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WASHINGTON STATE
SUPREME COURT

No. 101411-2

Division I Cause No. 56043-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHAD WAYNE HURN, Petitioner

v.

DEPARTMENT OF CORRECTIONS, et al, Respondents

PETITION FOR REVIEW

Chad Wayne Hurn, pro se
PO Box 37
Littlerock, WA 98556

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A. INTRODUCTION

This case presents issues of constitutional magnitude that has the potential to impact a vast number of people in our state. Prisoners and Appellants are people nonetheless, and prison walls do not form an iron curtain separating those people from their constitutional rights. The very first enactment of the Washington State Constitution, article I, section I, is the declaration that governments are established to protect and maintain individual rights. Furthermore, the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.

The Court of Appeals decision allows prison guards, and essentially any state actor, to read privileged attorney-client communications page-by-page and line-by-line, and subsequently seize any documents that happen to contain a name other than the intended recipient's in a document, and then take the documents outside the presence of the recipient to conduct research on them, ultimately censoring privileged attorney-client communications.

This practice of interference and censorship eviscerates the First and Sixth Amendment protections that attorney-client communications are given, and furthermore impedes appellants' access to the court by denying them the necessary evidence needed to appeal or collaterally attack their conviction.

Believing this to be in error, petitioner respectfully requests review and relief from this Court.

B. IDENTITY OF PETITIONER

Petitioner Chad Wayne Hurn respectfully asks this Court to accept review of the Court of Appeals decision which affirmed the trial court's granting of summary judgment in this case, as designated in part C of this petition. Mr. Hurn is proceeding pro se in this matter.

C. COURT OF APPEALS DECISION

The opinion at issue was filed on May 10, 2022. A copy of the unpublished decision is attached hereto as Appendix A. Reconsideration was requested. The ruling on that motion is attached hereto as Appendix B. This Petition for Review is timely brought.

D. ISSUES PRESENTED FOR REVIEW

1. Does the Sixth Amendment and interpretive case law permit prison guards to read and censor attorney-client communications?

2. Does the Sixth Amendment and Article I, Section 22 and interpretive case law protect an Appellant's right to communicate with counsel and obtain evidence without governmental interference?

3. Did the Court of Appeals fail to conduct a de novo review of the record and construe the facts in the light most favorable to Mr. Hurn as the non-moving party?

E. STATEMENT OF THE CASE

Chad Hurn, a prisoner appealing his criminal convictions, had his legal mail interfered with by prison guards on four occasions. Defendants assert they followed Department of Corrections ("DOC") policy when reading and censoring Mr. Hurn's legal mail. Mr. Hurn felt otherwise, filing a lawsuit in Thurston County Superior Court alleging violations of his First and Sixth Amendment rights as well as tort claims.

Defendants moved for summary judgment submitting declarations of defendants and counsel in support. Mr. Hurn responded, submitting a declaration with voluminous supporting exhibits as well as a motion for judicial notice for the court to consider amicus briefs from the ACLU and the Yale Ethics Bureau discussing the harm that the interference with attorney-client communications has on attorneys. Defendants submitted a reply brief, and the court granted summary judgment at a hearing held without argument, or providing any analysis.

The Court of Appeals affirmed summary judgment, and in doing so largely ignored the evidence Mr. Hurn put before the court, despite the applicable standard of review requiring that evidence be viewed in a light most favorable to the non-moving party. The evidence before the court showed that:

On four separate occasions Mr. Hurn had his legal mail interfered with by a prison guard. The prison guard opened the legal mail in Mr. Hurn's presence and commenced to reading documents page-by-page and line-by-line, and took several pages outside Mr. Hurn's presence.

When Mr. Hurn asked the prison guard if she had a warrant authorizing her to read his legal mail, she responded by stating she didn't need one, and when another inmate asked her to stop reading his own legal mail, the guard told him to shut up or she would just take it back to the mailroom and read it at her leisure.

