UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DANIEL DONOVAN,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 04-102-B-W
	)	
MARTIN MAGNUSSON, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DISPOSITIVE MOTIONS AND MOTION FOR PRELIMINARY INJUNCTION

This is an action brought by (now former) inmate Daniel Donovan concerning the opening of twenty pieces of mail by correctional personnel outside his presence during the time that Donovan was incarcerated at the Bolduc Correctional Facility. Now ready for resolution are Donovan's pro se motion for summary judgment (Docket No. 21), the defendants' motion to dismiss and, in the alternative, motion for summary judgment (Docket No. 55), and Donovan's motion for a preliminary injunction (Docket No. 62).

I recommend that the Court **DENY** the motion for preliminary injunction as Donovan has finished his sentence and therefore cannot demonstrate the requisite threat of harm.

Because I conclude that the defendants are entitled to have the complaint dismissed for want of standing on Donovan's access to court claim, I recommend that the court grant the motion to dismiss as to this claim. However, Donovan has also framed his federal 42 U.S.C. § 1983 count as being brought under the First Amendment and,

rejecting the defendants' hollow assertion that they are entitled to qualified immunity, I conclude that Donovan is entitled to summary judgment; his First Amendment rights were violated by, what is undisputed to have been, the repeated opening of his privileged mail outside his presence. However, there is a genuine issue of material dispute as to whether defendants Ames and Littlefield, the only two defendants in this action that could be charged with liability for the violations, are liable in their supervisory capacities for the unconstitutional conduct.

Neither party has adequately addressed Donovan's state law tort claims in their motions; I conclude that they are not ripe for judgment as to Ames and Littlefield. With respect to Donovan's claim under the Maine Constitution I recommend that the Court grant judgment to all the defendants.

Discussion

A. Motion for Preliminary Injunction

Donovan's motion for preliminary injunction was filed on November 20, 2004. This motion complained of mail opening at the Maine State Prison (MSP), to which Donovan was transferred from Bolduc Correctional Facility (BCF). He claims that since his September 21, 2004, transfer to the MSP four pieces of privileged mail were opened outside his presence. On November 23, 2004, I entered an order indicating that the motion for preliminary injunction was best addressed in the context of the pending cross-motions for summary judgment. (Docket No. 69.) The docket now reflects that Donovan has been released from his sentence and is residing in Milo, Maine.

Addressing a similarly postured claim for injunctive relief, the United States Supreme Court explained in City of Los Angeles v. Lyons:

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshhold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. Flast v. Cohen, 392 U.S. 83, 94-101 (1968); Jenkins v. McKeithen, 395 U.S. 411, 421-425 (1969) (opinion of MARSHALL, J.). Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. Baker v. Carr, 369 U.S. 186, 204(1962). Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." See, e.g., Golden v. Zwickler, 394 U.S. 103, 109-110 (1969); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273(1941); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

461 U.S. 95, 101-02 (1983). The Court concluded that the plaintiff, who allegedly was placed in a choke hold at a traffic stop five months earlier, could not "establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." Id. at 105.

Certainly, now that Donovan has served his sentence there is no immediate threat that he will again find himself at either BCF or the MSP, let alone that he will again have his privileged mail opened outside his presence. My recommendation on the pending dispositive motions pertains only to Donovan's claims vis-à-vis BCF and does not foreclose him from seeking redress for violations of his right at MSP.

B. The 42 U.S.C. § 1983 Claims

In setting forth the allegations pertaining to his first claim for relief -- captioned as violations of 42 U.S.C. § 1983 by all the defendants -- Donovan asserts that he was deprived his rights under the First, Fourth, Sixth, and Fourteenth Amendments of the

United States Constitution.[1] (See Compl. ¶¶ 66, 84, 85, 87, 94.) Any claims that the opening of his mail out of his presence offended the Fourth or Fourteenth Amendment due process clause must fail, see Sandin v. Conner, 515 U.S. 472, 483-84 (1995); Hudson v. Palmer, 468 U.S. 517 (1984); Barstow v. Kennebec County Jail, 115 F.Supp.2d 3, 8 (D.Me. 2000), and Donovan does not argue otherwise.[2] However, Donovan's claims under the Sixth and First Amendments require some analysis.

1. Defendants' Motion to Dismiss and the Denial of Access to Court Claim

One constitutional right implicated by Donovan's complaint is his Sixth Amendment right to access to court. And this is how Donovan, in part, styles his claim in relying on the First Circuit's Smith v. Robbins, 454 F.2d 696, 697 (1st Cir.1972); see also Smith v. Robbins, 328 F.Supp. 162, 165 (D. Me.1971) (case below) ("The issue presented by the instant case thus requires the Court to balance plaintiff's Sixth Amendment right to the effective assistance of counsel with the demands of prison security and orderly administration.").

The law on Sixth Amendment claims of this ilk has evolved since Smith. Most important for the current dispute is the United States Supreme Court's Lewis v. Casey, 518 U.S. 343 (1996) in which the Court concluded that in order to have standing to bring a denial of access to court claim a plaintiff must demonstrate that the alleged infringement "hindered his efforts to pursue a legal claim." Id. at 351.

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[1] Donovan also states in this claim that the defendants violated his rights under the Maine Department of Corrections policies. However, he cannot get 42 U.S.C. § 1983 relief on that basis alone; there must be a violation of a federal right to sustain a § 1983 count.

[2] In setting forth his complaint allegations with respect to his first count, the federal claim, Donovan alleges that the opening of his mail violated his Fourth, Sixth, and Fourteenth Amendment rights. However, it is clear from Donovan's own motion for summary judgment and his response to the defendants' dispositive motion that he confines his claim to a claim based on Smith v. Robbins and the chilling effect the opening of his mail had on his ability to send mail to attorneys, government officials, and/or legal advocacy groups. (See Mot. Summ. J. at 1-3; Omnibus Reply at 3.)

This is the actual injury standing requirement. And, while it has not yet outright overruled this element of Smith, or cases reaching a like conclusion, see Henry v. Perrin, 609 F.2d 1010, 1013 -14 & n.1 (1st Cir. 1979), the First Circuit has recognized the import of the Casey actual injury requirement in cases involving access to court claims: "At any rate, a prisoner must show actual injury in order to demonstrate a violation of the right of access to the courts. The Lewis Court defined actual injury as "a nonfrivolous legal claim [being] frustrated or ... impeded." Boivin v. Black, 225 F.3d 36, 43 n.5 (1st Cir. 2000) (footnotes and citations omitted).

While Casey addressed claims that the law library and legal assistance did not meet the inmate's needs, Courts addressing denial of access claims involving mail practices have concluded that the actual injury requirement is applicable to such claims. In Oliver v. Fauver, 118 F.3d 175 (3d Cir. 1997) the Third Circuit overruled the conclusion of the Panel in Bieregu v. Reno, 59 F.3d 1445 (3d Cir. 1995) to the extent that it did not require actual injury. The Oliver Panel concluded: "[T]here is no question that after Casey, even claims involving so-called central aspects of the right to court access require a showing of actual injury. That is, the inmate must 'demonstrate that the alleged shortcomings ... hindered his efforts to pursue a legal claim.'" 118 F.3d at 177-78 (quoting Casey, 518 U.S. at 351). In Oliver the plaintiff alleged, vis-à-vis his access to court claim, that on three separate occasions correctional officers returned his outgoing mail to him without mailing it and on at least one occasion had opened his outgoing mail relating to disciplinary proceedings. The prisoner did not allege actual injury and the Third Circuit affirmed the District Court's grant of summary judgment to the defendants. Id. at 178. And in Taylor v. Oney, the District Court granted summary judgment for

defendants on the basis of Casey and Oliver with respect to a complaint alleging that prison officials repeatedly opened legal mail without consent and outside of his presence in May 1997, March 1998, May 1998, October 1998, March 1999, June 1999, and July 1999, violating his right to confidential and uncensored communications. Civ. No. 00-557, 2004 WL 609335, 1 -4 (D. Del. Mar. 24, 2004).

