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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Larry Joe Prince,**  
Petitioner  
-vs-  
**Dora B. Schriro, et al.,**  
Respondents

CV-08-1299-PHX-SRB (JRI)

**REPORT & RECOMMENDATION  
On Motion for Preliminary Relief  
and ORDER**

**I. MATTER UNDER CONSIDERATION**

Petitioner filed a Motion for Pro Se Legal Materials on December 22, 2008 (#22), seeking preliminary relief in the form of an order for a typewriter. Respondents' filed a Response (#23) on January 9, 2009, and Petitioner filed a Reply (#24) on January 28, 2009.

The Petitioner's Motion is now ripe for consideration, and seeks preliminary relief. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(1), Local Rules of Civil Procedure.

**II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND**

Petitioner is an inmate of the State of Arizona who is currently incarcerated in the State of New Mexico. Petitioner filed a *pro se* Petition for Writ of Habeas Corpus on July 14, 2008 (#1), challenging his Arizona conviction. On October 27, 2008, Respondents filed their Answer (#16). Petitioner sought, but was denied an extension of time to reply. The Court ordered a supplemental answer, which is past due. (Order 1/28/09, #24.)

Petitioner filed the instant motion on December 22, 2008, arguing that he suffers from a permanent injury to his right hand, which cause his pain when he writes and makes his

1 writing illegible, and that prison officials refuse to allow him use of a typewriter. He reports  
2 that the Arizona courts have previously ordered that he be allowed to possess and use a  
3 typewriter. Since then he was transferred to a New Mexico prison under an interstate  
4 compact, and that New Mexico officials have seized his typewriter and deny him the usage  
5 of the typewriter. He further argues that while he can obtain assistance of other inmates,  
6 doing so is a violation of prison regulations and he and the other prisoner risk disciplinary  
7 sanctions.

8 Respondents argue (#23) that the Court should defer to the decision of prison  
9 administrators on this issue absent violation of a constitutional right, and that Petitioner has  
10 managed to litigate thus far without a typewriter, and thus cannot sustain a claim of denial  
11 of access to the courts.

12 Petitioner replies (#25) that he does not seek to be provided a typewriter, nor even to  
13 possess one in his cell, but merely to be permitted access to his own typewriter. He argues  
14 that his disability has been acknowledged by the Arizona courts after their examination of  
15 him and his injured hand, and that even the New Mexico prison authorities have previously  
16 recognized his disability and permitted him possession and/or use of his typewriter.

### 17 18 19 **III. APPLICATION OF LAW TO FACTS**

20 **Standard for Injunctive Relief** - A request for injunctive relief requires that a  
21 plaintiff make a showing of “real or immediate threat” of injury. *Hodgers-Durgin v. De La*  
22 *Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 502  
23 (1974)). Plaintiff is entitled to preliminary injunctive relief only if he shows either: “(1) a  
24 likelihood of success on the merits and the possibility of irreparable injury; or (2) the  
25 existence of serious questions going to the merits and the balance of hardships tipping in [the  
26 movant’s] favor.” *MAI Sys. Corp. v. Peak Computers, Inc.*, 991 F.2d 511, 516-517 (9th Cir.  
27 1993) (quoting *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990)). Under either  
28 formulation of the test, the movant must demonstrate a significant threat of irreparable injury.

1 *AGCC v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991).

2 Further, in unusual circumstances (as here), where the preliminary injunction relates  
3 to the inmate's access to the district court, the district court need not consider the merits of  
4 the underlying complaint in considering whether to grant a preliminary injunction.  
5 *Diamontiney v. Borg*, 918 F.2d 793, 796 (9th Cir. 1990).

6 **Preliminary Relief Different From Ultimate Relief** - The purpose of preliminary  
7 injunctive relief is to preserve the status quo or to prevent irreparable injury pending the  
8 resolution of the underlying claim on the merits. Therefore, the party seeking preliminary  
9 injunctive relief “must necessarily establish a relationship between the injury claimed in the  
10 motion and the conduct asserted in the complaint.” *Devose v. Herrington*, 42 F.3d 470, 471  
11 (8<sup>th</sup> Cir. 1994) (Eighth Amendment claim cannot provide basis for preliminary injunction  
12 against alleged acts in retaliation for filing claim). Thus, Plaintiff must ordinarily seek  
13 injunctive relief related to the merits of his underlying claim. “A district court should not  
14 issue an injunction when the injunction in question is not of the same character, and deals  
15 with a matter lying wholly outside the issues in the suit.” *Kaimowitz v. Orlando, Fla.*, 122  
16 F.3d 41, 43 (11th Cir. 1997).