The prison guard took Mr. Hurn's legal mail, which consisted of his attorney-client files and portions of his own trial transcripts, outside his presence, and conducted research on them using a DOC OMNI database.[1] Then, a guard scanned Mr. Hurn's legal documents into a computer and disseminated them electronically to then prison captain Danial Davis, who then allegedly conducted his own research on Mr. Hurn's attorney-client files to determine if any name in a document happened to be someone who was incarcerated. Davis then sent electronic copies of Hurn's attorney-client mail to then Correctional Program Manager Roy Gonzalez. Defendants refused to identify the number of pages taken from Mr. Hurn's legal mail in some instances.

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1. OMNI is an acronym for Offender Management Network Information

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner respectfully requests review of this matter to clarify whether it is lawful for prison guards to read and censor attorney-client communications.

1. Review Is Proper Because The Decision By The Court Of Appeals Conflicts With Both State And Federal Constitutions As Well As Interpretive Case Law And Allows For Widespread Abuse Of The Attorney-Client Privilege.

Prison officials may institute procedures for inspecting "legal mail," e.g., mail sent between attorneys and prisoners. See Wolff v. McDonnell, 418 U.S. 539, 576-77, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974). But "prisoners have a protected First Amendment interest in having properly marked legal mail opened [and inspected] only in their presence." Hayes v. Idaho Corr. Center, 849 F.3d 1204, 1211 (9th Cir. 2017). "Legal mail" may not be read or copied without the prisoner's permission. See Casey v. Lewis, 43 F.3d 1261, 1269 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 343 (1996).

The Ninth Circuit has explained that there is a clear difference between inspecting legal mail for contraband and reading it under Wolff,

418 U.S. at 577, such that prison officials may not circumvent this prohibition by reading an inmate's legal mail in his presence because this practice does not ameliorate the chilling effect on the inmate's Sixth Amendment rights. See Nordstrom v. Ryan, 762 F.3d 903, 911 (9th Cir. 2014) (Nordstrom I). In addition to the developed common law, the American Bar Association Standards on Treatment of Prisoners prohibit prisons from examining legal mail outside a prisoner's presence.[2]

The Sixth Amendment is applicable to the states via the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). "A criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential to his defense." Nordstrom I, 762 F.3d at 910. "One threat to the effective assistance of counsel posed by government interception of attorney-client

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2. Standard 23-9.4(c)(i) provides that:

(i) For letters or other documents sent or passed between counsel and prisoner:

A. correctional authorities should not read the letter or documents, and should search only for physical contraband; and

B. correctional authorities should conduct such a search only in the presence of the prisoner to or from whom the letter or document is addressed.

communications lies in the inhibition of free exchanges between defendant and counsel." Weatherford v. Bursey, 429 U.S. 545, 554 n. 4, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). "[T]he Constitution does not permit...[the] reading [of] attorney-client correspondence." Nordstrom I, at 910-11.

In Nordstrom, a guard read a prisoner's legal mail for about 15 seconds, and when asked to stop, the officer stated he was "authorized to search legal mail for contraband as well as scan the content of the material to ensure it is legal subject matter." 762 F.3d at 906. The Court held that prison officials violate a prisoner's rights when they read a single piece of legal mail, even without a showing of prejudice. Id. at 910.

In Nordstrom II, the Ninth Circuit reiterated its holding in Nordstrom I, that prison officials may inspect, but not read, a prisoner's legal mail in his presence. And, at most, an inspection should be for 'suspicious features' that can be identified **without reading the words on a page;** i.e., 'maps of the prison yard, the times

of guards' shift changes, and the like.'" Nordstrom v. Ryan, 856 F.3d 1265, 1272 (9th Cir. 2017) (Nordstrom II) (citing Nordstrom I, at 906) (emphasis added).

The evidence before the trial court included the declaration of Mr. Hurn, in which he detailed each instance of the prison guards reading his legal mail in his presence, which was directly observed, as well as affidavits of two other witnesses who also observed prison guards reading and censoring Mr. Hurn's legal mail. Defendants evidence consisted of the prison guard stating she was "inspecting" Hurn's legal mail and not reading it. However, it is an undisputed fact that the prison guard read names within documents in Mr. Hurn's legal mail. Another undisputed fact is that the guard took Mr. Hurn's legal mail outside his presence and conducted research using OMNI, which necessitated typing information into a query, which cannot be done absent first "reading" it in Mr. Hurn's legal mail.