Donovan's complaint allegations set forth the twenty different occasions in which his mail, mail which Donovan describes as privileged, was opened outside his presence. Apropos his federal constitutional claim, in paragraph 98 of his complaint he alleges: "The action of all Defendants caused or contributed to a substantial chilling effect on Mr. Donovan's right to petition the courts, redress grievances to government officials, or communicate with his attorney and/or advocacy groups by 'opening' his privileged mail." In the following paragraph he alleges that he "was denied clearly established U.S. and Maine Statutory and Constitutional rights under the color of state law." (Compl. ¶ 99.) He then alleges that he "has suffered and will continue to suffer personal injury and damages" as a result of the defendants' actions. (Id. ¶ 100.)

In his omnibus reply to defendants' motion Donovan states:

> Mr. Donovan had legitimate concerns that were being addressed to attorneys, government officials, and/or legal advocacy organizations, but BCF/MSP and/or MDOC Officials chilled his ability to freely correspond with those people. These violations continued, even while Mr. Donovan was informally and formally confronting the issue. The BCF/MSP Officers who handed Mr. Donovan his privileged mail were the Officers who made the notations in the Legal Mail Logbook. Mr. Donovan submits these violations 'regularly and unjustifiably' interfered with his privileged mail, demonstrating a pattern or an actionable violation that is obvious.

(Omnibus Reply at 3.)

Donovan distinguishes his case from Oliver by pointing out that in Oliver there was no pattern of opening privileged mail whereas Donovan is alleging an ongoing pattern of opening his privileged mail addressed to him from government officials, legal advocacy organizations, and his attorney in preparation of various legal cases. (Omnibus Reply at 5.) He insists that the pattern "caused a severe chilling effect on his ability to proceed." However, he also distinguishes Oliver and Casey, by arguing that "the instant case does not involve access to the court system" and, therefore, the actual injury requirement does not apply. (Id. at 6.)

Viewing the allegations of Donovan's complaint in light of the law discussed, his claims do not involve an interference with his access to the court system. Compare Cody v. Weber, 256 F.3d 764, 767-69 (8th Cir. 2001) ("In his amended complaint, Cody does allege that he has been injured. He asserts that defendants have obtained an unfair advantage in defending themselves against his claims of constitutional denials and violations by reading his legal papers. He lists all of the various lawsuits he has filed challenging the conditions of his confinement, and he describes a number of instances in which his legal papers have been searched, copied, and read. In one such instance, Cody specifies the date the individual in charge of prison security showed Cody a copy of a letter from an attorney that had been copied without Cody's permission. We conclude that Cody has satisfied the Lewis requirement of alleging actual injury."). Accordingly, to the extent that his 42 U.S.C. § 1983 attempts to raise a Sixth Amendment access to court

claim it fails on its face to meet the actual injury requirement and the defendants are entitled to dismissal of that claim.[3]

2. Cross Motions for Summary Judgment and the First Amendment Claim[4]

a) Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). If the movant meets this burden, the non-movant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir.1999) (citation and internal punctuation omitted). I view the record on summary judgment in the light most favorable to the nonmovant, drawing all reasonable

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[3] Given Donovan's concession that his case does not involve access to the court, it is not necessary to address this claim through the summary judgment prism; however, if one did the result would be the same.

[4] The defendants acknowledge the complaint contains a First Amendment claim and argue that the same Casey actual injury requirement applies to this First Amendment claim. They argue:

> By analogy to the right of access to courts, and based on the same doctrine of standing, to so must the plaintiff's claims of right to petition the government be dismissed for failure to allege actual injury. This right is no more important than the right of access to the courts and garners no more protection.

(Defs.' Mot. Dismiss & Summ. J. at 3.) I do not read the actual injury requirement as turning on the hierarchy of the First Amendment right in comparison to the Sixth Amendment right. And, if it does, the defendants have provided absolutely no authority for concluding that Donovan must demonstrate that he was actually hindered in his right to petition the government. Certainly, after just confronting the Sixth Amendment issues with respect to the plaintiff's access to court claims, Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993) (a decision I discuss in some detail below) did not believe that apropos a First Amendment claim the plaintiffs had to demonstrate actual injury from the opening of incoming privileged mail outside the presence of the inmate.

It is Donovan's contention that this repeated practice had a "chilling effect" on his First Amendment rights. The Ninth Circuit explained in O'Keefe v. Van Boening:

> In order to establish that government action has infringed on the constitutional right to petition the government, an individual need not show that the government has directly interfered with the exercise of this right. Laird v. Tatum, 408 U.S. 1, 11, (1972). Unconstitutional restrictions may arise from the deterrent, or "chilling," effect of governmental action. Id.

82 F.3d 322, 325 (9th Cir. 1996).

inferences in the nonmovant's favor. Nicolo v. Philip Morris, Inc., 201 F.3d 29, 33 (1st Cir.2000).[5]

b) The Facts

(1) *Donovan's Statement of Material Fact*

There is no dispute that between November 2002 and April 28, 2003, BCF officials were required to comply with Maine Department of Corrections Policies 14.1[6] and 16.2. (Pl.'s SMF ¶¶ 42, 43.) Policy 16.2 provides apropos privileged correspondence:

> Procedure A. Privileged Correspondence
> 1. Privileged correspondence is mail between a prisoner and:
> a. Attorneys
> b. Judges and clerks of federal and state courts
> c. The Commissioner of Corrections and his/her staff
> d. The President, Vice-President and Attorney General of the United States
> e. Any member of the United States Congress
> f. The Governor and Attorney General
> g. Any member of the State Legislature
> h. Any parole board member.
> ....
> Procedure C. Incoming Privileged Mail
> 1. Incoming mail from any of the above in Procedure A.1 shall be treated as privileged only if the name and official status of the sender appears on the envelope.
> 2. All incoming privileged correspondence may be opened and examined for cash, checks, money orders or contraband, but only in the presence of the prisoner to whom the communication is addressed.
> 3. In cases where cash, checks or money orders are found, they shall be removed and credited to the prisoner's account.
> 4. Where contraband is found, it shall be removed.
> 5. In no case shall incoming privileged mail be read without written authorization from the Chief Administrative Officer of the facility. Such authorization must be based upon a reasonable belief that information

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[5] This court has an obligation to construe Donovan's pleadings, as a pro se litigant, liberally, see Estelle v. Gamble , 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519 (1972).

[6] Policy 14.1 pertains to the legal rights of inmates for access to the courts to challenge the legality of their conviction or confinement, seeking redress for illegal conditions or treatment while inmates, pursuing civil remedies, and asserting constitutional or statutory rights.

