleged violation of Plaintiff's rights. *See Williams v. Dep't of Corrs.*, 208 F.3d 681, 682 (8th Cir. 2000) (explaining "sua sponte dismissal [is] appropriate ... where [it is] 'patently obvious' that [the] plaintiff cannot prevail on alleged facts, and [an] opportunity to amend would be futile." (citation omitted)).

IT IS THEREFORE ORDERED:

1. This action is dismissed without prejudice.
2. Judgment shall be entered by separate document.

Dated this 20th day of September 2021.

BY THE COURT:

Richard G. Kopf

Richard G. Kopf
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ABDUR-RASHID MUHAMMAD,

Plaintiff,

vs.

SCOTT FRAKES, et al.,

Defendants.

4:21CV3096

MEMORANDUM
AND ORDER

On September 20, 2021, the court entered a judgment of dismissal without prejudice after finding that Plaintiff's Amended Complaint (Filing 12) fails to state a claim upon which relief may be granted, and that amendment would be futile. (See Filings 13, 14.) On October 14, 2021, Plaintiff filed a motion for reconsideration and for leave to amend. (Filing 15.) The motion will be denied in all respects.

[I]t is well-settled that plaintiffs "remain free where dismissal orders do not grant leave to amend to seek vacation of the judgment under Rules 59 and 60[b] and offer an amended complaint in place of the dismissed complaint." *Quartana* [v. *Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986)]. But it is also well-settled that "district courts in this circuit have considerable discretion to deny a [timely] post judgment motion for leave to amend because such motions are disfavored, but may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits." *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823-24 (8th Cir. 2009). Leave to amend will be granted if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief. *See Dorn v. State Bank of Stella*, 767 F.2d 442, 443-44 (8th Cir. 1985); *Acevedo-Villalobos v. Hernandez*, 22 F.3d 384, 389 (1st Cir.), *cert. denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994).

United States v. Mask of Ka-Nefer-Nefer, 752 F.3d 737, 742-43 (8th Cir. 2014).

Because Plaintiff has not indicated which provision of the Federal Rules of Civil Procedure he is relying upon in making the motion for reconsideration, it may be treated either as a Rule 59(e) motion to alter or amend judgment or as a Rule

60(b) motion for relief from judgment. *See Sanders v. Clemco Indus.*, 862 F.2d 161, 168 (8th Cir. 1988). But whichever rule is applied, the motion fails.

Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence. *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment. *Id.*

Under Rule 60(b), a court may grant a party relief from a judgment for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Relief under the catchall provision, Rule 60(b)(6), is available only in “extraordinary circumstances.” *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524 (2005)).

Upon consideration of Plaintiff’s motion, the court concludes Plaintiff has not demonstrated any legitimate reason for altering, amending, or otherwise obtaining any relief from the court’s judgment of dismissal without prejudice. He has not shown that the dismissal was the result of manifest error of law or fact, nor has he presented any “extraordinary circumstances” justifying relief.

As the court has previously explained, the reason the Amended Complaint was dismissed, and Plaintiff was not granted further leave to amend, is that he “failed to correct the pleading deficiencies that were pointed out in the court’s Memorandum and Order on initial review of his original Complaint, particularly the need to plead (1) more than negligence and (2) each Defendant’s personal involvement in or direct

responsibility for the alleged violation of Plaintiff's rights." (Filing 13 at 6.) *See, e.g., Frazier v. City of Omaha Police Dep't*, No. 8:18CV539, 2019 WL 11680200, at *2 (D. Neb. Apr. 23, 2019) (dismissing case because pro se plaintiff "failed to follow the court's order to file an amended complaint consistent with the court's clear directions in its previous Memorandum and Order") *aff'd*, No. 19-2069, 2019 WL 11717127 (8th Cir. Sept. 27, 2019), *cert. denied*, 140 S. Ct. 2527 (2020); *Slangal v. Getzin*, 148 F.R.D. 691, 700 (D. Neb. 1993) (adopting magistrate judge's recommendation that amended complaint be dismissed where pro se plaintiff "received full notice of the insufficiency of his original complaint and received a meaningful opportunity to respond through an invitation to file an amended complaint in order to remedy the noted failings," but failed to do so); *Tyler v. City of Omaha*, 780 F. Supp. 1266, 1275 (D. Neb. 1991) (magistrate judge's order recommending dismissal of pro se amended complaint that did not remedy failings noted in order on initial review of original complaint), *remanded without opinion*, 953 F.2d 648 (8th Cir. 1991) (Table).