In Nordstrom I, the court held that the plaintiff adequately stated a Sixth Amendment claim where he alleged that: (1) prison officials

had a policy and practice of reading his legal mail; (2) prison officials claimed the right to do so; and (3) the policy violated his ability to confidentially communicate with his attorney. 762 F.3d at 911.

In this case, Mr. Hurn asserted similar claims as Nordstrom: (1) there is a policy by which prison staff read and censored his legal communications between him and his attorney; (2) defendants claim entitlement to "inspect" "screen" or "scan" Mr. Hurn's legal mail; and (3) the scanning/screening/inspecting policy or practice violated his attorney-client privilege. "It is obvious ... that a policy or practice permitting prison staff to not just inspect for contraband, but to read an inmate's legal mail is highly likely to inhibit the sort of candid communications that the right to counsel and the attorney-client privilege are meant to protect." Id. at 910.

More than half a century ago, the Washington State Supreme Court ruled that, when State actors pry into a defendant's privileged attorney-client communications, prejudice must be presumed. State v. Cory, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963).

This Court reaffirmed this ruling in State v. Pena-Fuentes, 179 Wn.2d 808, 818-20, 318 P.3d 257 (2014) and, in light of a State actor's eavesdropping on privileged attorney-client communications, imposed a presumption of prejudice. A distinction between misconduct by law enforcement and misconduct by jail guards is not recognized by our Supreme Court or Division One Court of Appeals. State v. Irby, 3 Wn.App.2d 247, 415 P.3d 611 (2018).

Under our State's jurisprudence, in order to determine whether a deprivation of a prisoner's Sixth Amendment right occurred - and whether a remedy must issue, the court engages in a four-part inquiry:

> 1. Did a State actor participate in the infringing conduct alleged by the defendant?
>
> 2. If so, did the State actor(s) infringe upon a Sixth Amendment right of the defendant?
>
> 3. If so, was there prejudice to the defendant? That is, did the State fail to overcome the presumption of prejudice arising from the infringement by not proving the absence of prejudice beyond a reasonable doubt?
>
> 4. If so, what is the appropriate remedy to select and apply, considering the totality of the circumstances present, including the degree of prejudice to the defendant's right to a fair trial and the degree of nefariousness of the conduct by the State actor(s)?

Irby, 3 Wn.App.2d at 252-53.

While Cory, Pena-Fuentes, and Irby dealt with criminal defendants in a pre-trial setting, the test is instructive as Mr. Hurn was a post-trial appellant. Because, article I, section 22 provides the right to trial and the right to appeal in all cases, this Court should take this opportunity and extend this same test, or craft a new one to protect appellants' rights on direct appeal and habeas proceedings in order to comply with constitutional guarantees.

The trial court did not engage in any such inquiry in the present case, and under the applicable standard of review the evidence should have necessitated a fact finding in order to overcome the presumption of prejudice. However, under Nordstrom, Mr. Hurn need only show a chilling of his attorney-client communications, which he arguably did.

The appellate court erred in affirming summary judgment in this case because the defendants did not show that the interference with Mr. Hurn's attorney-client files and trial transcripts did not at a minimum chill his Sixth Amendment rights.

Accordingly, the issues raised in this Petition for Review involve issues of substantial public interest that should be decided by the Supreme Court.

G. CONCLUSION

The Court should hold that legal mail shall not be read or interfered with by state actors, and that prisoners and appellants have a right to their client files and related discovery in order to challenge their convictions without interference, and that Mr. Hurn has produced evidence sufficient that a reasonable person could rule in his favor. Mr. Hurn respectfully requests that this Court grant review and reverse the lower courts' decision to allow state actors to read and censor attorney-client communication.

Respectfully submitted this 25 day of October, 2022.