> related to on-going or future criminal activity is contained in the correspondence. The reading of such mail must be done in the presence of the prisoner.

(Compl. Attach. 1 at 2-3.) By contrast, incoming general correspondence can be opened and examined for cash, checks, money orders, or contraband with no requirement that the opening take place in the prisoner's presence. (Id. at 4.) Magnuson also issued a Commissioner Directive to each adult facility that added the Maine Civil Liberties Union, the American Civil Liberties Union, the Disability Rights Center, the NAACP Legal Defense Fund, and Maine Equal Justice Partners to the Procedure A list. (Id. at 6.)

There is also no dispute that the Maine Department of Corrections Policy 29.1 allows a prisoner to grieve the opening of his privileged mail. If the grievance has merit the possible remedies include an apology, a change in the handling practices to decrease the chance of recurrence, additional staff training, a directive that responsible staff not engage in such conduct, or a reassignment/disciplining of staff. (Pl.'s SMF ¶ 3.)

Except as noted there is no dispute to the following. On November 13, 2002, and March 18, 2003, Donovan received a letter from Attorney Darla Mondou, pertaining to legal matters, which was opened and which was privileged. (Id. ¶¶ 4, 19.)[7] Donovan received a letter from Maine Senator Paul Davis on December 31, 2002; from Maine Representative Ross Paradis on January 14, 2003; from the Maine House of Representatives on January 18, 2003; from U.S. Representative Thomas Allen on January 18, 2003; from Maine Senator Ethan Strimling on January 25, 2003; from Maine Representative Edward Povich on January 20, 2003; from the Maine Civil Liberties

[7] Donovan also contends that it was inspected, reviewed, and possibly photocopied but the defendants "object" stating that Donovan could only have personal knowledge that it was opened prior to his receipt of it. This is precisely the point of the policy and demonstrates the First Amendment protection it affords. An inmate is unable to know whether his privileged mail has been read by prison staff unless he is present during the opening.

Union on February 1, 2003, from the Maine Civil Liberties Union on February 4, 2003, from the Disability Rights Center on February 12, 2003; from the American Civil Liberties Union on February 19, 2003; from U.S. Senator Susan Collins on February 19, 2003; from the Disability Rights Center on March 22, 2003; and two letters from the American Civil Liberties Union on April 29, 2003, (Id. ¶¶ 5,6, 8,10, 11,12, 13, 15, 17, 18, 20, 22; Defs.' Reply SMF ¶¶ 5,6, 8,10, 11,12, 13, 15, 17, 18, 20, 22.) These fourteen letters related to matters pertaining to overcrowding and dangerous conditions of confinement in Maine Department of Correctional facilities and there is no dispute that these letters were privileged and had been opened outside Donovan's presence. (Pl.'s SMF ¶¶ 5,6, 8,10, 11,12, 13, 15, 17, 18, 20, 22; Defs.' Reply SMF ¶¶ 5,6, 8,10, 11,12, 13, 15, 17, 18, 20, 22.)

There is no dispute that Donovan also received letters from "the Maine House of Representatives" on January 24, 2003, February 5, 2003, February 13, 2003, April 3, 2003, and that these were opened outside Donovan's presence (Pl.'s SMF ¶ 9, 14, 16, 21; Defs.' Reply SMF ¶¶ 9, 14, 16, 21.) The defendants contend that these four letters were not privileged under the policy because it was not from a "member" of the legislature. (Defs.' Reply SMF ¶¶ 9, 14, 16, 21; see also Def.s' SMF ¶ 60.)[8] To this, Donovan contends that all the letters fit under the definition of privileged under the policy and the United States Constitution and applicable case law. (Pl.'s Opposing SMF ¶ 60.)

Citing only the allegations of his complaint, Donovan asserts that Littlefield and Ames, as the third shift supervisors, were present during some of the violations or were directly responsible for them. (Pl.'s SMF ¶¶ 51, 52.) The defendants respond that

[8] The defendants do not similarly object to paragraph 7 which would seem to fall in the same category.

Donovan has no personal knowledge on this score. They also cite to the affidavit of Littlefield in which he swears that if he ever did open privileged mail outside a prisoner's presence it was purely by accident, he certainly never read the mail, and he never witnessed anyone open privileged mail outside a prisoner's presence. (Littlefield Aff. ¶¶ 3, 4.) And they cite to the affidavit of Ames and the paragraphs that indicate that any opening of mail in this manner by Ames would have been accidental, he would not have read the mail, and that when he was informed of Donovan's complaint he tried to be more careful in the handling of the mail. (Ames Aff. ¶ 3,4.) Further, Ames states that whenever he found out that a particular officer had possibly opened a piece of privileged mail outside the prisoner's presence he reminded the officer of the importance of not doing that. (Id. ¶ 7.)

Donovan's statement of material fact also includes allegations concerning the failure to change the practices concerning opening privileged mail (Pl.'s SMF ¶ 23), the failure to provide additional training (id. ¶¶ 24, 40, 47, 48, 50), the failure to file a directive to stop the improper opening (id. ¶ 25), the failure to facilitate a reassignment of staff or to take disciplinary action (id. ¶25), and the failure of individual defendants to remedy the problem (id. ¶¶ 45, 46).[9] For these assertions Donovan relies almost entirely on citations to his complaint allegations and, therefore, the assertions are not properly supported so as to warrant countenancing them.

[9] Donovan asserts that the BCF officers did not want to be burdened with opening inmate privileged mail (id. ¶ 48) and that they had an active grievance with their union representative seeking a discontinuation of this responsibility (id. ¶ 49). The defendants respond that this is hearsay and further qualify the statement by indicating that there was a grievance that claimed that MSP staff should handle this task but the grievance was dropped. (Defs.' Reply SMF ¶ 49.)

(2) The Defendants' Material Facts

In their statement of material fact the defendants assert as follows vis-à-vis each named defendant.

Dawn George – BCF First Shift Sergeant

Defendant George had no responsibility for prisoner mail. (Defs.' SMF ¶ 1.) When Donovan complained to George that a number of pieces of his privileged mail had been opened outside his presence, she told him he needed to bring his complaint to the third shift sergeants or to higher supervisory personnel, such as the Captain for security or the Unit Manager. (Id. ¶ 2.) George also had a brief conversation with defendant Ames, a third shift sergeant, and told him about Donovan's issue with the mail, to which Ames responded that he was aware of the issue. From this, defendant George assumed that defendant Ames was working on resolving the matter. (Id. ¶ 3.)

Earl Littlefield – BCF Third Shift Supervisor

Apropos Littlefield, if he ever did open privileged mail outside of a prisoner's presence, it was purely by accident, and he never read any prisoner mail. (Id. ¶ 4.) Littlefield claims he never witnessed anyone open privileged mail outside of a prisoner's presence. (Id. ¶ 5.) When Littlefield was informed that Donovan was complaining that his privileged mail had been opened outside of his presence, Littlefield tried to be more careful in his handling of the mail to prevent himself from opening privileged mail outside Donovan's presence. (Id. ¶ 6.)[10] Littlefield knew that defendant Ames had also been informed about Donovan's issue, and Littlefield believed that Ames, as the senior

[10] Citing paragraph 3 of the Littlefield affidavit, Donovan retorts that if Littlefield had not been there and not been responsible there would be no reason for him to try to be more careful in the handling of the mail to prevent the inappropriate practice. (Pl.'s Opposing SMF ¶ 8.)

third shift sergeant, had taken on the responsibility of working to resolve that issue with third shift correctional officers. (Id. ¶ 7.)