Plaintiff argues that numerous closures of the prison library due to staffing issues prevented him from drafting an Amended Complaint that could pass initial review under 28 U.S.C. §§ 1915(e)(2) and 1915A, but this is a flimsy, makeweight excuse. The court originally granted Plaintiff 30 days to file a Second Amended Complaint, until August 2, 2021 (see Filing 8), but on Plaintiff's motion (Filing 10), granted him a 30-day extension, until September 1, 2021. (See Filing 11.) Plaintiff did not take advantage of this extension of time, however, as the court received the Second Amended Complaint on July 28, 2021.¹ Thus, Plaintiff has failed to establish sufficient grounds for setting aside the court's judgment under Rule 59(e) or Rule 60(b), and the court finds that justice does not require that Plaintiff be allowed to file a Second Amended Complaint. *See* Fed. R. Civ. P. 15(a)(2).

In addition, the court's local rules provide that "[a] party who moves for leave to amend a pleading ... must file as an attachment to the motion an unsigned copy of the proposed amended pleading that clearly identifies the proposed amendments,"

¹ The Second Amended Complaint was signed on July 25, 2021. There is no indication as to when it was placed in the prison mailbox system., but the mailing envelope is postmarked July 26, 2021 (one full week before the original filing deadline). The court's order granting Plaintiff a 30-day extension was entered and mailed to Plaintiff on Tuesday, July 20, 2021.

and “[t]he motion must ... specifically state the proposed amendments” NECivR 15.1(a). And when, as here, the motion raises a substantial issue of law, it must be supported by a separately filed brief. *See* NECivR 7.1(a)(1)(A); *see also* NECivR 7.1(a)(1)(B) (“If the court concludes that a motion raises a substantial issue of law, ... it may treat the failure to file a brief as an abandonment of the motion.”); *Carter v. Muldoon*, No. 8:17CV319, 2018 WL 4775439, at *1 (D. Neb. Oct. 3, 2018) (denying pro se plaintiff’s motion to amend pleadings for noncompliance with local rules, including failure to file a supporting brief). *Raysean Barber v. Scott Frakes, et al.*, No. 8:21CV285, 2021 WL 4748688, at *2 (D. Neb. Oct. 12, 2021) (same). Although Plaintiff is proceeding pro se, he is “bound by and must comply with all local and federal procedural rules.” NEGenR 1.3(g). Plaintiff, ignoring the court’s local rules, has simply submitted a 17-page Second Amended Complaint without specifically identifying the proposed amendments or explaining how the Second Amended Complaint—in contrast to his two previous pleadings—states a plausible claim for relief against each Defendant. The Second Amended Complaint therefore will be stricken from the court file and the court will not set aside the judgment or undertake an initial review of the Second Amended Complaint under 28 U.S.C. §§ 1915(e)(2) and 1915A.

IT IS ORDERED:

1. Plaintiff’s motion for reconsideration and for leave to amend (Filing 15) is denied in all respects.
2. Plaintiff’s Second Amended Complaint (Filing 12) is stricken from the court file as an unauthorized filing.

Dated this 18th day of October 2021.

BY THE COURT:



Richard G. Kopf
Senior United States District Judge

APPENDIX

D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ABDUR-RASHID MUHAMMAD,

Plaintiff,

vs.

SCOTT R. FRAKES, Director, Nebraska
Department of Correctional Services;
ROBERT P. HOUSTON, Director in 2013,
Nebraska Department of Correctional
Services; MICHELE WILHELM, Warden,
Nebraska State Penitentiary; DIANE
SABATKA-RINE, Warden in 2013,
Nebraska State Penitentiary; SCOTT
ISHERWOOD, Housing Unit 5 Manager
in 2013; DOES 1 to 10, inclusive,

Defendants.