CHAD WAYNE HURN
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APPENDIX A

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

May 10, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHAD WAYNE HURN, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS; KERRI MCTARSNEY; MARGARET GILBERT; TAMMY NIKULA; DANIEL DAVIS; ISRAEL "ROY" GONZALES; all in their individual and official capacities Respondent.	No. 56043-7-II UNPUBLISHED OPINION

VELJACIC, J. – Chad Hurn appeals the trial court's order dismissing his complaint for negligence, trespass to chattels, and violation of his civil rights under 42 U.S.C. § 1983 against the Department of Corrections (DOC) and five DOC employees. He argues that the court erred in dismissing his § 1983 claim because genuine issues of material fact exist regrading whether he was denied his federal constitutional rights to communication with his attorney, access to the courts, and due process.

We hold that Hurn fails to establish a violation of his federal constitutional rights. Accordingly, we affirm the trial court's order granting summary judgment dismissal of Hurn's § 1983 claim.

FACTS

I. FACTUAL BACKGROUND

Hurn is an inmate in DOC custody after a jury found him guilty of 13 offenses, including assault in the second degree, unlawful possession of a firearm, possession of a stolen firearm, possession of a stolen vehicle, making or having vehicle theft tools, identity theft, tampering with a witness, communication with a minor for immoral purposes, and intimidating a witness. *State v. Hurn*, No. 71813-4-I, slip op. at 3-4 (Wash. Ct. App. Dec. 7, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/718134.pdf, *review denied*, 185 Wn.2d 1036 (2016). Division One of this court affirmed. *Id.* at 1.

Hurn is serving his sentence at Stafford Creek Corrections Center. During the events relevant to this appeal, the superintendent of the corrections center was Margaret Gilbert and the grievance coordinator was Kerri McTarsney.

II. DOC MAIL POLICY

DOC Policy 450.100 sets forth DOC's policy regarding mail services for offenders and defines staff responsibility for maintaining safety and security. Mail between an inmate and counsel is considered legal mail. *See* Clerk's Papers (CP) at 48-49 (DOC Policy 450.100(VII)(A)(1)(a), (c), & (d)). Incoming legal mail is opened by a designated employee, who "inspect[s] the contents to ensure they meet the policy requirements for legal mail and do not contain contraband or any other material that would threaten facility order or security." CP at 49 (DOC Policy 450.100(VII)(D)(1)). One policy requirement is that incoming mail may not contain information about another inmate without specific approval from the facility superintendent. *See* CP at 59 (DOC Policy 450.100 26). This prohibition is to minimize the threat posed by an inmate

who uses printed documents about another inmate to "coerce, intimidate, manipulate, or retaliate against that offender, threatening the safety, security, and order of the facility. CP at 95.

III. MAIL REJECTIONS

A. First Rejection—No. 52954

On October 7, 2015, DOC legal mail officer Tammy Nikula opened legal mail in Hurn's presence. The mail was from the King County Department of Public Defense Defender's Association Division. After inspecting the documents, Nikula determined that the mail contained documents with unapproved information about another inmate in violation of DOC policy. Nikula confirmed that the listed individual was an inmate through the Offender Management Network Information (OMNI) database. Based on this, Nikula rejected the mail and issued rejection notice 52954. Hurn appealed. He also complained to Gilbert about the time his appeal was taking. The rejection was ultimately upheld on appeal by the superintendent's designee, Daniel Davis, and by DOC's correctional program manager, Israel "Roy" Gonzalez.

B. Second Rejection—No. 52972

On October 8, 2015, Nikula again opened legal mail from the defender's association in Hurn's presence. She determined the mail contained documents with unapproved information about another inmate in violation of DOC policy. She confirmed that the listed individual was an inmate through OMNI. Nikula rejected the mail and issued rejection notice 52972. Davis and Gonzalez upheld the rejection.

C. Third Rejection—No. 10217

On October 14, 2015, Nikula opened legal mail addressed to Hurn from attorney Peter Connick in Hurn's presence. After inspecting the documents, she determined that the mail contained documents with unapproved information about another inmate in violation of DOC

policy. She confirmed that the listed individual was an inmate through OMNI. Nikula rejected the mail and issued rejection notice 10217. Hurn appealed. He also filed a grievance with McTarsney. Davis and Gonzalez upheld the rejection.