Roland Ames – BCF Third Shift Sergeant

Ames states that if he did open mail outside a prisoner's presence it was "purely by accident" and he never read the mail. (Id. ¶ 8.) Ames also said that when he learned of Donovan's complaints he tried to be more careful in his handling of privileged mail. (Id. ¶ 9.) [11] Ames also reminded third shift correctional officers to be careful not to open privileged mail outside of the prisoner's presence. (Id. ¶ 10.) And when a memo was sent out requiring that staff undergo training in the processing of prisoner privileged mail, Ames instructed third shift correctional officers to undergo that training. (Id. ¶ 11.) Whenever Ames found out that a particular officer had possibly opened a piece of privileged mail outside the prisoner's presence, he reminded that officer of the importance of not doing that. (Id. ¶ 12.) When defendant Ames was told to have a report written by any officer who opened privileged mail outside of a prisoner's presence, he made sure a report was written when he found out that another piece of Donovan's privileged mail was possibly opened outside of his presence and he also made it clear that officers would be held accountable if the problem persisted and that they might face possible disciplinary action (Id. ¶¶ 13, 14.) Ames believed that the problem of opening privileged mail outside of the presence of the prisoner had occurred for a number of reasons, including that there were a lot of different officers processing the mail, there was a lot of mail to sort through, and the third shift officers were new to the task. (Id. ¶ 15.) He also believed at each point that Donovan complained that appropriate steps were

[11] Citing paragraph 5 of the Ames affidavit, Donovan retorts that if Ames had not been there and not been responsible there would be no reason for him to try to be more careful in the handling of the mail to prevent the inappropriate practice. (Pl.'s Opposing SMF ¶ 4.)

taken to resolve his complaint. (Id. ¶ 16.) Since then, he has taken the additional step of having the officers scan all the mail before opening any of it and putting aside any mail that might be privileged so it can be dealt with separately. (Id. ¶ 17.)[12] As a result of all these steps, he believes that the problem has been resolved. (Id. ¶ 18.)

Richard Ivey – BCF Captain of Security

When defendant Ivey became the captain in charge of security, the third shift had already been given the responsibility of processing prisoner mail. (Id. ¶19.) At that time, Ivey had received no reports that there were any problems with the processing of prisoner mail. (Id. ¶ 20.) Ivey first heard that Donovan had a complaint about the opening of privileged mail outside of his presence in November of 2002, when Donovan mentioned it to him in passing during discussions that were primarily focused on health care issues. (Id. ¶ 21.) At around the same time, Ivey was told by the grievance review officer that Donovan had filed a grievance about the opening of a piece of privileged mail outside of his presence. (Id. ¶ 22.) As a result of both of these conversations, Ivey then spoke to the third shift supervisors and asked them to remind their staff to be careful to process privileged mail properly. (Id. ¶ 23.)[13] Ivey first became aware that the problem was an ongoing one when he was told that Donovan had filed another grievance, this one complaining that a number of pieces of privileged mail had been opened outside his presence. (Id. ¶ 24.) Ivey immediately sent a memo to all shift supervisors to have all

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[12] Donovan states that he has no way of knowing what has occurred vis-à-vis the opening of privileged mail since he left BCF, but suggests that disclosing the grievance log to the court and interviewing various inmates at BCF could clear up the matter. (Pl.'s Opposing SMF ¶17.) As discussed later the defendants' own factual assertions as to what happened after Donovan's transfer is probative of how there was a fairly simple pragmatic solution to the problem with respect to which Donovan was complaining for nearly six months.

[13] Donovan, citing his own affidavits attached to the complaint, states that he does not know what Ivey allegedly did to provide training but Donovan claims that no training occurred. (Pl.'s Opposing SMF ¶ 23.)

security staff undergo training in the processing of prisoner privileged mail. (Id. ¶ 25.) The next day he received back for each shift a training attendance sheet. (Id. ¶ 26.) Approximately a month later, Ivey was told that Donovan had complained that two more pieces of privileged mail had been opened outside of his presence. (Id. ¶ 27.) As a result, Ivey immediately sent out a memo to all facility staff reminding them that incoming privileged mail is to be opened in the prisoner's presence and telling them that any questions about this matter were to be directed to him. (Id. ¶ 28.) When Ivey gave this memo to the third shift supervisors, he also told them that if any piece of privileged mail were again opened outside a prisoner's presence, a report was to be written by the officer who did it so that the officer could be held accountable on an individual basis. Ivey had in mind progressive discipline if a particular officer was a repeat problem. (Id. ¶ 29.) After that, Ivey received reports of only one more instance of the possible opening of privileged mail outside a prisoner's presence. (Id. ¶ 30.) At the request of Deputy Warden Leida Dardis, with whom he discussed the issue in late April, Ivey sent copies of the reports to her. (Id. ¶ 31.) Ivey has not been informed of any other instances of the opening of privileged mail outside of a prisoner's presence since then. (Id. ¶ 32.)

Raymond Felt – BCF Unit Manager and Grievance Officer

The first time defendant Felt heard that Donovan had a complaint about the opening of privileged mail outside of his presence was when he filed a grievance with him on November 14, 2002. (Id. ¶ 33.) This grievance was resolved at the first level when Ivey told Felt that he would speak to the third shift supervisors about being careful

not to open privileged mail. (Id. ¶ 34.)[14] The next time Felt heard that Donovan had a complaint was when he filed another grievance with him in February of 2003. (Id. ¶ 35.) Shortly thereafter, Felt also received a memo from Anne Rourke, the inmate advocate for prisoners at the Bolduc Correctional Facility, also informing him that Donovan had an ongoing complaint. (Id. ¶ 36.) After receiving the grievance and memo, Felt set up a meeting between Felt, Donovan, and the inmate advocate. During that meeting, Felt told Donovan about a conversation he had had with Ivey in which Ivey had assured Felt that he was working with the third shift sergeants on Donovan's issue. (Id. ¶ 37.) After Donovan appealed the response to this grievance to defendant Merrill, Merrill sent defendant Felt a copy of an e-mail he had received from Wes Andrenyak, the inmate advocate for all prisoners, reiterating Donovan's complaint about the opening of his legal mail. (Id. ¶ 38.) In response to this message, Felt wrote a memo to Merrill summarizing what he knew or had been informed about the matter of the opening of Donovan's privileged mail outside of his presence up until that point in time. (Id. ¶ 39.) Donovan filed three more grievances with Felt about his mail after the February grievance. (Id. ¶ 40.) Felt, the Unit Manager and Grievance Review Officer of the BCF reviewed three pages of the log that prisoners sign when they receive privileged mail and noted that since mid-February, while two pieces of mail had been opened outside of the plaintiff's presence, numerous other pieces of the plaintiff's privileged mail had not been. (Id. ¶ 41.)