17 However, where the preliminary relief is directed to the prisoner’s access to the  
18 Courts, a nexus between the preliminary relief and the ultimate relief sought is not required.  
19 *See Dimaontiney*, 918 F.2d at 796 (acknowledging that although the case there was founded  
20 upon the same claims of denial of access, “because it affected [his] ability to litigate” it could  
21 have been brought in any of the prisoner’s other pending cases).

22 **Proper Respondents** - Petitioner couches his motion in terms of a request for an  
23 order directed to the New Mexico prison authorities. Respondents do not raise this issue.  
24 However, those authorities are not parties to this action, and Petitioner has not provided them  
25 any notice of his request. Nonetheless, given the relationship between Respondent and the  
26 New Mexico prison, Respondents are not powerless to address the issues complained of by  
27 Petitioner. In fact, documents provided by Petitioner in connection with his Motion for  
28 Extension, reflect a policy of the New Mexico authorities of requiring that all legal access

1 materials be supplied by the Arizona Department of Corrections. (#20 at Exhibit 1.)

2 **Affected Constitutional Right** - Prisoners have no constitutional right to use a  
3 typewriter. They do, however, have a constitutional right to access the courts. *Bounds v.*  
4 *Smith*, 430 U.S. 817, 821 (1977), *overruled on other grounds by Lewis v. Casey*, 518 U.S.  
5 343, 354 (1996). A prisoner’s fundamental right of access to the courts requires only that the  
6 prisoner be given a “reasonably adequate opportunity to present claimed violations of  
7 fundamental constitutional rights to the courts.” *Lewis*, 518 U.S. at 351. But prisoners are  
8 not guaranteed “the wherewithal to transform themselves into litigating engines.” *Id.* at 355.  
9 Instead, prisoners must be provided with the tools required to attack their sentences or  
10 challenge the conditions of their confinement; impairment of “any other litigating capacity  
11 is simply one of the incidental (and perfectly constitutional) consequences of conviction and  
12 incarceration.” *Id.* (italics omitted). Therefore, the Ninth Circuit has held that inmates have  
13 no right to a typewriter to prepare legal documents as long as there remains some means of  
14 preparing legal documents, such as hand-writing their pleadings. *Phillips v. Hust*, 477 F.3d  
15 1070, 1077 (9th Cir. 2007).

16 Here, Petitioner is free to file hand written filings. Although the local rules appear to  
17 mandate typed filings, and make no exception to that requirement for incarcerated persons,  
18 *see* Local Civil Rule 7.1(b)(1), this Court uniformly permits incarcerated persons to file  
19 hand-written documents.

20 However, Petitioner argues that this option is functionally not available to him  
21 because of his hand injury and the prohibitions against him soliciting the assistance of other  
22 inmates. Thus, Petitioner’s ability to exercise his right of access depends upon whether he  
23 is indeed sufficiently disabled so as to be hindered in preparation of his briefs, and has no  
24 recourse other than a typewriter, e.g. a scrivener.

25 **Physical Limitations** - Petitioner is poised to file a reply to an Answer (#16) which  
26 is 33 pages in length and focused on the arcane intricacies of procedural default, whilst  
27 challenging a conviction with a life sentence. Petitioner argues that the required writing not  
28 only will result in significant pain, and cause delay, but that as a result he will be hampered

1 in his thought processes as a result.

2 In their response, Respondents argue that Plaintiff fails to show the hand injury, and  
3 although he has complained to New Mexico health care providers about the injury, they have  
4 no documentation of it. They offer nothing to refute Petitioner's evidence of injury or its  
5 affects on his ability to write, but simply assert ignorance. (#23 at Exh. H, Brewster Affid.  
6 at ¶ 4.) The Court finds Respondents' ignorance unconvincing, particularly in light of their  
7 access to Petitioner's physical person and records.

8 Petitioner has supplied the court with the following evidence of such injury: (1) orders  
9 of two Maricopa County Superior Court orders, one in 1999 and another in 2002, directing  
10 that Petitioner be provided access to a typewriter; (2) medical records including: a 1986 X-  
11 ray report showing a fracture of the "right fifth metacarpal bone," (the bone connecting the  
12 little finger to the wrist), a 1998 medical note reflecting a history of a 1993 fracture to the  
13 right middle finger, and a 2006 medical note reflecting x-rays of his hand. Petitioner argues  
14 that as a result of the latter and a diagnosis of "post-traumatic arthritis" he was previously  
15 permitted the use of his typewriter by prison officials. In fact, he provides copies of New  
16 Mexico prison memos permitting him use of his typewriter in his cell and then in the prison  
17 library up until recently (#20, Exhibit 1.) No explanation for the change has been offered  
18 by Respondents.

