No. ___

In the Supreme Court of the United States

DENNIS DAHNE,

PETITIONER,

v.

THOMAS RICHEY,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Inmates in state and federal prisons file hundreds of thousands of grievances every year, and grievance programs peacefully resolve countless disputes at an administrative level, without litigation. To make these grievance programs more effective and avoid needless tension between inmates and officers, most states and the federal government prohibit abusive, disrespectful, or threatening language in grievances. But the Ninth Circuit has held, in a series of cases, that such restrictions violate the First Amendment. Based on this conclusion, the Ninth Circuit here held that a Washington correctional officer violated an inmate's clearly established First Amendment rights when he directed the inmate to omit such content. Five other circuits and many state courts have held that similar restrictions are constitutional. The question presented is:

Do prison inmates have a First Amendment right to include threatening, abusive, and irrelevant language in grievances?

PARTIES

Petitioner Dennis Dahne was the defendant in the district court and appellant in the court of appeals. He is a Grievance Coordinator for the Washington Department of Corrections at the Stafford Creek Corrections Center.

Respondent Thomas W.S. Richey was the plaintiff at the district court and appellee in the court of appeals. He is an inmate in the custody of the Washington Department of Corrections.

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INTRODUCTION

Alone among the circuits, the Ninth Circuit has long adhered to a rule that prisoners have a First Amendment right to include "disrespectful language" in grievances. *Brodheim v. Cry*, 584 F.3d 1262, 1271-72 (9th Cir. 2009) (citing *Bradley v. Hall*, 64 F.3d 1276, 1281-82 (9th Cir. 1995)). Though this Court has made clear that the decision first announcing this rule was wrong, *Shaw v. Murphy*, 532 U.S. 223, 230 n.2 (2001) (repudiating *Bradley*, 64 F.3d 1276), the Ninth Circuit still applies its reasoning routinely.

In this case, the Ninth Circuit applied this rule to hold that Respondent Thomas Richey had a clearly established constitutional right to include abusive, threatening language in prison grievances. Richey filed grievances repeatedly describing a corrections officer as "an extremely obese Hispanic female" and making related insults. App. 109a-12a. Richey, imprisoned for murder, also referenced the recent murder of a Washington corrections officer by an inmate, writing: "It is no wonder why guards are assaulted and even killed by some prisoners. When guards like this fat Hispanic female guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violent behavior." App. 109a-10a. Petitioner Dennis Dahne received one of these complaints and, pursuant to Washington's Offender Grievance Program, directed Richey to remove "unnecessary and inappropriate" language for the grievance to be processed. App. 111a-12a. Richey refused, and instead filed this lawsuit.

The district court dismissed Richey's claim, finding "no authority for the proposition that insulting a prison guard is protected conduct." App. 84a. The Ninth Circuit reversed and remanded, and after summary judgment proceedings, ruled for Richey. Relying on its decision in *Brodheim*, 584 F.3d 1262, the panel held that "no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." App. 4a (citing *Brodheim*, 584 F.3d at 1273). Paradoxically, the panel recognized that Dahne had "valid grounds" to ask Richey to rewrite his grievance "in the interest of maintaining good relations between prisoners and guards." App. 6a. The panel nonetheless held that Dahne violated Richey's free speech rights by failing to process the grievance as written. The panel also denied Dahne's claim of qualified immunity. App. 5a.

The Ninth Circuit's First Amendment analysis conflicts with the approach of five other circuits and many state courts, which hold that prisons can prohibit disrespectful language in grievances. And the Ninth Circuit's qualified immunity analysis is irreconcilable with this Court's precedent, which makes clear that one circuit's rule does not amount to "clearly established law" when other circuits disagree.

Whether prisons may lawfully restrict abusive, threatening language in grievances is a profoundly important issue cleanly presented by this case. Most states and the federal government have rules restricting such language, and prison grievances and related litigation are voluminous. The Court should grant certiorari to address this important topic.

OPINIONS BELOW

The Ninth Circuit decision below is *Richey v. Dahne*, 733 Fed. App'x 881 (9th Cir. 2018). App. 2a-7a. The order denying rehearing en banc is unreported and dated September 13, 2018. App. 1a. The district court's summary judgment order is unreported. App. 8a-23a. That order departed from the report and recommendation of a magistrate judge. App. 34a-61a.

The Ninth Circuit previously reviewed a summary dismissal of Richey's complaint and issued two decisions. One granted Richey in forma pauperis status. *Richey v. Dahne*, 807 F.3d 1202 (9th Cir. 2015), App. 66a-80a. The other reversed dismissal for failure to state a claim and is unreported. *Richey v. Dahne*, 624 Fed. App'x 525 (9th Cir. 2015), App. 62a-65a. The first district court ruling that dismissed for failure to state a claim is unreported. App. 81a-85a. That order also came after the report and recommendation of a magistrate judge. App. 86a-103a.

JURISDICTION

The Ninth Circuit denied rehearing en banc on September 13, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

> people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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[.]

STATEMENT

A. Washington's Prison Grievance Program Peacefully Resolves Conflicts and Reduces Inmate Litigation

The Washington Offender Grievance Program plays a crucial role in the daily lives of inmates and staff in Washington correctional institutions. Inmates submit over 20,000 grievances each year addressing a variety of issues such as living conditions, application of rules and policies, actions taken by staff, and complaints about staff. ER 105.[1]

For most inmate complaints, Washington's program is the administrative remedy that is endorsed by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), and which must be exhausted

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[1] ER refers to the Ninth Circuit excerpt of record available at Docket Entry 6.

prior to litigation. The program follows guidelines set forth in Department of Corrections Policy 550.100 and the Offender Grievance Program Manual. ER 115-65. These policies require respectful communication between staff and inmates to facilitate peaceful, efficient conflict resolution. The obligation for appropriate demeanor and language is reciprocal for staff and inmates. ER 127, 131. Inmates can file grievances against prison staff for using inappropriate demeanor or language when engaging with inmates. ER 164.

Grievances typically start when an inmate submits a written "offender complaint" to a staff grievance coordinator on a provided form and indicates a desire to make it a formal grievance. App. 87a-88a.[2] The grievance coordinator may pursue immediate resolution, return the complaint to the offender for rewriting or additional information, or engage in investigation, review, and response. App. 88a. Grievance coordinators thus ensure that offenders comply with basic grievance program procedures and requirements that allow the program to operate effectively and fairly.

Coordinators often receive complaints that need rewriting to focus on grievable topics or to conform in other ways with the Offender Grievance Program Manual. ER 105, 141. Rewrites are critical because they help the offender provide information needed to investigate or facilitate resolution, and they allow the system to function without wasting time on irrelevant information or issues. App. 107a;

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[2] The Washington Department of Corrections uses the term "offender" to describe persons in its custody. As used here, the term is interchangeable with "inmate" or "prisoner."

ER 105, 141. Rewrite instructions are common and offenders are encouraged to talk to a coordinator with questions about rewrites. ER 105. There is no punishment or disadvantage associated with rewrite instructions, and inmates are given additional time to comply with such instructions. ER 105, 108. However, if an offender does not follow the instruction or otherwise follow up within the required timeframe, the complaint is deemed withdrawn. App. 106a-07a.

Under Washington policies, prison grievance coordinators can direct offenders to remove gratuitous derogatory and abusive language in an offender complaint. App. 35a-36a; ER 138-41. These policies exist because Washington recognizes that "'derogatory and abusive language towards staff in a written grievance establishes a hostile and combative' environment, 'undermines the conciliatory goals of the [program],' and 'detracts from the integrity of the grievance system.'" App. 35a. For example, threats of violence or derogatory insults affect staff morale in what is inherently a stressful work environment and can cause needless tension between staff and inmates. Grievance coordinators also seek to remove irrelevant abusive language because it obscures real issues and can create or exacerbate hostile situations. App. 107a; ER 106-07. The use of irrelevant abusive and derogatory language in the grievance process leads to mistrust and resentment that detract from communication and harm the credibility of the Grievance Program. ER 108.

Inclusion of derogatory or threatening language in grievances harms not just those staff who process grievances, but also other staff and inmates. For example, if a grievance is about a specific staff

member, the grievance system policies anticipate that the staff member may review the grievance and respond. ER 68, 106. Thus, if a grievance containing abusive or threatening language about an employee could proceed, that employee would see the language even if they did not normally process grievances. And offenders who seek to intimidate or demean staff with abusive content can easily tell other inmates about their actions or show them copies of the grievance.

The majority of states have policies, like Washington's, that restrict irrelevant abusive or derogatory language in grievances.[3] Similarly, the

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[3] *See* Cal. Code Regs. tit. 15, §§ 3084.4(a)(4), 3084.6(b)(4) (2018); Ohio Admin. Code 5120-9-31(F) (2018); Or. Admin. R. 291-109-0140 (2018); Vt. Admin. Code 12-8-15:2; Wis. Admin. Code DOC § 310.07(4) (2018); 103 Mass. Code Regs. 491.21(3) (2017); Fla. Admin. Code r. 33-103.017(2) (effective Oct. 28, 2007); Alaska, http://www.correct.state.ak.us/pnp/pdf/808.03.pdf; Connecticut, https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0906pdf.pdf?la=en; Georgia, http://www.dcor.state.ga.us/sites/all/files/pdf/GDC_Inmate_Handbook.pdf; Hawaii, http://dps.hawaii.gov/wp-content/uploads/2015/07/COR-12-03-INMATE-GRIEVANCE-PROGRAM-EFF-7-1-15.pdf; Idaho, https://www.idoc.idaho.gov/ (follow *Policies & Forms* hyperlink; then follow *Policies* hyperlink; then follow *Offender Management* hyperlink; then follow *Grievance and Informal Resolution Procedure for Offenders* hyperlink); Indiana, https://www.in.gov/idoc/files/00-02301__Grievance_Procedure_1-01-10.pdf; Kentucky, https://corrections.ky.gov/About/cpp/Documents/14/CPP%2014.6.pdf; Michigan, https://www.michigan.gov/documents/corrections/03_02_130_200872_7.pdf; Montana, https://cor.mt.gov/Portals/104/Resources/Policy/MSPprocedures/3-3-3InmateGrievanceProgram.pdf; Nevada, http://doc.nv.gov/ (follow *Administrative Regulations* hyperlink; follow *700 Series: Inmate Regulations* hyperlink; follow *AR 740 - Inmate Grievance Procedure - Temporary - 11.20.2018* hyperlink); New Mexico, https://cd.nm.gov/policies/docs/CD-150500.pdf; North Carolina,

Federal Bureau of Prisons' Administrative Remedy Program allows staff to reject an inmate's complaint if it contains abusive or obscene language. *See* 28 C.F.R. § 542.17(a).

In addition to promoting prison safety and inmate rehabilitation, grievance programs help give effect to the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), enacted "to reduce the quantity and improve the quality of prisoner suits[.]" *Porter v. Nussle*, 534 U.S. 516, 524 (2002). As this Court recognizes, 42 U.S.C. § 1997e(a) requires "proper exhaustion," meaning an inmate must comply with a prison grievance system's "critical procedural rules." *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). These requirements to comply with state grievance programs reflect an intent "to eliminate unwarranted federal-court interference with the administration of prisons[.]" *Id.* at 93. The Washington Offender Grievance Program resolves the majority of complaints at the administrative level, App. 107a; ER 105, fulfilling the Prison Litigation Reform Act's purpose of reducing the quantity of inmate lawsuits.