Jeffery Merrill – BCF and MSP Warden

With respect to Merrill, he first heard of Donovan's problem with the opening of Donovan's mail in late March 2003 when he received Donovan's first grievance appeal

[14] Donovan asserts that he did not resolve this dispute at the first level because he incorporated the facts of this grievance into the appeal of a subsequent grievance. (Pl.'s Opposing SMF ¶ 34.) The dispute, if it is one, is not determinative of these motions.

and an e-mail from inmate advocate Wes Andrenyak/Andreyak. (Id. ¶ 43.) Merrill responded by forwarding the e-mail to Felt and asking for a report and by speaking to Anne Rourke about the matter. Based on the report from Felt and his talk with Rourke, Merrill believed the problem had been addressed appropriately. (Id. ¶¶ 44, 45.) When Merrill received further grievance appeals on the issue, he forwarded the e-mail correspondence between himself and Andrenyak/Andreyak to Leida Dardis, who is a Deputy Warden, with the belief that she would look into the matter in an appropriate manner. (Id. ¶ 46.) Merrill understood that Dardis did look into the matter and was satisfied that appropriate steps were being taken to resolve the issue. (Id. ¶ 47.) Each time Merrill received information about the opening of privileged prisoner mail outside the prisoner's presence, he believed that the problem was being handled appropriately. (Id. ¶ 48.)

Martin Magnusson- Maine Department of Corrections Commissioner

Apropos Commissioner Magnuson, he states that he never received any letters from Donovan about the opening of privileged mail and that he did not know about the one letter his assistance, Esther Riley, received about the matter. (Id. ¶¶ 49, 50.) Donovan, citing the affidavit of Riley, states that Riley had the responsibility to provide the letter to Magnusson. (Pl.'s Opposing SMF ¶¶ 49, 50.) Magnusson did sign the two responses to grievance appeals by Donovan after Riley informed him that the problem had been handled appropriately and indicated that if anything else needed to be done, Merrill would take care of it. (Defs.' SMF ¶ 51.)

Albert Barlow – BCF Deputy Warden

When defendant Barlow designated the third shift as the shift responsible for processing the mail he knew that all the officers are required to be familiar with and abide by Department of Corrections policies and did not feel the need to initiate training specific to this change. He also assumed that if it appeared specific training was necessary for third shift officers in the processing of incoming mail it would be initiated by Captain Donald Black, who was generally in charge of security matters at the facility at that time. (Id. ¶ 52.)[15] The first time Barlow became aware that such training might be necessary was when he was informed by way of a copy of a memo to all shift supervisors from Ivey, who had taken over from Captain Black, that training in the handling of prisoner privileged mail was to be conducted. (Id. ¶ 53.) The next time Barlow was informed anything about this matter was when he was copied on a memo from Ivey to all staff reminding them that incoming privileged mail is to be opened in the presence of the prisoner. (Id. ¶ 54.) Barlow was also copied on a memo from Felt to Merrill dated April 2, 2003. (Id. ¶ 55.) In addition, Barlow was copied on the e-mail correspondence between Andrenyak and Merrill that led to Felt writing his memo. (Id. ¶ 56.) What Barlow read in these memos and the e-mail is all he was ever told about this matter prior to Donovan's transfer from the facility. (Id. ¶ 57.) Barlow believed, based on these memos and the e-mail, that appropriate steps had been taken to resolve Donovan's complaints. (Id. ¶ 58.)

In responding to these statements, once again Donovan relies almost entirely on his complaint allegations, most often Paragraph 49 which reads: Between November 13, 2002, and April 29, 2003, BCF and/or MSP Officials "opened" twenty pieces of Mr.

[15] Citing generally to the Barlow affidavit, Donovan claims that Barlow had the responsibility to facilitate training and "he grossly disregarded the responsibility." (Pl.'s Opposing SMF 52.) (Id. at .)

Donovan's privileged mail and he reported each violation to Defendants Felt, Ivey, and George. Mr. Donovan submits that these employees failed to provide training, or cause BCF staff to discontinue the violations." (Compl. ¶ 49.) As set forth above, the defendants do not dispute that the twenty pieces of mail identified by Donovan were opened outside his presence. However, the citation to this complaint allegation does not suffice to controvert the defendants' factual assertions vis-à-vis their training efforts and protocols implemented.

c) The First Amendment Claim and Related Issues

(1) First Amendment and the Opening of Privileged Mail Outside an Inmate's Presence

It is true that Donovan sometimes dovetails his First and Sixth Amendment theories in his pleadings.[16] Apropos the relationship between the access to court and this type of First Amendment claim, the Fifth Circuit has explained:

> Of course, a prisoner's claim that interference with his legal mail violated his right of access to the courts is distinct from his claim that such conduct violated his right to free speech. However, because the jurisprudence governing each of these claims has become inextricably intertwined, our discussion includes cases involving access to the courts challenges, as well as cases involving only free speech challenges, to prison practices or regulations that interfere with the ability of prisoners to send or receive mail.

Brewer v. Wilkinson, 3 F.3d 816, 821 (5th Cir. 1993); see Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996) (case finding that there were sufficient allegations for such a claim based on assertion that inmate's mail was delayed inordinately and sometimes stolen, after concluding that the plaintiff had not stated a claim for denial of access to the

[16] In his complaint Donovan does allege a First Amendment violation in listing the various amendments he relies on. (Compl. ¶ 66.) And he does argue in his pleading relating to these motions, in trying to distinguish Oliver and Casey, that the First Amendment is implicated. (Omnibus Reply at 6.) Only in an under-their-breath footnote do the defendants recognize that this claim is predicated on the First Amendment. (Defs.' Mot. Dismiss & Summ. J. at 3 n.3.)

courts or infringement of a privacy rights).[17] Before the Brewer Panel were, among other claims, allegations – quite similar to Donovan's -- that prison officials opened the plaintiffs' incoming legal mail and inspected it for contraband outside of their presence, in violation of the jail's policy. The plaintiffs were not asserting that their ability to prepare or transmit a necessary legal document had been affected by this opening and inspection or that their mail had been censored. Brewer, 3 F.3d at 825.

The Brewer Panel painstakingly reviewed the lay of the land with respect to mail practices and free speech challenges summarizing the operative portions of Procunier v. Martinez, 416 U.S. 396 (1974), Wolff v. McDonnell, 418 U.S. 539 (1974), (its own Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976)), Turner v. Safley, 482 U.S. 78 (1987), and Thornburgh v. Abbott, 490 U.S. 401 (1989). It concluded that Turner (and the follow-up of Thornburgh) provided the proper compass through which to gauge First Amendment claims such as the ones generated by the privileged mail opening practices. Id. at 824.[18]

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[17] The Sixth Circuit has also explored the overlap between the Sixth and First Amendment issues:

> [W]hen the incoming mail is "legal mail," we have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts. See Kensu v. Haigh, 87 F.3d 172, 174 (6th Cir.1996) ("The right of a prisoner to receive materials of a legal nature, which have impact upon or import with respect to that prisoner's legal rights and/or matters, is a basic right recognized and afforded protection by the courts ...."); see also Davis v. Goord, 320 F.3d 346, 351 (2d Cir.2003) ("In balancing the competing interests implicated in restrictions on prison mail, courts have consistently afforded greater protection to legal mail than to non-legal mail....").

Sallier v. Brooks, 343 F.3d 868, 873-74 (6th Cir. 2003).