D. Fourth Rejection—No.13203

On July 1, 2016, Nikula opened legal mail addressed to Hurn from the defender's association in Hurn's presence. After inspecting the documents, she determined that the mail contained documents with unapproved information about another inmate in violation of DOC policy. She confirmed that the listed individual was an inmate through OMNI. Based on this, she issued mail rejection 13203. Hurn appealed the mail rejection, and both a superintendent's designee and Gonzalez upheld the rejection.

III. DOC STAFF CHANGES

Since the mail incidents in 2015 and 2016, Nikula transferred out of DOC's legal mail department. And Gilbert, McTarsney, Davis, and Gonzalez are no longer DOC employees.

IV. PROCEDURAL HISTORY

Hurn filed a complaint against DOC, Gilbert, McTarsney, Nikula, Davis, and Gonzalez. He alleged negligence, trespass to chattels, and civil rights violations under § 1983. The defendants filed a motion for summary judgment, which the trial court granted, dismissing all Hurn's claims. Hurn appeals the summary judgment order.[1]

[1] Hurn appeals solely the constitutional issues applicable to his § 1983 claim; he does seek review of the trial court's dismissal of his other claims.

ANALYSIS

Hurn contends the trial court erred in dismissing his § 1983 claim in summary judgment. He argues that DOC and the DOC employees violated several of his constitutional rights. We disagree.

I. STANDARD OF REVIEW

We review a trial court's order on summary judgment de novo. *Weaver v. City of Everett*, 194 Wn.2d 464, 472, 450 P.3d 177 (2019). All facts and reasonable inferences are construed in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Weaver*, 194 Wn.2d at 472.

II. 42 U.S.C. § 1983

42 U.S.C. § 1983 seeks to protect citizens who have been deprived of their constitutional rights by someone acting under the color of state law. That statute states,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To prevail on a § 1983 claim, a party "'must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law.'" *Freedom Found. v. Teamsters Local 117 Segregated Fund*, 197 Wn.2d 116, 145, 480 P.3d 1119 (2021) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999)).

A plaintiff may not bring suit under § 1983 in state court against the State because a state is not a person subject to suit within the meaning of § 1983. *Wash. State Republican Party v. Pub.*

Disclosure Comm'n, 141 Wn.2d 245, 285-86, 4 P.3d 808 (2000). Similarly, state agencies are not subject to § 1983 actions. *ARUP Labs., Inc. v. State*, 12 Wn. App. 2d 269, 276, 457 P.3d 492, *review denied*, 196 Wn.2d 1006 (2020). But a plaintiff may assert § 1983 claims against government officials in their individual capacities for actions taken under color of state law. *Republican Party*, 141 Wn.2d at 286.

When a defendant moves for summary judgment on a § 1983 claim, the trial court has two questions before it. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The first question is whether the facts asserted by the plaintiff make out a violation of a constitutional right. *Id.* The second question is whether the right was clearly established at the time of the violation. *Id*

If a government official has deprived a prisoner of his or her constitutional rights, the prisoner may seek damages from the individual government official and/or injunctive relief. *See* 42 USC § 1983; *Parmelee v. O'Neel*, 168 Wn.2d 515, 525, 229 P.3d 723 (2010)

A. DOC not Subject to § 1983 Action and Injunctive Relief not Available Against Former DOC employees

As an initial matter, we hold that because DOC is a state agency, it is not subject to a § 1983 action. *ARUP Labs.*, 12 Wn. App. 2d at 276. The trial court properly granted summary judgment dismissal in DOC's favor. Additionally, because Nikula no longer works in DOC's legal mail department and Gilbert, McTarsney, Davis, and Gonzalez are no longer DOC employees, there is no on-going action by these individuals that needs to be enjoined. Thus, there is no injunctive relief available to Hurn and claims for injunctive relief against these individual defendants are moot. *See Client A v. Yoshinaka*, 128 Wn. App. 833, 841, 116 P.3d 1081 (2005) (matter is moot when count cannot provide effective injunctive relief).