No. 4:21CV3096

SECOND AMENDED COMPLAINT

Plaintiff, ABDUR-RASHID MUHAMMAD, formerly known as Antonio Rooks-Byrd, without counsel, and for his claims for relief against the Defendants, states and alleges as follows:

INTRODUCTION

1. Plaintiff brings this civil rights action to redress the deprivation under color of state law of rights, privileges and immunities secured to Plaintiff by provisions of the First and Fourteenth Amendments to the United States Constitution and, Article I, Sections 3, 5, and 13 to the Constitution of the State of Nebraska.

2. At issue are the unlawful acts, omissions, policies, procedures, practices, and customs of the Nebraska Department of Correctional Services ("NDCS") Defendants Scott R. Frakes, Robert P. Houston, Michele Wilhelm, Diane Sabatka-Rine, Scott Isherwood (collectively "NDCS Defendants"), and DOES 1 to

10, inclusive.

3. NDCS Defendants and DOES 1 to 10, inclusive, and each of them, under color of state law, unconstitutionally deprived Plaintiff his rights to access the courts, freedom of speech, and due process of law, as guaranteed by the United States Constitution and the Constitution of the State of Nebraska.

4. NDCS Defendants and DOES 1 to 10, inclusive, together and under color of state law, conspired and colluded among and between themselves to deprive Plaintiff of his constitutional rights secured by the United States Constitution and the Constitution of the State of Nebraska.

5. Plaintiff seeks declaratory, injunctive, and monetary relief under 42 U.S.C. §§ 1983, 1985 for the NDCS Defendants' unlawful, reckless, intentional, and conspiratorial actions that deprived the Plaintiff's constitutional rights and is inflicting profound personal suffering upon him that continues to this day.

JURISDICTION

6. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343. This Court also has jurisdiction over Plaintiff's claims for declaratory and injunctive relief pursuant to 28 U.S.C. 2201, 2202. Monetary damages are available pursuant to 42 U.S.C. §§ 1983, 1985. This Court also has authority under 42 U.S.C. § 1988 to award Plaintiff reasonable attorneys' fees, litigation expenses, and costs. Plaintiff requests that this Court take supplemental jurisdiction of related state claims pursuant to 28 U.S.C. § 1367(a).

VENUE

7. This Court is a proper venue for this action pursuant to 28 U.S.C. § 1391(b)(2) in that the events or omissions giving rise to Plaintiff's claims

have occurred and are occurring, but not exclusively, in and around Lancaster County, Nebraska in this judicial district. Trial on this matter is proper in Lincoln, Nebraska.

PARTIES

8. Plaintiff Abdur-Rashid Muhammad ("Plaintiff" or "MUHAMMAD"), formerly known as Antonio Rooks-Byrd, is a United States Citizen and a resident of Lincoln, State of Nebraska. At all time pertinent hereto Plaintiff MUHAMMAD was and is incarcerated at the Nebraska State Penitentiary ("NSP") within the custody and control of NDCS Defendants and their employees.

9. Defendant Scott R. Frakes ("FRAKES"), is a resident of the State of Nebraska and is, at all times pertinent hereto, the Director of NDCS. FRAKES is responsible for the administration, operation and supervision of state corrections institutions and facilities within the State of Nebraska, including NSP, and for promulgation and enforcement of rules, regulations, policies, and practices relevant thereto. FRAKES is sued in his individual capacity and, at all times relevant hereto, he has acted under color of state law.

10. Defendant Robert P. Houston ("HOUSTON"), was a resident of the State of Nebraska and was, at all times pertinent hereto, the Director of NDCS in 2013. HOUSTON was responsible for the administration, operation and supervision of state corrections institutions and facilities within the State of Nebraska, including NSP, and for promulgation and enforcement of rules, regulations, policies, and practices relevant thereto. HOUSTON is sued in his individual capacity and, at all times relevant hereto, he has acted under color of state law.

11. Defendant Michele Wilhelm ("WILHELM"), is a resident of the State of

Nebraska and is, at all times pertinent hereto, the Warden of NSP. WILHELM is responsible for the administration, operation and supervision of NSP staff and the NSP facility, the custody and control of NSP inmates, and for the promulgation and enforcement of rules, regulations, policies, and practices relevant thereto. WILHELM is sued in her individual capacity and, at all times relevant hereto, she has acted under color of state law.