[18] The Brewer Panel concluded:

> The Court's decision in Thornburgh appears to us to have invalidated the reading of Martinez which the Sterrett court had given it. In adopting Turner's "legitimate penological interest" standard of review for constitutional challenges to prison regulations or practices, Thornburgh must be read as modifying Sterrett and its progeny, including Guajardo, in regard to prison regulations or practices which deal with prisoner

Turner involved, in addition to another claim, a challenge to a prison's mail policy that prohibited inmate-to inmate correspondence. Recognizing that the policy implicated the inmates' fundamental, First Amendment rights, the Court concluded that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89.

The Court explained that "several factors are relevant in determining the reasonableness of the regulation at issue." Id. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Id. Second, the court should examine "whether there are alternative means of exercising the right that remain open to prison inmates." Id. at 90. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id. "Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation." Id.

Here, we have uncontested facts that personnel at the Bolduc Correctional Facility opened sixteen to twenty pieces of Donovan's privileged mail in contravention of the policy of the Maine Department of Corrections. The course of conduct is explained by the defendants as being inadvertent and a product of inattention by the third shift personnel responsible for assuring that the policy was followed. I cannot see how this admitted negligence and inattention can be described as a "legitimate governmental interest." Furthermore, there is no alternative on Donovan's part for receiving the mail

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> mail. That is, in determining the constitutional validity of prison practices that impinge upon a prisoner's rights with respect to mail, the appropriate inquiry is whether the practice is reasonably related to a legitimate penological interest.

Id. at 824.

from the entities involved other than have them funneled, properly marked, through the prison mail procedure. With respect to the impact that the asserted constitutional right would have on the guards and other inmates, the very state-wide implementation of Policy 16.2 is a demonstration that this opening policy is an appropriate burden to put on the prison personnel and is a reasonable allocation of prison resources. So too, does the existence of this policy demonstrate that there is a reasonable alternative to the opening of privileged mail outside the presence of inmates. The fact that Ames eventually developed a simple screening and set aside a method for handling the mail that rectified the problem also weighs in Donovan's favor on this score (see Defs.' SMF ¶¶ 17, 32); it is probative of how there was a fairly simple pragmatic solution to the problem with respect to which Donovan was complaining of since mid-November 2002.

Simply put, using the Turner analysis, Donovan's First Amendment rights are impacted by the opening of his privileged mail outside his presence and the defendants cannot argue that the repeated opening of admittedly privileged mail outside Donovan's presence "is reasonably related to a legitimate penological interest." Brewer, 3 F.3d at 824.[19] In the absence of an articulated legitimate penological interest, the opening of privileged mail in these circumstances violates Donovan's First Amendment rights.

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[19] In contrast, the Brewer plaintiffs did concede that "the mail was opened and inspected for the 'legitimate penological objective' of prison security, i.e., to detect contraband." Id. Because the plaintiffs had conceded that the defendants had a legitimate penological reason for their incoming mail practice, the Panel held:

> [T]he violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights. The Appellants, therefore, have not stated a cognizable constitutional claim either for a denial of access to the courts or for a denial of their right to free speech by alleging that their incoming legal mail was opened and inspected for contraband outside their presence.

Id. (footnotes omitted).

In my view the concession made by the plaintiffs in Brewer is totally absent in this case and in fact, the evidentiary record assembled by the defendants reveals absolutely no "legitimate penological objective" involved in repeatedly opening Donovan's legal mail under the circumstances of this case.

While the fact that the Department of Corrections had a policy in place that called for the opening of this mail in the inmate's presence does not mean transgressing the policy is a constitutional violation, see Davis v. Sherer, 468 U.S. 183, 193-95 (1984); Soto v. Flores, 103 F.3d 1056, 1064 (1st Cir. 1997), the repeated disregard of the policy is probative of whether the defendants were acting in an arbitrary and capricious fashion, see Lavado v. Keohane, 992 F.2d 601, 610 (6th Cir. 1993) ("While we do not contend here that violations of the Bureau of Prisons regulations, per se, are violations of the aforementioned clearly established constitutional rights, we believe that the allegations of blatant disregard for established regulations give rise to an inference of arbitrary or capricious action.") (footnote omitted). See also Sallier v. Brooks, 343 F.3d 868, 873 - 874 (6th Cir. 2003).

And Donovan's case is different from Gardner v. Howard, 109 F.3d 427, 430 - 31 (8th Cir. 1997) in which the Court concluded that the inadvertent opening of two pieces of mail did not suffice to state a 42 U.S.C. § 1983 claim.[20] See also Bieregu , 59 F.3d at 1452 (single instance of damaged mail does not rise to the level of a constitutional violation), rev'd on other grounds by Oliver v. Fauver. 118 F.3d 175, 178 (3d Cir. 1997).[21] Here there is no dispute that Donovan had at least sixteen pieces of privileged mail opened outside his presence, despite Donovan's immediate and continuing efforts to complain about the incidents.

This recurring pattern had the potential to chill Donovan's exercise of his First Amendment rights (especially because he was concerned with retaliation by BCF

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[20] The Eighth Circuit primarily focused in on the plaintiff's access to courts claim.

[21] As discussed above, Oliver reversed Bieregu on its conclusion that an access to court claim need not include allegations of actual injury.

personnel for the exercise of these rights).[22] While Donovan has no evidence that the mail was read by the defendants, he has no way of knowing that they have not read the mail unless the mail is opened in his presence. Thus, the requirement that the mail be opened in the inmate's presence does serve the purpose of protecting the asserted First Amendment right. Compare Wollf, 418 U.S. at 577.

Based on the foregoing, I conclude that Donovan is entitled to partial judgment on his motion for summary judgment vis-à-vis his 42 U.S.C. § 1983 claim that his First Amendment rights were violated by the opening of sixteen to twenty pieces[23] of privileged mail from November 17, 2002, through April 29, 2003, even though Donovan was actively complaining of the problem.

This leaves the question of which, if any, of the named defendants are liable for the constitutional violations. The affidavits of Littlefield and Ames indicate that any opening of privileged mail outside Donovan's presence would have been accidental. This equivocation is not much to go on in terms of identifying which officers were actually responsible for the opening of the mail in question. It does not seem to me that

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[22] Donovan's concerns about retaliation were not purely fanciful. (See Report and Recommendation, Docket No. 60 at 6-8)(discussing circumstantial evidence regarding retaliatory transfer from Charleston Correctional Facility to MSP, occurring after the events discussed vis-à-vis this claim). The reasons for Donovan's transfer from Bolduc to the MSP have never been the subject of an evidentiary hearing, but the record clearly reflects that Donovan attempted to exercise his right to seek redress for perceived grievances with a special intensity that, one could infer, irritated prison authorities and might have provoked retaliation.

[23] As noted, the defendants argue that the letters addressed to the House of Representatives did not fall within the policy's definition of privileged mail because they were not addressed to a particular member of the house. I do not agree that the policy is the final word on what would and would not be considered privileged for First Amendment redress claims. They also argue that the letters (like most of the others) have nothing to do with access to the courts. However, to follow this reasoning would confound the Sixth Amendment claim with the First Amendment claim.