While claims for injunctive relief against the individuals listed above are moot, we still address whether genuine issues of material fact exist regarding Hurn's § 1983 action against the DOC staff[2] based on constitutional violations and if so, whether Hurn is entitled to damages.

B. Hurn Fails to Show State Officials Violated his Constitutional Rights.

1. Private Communication with Counsel—Sixth Amendment

Hurn contends that the DOC staff violated his Sixth Amendment constitutional right to communicate with counsel privately. We disagree.

The Sixth Amendment right to counsel includes the right to communicate privately with that counsel. *State v. Peña Fuentes*, 179 Wn.2d 808, 811, 318 P.3d 257 (2014). In the criminal context, we look to whether (1) a state actor participated in the infringing conduct alleged by the defendant; (2) if so, did the state actor(s) infringe on a Sixth Amendment right of the defendant; (3) if so, was there prejudice to the defendant, that is did the State fail to overcome the presumption of prejudice arising from the infringement by not proving the absence of prejudice beyond a reasonable doubt; and (4) if so, what is the appropriate remedy to select and apply, considering the totality of the circumstances. *State v. Irby*, 3 Wn. App. 2d 247, 252-53, 415 P.3d 611 (2018).

Similarly, in the § 1983 claim context, a party must establish that he or she was deprived of the right to private communication with counsel and that the state official's actions "hindered

[2] The State argues that all claims against McTarsney and Gilbert must fail as a matter of law because Hurn does not show how these individuals personally participated in his claims. A plaintiff may assert a § 1983 claim against government officials in their individual capacities for actions taken under color of state law. *Republican Party*, 141 Wn.2d at 286. McTarsney was the corrections center's grievance coordinator and Gilbert was the correction center's superintendent. Both were government officials involved in Hurn's grievance and appeal process. Accordingly, we are unpersuaded by the State's argument.

[the defendant's] efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).[3]

While inmates have a Sixth Amendment right to confidential attorney client communication, that right is balanced with prison officials' need to maintain safety and security at the prison. *Nordstrom v. Ryan*, 856 F.3d 1265, 1272 (9th Cir. 2017). For this reason, prison officials may not read legal mail, but they may inspect it to determine if it entails a threat to prison safety. *Id.*

Here, during the four incidents in question, prison officials inspected Hurn's mail and determined that its content violated DOC policy. While Hurn claims they did more than just inspect the mail, he fails to present a genuine issue of material fact regarding whether the mail was inspected or read.

Even assuming DOC staff's inspection and rejection of legal mail violated Hurn's Sixth Amendment right, Hurn must still show DOC staff's actions hindered his efforts to pursue a legal claim. *Lewis*, 518 U.S. at 351. He cannot make this showing. Hurn was able to appeal his convictions, raising numerous issues on review. *Hurn*, No. 71813-4-I, slip op. at 4-16. He also filed a personal restraint petition (PRP), where counsel successfully argued for Hurn's sentence to be reversed and remanded for resentencing. *In re Pers. Restraint of Hurn*, No. 78689-0-I, slip op. at *2 (Wash. Ct. App. July 20, 2020) (unpublished), http://www.courts.wa.gov/opinions/pdf/786890.pdf. In this sense, Hurn's efforts to raise legal claims have not been hindered by the State officials' actions. Without this showing, Hurn's § 1983 claim fails. The trial court properly concluded likewise.

[3] Hurn asks this court to adopt the *Irby* test when reviewing a § 1983 claim. But because civil actions are separate and distinct from criminal matters, we decline to do so.

2. Access to Courts—First and Fourteenth Amendment

Hurn next contends that DOC staff interfered with his access to the courts, an action that violated his rights under the First and Fourteenth Amendments. We disagree.

Prisoners have a constitutional right of access to the courts. *Lewis*, 518 U.S. at 346. This includes an individual's right to litigate his claims in court without active interference from the prison. *Id.* An individual must establish that a prison's "active interference" caused them to suffer an "actual injury" in order for a claim to survive summary judgment. *Id.; Nevada Dep't of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011). "Actual injury . . . is 'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'" *Greene*, 648 F.3d at 1018 (*quoting Lewis*, 518 U.S. at 348). The right of access to courts derives in part from the First Amendment and the Fourteenth Amendment. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); *Gonzales v. Inslee*, ___ Wn. App. 3d ___, 504 P.3d 890, 902 (2022).