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https://www.doc.state.nc.us/dop/policy_procedure_manual/g300.pdf; Pennsylvania, https://www.cor.pa.gov/About%20Us/Pages/DOC-Policies.aspx (follow *804 Inmate Grievance* hyperlink); South Carolina, http://www.doc.sc.gov/policy/GA-01-12.htm1544137224988.pdf; South Dakota, https://doc.sd.gov/documents/Administrative%20Remedy%20for%20Inmates72018.pdf; Tennessee, https://www.tn.gov/content/dam/tn/correction/documents/501-01.pdf; Texas, https://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf; Virginia, https://vadoc.virginia.gov/about/procedures/documents/800/866-1.pdf; Wyoming, http://corrections.wyo.gov/ (follow *Policies* hyperlink; follow *PP 3.100 Inmate Communication and Grievance Procedure* hyperlink).

B. Inmate Richey Submitted a Grievance with Gratuitous Threatening and Abusive Language and Refused to Rewrite it, so Officer Dahne Closed the Grievance

Respondent Thomas Richey is serving a sixty-five-year murder sentence in Washington State prison. He submitted a grievance in 2011 complaining that a correctional officer denied him access to the yard, a shower, and a change of clothes for insufficient reasons. App. 109a. He described the time and location of the incident and described the officer involved as "an extremely obese Hispanic female guard" who he had previously told "about her need to diet." App. 109a. The grievance continued with abusive statements about the officer and how likely it was for "some prisoners" to murder or assault officers:

> It isn't my problem that she is so obese, she holds a grudge over my previous comments about her enormous girth. It is no wonder why guards are assaulted and even killed by some prisoners. When guards like this fat Hispanic female guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violent behavior in retaliation.

App. 109a-10a. Richey made these statements months after an inmate murdered a correctional officer in a Washington facility. App. 90a.

The first employee to receive this complaint instructed Richey to "[r]ewrite appropriately" and "stick to the issue of what happened, when, who was involved." App. 110a. Richey submitted virtually the same statement two days later with more gratuitous

abusive statements that the officer was "an extremely obese Hispanic female guard," App. 111a, and this time stated that:

> It is no wonder why guards are slapped and strangled by some prisoners. When guards like this obese female Hispanic guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violence in retaliation.

App. 111a. Officer Dahne, Petitioner here, received this version of the complaint, and directed Richey to rewrite it as previously directed and remove "unnecessary and inappropriate" language. App. 12a, 106a. In the limited room available on the grievance form, Dahne did not attempt to address every statement that needed to be omitted because "a reasonable person could understand that making repeated references to a staff member's weight and talking about guards getting strangled have nothing to do with an actual grievable issue and are inappropriate," App. 9a, especially months after the murder of a staff member by an inmate. App. 106a. Richey did not rewrite the grievance, and Dahne closed it. App. 113a.

About twenty days later, Richey sent Dahne a message asking, "ARE YOU GOING TO PROCESS MY PROPERLY SUBMITTED GRIEVANCE OR WHAT? I'M NOT REWRITING IT SO DO YOUR JOB AND PROCESS IT." App. 113a. Officer Dahne responded that the complaint had been closed because it was not resubmitted as directed. App. 113a. Richey submitted a complaint about this closure, again refusing to rewrite the grievance and insulting Dahne's writing

skills. App. 114a. Richey never sought any further relief based on the substance of his grievance about the actions of the female guard. Instead, he sued Officer Dahne for closing the grievance.

C. Proceedings Below

1. The district court dismissed Richey's complaint, but the Ninth Circuit reversed and remanded

In 2012, Richey filed a pro se complaint under 42 U.S.C. § 1983 alleging that Officer Dahne violated his First Amendment rights. App. 87a. He claimed that declining to process his grievance as written violated both his First Amendment right to petition the government and his First Amendment right not to face retaliation for his speech. App. 87a. He sought only damages. App. 87a.

The district court dismissed Richey's claims with prejudice, determining that Richey "failed to allege a plausible claim for relief," "failed to allege facts to show that he engaged in protected conduct or that his First Amendment rights have been chilled," and "failed to allege that his right to redress grievances has been chilled by [Petitioner's] refusal to accept [Richey's] offensive grievance." App. 84a.

Richey appealed, and the Ninth Circuit reversed. App. 65a. The court explained: "'We have previously held that 'disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment.'" App. 63a (quoting *Brodheim*

v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009) (citing *Bradley v. Hall*, 64 F.3d 1276, 1281-82 (9th Cir. 1995))). The court reiterated the reasoning of its prior cases, saying that prisons have "a legitimate penological interest in encouraging 'respect by inmates toward staff and other inmates, and rehabilitation of inmates through insistence on their use of socially acceptable ways of solving their problems,'" but that "the link between this important purpose and the disrespect rules as applied to formal written grievances is weak." App. 63a (citing *Bradley*, 64 F.3d at 1280-81). The court described its prior decisions as holding that "a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance." App. 63a. Based on this, the Ninth Circuit held that Richey pleaded "a plausible claim that his rights were violated when the prison refused to process and investigate his grievance because it contained 'objectionable' language[.]" App. 63a-64a. The court also ruled that it was premature to decide Officer Dahne's qualified immunity defense.[4]

2. On remand, the District Court ruled that Officer Dahne violated Richey's right to petition and denied him qualified immunity

On remand, a Magistrate Judge recommended summary judgment for Officer Dahne based on

[4] In a separate opinion, relevant here only for background, the same panel held that Richey was entitled to in forma pauperis status while appealing his claim. App. 68a.

qualified immunity. App. 60a-61a. The district court rejected the recommendation. App. 22a.

Based on the Ninth Circuit's 2015 opinion, *Bradley*, and *Brodheim*, the district court ordered summary judgment for Richey on his right-to-petition claim, holding that "Richey has shown a violation of his constitutional right to freedom of speech." App. 15a. The court denied Officer Dahne's request for qualified immunity on this claim, citing the 2015 opinion (issued after Dahne's actions) to hold that "the law is clearly established on this issue[.]" App. 19a. The district court also concluded that disputed issues of fact prevented summary judgment on Richey's retaliation claim. App. 22a.

3. The Ninth Circuit holds that inmates have a clearly established right to include abusive language in grievances

Officer Dahne appealed, arguing that his actions were constitutional and that he was at least entitled to qualified immunity. The Ninth Circuit denied the appeal in significant part.

First, the Ninth Circuit held that Richey was entitled to summary judgment on his claim that Officer Dahne violated his First Amendment right to petition. The court acknowledged that "a prison regulation that restricts inmates' constitutional rights could be constitutionally sound if it 'is reasonably related to legitimate penological interests.'" App. 4a (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The court, however, held that its prior decision in *Brodheim* "held squarely that no legitimate penological interest is served by prison rules prohibit-

ing disrespectful language in grievances." App. 4a (citing *Brodheim*, 584 F.3d at 1273). *Brodheim* "reasoned that grievances were easy to insulate from other prisoners and from those prison officials who are the target of the grievance so that disrespectful language in a grievance did not raise any substantial security concern." App. 4a-5a (citing *Brodheim*, 584 F.3d at 1273). The panel quoted a passage that *Brodheim* adopted from the prior *Bradley* decision: "'A prisoner's statement in a grievance need not have any more impact on prison security through the maintenance of respect than the prisoner's unexpressed thoughts.'" App. 5a (quoting *Brodheim*, 584 F.3d at 1273 (quoting *Bradley*, 64 F.3d at 1281)).

The panel agreed "that a prison official merely requesting that a prisoner rewrite a grievance is not a First Amendment violation." App. 6a. "The prison could and did have valid grounds to make such a request in the interest of maintaining good relations between prisoners and guards." App. 6a. But, the panel concluded, "the violation here occurred when Dahne refused to allow the grievance to proceed through the administrative process after Richey did not rewrite it[.]" App. 6a. In other words, the panel held both that "[t]he prison could and did have valid grounds," to ask Richey to rewrite his grievance "in the interest of maintaining good relations between prisoners and guards," App. 6a, and that "no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." App. 4a (citing *Brodheim*, 584 F.3d at 1273).

The panel also denied qualified immunity on this claim in a single paragraph. App. 5a. Officer Dahne argued that he violated no clearly established law because the Ninth Circuit's prior decisions involved punishment and threats of punishment for abusive content in grievances, while Officer Dahne had merely directed Richey to rewrite his grievance. The panel acknowledged that prior circuit cases had involved reprisals against prisoners for the content of grievances, but said that "a correct reading of the scope of the holding in *Brodheim*" clearly established that Dahne's conduct was unconstitutional. App. 5a. The court never addressed holdings from other courts reaching very different conclusions as to whether prisons may limit abusive language in grievances.

The Ninth Circuit did, however, reject Richey's retaliation claim based on qualified immunity. The panel said that no prior case had "clearly established that merely refusing to accept a grievance for processing is a retaliatory adverse action." App. 7a.

Officer Dahne asked the Ninth Circuit to reconsider or to hear the case en banc based on the conflict between the Ninth Circuit's case law and the law in other circuits. The court declined. App. 1a.

After the first Ninth Circuit remand in this case, Richey began filing dozens of grievances against Washington corrections officers, routinely using words like "muffintop," "idiots," and "runt." In response to requests that he rewrite those grievances, he unsuccessfully tried to supplement his complaint

in this matter and then filed a separate case. In that case, the court denied the defendant prison employee's motion for summary judgment and qualified immunity based on the prior panel opinion. *See Richey v. Aiyeku*, No. 4:16CV05047 (E.D. Wash. Mar. 14, 2017) (ECF No. 57).

THE PETITION SHOULD BE GRANTED

Inmates in state and federal prisons file hundreds of thousands of grievances every year—20,000 annually in Washington alone. The rules for processing grievances are thus extremely important.

Most states and the federal government bar irrelevant, disrespectful, and abusive language in grievances, and with good reason. Such language can harm staff morale, enhance tension between staff and inmates, and make an already dangerous environment even more so.

Other than the Ninth Circuit, courts have uniformly upheld these restrictions. But the Ninth Circuit's deeply entrenched view is "that no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." App. 4a (citing *Brodheim*, 584 F.3d at 1273). On that basis, the Ninth Circuit found that Officer Dahne had violated inmate Richey's clearly established First Amendment rights.

The Ninth Circuit's First Amendment analysis conflicts with the holdings of five other circuits and many state courts, which have found no right to include disrespectful language in grievances. And the Ninth Circuit's qualified immunity analysis ignores this Court's holdings. The issue is important and cleanly presented, and the petition should be granted.