Donovan is seeking to hold the individual officers accountable for each discrete out-of-his-presence application of the letter opener to his privileged mail.[24]

Rather, as best I can judge, Donovan's theory is that the violations were the product of a failure to train and to supervise. It is undisputed that Ames had supervisory responsibility for the third shift. He states that whenever he found out that a particular officer had possibly opened a piece of privileged mail outside the prisoner's presence he reminded the officer of the importance of not doing that. Ames states that he reminded third shift correctional officers to be careful not to open privileged mail outside of the prisoner's presence and, in response to the memo, Ames instructed third shift correctional officers to undergo that training. Whenever he found out that a particular officer had possibly opened a piece of privileged mail outside the prisoner's presence, he reminded that officer of the importance of not doing that and he made sure a report was written when he found out that another piece of Donovan's privileged mail was possibly opened outside of his presence. Ames attributed the problem of opening privileged mail outside of the presence of the prisoner to having several different officers (newly) assigned to the task of sorting a high volume of mail. Ames states that he has, since Donovan's transfer, taken appropriate steps to resolve the problem. Littlefield also had supervisory responsibility for the third shift. His claim is that he thought Ames, as senior supervisor, was handling the matter.

"A supervisory officer may be held liable for the behavior of his subordinate officers where his 'action or inaction [is] affirmative[ly] link[ed] ... to that behavior in the sense that it could be characterized as "supervisory encouragement, condonation or

[24] I note that Donovan's complaint names John Does I-IV as defendants. Apparently, and perhaps because of his focus on the responsibility of the supervisory defendants, he did not take steps to discover their identities since filing his complaint.

acquiescence" or "gross negligence amounting to deliberate indifference."' " Wilson v. Town of Mendon 294 F.3d 1, 6 (1st Cir. 2002) (Lipsett v. University of P.R., 864 F.2d 881, 902 (1st Cir.1988)). The "affirmative link" requirement contemplates proof that the supervisor's conduct led inexorably to the constitutional violation. Hegarty v. Somerset County, 53 F.3d 1367, 1379 -80 (1st Cir. 1995).

In my view, giving Donovan the benefit of reasonable inferences on the defendants' own basically undisputed statements of material fact concerning Ames and Littlefield's supervisory responsibility for the third shift mail processing, there is a genuine dispute of fact as to whether these supervisors' inaction is affirmatively linked to the constitutional violations within the meaning of Wilson. I reach this conclusion in part because in the context of this summary judgment record all the court has to go on are Ames's and Littlefield's affidavits. It is not clear to me how Donovan could contravene these save by his evidence of repeated failures in abiding by the open-in-presence policy. A fact finder might believe the self-serving assertions put forth by Ames and Littlefield, but in this case Donovan has assembled a record that establishes so many violations of the policy that a fact finder might well conclude that the supervisors acquiesced and condoned the repeat violations. Other than the circumstantial evidence relating to the repeat violations on the third-shift supervisors' watch, Donovan produces no evidence that the other supervisors in the chain of command had any affirmative link to the claimed violations. Indeed the other supervisors all took appropriate steps to remedy the violation when they learned of it.

That said, there is no record evidence to under-gird such a claim for failure to train as to any of the defendants. "[F]or liability to attach based on an "inadequate

training" claim, a plaintiff must allege with specificity how a particular training program is defective." Roberts v. City of Shreveport, 397 F.3d 287, 293 (5th Cir. 2005) (outlining the plaintiff's summary judgment burden for a failure to train in use of deadly force claim). As noted above, Donovan has relied solely on his allegations in the complaint in support of his factual assertions vis-à-vis training.

(2) Qualified Immunity and the First Amendment Claim

With respect to a "right to petition the government" the defendants argue only that such a right is no more important than the right of access to the courts, garners no more protection, and "[i]n any event, the defendants are entitled to qualified immunity as there is no clear case law favoring the plaintiff on this point." (Defs.' Mot. Dismiss & Summ. J. at 3.) That is the extent of their presentation on qualified immunity on this claim.[25] In my view this meager argument (that ignores the precedent discussed above) does not suffice to carry the defendants' pleading burden for this defense. However, even if I am wrong on this point, I conclude that they are not entitled to qualified immunity from suit.

With respect to the qualified immunity analysis, the First Circuit prefers a three stage line of attack:

> The Supreme Court has set up a sequential analysis for determining whether a defendant violated clearly established rights of which a reasonable person would have known. See Saucier v. Katz, 533 U.S. 194, 201-06 (2001). This court has construed that framework to consist of three inquiries: "(i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." Limone v. Condon, 372 F.3d 39, 44 (1st Cir.2004). Under ordinary circumstances, the development of the doctrine of qualified immunity is best served by approaching these inquiries in the

[25] The defendants have not asserted qualified immunity in answering Donovan's complaint as the defendants have not answered the complaint.

> aforestated sequence. See Saucier, 533 U.S. at 201; Wilson v. Layne, 526 U.S. 603, 609 (1999).

Cox v. Hainey, 391 F.3d 25, 29 -30 (1st Cir. 2004). "The reason given for first addressing the alleged constitutional violation is that doing so assists in the development of the law on what constitutes meritorious constitutional claims." Tremblay v. McClellan, 350 F.3d 195, 199 (1st Cir. 2003) (citing Saucier, 533 U.S. at 201). "In many cases" Tremblay explains, "that approach is useful, especially where some novel theory is advanced." Id. I have already concluded that Donovan's First Amendment claim has merit.

On the question of whether the right was clearly established by November 2002, in Wolff v. McDonnell the Court addressed a claim by an inmate that his First, Sixth, and Fourteenth Amendment rights were infringed by a procedure whereby the prison may open mail from his attorney, even though in his presence and even though it may not be read. The Supreme Court reflected:

> While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see Procunier v. Martinez, 416 U.S. 396 (1974), this Court has not yet recognized First Amendment rights of prisoners in this context, cf. Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964). Furthermore, freedom from censorship is not equivalent to freedom from inspection or perusal.
> ....
> As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence insures that prison officials will not read the mail. The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters. We disagree with the Court of Appeals that this should only be done in 'appropriate circumstances.' Since a flexible test, besides being unworkable, serves no arguable purpose in protecting any of the possible constitutional rights enumerated

> by respondent, we think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires.

418 U.S. at 575-76, 577 (emphasis added). So Wollf did not unequivocally state that prisoners have a right to be present when their confidential mail is opened; indeed it expresses some doubt on the point.

However, on the basis of the case law discussed above, it is now clearly established that prisoners have a First Amendment right vis-à-vis their mail which is subject to restrictions that are reasonably related to security. Turner and Thornburgh established this as the inquiry and other courts have followed suit, see Sallier, 343 F.3d at 873-74; Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999); Altizer v. Deeds, 191 F.3d 540, 547-48 (4th Cir. 1999); Boswell v. Mayer, 169 F.3d 384, 388 -90 & n.2 (6th Cir. 1999); Rodriguez v. James, 823 F.2d 8, 12 (2d Cir. 1987); Avery v. Powell, 806 F. Supp. 7, 9-10 (D. Nh. 1992). If there were ever a clearly established constitutional rule, it is that the Turner balancing test will apply to alleged violations of a prisoner's First Amendment rights vis-à-vis his legal mail.