12. Defendant Diane Sabatka-Rine ("SABATKA-RINE"), is a resident of the State of Nebraska and was, at all times pertinent hereto, the Warden of NSP in 2013. SABATKA-RINE was responsible for the administration, operation and supervision of NSP staff and the NSP facility, the custody and control of NSP inmates, and for promulgation and enforcement of rules, regulations, policies and practices relevant thereto. SABATKA-RINE is sued in her individual capacity and, at all times relevant hereto, she has acted under color of state law.

13. Defendant Scott Isherwood ("ISHERWOOD"), was a resident of the State of Nebraska and was, at all times relevant hereto, the Housing Unit 5 Manager at the NSP facility in 2013. ISHERWOOD was responsible for the administration, operation and supervision of the Housing Unit 5 staff at the NSP facility, and for the promulgation and enforcement of rules, regulations, policies and practices relevant thereto. ISHERWOOD is sued in his individual capacity and, at all times relevant hereto, he has acted under color of state law.

14. Plaintiff is ignorant of the true names and capacities of the unknown NSP mailroom and Housing Unit 5 staff Defendants sued in this complaint as DOES 1 to 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes, and thereon

alleges, that each of the fictitiously named Defendants is personally responsible in some manner for the occurrences alleged in this complaint.

15. At all times mentioned in this complaint, each Defendant was the agent of the others and was acting within the course and scope of this agency, and all acts alleged to have been committed by any one of them was committed on behalf of every other Defendant.

FACTUAL ALLEGATIONS

16. Plaintiff drafted a pro se Notice of Appeal, Poverty Affidavit, Praecipe for Bill of Exceptions and Praecipe for Transcript ("legal documents") from the Sarpy County District Court's denial of his postconviction relief motion. These legal documents were signed, and Plaintiff's signature was notarized on April 8, 2013.

17. Defendant ISHERWOOD notarized Plaintiff's signatures on the Notice of Appeal and Poverty Affidavit on April 8, 2013.

18. On the same day of April 8, 2013, after ISHERWOOD notarized Plaintiff's signatures, Plaintiff delivered all of the aforementioned legal documents to ISHERWOOD, properly addressed and with institutional check attached for postage fee, for mailing pursuant to the NDCS outgoing mail procedures. Once all of these legal documents were placed with ISHERWOOD for outgoing mail, Plaintiff no longer had any control over the legal documents and could not control when they were processed and mailed out.

19. Plaintiff, through counsel William D. Gilner ("Gilner"), discovered on November 13, 2017, that the Nebraska Court of Appeals dismissed Plaintiff's appeal from the denial of his postconviction relief motion as untimely because the Clerk of the Sarpy County District Court did not receive his legal

documents in the mail until April 17, 2013, one day past the due date.

20. Plaintiff is informed and believes, and thereupon alleges, that ISHERWOOD and other unknown Housing Unit 5 Defendants DOES 1 to 10, inclusive, unlawfully, recklessly, and intentionally delayed delivery of Plaintiff's legal documents to the NSP mailroom for purposes of missing Plaintiff's filing deadline by its untimely mailing to the courts and deprivation of Plaintiff's constitutional rights.

21. Plaintiff is informed and believes, and thereupon alleges, that unknown NSP mailroom Defendants DOES 1 to 10, inclusive, unlawfully, wrecklessly, and intentionally delayed the processing and mailing out of Plaintiff's legal documents for purposes of missing Plaintiff's filing deadline by its untimely mailing and deprivation of Plaintiff's constitutional rights.

22. Defendants FRAKES, HOUSTON, WILHELM, SABATKA-RINE, and ISHERWOOD, acting under color of state law, were and/or remain responsible for promulgating, implementing, maintaining, administering, supervising, compiling, or correcting the inadequate and unlawful NDCS outgoing inmate mail procedures. NDCS Defendants were and are tolerating, covering up, and failing to remedy a pattern and practice among their employees of losing and delaying the processing and mailing out of NDCS inmates legal mail to unconstitutionally deny access to the courts, freedom of speech, and due process of law.