19 **Limitation on Inmate Assistance** - Neither do Respondents counter Petitioner's  
20 argument that his filings to date have been legibly only because he obtains help from other  
21 prisoners at the risk of disciplinary action. Petitioner provides copies of the regulations  
22 imposing those restrictions. (#22 at Attachments 2 & 3.) Nonetheless, Petitioner admits that  
23 all his filings have been prepared with the assistance of another inmate. (#22 at 4-5; #25 at  
24 7.)

25 **Likelihood of Harm** - Under these circumstances, Petitioner has shown the requisite  
26 likelihood of irreparable injury to his right of access to the courts. As recognized in  
27 *Diamontiney*, 918 F.2d at 796, a showing of success on the merits is not required.

28 **Deference to Prison Administrators** - Respondents protest that prison security

1 concerns should trump Petitioner’s right of access, citing *Bell v. Wolfish*, 441 U.S. 520,  
2 546–47 (1979). Indeed, the cases reflect substantial deference is due to prison  
3 administrators, and that due consideration to be given to the limitations on constitutional  
4 rights inherent in incarceration. “There must be a ‘mutual accommodation between  
5 institutional needs and objectives and the provisions of the Constitution that are of general  
6 application.’” *Bell*, 441 U.S. at 546 (quoting *Wolff v. McDonnell*, 418 U.S. at 556).  
7 However, a functional denial of a prisoner’s right of access to the courts to challenge his  
8 conviction as a violation of the constitution cannot be permitted without some specific  
9 showing of institutional need.

10 Certainly, the Court should not presume to undertake administration of the prison.  
11 Here, however, the Court need not interject itself into prison administration in novel or  
12 obtrusive ways. The New Mexico prison has previously permitted Petitioner use of a  
13 typewriter in his cell, and then in the prison library. The latter is certainly a common  
14 approach taken in the Arizona prisons, and one which Petitioner concedes is workable.  
15 Indeed, Respondents acknowledge that the Arizona Department of Corrections permits  
16 disabled inmates to have access to a typewriter. (#23 at 2.) Respondents offer no suggestion  
17 why such approaches would be disruptive in this case.

18 Respondents argue that even if they must permit Petitioner access to a typewriter, they  
19 have no obligation to provide Petitioner a typewriter. The Court need not address that issue,  
20 inasmuch as Petitioner has indicated he has a typewriter available to him.

21 Respondents and their New Mexico counterparts are free to fashion any appropriate  
22 means to insure that Petitioner’s right of access is provided in light of his physical  
23 limitations. For example, they may specify access to be in certain locations, only under  
24 observation, or under such other reasonable restrictions as they deem appropriate. They  
25 could even permit Petitioner a scrivener to assist him with handwritten filings.

26 **Form of Relief** - Under the circumstances, the remedy to the situation is dictated by  
27 the harm to be avoided and the deference to prison administrators, and it must be filtered  
28 through the resources available to Respondents remotely. Respondents request that “the

1 Court limit him to one typewriter, limit the use of the typewriter to litigating the instant case,  
2 and set a terminating time frame on the validity of the order.” (#23 at 8.)

3  
4 **IV. RECOMMENDATION**

5 **IT IS THEREFORE RECOMMENDED** that the Petitioner's Motion for Pro Se  
6 Legal Materials on December 22, 2008 (#22) be **GRANTED**.

7 **IT IS FURTHER RECOMMENDED** that Respondents be directed to take steps  
8 necessary so that: (1) during the pendency of this proceeding, (2) Petitioner is permitted  
9 access to his typewriter for reasonable periods of time, (3) for the purpose of preparing  
10 filings, including any necessary drafts, research, etc. in this case.

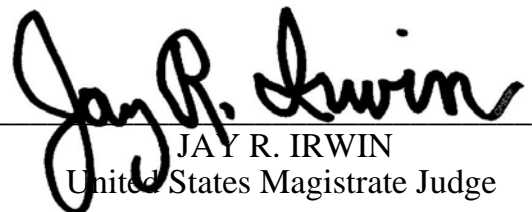
11 **IT IS ORDERED** that Petitioner shall file his reply in support of his habeas petition  
12 within twenty days of the filing of an Order on this Report & Recommendation.

13  
14 **V. EFFECT OF RECOMMENDATION**

15 This recommendation is not an order that is immediately appealable to the Ninth  
16 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*  
17 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

18 However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall  
19 have ten (10) days from the date of service of a copy of this recommendation within which  
20 to file specific written objections with the Court. Thereafter, the parties have ten (10) days  
21 within which to file a response to the objections. Failure to timely file objections to any  
22 factual or legal determinations of the Magistrate Judge will be considered a waiver of a  
23 party's right to *de novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328  
24 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003)(*en banc*).

25  
26 DATED: February 27, 2009

27   
28 JAY R. IRWIN  
United States Magistrate Judge