For purposes of the third prong of the qualified immunity inquiry, this case law gave the defendants a "fair and clear warning," Hope v. Pelzer, 536 U.S. 730, 741 (2002), that their conduct apropos the opening of Donovan's privileged mail had to be reasonably related to legitimate penological interests. It is safe to say that a reasonable officer, situated similarly to the defendants, would have understood the repeated opening of Donovan's privileged mail contravened the discerned constitutional right.[26] Again,

[26] I note that this is also not a case in which the defendants argue that they were interpreting a Department of Correction's policy when they opened Donovan's mail. Compare Lavado v. Keohane, 992 F.2d 601, 608 (6th Cir. 1993) (concluding that the defendants who on six occasions opened letters outside inmate's presence would have reasonably believed the action to have been lawful since the letters did not

the existence of Policy 16.2 undercuts any argument that the officers' conduct in contravention of the policy – for no stated penological reason, compare Brewer, 3 F.3d at 824 – was reasonably related to a legitimate penological objective.

(3) Damages

Donovan seeks $20,000 in compensatory and punitive damages vis-à-vis this claim. While no 42 U.S.C. § 1983, action "may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury," 42 U.S.C. § 1997e(e), Rowe concluded that § 1997e(e)'s 'actual injury' requirement was no bar to nominal or other damages for First Amendment violations: "A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained." 196 F.3d at 781 -82; see also Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) ("[I]n the context of First Amendment claims, we have held explicitly that prisoners need not allege a physical injury to recover damages because the deprivation of the constitutional right is itself a cognizable injury, regardless of any resulting mental or emotional injury."). This is even true vis-à-vis punitive damages. See Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Calhoun, 319 F.3d at 941; Doe v. Delie, 257 F.3d 309, 314 n. 13 (3d Cir.2001). So, if Donovan can demonstrate that there was a specific intent or reckless indifference on the part of Ames or Littlefield he may be entitled to such an award of punitive damages. See Powell v. Alexander, 391 F.3d 1, 19 - 20 (1st Cir. 2004) ("Although the specific intent to violate a plaintiff's federally protected right will support a punitive damages award, "reckless indifference" towards a plaintiff's

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strictly comply with the Bureau of Prisons regulations requiring the marking, "Special Mail--Open only in the presence of the inmate.").

federally protected right also suffices to authorize liability for punitive damages under § 1983."); see also id. at 19 n.2.

C. Claims under Maine Law

Donovan's second claim for relief is brought under the Maine Constitution (Compl. ¶¶ 106-113.) His third claim is one for the state tort of invasion of privacy. (Id. ¶¶ 114-115.) His fourth claim is for intentional infliction of emotional distress. (Id. ¶ 116-121.) And his fifth claim is for negligence and negligent supervision. (Id. ¶¶ 122-128.)

With respect to the notice requirement under the Maine Tort Claims Act, the defendants assert that Donovan's notice of claim to the Attorney General's Office complaining about the opening of his privileged mail was not received by the Attorney General's Office until August 28, 2003. (Defs.' SMF ¶ 61.) Donovan admits as much and the attached notice of claim as to all these defendants is dated August 22, 2003. It is evident that with respect to the final few pieces of privileged mail in March and April the notice of claim was timely. The defendants claim that their affidavits show that all the defendants acted reasonably in addressing Donovan's complaints about opening mail and that Donovan cannot therefore succeed on his negligence claim let alone a tort claim requiring intention. (Defs.' Mot Dismiss & Summ. J. at 5.) Donovan's tort claims, as limited by his notice of claim and its timeliness, are subject to summary judgment as to the majority of the defendants. Pursuant to 14 M.R.S.A. § 8111 (1) (C) & (E), employees of governmental entities, the only named defendants in this action, are absolutely immune from liability for discretionary duties and intentional acts within the scope and course of employment, unless undertaken in bad faith. The record establishes that the only

defendants against whom a common law tort claim could possibly be sustained are Ames and Littlefield.

With respect to Donovan's Maine Constitutional claims, as the defendants concede, the Maine Law Court has held that rights under the Maine Constitution are to be interpreted consistently with the analogous rights under the United States Constitution. Accordingly, the only claim under the Maine Constitution that survives these cross motions for summary judgment is Donovan's First Amendment claim.

However, the Maine Law Court reasoned in Andrews v. Department of Environmental Protection:

> Andrews seeks monetary, declaratory, and injunctive relief pursuant to article I, section 4 of the Maine Constitution, which provides in relevant part: "[e]very citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty; ...." Me. Const. art. I, § 4. We agree with the defendants' contention that this provision of the Maine Constitution cannot support a private cause of action.
>
> ...
>
> In this case, specific legislative action creating a private cause of action for a violation of a person's rights under the Maine Constitution, *see* Maine Civil Rights Act, 5 M.R.S.A. §§ 4681-4685 (Supp.1997), precludes the remedy sought by Andrews. Pursuant to the Act:
>
> > [w]henever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat [thereof] ... with the exercise or enjoyment by any other person of rights secured by ... the Constitution of Maine ..., the person whose exercise or enjoyment of these rights has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name and on that person's own behalf a civil action for legal or equitable relief.
>
> 5 M.R.S.A. § 4682. Andrews has not alleged an interference with his free speech rights by physical force or violence, damage or destruction of property, trespass on property, or threats thereof. See 5 M.R.S.A. § 4682.

> He therefore has no cause of action pursuant to the Act. We decline to expand the available remedies for a violation of rights guaranteed by the Maine Constitution beyond those which the Legislature in its wisdom has provided.

1998 ME 198, ¶¶ 21, 23- 24, 716 A.2d 212, 220. Based upon Andrews and the record before the court it is evident that Donovan cannot sustain his First Amendment claim under the Maine Constitution.

Conclusion

For these reasons, I recommend that the Court **DENY** the motion for preliminary injunction. (Docket No. 62.) I recommend that the Court **GRANT** the defendants' motion (Docket No. 55) to the extent that it seeks dismissal of Donovan's Sixth Amendment claim and to the extent it seeks summary judgment on all of his claims against all the defendants under the Maine Constitution and any 42 U.S.C. § 1983 and state tort common law claims against Martin Magnusson, Jeffery Merrill, Albert Barlow, Raymond Felt, Richard Ivey, Dawn George and John Does 1-4. I further recommend that the Court **GRANT in part** Donovan's motion for summary judgment (Docket No. 21) on the ground that his First Amendment rights were violated but **DENY** it on the question of whether or not Ames and Littlefield are liable in their supervisory capacities for the unconstitutional conduct. Finally, I recommend that the Court **DENY** both parties' motions apropos Donovan's state law tort claims as to Ames and Littlefield.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated March 11, 2005

DONOVAN v. MAGNUSSON et al
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 06/15/2004
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

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V.

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RICHARD IVEY represented by **DIANE SLEEK**
Individually and in his capacity as (See above for address)
Captain of the security staff *ATTORNEY TO BE NOTICED*

Defendant

DAWN GEORGE represented by **DIANE SLEEK**
Individually and in her capacity as (See above for address)
Sergeant *ATTORNEY TO BE NOTICED*

Defendant

EARL LITTLEFIELD represented by **DIANE SLEEK**
Individually and in his capacity as (See above for address)
Sergeant *ATTORNEY TO BE NOTICED*

Defendant

ROLAND AMES represented by **DIANE SLEEK**
Individually and in his capacity as (See above for address)
Sergeant *ATTORNEY TO BE NOTICED*

Defendant

JOHN DOES 1-4