A. The Ninth Circuit's Analysis of Inmate First Amendment Rights Conflicts with Multiple Circuit and State Courts

While prison inmates retain many constitutional rights, "lawful incarceration brings about necessary withdrawal or limitation of many privileges and rights[.]" *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (internal quotation marks omitted). Thirty years ago, this Court adopted an overarching test to analyze inmates' constitutional claims: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. The Court articulated four factors to consider when deciding if prison rules are reasonable: (1) "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) the "absence of ready alternatives" or if the rule at issue is an "exaggerated response to prison concerns." *Id.* at 89-90 (internal quotation marks omitted).

Applying this test (loosely) and its prior precedent, the Ninth Circuit here held that "no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." App. 4a (citing *Brodheim*, 584. F.3d at 1273). But five other circuits and many state courts have reached a contrary conclusion.

1. The Ninth Circuit's entrenched rule, applied here, is that inmates have a right to include irrelevant, disrespectful language in grievances

The Ninth Circuit's unique view of inmate speech in grievances started in *Bradley v. Hall*, 64 F.3d 1276 (9th Cir. 1995), where the court reviewed an Oregon rule "prohibiting the use of 'hostile, sexual, abusive or threatening' language" in grievances. *Id.* at 1278 (quoting Or. Admin. R. 291-105-015(2)(f), (g)). The court acknowledged that this rule served "several legitimate penological interests," but held that "we must balance the importance of the prisoner's infringed right against the importance of the penological interest served by the rule." *Id.* at 1280. Conducting this balancing, the court held that the rule placed a "substantial" burden on inmates' right to petition the government, *id.*, and that the prison's legitimate concerns could be achieved in other ways, such as by restructuring grievance systems to "shield" prison officials who regularly interacted with inmates from abusive statements directed at them, *id.* at 1281. The court therefore held "that prison officials may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance." *Id.* at 1282.

This Court repudiated *Bradley* in *Shaw v. Murphy*, 532 U.S. 223 (2001). The Ninth Circuit had extended *Bradley* to hold that an inmate's First Amendment rights were violated when he was sanctioned for "insolent" language in a letter to

another inmate. But, as *Shaw* explains, *Bradley* erred "when it 'balance[d] the importance of the prisoner's infringed right against the importance of the penological interest served by the rule.'" *Id.* at 230 n.2 (alteration in original) (internal quotation marks omitted). "In *Turner* we adopted a unitary, deferential standard for reviewing prisoners' constitutional claims[.]" *Id.* at 229.

The Ninth Circuit was undeterred. In 2009, the court acknowledged that this Court had "explicitly disapproved of our 'balancing' method of analysis" in *Shaw*. *Brodheim*, 584 F.3d at 1272 (citing *Shaw*, 532 U.S. 223). But the court "reach[ed] the same result as the *Bradley* court." *Id.* Quoting at length from *Bradley*, the court said that there was no link between the prison's interest in "peaceable operations" and rules regulating language in written grievances. *Id.* (quoting *Bradley*, 64 F.3d 1281). The court speculated that prisons could simply restructure grievance programs to avoid having those who are the target of grievances see abusive statements. *Id.* at 1273 ("It takes little imagination to structure a grievance system and regime of disrespect rules that would make a prisoner's statements in a complaint or grievance invisible to all those involved in the daily operations of the prison, alleviating any security concern." (quoting *Bradley*, 64 F.3d at 1281)). Judge Bea did not join the panel's conclusion that the prison lacked legitimate penological interests in enforcing disrespect rules as to written grievances. *Id.* at 1274 (Bea, J., concurring in result).

The panel here analyzed inmate Richey's free speech claim under this Ninth Circuit precedent. The panel said: "In *Brodheim* we held squarely that no

legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." App. 4a (citing *Brodheim*, 584 F.3d at 1273). "We reasoned that grievances were easy to insulate from other prisoners and from those prison officials who are the target of the grievance, so that disrespectful language in a grievance did not raise any substantial security concern." App. 4a-5a. Because "rules prohibiting disrespectful language do not serve a legitimate penological interest in the special context of prison grievances," the panel found that Officer Dahne had violated Richey's First Amendment rights. App. 5a. And it held that those rights were clearly established by its prior decisions. The Ninth Circuit confirmed its commitment to this rule by denying rehearing en banc. App. 1a.

As detailed in the next section, many other courts would have rejected Richey's claim out of hand.

2. Five Circuits and many state courts hold that inmates have no first amendment right to include irrelevant, disrespectful language in grievances

Applying this Court's framework for evaluating inmate rights, five circuits and many state courts have upheld rules restricting or punishing abusive or disrespectful language in prison grievances. These courts have uniformly concluded that such rules serve legitimate penological interests.

In *Smith v. Mosley*, 532 F.3d 1270 (11th Cir. 2008), the Eleventh Circuit held that prisons may discipline inmates for grievance letters that include "insubordinate remarks." *Id.* at 1277. The inmate

there, Smith, filed a grievance that made serious complaints about inmates being forced to go outside in cold weather in "sub-standard clothing," but it also included a range of insulting language. *Id.* at 1272-73. Smith was placed in administrative segregation and lost all privileges for 90 days, 45 of those days for violating a rule against making false statements about an employee, and 45 for "insubordination." *Id.* at 1274. The court held that both rules "are reasonably related to legitimate penological interests and therefore valid limitations on inmate speech." *Id.* at 1277. Officials could assume that the language the inmate "employed, which reeked of disrespect for the administrators' authority, would be noised about the prison's population and, if ignored, could seriously impede their ability to maintain order and thus achieve the institution's penological objectives." *Id.* at 1279; *see also Mathews v. Paynter*, __ Fed. App'x __, 2018 WL 4664043, at *3 (11th Cir. Sept. 27, 2018) (citing *Mosley*, and holding that prison rule prohibiting disrespect against prison official could be applied to statements in a grievance because it was "reasonably related to legitimate penological interests and therefore [a] valid limitation[ ] on inmate speech" (alterations in original) (quoting *Mosley*, 532 F.3d at 1277)).

The Seventh Circuit has issued several published opinions recognizing that prisons have legitimate interests in preventing disrespectful or abusive language in prison grievances. First, in *Ustrak v. Fairman*, 781 F.2d 573 (7th Cir. 1986), the court held that there was no First Amendment violation in punishing a prisoner for writing a letter to the warden referring to guards as "stupid lazy

assholes." *Id.* at 580. The letter "violat[ed] a regulation that forbids inmates' 'being disrespectful to any employee of the institution[.]'" *Id.* The court said the regulation had a "direct and elementary relation to the needs of prison administration. We can imagine few things more inimical to prison discipline than allowing prisoners to abuse guards[.]" *Id.*

More recently, in *Hale v. Scott*, 371 F.3d 917 (7th Cir. 2004), the court said that an inmate could be punished for violating a rule against "insolence" by including irrelevant allegations about a guard's sexual behavior in a grievance. *Id.* at 918. "Accusations of sexual misconduct unrelated to the accusing inmate's legitimate concerns . . . are species of such insolence. To privilege them merely because they are appended irrelevantly to a grievance would make no sense." *Id.* at 919 (citation omitted). *Hale* criticized Ninth Circuit cases for a crabbed approach to evaluating prison rules, invalidating rules "merely [because] the needs of the prison did not require that the regulation be enforced in the particular case against a particular prisoner[.]" *Id.* at 920; *see also Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010) (First Amendment does not protect "the confrontational, disorderly manner in which [inmate] complained about the treatment of his personal property"); *Armstead v. Clark*, 193 Fed. App'x 613, 616 (7th Cir. 2006) ("[L]anguage that is otherwise punishable is not shielded from disciplinary action merely because it appears in a grievance.").

The Eighth Circuit, similarly, has held that prisons may punish inmates for "insulting behavior" in grievances. *Cowans v. Warren*, 150 F.3d 910 (8th Cir. 1998) (per curiam). In a grievance, inmate

Cowans accused several guards of directing racial slurs at him, and he referred to the guards as "racist," "supremacist," and "dogs." *Id.* at 911. He received a punishment of 10 days in administrative segregation for violating a rule against "insulting behavior." *Id.* The Eighth Circuit held that because this was a legitimate rule, the punishment could constitutionally be applied. *Id*. at 912; *see also Aziz v. Schriro*, 6 Fed. App'x 565, 566 (8th Cir. 2001) (citing *Cowans* and holding that inmate failed to state a section 1983 claim based on disciplinary action resulting from language in a written grievance).

The Third Circuit, meanwhile, has long held that prisons may discipline inmates for "insolence or disrespect toward a staff member" in a grievance. *Hadden v. Howard*, 713 F.2d 1003, 1006-07 (3d Cir. 1983). Though the claim in this case was one of due process rather than free speech, the question of whether such rules serve legitimate penological interests was the same. The court held that legitimate penological interests are served by restricting such content in grievances. "If it is possible for inmates maliciously to lie and maliciously to show disrespect toward prison staff members, merely by doing so within the context of filing an inmate complaint, then serious problems of staff morale and prison discipline may reasonably be expected to arise." *Id*. at 1007-08 (citing *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979)); *see also Torres v. Clark*, 522 Fed. App'x 103, 106 (3d Cir. 2013) ("use of abusive, obscene, or inappropriate language towards" an official in an outgoing letter "plainly violated the prison's permissible restriction on Torres's First Amendment

rights and therefore cannot form the basis for a retaliation claim"); *Corliss v. Varner*, 247 Fed. App'x 353, 355 (3d Cir. 2007) (following Seventh and Eighth Circuit cases to hold that regulation prohibiting "abusive, obscene or inappropriate language" is a permissible restriction on an inmate's constitutional rights in any prison context).

Finally, the Sixth Circuit has held that a prison does not violate the First Amendment when it removes an inmate from a legal advisor position because of aggressive speech and conduct employed while pursuing grievances. *Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001). The court assumed the inmate "had a right to file grievances," but held that "he did so in a manner that violated legitimate prison regulations and objectives" and thus was not engaged "in a protected activity." *Id*. "While it is true that a prisoner has a First Amendment right to file grievances against prison officials, if a prisoner violates a legitimate prison regulation, he is not engaged in protected conduct[.]" *Id*. (footnote omitted) (citation omitted) (internal quotation marks omitted) (citing *Pell*, 417 U.S. at 822); *see also Griffin v. Berghuis*, 563 Fed. App'x 411, 416 (6th Cir. 2014) (applying *Smith* to hold that a prisoner's complaint about prison conditions is not protected by First Amendment "if it is made in a manner incompatible with the institution's legitimate penological objectives"); *Lockett v. Suardini*, 526 F.3d 866, 874 (6th Cir. 2008) (inmate had no First Amendment right to insult prison employee during a hearing in violation of rule prohibiting insolent behavior).