Hurn contends that he was denied access to the courts because mail from defense counsel was rejected. He argues this caused actual injury because he was denied the opportunity to "litigate these claims and potentially other valid claims" including a claim that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Br. of Appellant at 24. But while he generally addresses the withheld information and *Brady* claims, he fails to identify *how* that information impacted contemplated or existing litigation. Hurn has failed to show how the withheld information, caused him actual prejudice, and in so failing, does not show actual injury. Hurn's § 1983 claim based on violation of the First and Fourteenth Amendments fails. Again, the trial court properly concluded likewise.

3. Due Process—Fourteenth Amendment

Hurn next contends his due process rights were violated based on the manner his mail was inspected. We disagree.

An inmate has a Fourteenth Amendment due process liberty interest regarding the processing of his or her incoming mail. *Sorrels v. McKee*, 290 F.3d 965, 972 (9th Cir. 2002). The minimum procedural safeguards afforded by the due process clause to inmate mail are notice that the mail was seized and a reasonable opportunity to protest the decision. *Id.* at 972.

Here, Hurn was notified of DOC's inspections and rejections, and given the opportunity to appeal each decision. Nevertheless, relying on former WAC 137-48-030(3) (2005)[4], Hurn argues his due process rights were still violated because DOC staff did not obtain a search warrant before inspecting his mail. But former WAC 137-48-030(3) did not require a search warrant to inspect mail, only to read the mail. And Hurn does not show a liberty interest in former WAC 137-48-030(3). Liberty interests are not created by negative implications from mandatory language in prison regulations. *Sandin v. Conner*, 515 U.S. 472, 483-84, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). Rather, to create a liberty interest, the action taken must be an atypical and significant deprivation from the normal incidents of prison life. *Id.* Inspecting incoming legal mail based on safety and security concerns is not an atypical practice of prison life. Accordingly, Hurn shows no liberty interest in former WAC 137-48-030(3). Absent an established liberty interest, he cannot show deprivation in violation of due process protections.

Without a showing of a due process violation, Hurn's § 1983 claim based on violation of the Fourteenth Amendments fails. The trial court properly concluded likewise.

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[4] Former WAC 137-48-030(3) stated, "Legal mail shall not be read without a search warrant but may be inspected in the presence of the inmate to verify legal mail status and that the mail is free of contraband."

C. Damages

Because Hurn has failed to establish a violation of his federal constitutional rights, he is not entitled to damages under 42 U.S.C. § 1983. *City of Seattle v. McCready*, 124 Wn.2d 300, 312, 877 P.2d 686 (1994).

CONCLUSION

We affirm the trial court's order granting summary judgment dismissal of Hurn's § 1983 claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Ve iacic, J.

We concur:

Worswick, J.

Cruser, A.C.J.

APPENDIX B

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

October 7, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHAD WAYNE HURN, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS; KERRI MCTARSNEY; MARGARET GILBERT; TAMMY NIKULA; DANIEL DAVIS; ISRAEL "ROY" GONZALES; all in their individual and official capacities Respondent.	No. 56043-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Chad Hurn, moves this court to reconsider its May 10, 2022 unpublished opinion. Respondent Department of Corrections responded in opposition to Appellant's motion. After consideration, we deny the motion. It is

SO ORDERED.

Panel: Jj. Worswick, Cruser, Veljacic.

FOR THE COURT:

Veljacic, J.

DECLARATION OF SERVICE BY MAIL

GR 3.1

I, Chad Wayne Hurn, declare and say that on the 25 day of October, 2022, I deposited a PETITION FOR REVIEW in the Cedar Creek Corrections Center Legal Mail system, by First Class Mail pre-paid postage addressed to the following:

The Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

The Court of Appeals
Division One
One Union Square
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25 day of October, 2022, in the City of Littlerock, County of Thurston, State of Washington.

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