23. NDCS facilities, including NSP, are drastically and dangerously understaffed. For those staff that NDCS does employ, training is minimal, overtime is abused, and turnover is high.

24. Typically, correctional officers work 12-hour shifts. Mandatory overtime, where NDCS staff are required to work an additional four hours

follow. NDCS requires prisoners to file informal grievances within three calendar days of the incident, and staff must respond within ten business days. Appealing the response must be done at two levels, and prisoners are required to adhere to very strict deadlines. Prisoners are also required to provide several attachments to their appeals, which can be difficult for prisoners who do not understand that they are required to keep these grievances and responses.

30. NDCS Defendants also fail to provide adequate grievance opportunities to prisoners in isolation, and they fail to provide assistance to those prisoners in isolation, and they fail to provide assistance to those prisoners who, due to physical, intellectual, or psychiatric disability, are unable to grieve on their own.

31. Grievance forms are not freely available in the housing units, particularly in the isolation units. NDCS Defendants do not adequately train staff in how to provide, appropriately process, and timely respond to grievance forms.

CLAIMS FOR RELIEF

First Cause of Action

(Plaintiff v. Defendants ISHERWOOD in his official capacity and
DOES 1 to 10, inclusive)
(42 U.S.C. § 1983, First and Fourteenth Amendment violations)

32. Plaintiff incorporates by reference each and every allegation contained in the paragraphs above.

33. Commencing on April 8, 2013, Defendants ISHERWOOD, unknown housing unit 5 and mailroom DOES 1 to 10, inclusive, and each of them, were acting under color of state law when they committed the mentioned actions and omissions,

doing so unlawfully without proper reason or authority, without reasonable or probable cause and with actual knowledge of, or with deliberate indifference to Plaintiff's constitutional rights.

34. Defendants ISHERWOOD and DOES 1 to 10, inclusive, and each of them, under color of state law, deprived Plaintiff of his constitutional rights to access the courts to petition the Government for a redress of grievances, freedom of speech, and due process of law in violation of the First and Fourteenth Amendments to the United States Constitution.

35. Defendant ISHERWOOD and DOES 1 to 10, inclusive, and each of them, unlawfully, deliberately and purposely delayed delivery of Plaintiff's legal documents or mail to the NSP mailroom for purposes of missing Plaintiff's deadline by its untimely mailing to the courts and deprivation of Plaintiff's constitutional rights.

36. Unknown NSP mailroom staff Defendants DOES 1 to 10, inclusive, and each of them, unlawfully, deliberately, and purposely delayed processing and mailing out Plaintiff's legal documents or mail for purposes of Plaintiff missing his filing deadline by its untimely mailing to the courts and deprivation of Plaintiff's constitutional rights.

37. In performing the unlawful acts and omissions described above, Defendants ISHERWOOD and DOES 1 to 10, inclusive, acted with oppression and malice.

Second Cause of Action

(Plaintiff v. Defendants FRANKS, HOUSTON, WILHELM, SABATKA-RINE and
ISHERWOOD in their individual capacities)
(42 U.S.C. § 1983, First and Fourteenth Amendment violations)

38. Plaintiff incorporates by reference each and every allegation contained

in the paragraphs above.

39. At all times relevant herein, Defendants FRAKES, HOUSTON, WILHELM, SABATKA-RINE, and ISHERWOOD, and each of them, acted by virtue and color of state law. Said acts by these NDCS Defendants were in absence of legal authority and willful disregard of clearly established law and with specific intent to deprive Plaintiff of his constitutional rights, secured by 42 U.S.C. § 1983 and by the First and Fourteenth Amendments to the United States Constitution.

40. Defendants HOUSTON, SABATKA-RINE, and ISHERWOOD, and each of them, acting under color of state law, were responsible for promulgating, implementing, maintaining, administering, supervising, compiling, or correcting the inadequate and unlawful NDCS outgoing inmate mail procedures. Defendants HOUSTON, SABATKA-RINE, and ISHERWOOD tolerated, covered up, and failed to remedy a pattern and practice among their employees of losing or delaying the processing and mailing out of Plaintiff's and other NDCS inmates legal documents or mail to unlawfully deny access to the courts, freedom of speech, and due process of law.