In addition to the above circuits, many state courts have held that prisons do not violate the First Amendment by restricting or punishing disrespectful language in prison grievances. Most notably, in *In re Personal Restraint Petition of Parmelee*, 115 Wash. App. 273, 63 P.3d 800 (2003), the Washington Court of Appeals held that prisons have very good reasons for limiting "scandalous, indecent, or insolent language about corrections officers in written grievances." *Id.* at 286. "Given the ugly realities of prison life," if such rules were eliminated "we have no doubt that the impact would be a veritable barrage of similar written 'grievances,' filed not for the purpose of addressing prisoner concerns but for the purpose of venting frustration, resentment, and despair." *Id.*; *see also Semenchuk v. Ohio Dep't of Rehab. & Corr.*, 2010-Ohio-5551, at ¶ 33 (Ct. App.) (upholding an Ohio prison regulation subjecting inmates to punishment for "disrespectful, threatening or otherwise inappropriate comments" in grievances); *Tafari v. Fischer*, 62 A.D.3d 1215, 1216, 881 N.Y.S.2d 509 (2009) (prison can discipline inmate for "obscene and abusive descriptions" in a grievance); *Alward v. Golder*, 148 P.3d 424, 428 (Colo. App. 2006) ("Inmate's . . . First Amendment rights were not violated by defendants' actions in disciplining him for using offensive language in his grievance.").

In short, if Richey had filed his claim in countless other courts, including in state court in Washington, it would have been rejected out of hand. But because he filed it in the Ninth Circuit, he prevailed. The conflict is stark.

B. The Ninth Circuit's Cursory Denial of Qualified Immunity Conflicts with Numerous Decisions of this Court

The question presented is doubly important because the Ninth Circuit not only issued a First Amendment ruling that conflicts with countless other courts, but also held that the First Amendment right it declared was clearly established. This ruling conflicts with several principles of qualified immunity this Court has established and deeply "undermine[s] the values qualified immunity seeks to promote." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

1. Qualified immunity protects government officials from liability unless their actions violate clearly established rights

Government officials are "immune from suit under 42 U.S.C. § 1983 unless they have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'" *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)). "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it.'" *Id.* (alteration in original) (quoting *Plumhoff*, 134 S. Ct. at 2023). The standard requires "that 'existing precedent . . . placed the statutory or constitutional question beyond debate.'" *Id.* (alteration in original) (quoting *al-Kidd*, 563 U.S. at 741). The Court has "repeatedly told courts . . . not to define clearly established law at a

high level of generality" in order to determine "whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (alteration in original).

This "exacting standard" for clearly established rights "'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *Sheehan,* 135 S. Ct. at 1774 (alteration in original) (quoting *al-Kidd*, 563 U.S. at 743). The doctrine thus balances the "need to hold public officials accountable when they exercise power irresponsibly" with the important "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

2. The Ninth Circuit decision flouts this Court's repeated direction to rely on precedent that clearly addresses the conduct of an official

The ruling below conflicts with this Court's cases holding that clearly established rights exist only when authoritative precedent addresses the specific type of action taken by an official. *E.g.*, *Sheehan*, 135 S. Ct. at 1774; *Mullenix*, 136 S. Ct. at 308; *al-Kidd*, 563 U.S. at 740; *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015).

Prior to this case, no decision had held that prison officials violate an inmate's First Amendment right to petition simply by declining to process a grievance that included irrelevant abusive or threatening content. *Brodheim* addressed a retaliation claim and held that disrespectful language

in a grievance was "protected conduct" for which an inmate could not be threatened with retaliation. *Brodheim*, 584 F.3d at 1271. The *Brodheim* decision relied on *Bradley*, which held "that 'prison officials may not *punish* an inmate merely for using "hostile, sexual, abusive or threatening" language in a written grievance.'" *Brodheim*, 584 F.3d at 1271 (quoting *Bradley*, 64 F.3d at 1281-82) (emphasis added).

Petitioner did not punish Richey, threaten with punishment, or retaliate; he simply required Richey to rewrite a grievance and omit irrelevant abusive material. Neither *Brodheim* nor *Bradley* addressed this situation, and even this panel recognized that no prior case had "clearly established that merely refusing to accept a grievance for processing is a retaliatory adverse action." App. 7a. Nonetheless, the panel held that Officer Dahne violated a clearly established right to petition even though no prior case had found a violation in such circumstances.

The panel's holding is particularly jarring given that the Ninth Circuit had previously found no constitutional violation in a situation where an officer simply refused to process a grievance. In *Clark v. Woodford*, 36 Fed. App'x 240 (9th Cir. 2002),[5] an inmate sought to avoid PLRA exhaustion requirements after "correctional officers 'screened out' his complaints on the basis of his use of 'inappropriate statements[.]'" *Id.* at 241. The inmate argued that screening complaints to require removal of inappropriate language "violated his right to petition

[5] Under Ninth Circuit Rule 36-3(c)(iii), unpublished decisions issued before 2007 may be used to demonstrate the existence of a conflict among opinions.

the government for a redress of his grievances under the First Amendment as set forth in *Bradley*[.]" *Id.* The court disagreed. A requirement to resubmit "grievances after removing the 'inappropriate statements,' which included profanity and offensive language that was not essential to and likely detracted from the substance of his claim, does not constitute a 'punishment,' unlike in *Bradley*, and is not an 'exaggerated response to prison concerns.'" *Id.* at 241 (quoting *Turner*, 482 U.S. at 89-90).

In short, no prior case held that prisons must allow inmates to include irrelevant abuse in grievances. Thus, the Ninth Circuit flouted this Court's repeated admonitions that the clearly established analysis requires a court to "identify a case where an officer acting under similar circumstances" violated the constitution. *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

3. The ruling below conflicts with this Court's cases holding that rights are not clearly established by a circuit ruling in conflict with other circuits

The panel decision also conflicts with this Court's cases by denying qualified immunity when courts are divided on the issue presented and the broad consensus rejects a claimed right.

This principle was first established by *Wilson v. Layne*, 526 U.S. 603 (1999), where a split among the circuits on the governing legal issue developed after the events giving rise to the claim. In light of the conflict on the legal question that controlled the case, the Court upheld qualified immunity. "If judges thus disagree on a constitutional question, it is unfair to

subject [government officials] to money damages for picking the losing side of the controversy." *Id.* at 618.

The Court reapplied *Wilson* a decade later in *Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009). At that time, circuit courts were divided over "the consent-once-removed doctrine" allowing for a warrantless search of a house. However, the conflict had arisen because the Tenth Circuit case at hand had disagreed with three other circuits and two state courts. *Pearson* upheld qualified immunity to the defendant, reciting from *Wilson*. *Id.* at 245; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017) ("When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability."); *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (holding that government officials cannot fairly be "expected to predict the future course of constitutional law").

Officer Dahne's right to qualified immunity is analogous to the defendants in *Pearson* and even stronger than in *Wilson*. When Dahne directed Richey to rewrite his grievance, five federal circuits and numerous state courts had rejected First Amendment and realtaed challenges by inmates to prison regulation of abusive and disrespectful speech in grievances. *Infra* pp. 20-25. Ninth Circuit alone had a minority view, and even its cases were narrowly concerned with punishment or retaliation for speech. Richey, therefore, did not allege violation of a right that was so far beyond debate that Officer Dahne should have known he was violating the constitution. Rather, Officer Dahne had good reason to believe that the First Amendment did not preclude prison policies

that required inmates to omit abusive threatening content from grievances.

This stark conflict, together with the conflict among the lower courts on the First Amendment question, provides ample basis for this Court to grant the petition. Alternatively, the Court could summarily reverse on qualified immunity grounds, though that would leave the Ninth Circuit's erroneous First Amendment analysis in place, governing prisons in a large swath of the country.

C. The Question Presented is Important and the Ninth Circuit's Decision is Wrong

Whether prison grievance systems can restrict gratuitous abusive content is an important question that the Ninth Circuit has resolved incorrectly.

Over 17,000 inmates reside in Washington state prisons, and they file roughly 20,000 grievances annually.[6] In total, state prisons in the Ninth Circuit house 225,000 inmates,[7] and likely process hundreds

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[6] https://www.doc.wa.gov/docs/publications/reports/400-RE002.pdf; ER 105.

[7] Alaska, http://www.correct.state.ak.us/admin/docs/2017Profile.pdf?11082018; Arizona, https://corrections.az.gov/prisons, https://corrections.az.gov/capacity-custody-level/2018/12; California, https://www.cdcr.ca.gov/Facilities_Locator/, https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad181205.pdf; Hawaii, http://dps.hawaii.gov/about/divisions/corrections/; https://dps.hawaii.gov/wp-content/uploads/2018/12/Pop-Reports-EOM-2018-11-30.pdf; Idaho, https://www.idoc.idaho.gov/content/prisons; Montana, https://cor.mt.gov/Adult/MSP, https://cor.mt.gov/Portals/104/Resources/Reports/daily.pdf; Nevada, http://doc.nv.gov/Facilities/Home/, http://doc.nv.gov/uploadedFiles/docnvgov/content/About/Statistics/Monthly_Reports

of thousands of grievances annually. Thus, while the Ninth Circuit's First Amendment analysis of prison grievances is well outside the mainstream, it governs a massive number of grievances filed ever year.

If States must allow inmates to include gratuitous abusive language in grievances, then inmates will file more such grievances and litigate them, as the facts of this case demonstrate. After the panel here reversed dismissal of Richey's claim, he began filing dozens of offensive grievances against Washington corrections officers, and he filed a lawsuit (which has survived summary judgment) when he was told to rewrite those grievances. *See Richey v. Aiyeku*, No. 4:16CV05047 (E.D. Wash. Mar. 14, 2017); *see also, e.g.*, *In re Parmelee*, 115 Wash. App. at 286 ("Given the ugly realities of prison life," if prisons could not restrict abusive content in grievances, "we have no doubt that the impact would be a veritable barrage of similar written 'grievances,' filed not for the purpose of addressing prisoner concerns but for the purpose of venting frustration, resentment, and despair.").

Moreover, the Ninth Circuit's analysis means not only that most States' regulations governing grievance content are unconstitutional,[8] but also that the federal government's rules for processing

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_by_Year/StatFacts_07312018.pdf; Oregon, https://www.oregon.gov/doc/Pages/about_us.aspx; Washington, https://www.doc.wa.gov/docs/publications/reports/400-RE002.pdf.

[8] See note 7 above, listing states with prison regulations restricting disrespectful or abusive content.

grievances are unconstitutional. *See* 28 C.F.R. § 542.17(a) (allowing federal prisons to "reject and return to the inmate without response a Request or an Appeal that is written by an inmate in a manner that is obscene or abusive"). The Bureau of Prisons should not have to process grievances differently in the Ninth Circuit based on that court's outlier rule.

The harms caused by the Ninth Circuit's extraordinary rule are particularly unjustified because the rule is so clearly incorrect. Under *Turner*, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Courts analyze four factors to decide if prison rules are reasonable: (1) "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) the "absence of ready alternatives" or if the rule at issue is an "exaggerated response to prison concerns." *Id.* at 89-90 (internal quotation marks omitted). Each of these factors supports the constitutionality of Washington's rules and Officer Dahne's actions here.

First, there is a "valid, rational connection between the prison regulation and the legitimate

governmental interest put forward to justify it." *Turner*, 482 U.S. at 89. As many other circuits have recognized, limiting disrespectful language in grievances promotes respect between offenders and prison staff and avoids needless hostility. *See, e.g.*, *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986) (holding that such regulations have a "direct and elementary relation to the needs of prison administration" because "[w]e can imagine few things more inimical to prison discipline than allowing prisoners to abuse guards"). Indeed, even this panel recognized that Officer Dahne had "valid grounds" to ask Richey to rewrite his grievance "in the interest of maintaining good relations between prisoners and guards." App. 6a.