41. Defendants FRAKES and WILHELM, and each of them, acting under color of state law were and remain responsible for promulgating, implementing, maintaining, administering, supervising, compiling, or correcting the inadequate and unlawful NDCS outgoing inmate mail procedures. Defendants FRAKES and WILHELM are tolerating, covering up, and failing to remedy a pattern and practice among their employees of losing or delaying the processing and mailing out of Plaintiff's and other NDCS inmates legal documents or mail to unlawfully deny access to the courts, freedom of speech, and due process of law.

42. NDCS Defendants, as final policy makers, had and have in effect policies, practices, procedures, and customs that deprived and are depriving Plaintiff of his constitutional rights.

43. The policies, practices, procedures, and customs include, but are not limited to, the following:

- a. failing to properly train and supervise employees in the techniques of processing and mailing out NDCS inmate legal mail.
- b. failing to properly train and supervise employees in the techniques of how to provide, appropriately process, and timely respond to grievance forms.
- c. failing to discipline employees who violate the Constitution or law or otherwise violate the rights of NDCS inmates or prisoners.
- d. investigating grievances in a manner designed to always coverup any unlawful acts and/or wrongdoings of employees.
- e. falsifying and fabricating responses to grievances without regard to whether policies, practices, procedures, and customs might violate NDCS prisoners' constitutional rights.
- f. failing to adequately staff NDCS facilities, including NSP and its law library.
- g. deliberate indifference to the violation of the rights of NDCS prisoners by employees.

44. The policies, practices, procedures, and customs, separately and together, were deliberately and purposefully implemented to deprive Plaintiff of his constitutional rights. At the very least, NDCS Defendants implemented these policies with a deliberate indifference to the rights of Plaintiff.

45. In performing the unlawful acts and omissions described herein above, Defendants FRAKES, HOUSTON, WILHELM, SABATKA-RINE, and ISHERWOOD acted with oppression and malice.

Third Cause of Action

(Plaintiff v. Defendants FRAKES, HOUSTON, WILHELM, SABATKA-RINE and ISHERWOOD in their individual capacities and DOES 1 to 10, inclusive)
(42 U.S.C. § 1985, First and Fourteenth Amendment violations)

46. Plaintiff incorporates by reference each and every allegation contained in the paragraphs above.

47. NDCS Defendants and DOES 1 to 10, inclusive, together and under color of state law, reached an agreement or understanding, engaged in a course of conduct, and otherwise conspired and colluded among and between themselves to deprive Plaintiff of his constitutional rights to fair access to the courts; to freedom of speech; and to due process of law.

48. NDCS Defendants and DOES 1 to 10, inclusive, committed the overt acts set forth above together, culminating the procedural default of Plaintiff's meritorious postconviction relief claims. NDCS Defendants and DOES 1 to 10, inclusive, together, deliberately and purposely delayed the delivery of Plaintiff's legal documents or mail to the NSP mailroom; delayed the processing of Plaintiff's legal documents or mail in the NSP mailroom; and delayed the mailing out of Plaintiff's legal documents or mail to the courts; all for purposes of Plaintiff missing his filing deadline and deprivation of his constitutional rights.

49. NDCS Defendants and DOES 1 to 10, inclusive, together engaged in these unlawful actions with actual knowledge of, or with deliberate indifference to, Plaintiff's constitutional rights. Had NDCS Defendants and/or DOES 1 to 10,

inclusive, notified Plaintiff that his legal documents were lost or held up, Plaintiff could have resent copies of his legal documents for mailing to the courts and the legal documents would have been timely filed. Instead, NDCS Defendants and DOES 1 to 10, inclusive, together and with reckless disregard for the truth and Plaintiff's rights, covered up NDCS employees delay in the mailing out of Plaintiff's legal documents or mail.

50. NDCS Defendants' and DOES' 1 to 10, inclusive, conspiracy to delay timely mailing of Plaintiff's legal documents or mail to the courts, and their acts in furtherance thereof, violated Plaintiff's constitutional protected rights.

51. In performing the unlawful acts and omissions described herein above, NDCS Defendants and DOES 1 to 10, inclusive, acted with oppression and malice.