Second, "alternative means of exercising the right [] remain open to prison inmates." *Turner*, 482 U.S. at 90. Requiring inmates to omit irrelevant abusive and threatening language does not meaningfully restrict their right to petition and to access the courts. Richey easily could have conveyed the substance of his complaint without insulting the officer's diet or referring to officers being "slapped and strangled by some prisoners." *See Lewis v. Casey*, 518 U.S. 343, 351-52 (1996) (meaningful access to the courts is not compromised where inmates' efforts to pursue legal claims are not actually hindered). In fact, Washington's policy protects inmates who have genuine complaints by eliminating misuse of the system. *See Woodford*, 548 U.S. at 93-95.

Third, the Ninth Circuit ignored "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally." *Turner*, 482 U.S. at 89. Forcing States to allow inmates to insult and threaten guards will harm staff morale and increase tension between offenders and staff. *See, e.g., Hadden*, 713 F.2d at 1008 (recognizing that allowing inmates "maliciously to show disrespect toward prison staff members" would lead to "serious problems of staff morale and prison discipline"). It will also harm other inmates by gumming up the grievance system and creating a more hostile environment. *See, e.g., Mosley*, 532 F.3d at 1279 (acknowledging that prison officials could assume that grievance, "which reeked of disrespect for the administrators' authority, would be noised about the prison's population and, if ignored, could seriously impede their ability to maintain order"); *In re Parmelee*, 115 Wash. App. at 286 (recognizing that allowing scandalous attacks on guards in grievances would lead to "a veritable barrage of similar written 'grievances'").

Fourth, there are no "ready alternatives," and requiring inmates to omit abusive language is not an "'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 89-90. The Ninth Circuit has repeatedly suggested, and did so again here, that prisons could simply reshape their grievance systems so that grievances are "insulate[d] from other prisoners and from those prison officials who are the target of the grievance, so that disrespectful language in a grievance [would] not raise any substantial security concern." App. 4a-5a (citing *Brodheim*, 584 F.3d at 1273). This absurd claim is a perfect example of why

"prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89 (alterations in original) (citing *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128 (1977)).[9] Isolating grievance reviewers or creating special reviewers whenever an inmate includes gratuitous insults would be a logistical nightmare. Washington prisons review over 20,000 grievances a year, and Officer Dahne's institution alone handles over 300 a month. Even if it were possible to ensure that the initial reviewer of a grievance was not the target of offensive language in the grievance, Washington's grievance policy understandably contemplates that an officer who is the subject of a grievance will have an opportunity to review it before the prison responds. ER 68. And it is hard to fathom how prisons could prevent inmates from sharing copies of their offensive grievances with each other. *See, e.g., Mosley*, 532 F.3d at 1279 (recognizing this problem).

In short, Washington's grievance policies, which mirror state (and federal) policies around the country, serve legitimate penological interests and are constitutional. The Ninth Circuit's contrary ruling and continued misapplication of *Turner* present an important question that the Court should address.

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[9] *See also, e.g., Beard v. Banks*, 548 U.S. 521, 528 (2006) (courts owe substantial deference to the judgment of prison administrators); *Shaw*, 532 U.S. at 232 (same); *Thornburgh v. Abbott*, 490 U.S. 401, 413, 418 (1989) (same).

D. This Case is an Ideal Vehicle to Address the Question Presented, Which Needs No Further Percolation

There is no vehicle problem that would prevent the Court from reaching the question presented, and no reason for the Court to delay in addressing it.

The Ninth Circuit held that summary judgment was properly granted for inmate Richey on his claim that Officer Dahne violated his First Amendment right to petition, and held that this right was clearly established. App. 4a-6a. The material facts are undisputed, and the issues before the Court would be purely legal. A ruling on the question presented would be dispositive.

Moreover, though the panel opinion is unpublished, there is no reason to wait for this issue to percolate further in the Ninth Circuit or elsewhere. The panel opinion here is rooted in the Ninth Circuit's published opinion in *Brodheim*, 584 F.3d 1262. Since issuing that opinion in 2009, the Ninth Circuit has cited it over 100 times, and district courts in the Ninth Circuit have cited it over 1,500 times. It has long since become clear that the Ninth Circuit is not going to reverse course and bring its precedent in line with other circuits, as confirmed here by the denial of rehearing en banc despite a petition clearly demonstrating the conflict. And there is no reason to wait for further percolation elsewhere because many other courts have reached conclusions contrary to the Ninth Circuit's, with no indication that any are even considering adopting its misguided view. The time is now for the Court to review this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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December 12, 2018

APPENDIX

APPENDIX

Order (Sept. 13, 2018),
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Memorandum (Apr. 25, 2018),
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Part Report and Recommendation, Granting
in Part and Denying in Part Plaintiff's
Motion for Partial Summary Judgment, and
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Judgment (Dec. 15, 2016),
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United States District Court, W.D. Wash.,
No. 3:12-cv-05060-BHS 8a

Order Adopting in Part and Modifying in
Part Report and Recommendation, Denying
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Declaration of Dennis Dahne (Mar. 17, 2016),
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United States District Court, W.D. Wash.,
No. 3:12-cv-05060-BHS 104a

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS W.S. RICHEY, Plaintiff-Appellee, v. D. DAHNE, Defendant-Appellant.	No. 17-35032 D.C. No. 3:12-cv-05060-BHS Western District of Washington, Tacoma ORDER

Before: W. FLETCHER and GOULD, Circuit Judges, and EZRA,* District Judge.

The panel voted to deny Appellant's Petition for Rehearing.

Judges Fletcher and Gould voted to deny Appellant's Petition for En Banc Rehearing, and Judge Ezra has so recommended.

The full court has been advised of Appellant's Petition for En Banc Rehearing. Fed. R. App. P. 35.

Appellant's Petition for Rehearing and the Petition for En Banc Rehearing are DENIED.

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS W.S. RICHEY, Plaintiff-Appellee, v. D. DAHNE, Defendant-Appellant.	No. 17-35032 D.C. No. 3:12-cv-05060-BHS MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted March 13, 2018
Seattle, Washington

Before: W. FLETCHER and GOULD, Circuit Judges, and EZRA,** District Judge.

Thomas Richey, a Washington state prisoner, filed an internal grievance complaining about the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

actions of a prison guard. The grievance included rude comments about the guard's weight, including describing her as "extremely obese." Dennis Dahne, an official charged with handling grievances, took issue with parts of the grievance and told Richey to rewrite the grievance to eliminate the objectionable commentary. Richey submitted a "rewrite" that kept the rude comments, and that resulted in the facts that generated this lawsuit.

Dahne did not process the rewritten grievance still containing the offensive language about the guard's weight, and the grievance was subsequently considered to be "administratively withdrawn," which meant that it would not be processed.

Richey sued for violation of his First Amendment right to petition and for retaliation for exercising his rights under the First Amendment.[1] The district court granted summary judgment to Richey on the right to petition claim, and denied summary judgment to Dahne on the retaliation claim, holding that there were material questions of fact related to that claim.

Dahne appeals, arguing that he is entitled to qualified immunity on both claims. We affirm the district court's grant of summary judgment to Richey on his right to petition claim, but reverse the district court on qualified immunity grounds on his retaliation claim.

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[1] We previously reviewed this case at the motion to dismiss stage, holding that Richey had stated a plausible claim for relief. *Richey v. Dahne*, 624 F. App'x 525 (9th Cir. 2015).

1. Under the First Amendment, speech is protected unless the speech falls under one of a few narrowly defined categories of unprotected speech such as fighting words, defamation, or obscenity. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-84 (1992). We have previously held that "disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment." *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (citing *Bradley v. Hall*, 64 F.3d 1276, 1281-82 (9th Cir. 1995)). But to say that a category of speech is protected does not mean that all governmental limits on such speech are unconstitutional. In *Turner v. Safley*, the United States Supreme Court held that a prison regulation that restricts inmates' constitutional rights could be constitutionally sound if it "is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987). The standard under *Turner* requires that a valid regulation must (1) be content neutral, (2) logically advance proper goals such as institutional security and safety, and (3) not be an exaggerated response in relation to those goals. *Id.* at 93. The Supreme Court later clarified that a prison regulation is considered to be content neutral if its purpose is "unrelated to the suppression of expression." *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989) (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

In *Brodheim* we held squarely that no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances. *Brodheim*, 584 F.3d at 1273. We reasoned that grievances were easy to insulate from other prisoners and from those prison officials who are the

target of the grievance, so that disrespectful language in a grievance did not raise any substantial security concern. *Id*. "A prisoner's statement in a grievance need not have any more impact on prison security through the maintenance of respect than the prisoner's unexpressed thoughts." *Id*. (quoting *Bradley* 64 F.3d at 1281).

Dahne contends that Brodheim clearly established only that it would be unconstitutional to punish a prisoner because of the content of the grievance, and not that it was unconstitutional to refuse the grievance because of that content. We reject this contention. The holding of *Brodheim* is not as narrow as Dahne contends. While it is true that *Brodheim* involved a warning or threat against a prisoner because of the content of a grievance, limiting *Brodheim* to only those types of cases would require that we ignore the *Brodheim* court's reasoning, and that we disregard the broader Frist Amendment framework under *Turner*. Instead, we consider that a correct reading of the scope of the holding in *Brodheim* is that rules prohibiting disrespectful language do not serve a legitimate penological interest in the special context of prison grievances. Under the *Turner* framework, a prison may constrain the expression of prisoners for a non-content-based legitimate penological reason, such as avoiding hostilities or potential violence. But absent such a legitimate penological reason, content-based limitation of a prisoner's expression is unconstitutional. Prisoners, just like those on the outside, have and value their First Amendment rights.

We clarify, however, that a prison official merely requesting that a prisoner rewrite a grievance is not a First Amendment violation. The prison could and did have valid grounds to make such a request in the interest of maintaining good relations between prisoners and guards. But, the violation here occurred when Dahne refused to allow the grievance to proceed through the administrative process after Richey did not rewrite it in a way that satisfied Dahne's sense of propriety. Functionally, allowing curtailment of the prison's grievance process in this way would mean that only a grievance that conformed to Dahne's personal conception of acceptable content could get meaningful review. That is the sort of content-based discrimination that runs contrary to First Amendment protections.

We also stress that the holding of *Brodheim* relates only to the narrow category of cases dealing with prison grievances. Nothing about *Brodheim* or our holding today should be construed as suggesting that prisoners have a right to publicly use disrespectful language in the broader prison environment. Such actions would plausibly raise legitimate penological concerns related to the security of guards and the desirability of maintaining harmonious relationships between guards and prisoners to the extent possible. Hence prisons will often be justified in curtailing that sort of public disrespectful behavior outside of the prison grievance process.

2. Turning to Richey's retaliation claim, we hold that the district court erred by not granting summary judgment to Dahne on qualified immunity

grounds. In *Rhodes v. Robinson*, we held that a retaliation claim has five elements:

> (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

408 F.3d 559, 567-68 (9th Cir. 2005). Neither our prior case law nor that of the Supreme Court has clearly established that merely refusing to accept a grievance for processing is a retaliatory adverse action. Richey claims that under *Brodheim* an "adverse regulatory action" can count as a retaliatory adverse action. And he argues that refusing to process the grievance is an adverse regulatory action. However, in context in *Brodheim* the "adverse regulatory action" language refers to some additional punitive action or threat of punitive action over and above merely refusing to accept the grievance. *Brodheim*, 584 F.3d at 1270-71. Because of the lack of case law addressing the issue of whether not processing a grievance could be viewed as retaliation, it is not the case that "every reasonable official would have understood" that refusing a grievance violates a prisoner's right against retaliation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). We reverse the district court and grant summary judgment for Dahne on Richey's retaliation claim on qualified immunity grounds.

AFFIRMED IN PART AND REVERSED IN PART.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS W.S. RICHEY, Plaintiff, v. D. DAHNE, Defendant.	CASE NO. C12-5060BHS ORDER ADOPTING IN PART AND MODIFYING IN PART REPORT AND RECOMMENDATION, GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before Court on the Report and Recommendation ("R&R") of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 59), Plaintiff Thomas W.S. Richey's ("Richey") objections (Dkt. 62), and Defendant Dennis Dahne's ("Dahne") objections (Dkt. 63). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL AND FACTUAL BACKGROUND

Originally, both parties asserted that the facts were undisputed. Dkt. 46 at 1-2; Dkt. 52 at 1. Now, however, it appears that some material facts are disputed.

Richey, an inmate, submitted a prison grievance that identified a prison officer as "an extremely obese Hispanic female guard . . . ." Dkt. 47, Declaration of Thomas WS Richey ("Richey Dec."), Exh. A. An officer, who is not a party to this proceeding, declined to accept the grievance and, instead, returned the grievance to Richey with and instruction to rewrite it appropriately and resubmit it within five days. *Id.* Richey rewrote portions of the grievance, repeated the language quoted above, and resubmitted the grievance. *Id.*, Exh. B. The R&R states that an unidentified officer refused to accept the grievance and, instead, ordered Richey to rewrite the grievance stating that "Hispanic female is adiquit [sic]. Extremely obese is un-necessary [sic] and inappropriate." Dkt. 59 at 4. The record, however, reflects that Dahne ordered Richey to rewrite the grievance. Dahne declares as follows:

> I directed Offender Richey to comply with the previous rewrite instruction he had gotten because the grievance contained so much irrelevant, inappropriate, and borderline threatening extra language. I told him to: "Rewrite as directed. Hispanic female is adequate [sic]. Extremely obese in un-necessary [sic] and inappropriate." I did not have room to include every single part of the grievance that was not in accordance with the OGP guidelines, but I believed a reasonable person could understand that making repeated references to a staff member's weight and talking about guards getting strangled have nothing to do with an actual grievable issue and are inappropriate.

Dkt. 52-2 at 3-4. Dahne did not date this rewrite order. Dkt. 70, Exh. 2.

On December 7, 2016, Richey submitted an offender's kite to Dahne asking if Dahne, as the grievance coordinator, was going to process his grievance. *Id.*, Exh. 3. Dahne responded as follows: "No, due to your decision not to rewrite as requested, your grievance has been administratively withdrawn." *Id.* The Court was originally under the impression that there was a rule that failure to rewrite a grievance automatically resulted in an administrative withdrawal of the grievance. After further review of the record, however, it does not appear that this is a mandatory rule. Instead, it appears that the grievance coordinator may also grant an extension of the timeframe to rewrite the grievance or automatically appeal an initial grievance to the next level. Dkt. 52-2 at 38-40. Regardless, Richey asserts that Dahne failed to date the document ordering Richey to rewrite his grievance and, therefore, questions of fact exist whether five days passed before Dahne considered the grievance administratively withdrawn. Dkt. 70 at 4 (citing *id.*, Exh. 2).

Furthermore, Richey has submitted evidence that Dahne accepted a rewritten grievance dated December 8, 2016 with the same identification number as the original grievance. *Id.*, Exh. 4. On this grievance Dahne wrote that it "will be forwarded to HQ as appeal of coordinators request for rewrite." *Id.* Richey contends that, if his response was procedurally untimely and withdrawn, the grievance could not have been forwarded as an appeal. Dkt. 70 at 5. This

evidence appears to contradict Dahne's claim that he administratively withdrew Richey's initial grievance.

These facts allegedly implicate two provision of the Washington Department of Corrections' ("DOC") Offender Grievance Program ("OGP"). First, if the inmate's "complaint contains profane language, except when used as a direct quote," the grievance form is returned "unprocessed with a notation to rewrite it." Dkt. 52-2 at 33. Second, the Grievance Program Manager and Dahne declare that if an inmate "does not follow the rewrite instructions within the required timeframe" – within five days of receipt of those instructions – "the matter is considered administratively withdrawn, which is the procedural determination made when OGP deadlines are missed without reason for the delay." Dkt. 52-1 at 5; Dkt. 52-2 at 4.

On December 6, 2012, the Court granted Dahne's motion to dismiss Richey's claim for failure to state a claim. Dkt. 21. In reversing this Court's order granting Dahne's motion to dismiss, the Ninth Circuit concluded that Richey had stated a plausible claim for violation of his First Amendment right to grieve and retaliation for exercising that right and, regarding the defense of qualified immunity, provided as follows:

> Dahne seeks qualified immunity because his "actions and decisions were based on his application of Department policy and his attempt to have Richey comply with the grievance program's requirements so that Richey's complaint could be addressed." At the motion to dismiss stage, however, "it is the defendant's conduct as alleged in the complaint

> that is scrutinize for 'objective legal reasonableness,'" *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)) (emphasis in original), and Richey's complaint says nothing about whether the prison had any language policy, what that policy was, and how consistently that policy was enforced. Dahne is therefore not entitled to qualified immunity at this time.

Richey v. Dahne, 624 F. App'x 525, 526 (9th Cir. 2015).

On June 27, 2016, Judge Strombom issued the R&R recommending that the Court deny Richey's motion for summary judgment and grant Dahne's motion for summary judgment because Dahne is entitled to qualified immunity. Dkt. 59. Judge Strombom concluded (1) that material questions of fact exist on Richey's First Amendment claim, Dkt. 59 at 14, (2) that material questions of fact exist on Richey's retaliation claim, *Id*. at 16, and (3) Dahne is entitled to qualified immunity because Richey's constitutional rights were not clearly established, *Id.* at 19.

On July 7, 2016, Richey filed objections arguing that his rights were clearly established at the time of the alleged violation. Dkt. 62. On July 18, 2016, Dahne responded. Dkt. 64. On July 22, 2016, Richey replied. Dkt. 66.

On July 11, 2016, Dane filed objections arguing that there are no disputed issues of material fact and that Dahne is entitled to summary judgment that he did not violate any of Richey's constitutional rights. Dkt. 63. On July 18, 2016, Richey responded. Dkt. 65.

On September 14, 2016, the Court issued an order adopting in part and modifying in part the R&R, granting Dahne's motion for summary judgment, and denying Richey's motion for summary judgment. Dkt. 68. In relevant part, the Court found that, out of the three interactions between Richey and corrections officers regarding his grievances, Dahne personally participated in only one of those interactions. Dkt. 68 at 2. The Clerk then entered judgment in favor of Dahne against Richey. Dkt. 69.

On September 19, 2016, Richey filed a motion for relief from judgment arguing that Dahne personally participated in two of the three interactions. Dkt. 70. On December 15, 2016, the Court granted Richey's motion and vacated its previous order and the judgment. Dkt. 73.

II. DISCUSSION

A. Standard of Review

The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instruction. Fed. R. Civ. P. 72(b)(3).

In this case, the parties have properly objected to the three main conclusions set forth in the R&R. Thus, the Court will conduct a *de novo* review of the motions.

B. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on

file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In this case, the Court agrees with Dahne that the material facts are undisputed and the matter turns on questions of law. Thus, the Court declines to adopt the R&R to the extent that it concludes that material questions of fact exist.

C. 42 U.S.C. § 1983

Section 1983 is a procedural device for enforcing constitutional provisions and federal statutes; the section does not create or afford substantive rights. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under section 1983, a plaintiff must demonstrate that (1) the conduct complained of was committed by a person acting under color of state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or by the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Qualified immunity shields government officials from civil liability unless a plaintiff demonstrates: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). The Court has discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances

in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

1. Constitutional Violations

Richey asserts two constitutional claims. First, Richey asserts that his constitutional right of access to the courts was infringed. The Ninth Circuit has held "that prison official may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance." *Bradley v. Hall*, 64 F.3d 1276, 1282 (9th Cir. 1995). It has also "held that disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment." *Richey v. Dahne*, 624 Fed. Appx. 525 (9th Cir. 2015) (quoting *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009)). In other words, "applying the *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), factors for assessing the constitutionality of a prison regulation, a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance." *Richey*, 624 Fed. Appx. at 525 (citing *Brodheim*, 584 F.3d at 1272-73).

In this case, Richey has met his burden to show a violation of his constitutional right. Dahne took the adverse action of ordering Richey to rewrite his grievance because of inappropriate language in the grievance. *Richey*, 624 Fed. Appx. at 525 (citing *Brodheim*, 584 F.3d at 1272-73). Despite Dahne's numerous arguments to the contrary, it does not get much clearer than the Ninth Circuit reiterating the law in an earlier order in the same case. Moreover, the Court adopts the R&R's rejection of each of Dahne's arguments on this issue. Dkt. 72 at 14. The Court, however, rejects the ultimate conclusion that Dahne has failed to establish an absence of material questions of fact. Instead, the issue is one of law, and

Richey's motion and denies Dahne's motion on Richey's First Amendment freedom of speech claim.

Second, Richey asserts that Dahne retaliated against Richey because Richey exercised his first amendment rights. "Retaliation against prisoners for their exercise of [their First Amendment] right is itself a constitutional violation, and prohibited as a matter of 'clearly established law.'" *Brodheim*, 584 F.3d at 1269. There are five elements to a retaliation claim:

> (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

Id. (quoting *Rhodes v. Robinson*, 408 F.3d 559, 566 (9th Cir. 2005)).

In this case, Richey has met his burden on each element of his claim. Dahne took the adverse action of administratively withdrawing Richey's grievance. Although Dahne argues that ordering an inmate to rewrite a grievance is not an adverse action, the R&R sufficiently rejects this argument. Dkt. 59 at 15. "Outside the prison context, we have never held that a plaintiff must establish an explicit threat to prevail on a retaliation claim. . . . We see no reason why a different standard should apply in this setting." *Brodheim*, 584 F.3d at 1270. Richey has submitted sufficient evidence to create questions of fact whether failing to accept a grievance and being precluded from accessing the court would follow his failure to comply

with Dahne's orders. Thus, no matter how egregious the underlying conduct alleged in the grievance, an inmate would have no recourse if he allegedly, and in complete discretion of the grievance coordinator, insulted a guard in the written grievance.