Fourth Cause of Action

(Plaintiff v. Defendants FRAKES, HOUSTON, WILHELM, SABATKA-RINE, and ISHERWOOD in their individual capacities and DOES 1 to 10, inclusive)
(Violation of State Civil Rights Brought Pursuant to this Court's Supplemental Jurisdiction Under 28 U.S.C. § 1367(a))

52. Plaintiff incorporates by reference each and every allegation contained in the paragraphs above.

53. As a result of the mentioned unlawful actions, omissions, conduct, policies, procedures, practices, and customs of NDCS Defendants FRAKES, HOUSTON, WILHELM, SABATKA-RINE, ISHERWOOD, and DOES 1 to 10, inclusive, and each of them, under color of state law; interfered with the exercise and enjoyment of Plaintiff's rights secured by the United States Constitution and other federal laws; and the Constitution and laws of Nebraska, including, but not limited to; Plaintiff's rights to access open courts without denial or

delay; to freedom of speech; and to due process of law.

54. These violations of Plaintiff's rights by NDCS Defendants and DOES 1 to 10, inclusive, and each of them, are guaranteed by Article I, Sections 3, 5, and 13 to the Constitution of the State of Nebraska, which entitles Plaintiff to compensatory and punitive damages, injunctive relief, statutory civil penalties, and attorney's fees, all of which are provided for by the laws and the Constitution of Nebraska and are requested.

55. As a direct and proximate result of the mentioned conduct of all NDCS Defendants and DOES 1 to 10, inclusive, and each of them, Plaintiff has suffered and will continue to suffer great emotional and psychological distress, humiliation and mental anguish, the nature and amount of which will be shown according to proof at trial.

56. NDCS Defendants and DOES 1 to 10, inclusive, knowingly, and willfully acted with malice and oppression and with the intent to harm Plaintiff in a despicable manner and did so with a reckless disregard and deliberate indifference to Plaintiff's constitutional rights as a citizen and a human being.

57. NDCS Defendants and DOES 1 to 10, inclusive, will continue to violate Plaintiff's constitutional rights if Plaintiff is not afforded the relief demanded below.

58. NDCS Defendants' and DOES' 1 to 10, inclusive, unlawful actions and omissions as set forth above are imposing an immediate and ongoing harm upon Plaintiff, and have caused Plaintiff emotional distress, deprivation of his constitutional rights, damages to his reputation, material and economic loss, and other damages for which Plaintiff is entitled to monetary relief.

59. The intentional or reckless misconduct of NDCS Defendants and DOES 1 to 10, inclusive, as set forth above, furthermore entitles Plaintiff to punitive damages in an amount to be proven at trial for purpose of punishing all these NDCS Defendants and to deter them and others from such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against all NDCS Defendants, jointly and severally, as set forth below:

1. Declaring that the policies, practices, procedures, customs, acts, and omissions of all NDCS Defendants, as set forth above, are unlawful and violate Plaintiff's rights under the Constitution of the United States and the Constitution of the State of Nebraska;
2. Preliminary and permanent injunction enjoining all NDCS Defendants, and all persons acting in concert with them under color of state law, from subjecting Plaintiff to illegal and unconstitutional policies, practices, procedures, customs, acts, and omissions set forth above;
3. Awarding Plaintiff compensatory and punitive damages in a sum in excess of the jurisdictional limit of this Court, the exact amount to be proven at trial;
4. Awarding Plaintiff reasonable attorneys' fees and litigation costs, including, but not limited to fees, costs, and disbursements pursuant to applicable law;
5. Retain jurisdiction of this case until all NDCS Defendants have fully complied with the orders of this Court, and there is a reasonable assurance that the NDCS Defendants will continue to comply in the future absent

continuing jurisdiction.

6. Granting such other and further relief as this Court deems just and proper.

JURY DEMAND AND DESIGNATION OF PLACE OF TRIAL

Plaintiff demands that this case be tried to a jury in Lincoln, Nebraska.

DECLARATION: I declare under penalty of perjury that the foregoing is true and correct.

RESPECTFULLY SUBMITTED AND EXECUTED, this 10th day of October, 2021.

ABDUR-RASHID MUHAMMAD, Plaintiff

By: 

Abdur-Rashid Muhammad #73537
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PRO SE PLAINTIFF