As for causation, Richey has shown that questions of fact also exist on this issue. In the offender's kite, Dahne wrote that, due to Richey's decision not to rewrite as Dahne had ordered Richey to do, Dahne had administratively withdrawn the grievance. Dkt. 70 at 13. While Dahne asserts that he was following the procedural requirement of administrative withdrawal, Richey has submitted sufficient evidence to show that material questions of fact exist for trial. For example, Dahne's request to rewrite is not dated, making it unclear when the five-day response deadline began and ended. Richey also claims that he did submit a "rewrite" wherein he refused to rewrite his grievance. In light of this evidence, the Court concludes that material questions of fact preclude summary judgment.

Regarding the chilling of an inmate's free speech, Dahne's arguments are without merit. In the Ninth Circuit, "a prisoner's fundamental right of access to the courts hinges on his ability to access the prison grievance system." *Bradley*, 64 F.3d at 1279. The Ninth Circuit has "held that an objective standard governs the chilling inquire; a plaintiff does not have to show that 'his speech was actually inhibited or suppressed,' but rather that the adverse action at issue 'would chill or silence a person of ordinary firmness from future First Amendment activities.'" *Brodheim*, 584 F.3d at 1271. A reasonable juror could conclude that repeatedly refusing to accept

a grievance because it contains inappropriate language would chill a person of ordinary firmness from submitting additional grievances.

Regarding the final element, Richey "must show that the challenged action 'did not reasonably advance a legitimate correctional goal.'" *Brodheim*, 584 F.3d at 1271 (quoting *Rhodes*, 408 F.3d at 568). Richey has easily met this burden because Dahne has failed to advance a legitimate goal. Dahne argues as follows:

> [P]rison officials have a legitimate penological interest in requiring Richey, and all inmates, to comply with the procedural requirements of the grievance program. Prisons have a legitimate penological interest in requiring that inmate grievances contain only a straightforward statement of concern about the one issue the inmate is grieving and comply with deadlines. If prisoners are able to flout the OGP's procedural rules and still demand that the prison process their grievances, then the ability of prisons to resolve disputes, maintain order and respect, and enforce prison rules is threatened.

Dkt. 52 at 21. Contrary to Dahne's argument, the Ninth Circuit has held that "a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance." *Richey*, 624 Fed. Appx. at 525 (citing *Brodheim*, 584 F.3d at 1272-73). Although Dahne also relies on the timing deadlines, questions of fact exist whether Dahne actually enforced the deadlines or withdrew the grievance in retaliation for Richey's failure to rewrite

the grievance as ordered. Therefore, the Court denies both motions for summary judgment on this aspect of Richey's retaliation claim because material questions of fact exist for trial.

2. Clearly Established Law

Government officials may be immune from constitutional violations if the law was not clearly established at the time of the incident. *Ashcroft*, 131 S. Ct. at 2080.

In this case, the R&R concludes that Dahne is entitled to qualified immunity. Specifically, the R&R concludes that

> [w]hile at the time of the challenged conduct in this case the Ninth Circuit had established that inclusion of disrespectful language in a grievance 'is itself protected activity,' it cannot be said that instructing an inmate to rewrite a grievance because of the inclusion thereof, necessarily amounted to a violation of an inmate's First Amendment right to redress grievances.

Dkt. 59 at 19. Contrary to this conclusion, the Court has concluded that failure to accept a grievance because of inappropriate or disrespectful language is a question of law and not a question of fact. As such, the law is clearly established on this issue because the Ninth Circuit has held that "a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance." *Richey*, 624 Fed. Appx. at 525 (citing *Brodheim*, 584 F.3d at 1272-73). Dahne took the action of ordering a rewrite and administratively withdrawing the grievance. The

question becomes whether Dahne would objectively know that his actions were "adverse" actions. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (liability "turns on the 'objective legal reasonableness' of the action."). The Court concludes that a reasonable officer would know that either rejecting or withdrawing a grievance because it included offensive language was a constitutional violation.

In fact, the language from the Ninth Circuit cases leaves almost no doubt on this issue. For example, "a prisoner's fundamental right of access to the courts hinges on his ability to access the prison grievance system." *Bradley*, 64 F.3d at 1279. We hold that "prison officials may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance." *Id.* at 1282. Similarly, "[i]t is *well-established* that, among the rights they retain, prisoners have a First Amendment right to file prison grievances." *Brodheim*, 584 F.3d at 1269 (emphasis added). Under these principles, the Court concludes that the contours of Richey's rights to file a grievance were "'sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft*, 563 U.S. at 741 (citing Anderson, 483 U.S. at 640). Therefore, the Court rejects Dahne's request for qualified immunity on the basis that the law was not clearly established.

Dahne, however, also argues that his "actions and decisions were based on his application of Department policy and his attempt to have Richey comply with the grievance program's requirements so that Richey's complaint could be addressed." Dkt. 52 at 23. "The doctrine of qualified immunity shields

public officials performing discretionary functions for personal liability under certain circumstances." *Grossman v. City of Portland*, 33 F.3d 1200, 1208 (9th Cir. 1994). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). "Unlike in many [qualified immunity] cases, here the allegedly unconstitutional action undertaken by the individual defendant consists solely of the enforcement of an ordinance which was duly enacted by the city council." *Grossman*, 33 F.3d at 1209. "Courts have accordingly held that the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." *Id.*

> As with most legal matters, there are no absolutes here. On the one hand, an officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. On the other, as historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. Where a statue authorizes official conduct which is patently violative of fundamental constitutional principles, an

> officer who enforces that statute is not entitled to qualified immunity. Similarly, an officer who unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity even if there is no clear case law declaring the ordinance or the officer's particular conduct unconstitutional.

Id. at 1209-10.

In this case, Dahne asserts this doctrine with respect to Richey's retaliation claim. For example, Dahne argues that "[c]onsistent with Department policy, Dahne administratively closed the grievance because Richey refused to comply with a rewrite instruction within the required time period." Dkt. 52 at 23. Richey, however, has submitted sufficient evidence to create material questions of fact on this action. The lack of a date on the rewrite order and the December 8, 2011 grievance under the same identification number undermine Dahne's assertion that he administratively withdrew Richey's grievance because of a lapsed deadline. Accordingly, the Court denies Dahne's request for immunity on this issue because material questions of fact exist.

III. ORDER

Therefore, it is hereby **ORDERED** that the Court adopts in part and modifies in part the R&R (Dkt. 59), Richey's motion for partial summary judgment (Dkt. 46) is **GRANTED in part** and **DENIED in part**, and Dahne's cross-motion for summary judgment (Dkt. 52) is **DENIED**. The parties

shall meet and confer and submit a joint status report regarding pretrial and trial deadlines.

Dated this 15th day of December, 2016.

s/ Ben H. Settle
BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS W.S. RICHEY, Plaintiff, v. D. DAHNE, Defendant.	CASE NO. C12-5060BHS ORDER ADOPTING IN PART AND MODIFYING IN PART REPORT AND RECOMMENDATION, DENYING PLAINITFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND GRANTING DEFEDNAT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before Court on the Report and Recommendation ("R&R") of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 59), Plaintiff Thomas W.S. Richey's ("Richey") objections (Dkt. 62), and Defendant Dennis Dahne's ("Dahne") objections (Dkt. 63). The Court has reconsidered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL AND FACTUAL BACKGROUND

The undisputed facts are fairly simple.[1] Richey, an inmate, submitted a prison grievance that

[1] Both parties assert that there are no disputed issues of material facts. Dkt. 46 at 1-2; Dkt. 52 at 1.

identified a prison officer as "an extremely obese Hispanic female guard . . . ." Dkt. 47, Declaration of Thomas WS Richey ("Richey Dec."), Exh. A. An officer, who is not a party to this proceeding, declined to accept the grievance and, instead, returned the grievance to Richey with an instruction to rewrite it appropriately and resubmit it within five days. *Id.* Richey rewrote portions of the grievance, repeated the language quoted above, and resubmitted the grievance. *Id.*, Exh. B. An officer, who is not a party to this proceeding, refused to accept the grievance. *Id.* Instead, the officer ordered Richey to rewrite the grievance stating that "Hispanic female is adiquit [sic]. Extremely obese is un-necessary [sic] and inappropriate." *Id.*

Richey failed to rewrite and resubmit the grievance. Instead, Richey submitted an offender's kite to Dahne asking if Dahne, as the grievance coordinator, was going to process his grievance. *Id.*, Exh. C. Dahne responded as follows: "No, due to your decision not to rewrite as requested, your grievance has been administratively withdrawn." *Id.*

These facts implicate two provisions of the Washington Department of Corrections' ("DOC") Offender Grievance Program ("OGP"). First, if the inmate's "complaint contains profane language, except when used as a direct quote," the grievance form is returned "unprocessed with a notation to rewrite it." Dkt. 52-2 at 33. Second, if an inmate "does not follow the rewrite instruction within the required timeframe" – within five days of receipt of those instruction – "the matter is considered administratively withdrawn, which is the procedural determination made when OGP deadlines

are missed without reason for the delay." Dkt. 52-1 at 1; Dkt. 52-2 at 4.

On December 6, 2012, the Court granted Dahne's motion to dismiss Richey's claim for failure to state a claim. Dkt. 21. In reversing this Court's order granting Dahne's motion to dismiss, the Ninth Circuit concluded that Richey had stated a plausible claim for violation of his First Amendment right to grieve and retaliation for exercising that right and, regarding the defense of qualified immunity, provided as follows:

> Dahne seeks qualified immunity because his "actions and decisions were based on his application of Department policy and his attempt to have Richey comply with the grievance program's requirements so that Richey's complaint could be addressed." At the motion to dismiss stage, however, "it is the defendant's conduct as alleged in the complaint that is scrutined for 'objective legal reasonableness,'" *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)) (emphasis in original), and Richey's complaint says nothing about whether the prison had any language policy, what that policy was, and how consistently that policy was enforced. Dahne is therefore not entitled to qualified immunity at this time.

Richey v. Dahne, 624 F. App'x 525, 526 (9th Cir. 2015).

On June 27, 2016, Judge Strombom issued the R&R recommending that the Court deny Richey's motion for summary judgment and grant Dahne's motion for summary judgment because Dahne is

entitled to qualified immunity. Dkt. 59. Judge Strombom concluded (1) that material questions of fact exist on Richey's First Amendment claim, Dkt. 59 at 14, (2) that material questions of fact exist on Richey's retaliation claim, *Id*. at 16, and (3) Dahne is entitled to qualified immunity because Richey's constitutional rights were not clearly established, *Id*. at 19.

On July 7, 2016, Richey filed objections arguing that his rights were clearly established at the time of the alleged violation. Dkt. 62. On July 18, 2016, Dahne responded. Dkt. 64. On July 22, 2016, Richey replied. Dkt. 66.

On July 11, 2016, Dahne filed objections arguing that there are no disputed issues of material fact and that Dahne is entitled to summary judgment that he did not violate any of Richey's constitutional rights. Dkt. 63. On July 18, 2016, Richey responded. Dkt. 65.

II. DISCUSSION

A. Standard of Review

The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

In this case, the parties have properly objected to the three main conclusions set for the in the R&R. Thus, the Court will conduct a *de novo* review of the motions.

B. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In this case, the Court agrees with Dahne that the material facts are undisputed and that matter turns on questions of law. Thus, the Court declines to adopt the R&R to the extent that it concludes that material questions of fact exist.

C. 42 U.S.C § 1983

Section 1983 is a procedural device for enforcing constitutional provisions and federal statues; the section does not create or afford substantive rights. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under section 1983, a plaintiff must demonstrate that (1) the conduct complained of was committed by a person acting under color of state law and that (2) the conduct deprived a persona of a right, privilege, or immunity secured by the Constitution or by the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Qualified immunity shields government officials from civil liability unless a plaintiff demonstrates: "(1) that the official violated a statutory or constitutional right and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080

(2011). The Court has discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

In this case, Richey asserts a First Amendment claim and a retaliation claim. To the extent that his constitutional rights may have been violated, he has simply failed to assert claims against the appropriate defendants. Pursuant to the OGP, the grievance coordinator may return a grievance to an inmate when the "complaint contains profane language, except when used as a direct quote." *Id*. at 33. Moreover, a grievance rewrite must be submitted within five days of the directive to rewrite or the grievance will be administratively withdrawn. *Id*. at 4. Dahne didn't promulgate this policy and has limited discretion to act under this policy. Thus, Richey's claims should be asserted against the DOC, not the officer enforcing a properly enacted policy. The Ninth Circuit said as much when it stated that "Richey has stated a plausible claim that his rights were violated when the **prison** refused to process and investigate his grievance . . . ." *Richey*, 624 F. App'x 525 (emphasis added). Moreover, Dahne raised this issue on appeal, *see id.*, and in his motion for summary judgment, Dkt. 52 at 23-24. Accordingly, the Court declines to adopt the rationale in the R&R on the issue of qualified immunity and bases this order on the analysis below.

"The doctrine of qualified immunity shields public officials performing discretionary functions from personal liability under certain circumstances." *Grossman v. City of Portland*, 33 F.3d 1200, 1208 (9th

Cir. 1994). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). "Unlike in many [qualified immunity] cases, here the allegedly unconstitutional action undertaken by the individual defendant consists solely of the enforcement of an ordinance which was duly enacted by the city council." *Grossman*, 33 F.3d at 1209. "Courts have accordingly held that the existence of a statue or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." *Id*.

> As with most legal matters, there are no absolutes here. On the one hand, an officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. On the other, as historical events such as the Holocaust and the My Lai massacre demonstrated, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. Similarly, an officer who unlawfully enforces an ordinance in a

> particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity even if there is no clear case law declaring the ordinance or the officer's particular conduct unconstitutional.

Id. at 1209-10.

With regard to Richey's First Amendment claim, Dahne is entitled to qualified immunity. It is undisputed that other prison guards instructed Richey to rewrite his grievance to remove the allegedly offensive language. Richey Dec. at ¶¶ 2-6. Richey did not rewrite his November 17, 2011 grievance. Instead, Richey wrote an offender's kite to Dahne asking whether his previous grievance would be processed, and Dahne responded by writing: "No, due to your decision not to rewrite as requested, your grievance has been administratively withdrawn." *Id*., ¶ 7; *Id*., Exh. 3. Based on these undisputed facts from Richey, Dahne did not pass upon the content of Richey's speech and, instead, merely enforced the rule that a failure to resubmit within five days constitutes an administrative withdrawal. Even if this content-neutral rule somehow violates Richey's First Amendment rights, it was objectively reasonable for Dahne to enforce the five-day rule that a grievance that is not resubmitted is deemed withdrawn. In other words, a requirement to resubmit a grievance within five days is not "patently violative of fundamental constitutional principles . . . ." *Grossman*, 33 F.3d. at 1209. Therefore, the Court grants Dahne's motion for

summary judgment because he is entitled to qualified immunity.[2]

Similarly, with regard to Richey's retaliation claim, Richey argues that Dahne is liable because he repeatedly rejected Richey's grievances and demanded that Richey censor his protected speech. Dkt. 46 at 4. Dahne did not order Richey to rewrite his grievance and, therefore, this part of Richey's claim is unsupported by the undisputed facts. Moreover, Dahne enforced the rule that failure to resubmit a grievance constitutes an administrative withdrawal. The question then becomes: Would a reasonable officer consider this policy as patently violative of Richey's right to be free from retaliation? Richey argues that "the right to be free from retaliation [was] clearly established in this Circuit years before the time of [Dahne's] conduct." Dkt. 46 at 17 (citing *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009)). The Court does not disagree with the assertion that the Circuit has clearly established some relevant law. The Court, however, declines to take the next step in the analysis that a reasonable officer should have refused to enforce the five-day rule because it patently violates Richey's right to be free from

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[2] The Court takes no position as to the officers that ordered Richey to rewrite his grievance or the official that promulgated the enacted grievance policies because those individuals are not parties to this action. *See* Dkt. 4. Moreover, even though the Ninth Circuit and this Court question the constitutionality of certain provisions in the OGP, Richey has not asserted a claim to enjoin the institution from enforcing these policies. Instead, Richey only seeks damages from an officer enforcing a questionable policy, Dkt. 4 at 6, which, under these circumstances, is barred by qualified immunity

retaliation. There are definitely constitutional problems with a system that sets up a hypothetically endless loop of rejections and revisions. However, failing to process a grievance that was not resubmitted is an entirely different matter, and no reasonable officer in Dahne's position should have declined to follow the five-day rule because it obviously violated Richey's rights. Therefore, the Court concludes that Dahne is entitled to qualified immunity on all of Richey's claims.

II. ORDER

Therefore, it is hereby **ORDERED** that the Court adopts in part and modifies in part the R&R (Dkt. 59), Richey's motion for partial summary judgment (Dkt. 46) is **DENIED**, Dahne's cross-motion for summary judgment (Dkt. 52) is **GRANTED**, and the Clerk shall enter **JUDGMENT** in favor of Dahne and close this case.

DATED this 14th day of September, 2016.

s/ Ben H. Settle
BENJAMIN H. SETTLE
United States District Judge

UNITD STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS W.S. RICHEY, Plaintiff, v. D. DAHNE, Defendants.	Case No. 3:12-cv-05060-BHS-KLS REPORT AND RECOMMENDATION Noted for July 15, 2016

This matter is before the Court on plaintiff's motion for partial summary judgment and defendant's cross motion for summary judgment. Plaintiff has sued defendant for violating his First Amendment right to redress grievances and to be free of retaliation.[1] This matter has been referred to the undersigned Magistrate Judge.[2] For the reasons set forth below, the undersigned recommends the Court deny plaintiff's motion and grant defendant's cross motion.

FACTUAL AND PROCEDURAL HISTORY

The Washington State Department of Corrections (DOC) has an Offender Grievance Program (OGP) that has been in effect since the early 1980s.[3] "Under the OGP, inmates may file grievances on a wide range of issues relating to their

[1] Dkt. 4, p. 5.

[2] *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261 (1976); 28 U.S.C. § 636(b)(1)(B); Local Rule MJR 4(a)(4).

[3] Dkt. 52-1, p. 2.

incarceration," including "the actions of staff" and "retaliation by staff for filing grievances."[4] Inmates are directed to write "a simple, straight-forward statement of concern" within the space provided for that purpose on a formal grievance form when writing a grievance.[5] When an inmate has "not written a simple, straight-forward statement of concern" or the inmate's "complaint contains profane language, except when used as a direct quote," the grievance form is returned "unprocessed with a notation to rewrite it."[6]

According to the DOC, the OGP is "critical to the safety and security of DOC prisons."[7] This is "because it promotes respectful, peaceful, and efficient resolution of conflicts within the prisons," and is "possible because it promotes proper and effective communication between staff and offenders in an effort to resolve issues at the lowest possible level."[8] Because "[t]he use of derogatory and abusive language towards staff in a written grievance establishes a hostile and combative" environment, "undermines the conciliatory goals of the" OGP, and "detracts from the integrity of the grievance system," DOC grievance coordinators "sometimes give rewrite instructions asking for the removal of [such] language that has no bearing on the offender's complaint."[9] When this

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[4] *Id.* at p. 3.

[5] Dkt. 52-2, p. 30.

[6] *Id.* at p. 33.

[7] Dkt. 52-1, p. 4.

[8] *Id.* at pp. 4-5.

[9] *Id.* at pp. 5-6.

happens, the inmate "is directed to rewrite the grievance without the derogatory or abusive language where possible, based on what a reasonable person would know and understand to be derogatory or abusive."[10]

"Outside the four corners of a written grievance, the [DOC] has the authority to infract and disciplines [sic] offenders who use abusive language, harassment, or other offensive behavior directed against staff."[11] If an inmate "does not follow the rewrite instruction within the required timeframe" – within five days of receipt of those instructions – "the matter is considered administratively withdrawn, which is the procedural determination made when OGP deadlines are missed without reason for the delay."[12] An inmate, however, "can submit another grievance on the issue even if [a grievance] has been administratively withdrawn."[13]

At all times relevant to this matter, plaintiff was an inmate at the DOC's Stafford Creek Corrections Center (SCCC).[14] On November 11, 2011, plaintiff submitted a written grievance in which he asserted that:

> On 11-10-11, an extremely obese Hispanic female guard on [the Intensive Management

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[10] *Id.* at p. 7.

[11] *Id.* at p. 6.

[12] *Id.* at p. 5; Dkt. 52-2, p. 4.

[13] Dkt. 52-2, p. 4.

[14] Dkt. 4.

Unit (IMU)]'s 2nd shift verbally corrected me from turning after stepping back from my cell. On the way along the tier, she tugged and shook my arm and asked me if I heard her. I said, "I'm not deaf. I heard you." On the way down the steps, she told me not to pull her (I wasn't). I rolled my eyes and said, "Here we go." I have previously been subject to abusive treatment from this unprofessional obese guard. She has taken my right to a shower on previous occasions because I commented about her need to diet. After I said, "Here we go," she pulled on my arm painfully and told me to go back to my cell. She denied me of my right to yard and to a shower. Once in my cell, in natural exasperation, I expelled the statement, "son of a bitch." She heard this and claimed I called her a bitch and then denied me a shower roll. She denied me these things without a hearing or due process. If she had a problem with my behavior she could verbally correct me or infract me. She has no authority to deprive me of the right to a shower and clean clothes without a hearing of some sort. She is abusing her position of authority. It isn't my problem that she is so obese, she holds a grudge over my previous comments about her enormous girth. It is no wonder why guards are assaulted and even killed by some prisoners. When guards like this fat Hispanic female guard abuse their position as much as they abuse their caloric intake, it can make prisoners less civilized then myself to resort to violent behavior in

> retaliation. She is a danger to the orderliness and security of the prison.[15]

In terms of a suggested remedy, plaintiff wrote:

> The guard in this incident should be reprimanded and educated. She should receive a staff misconduct report. She needs to learn that she cannot deprive prisoners of their right to a shower or clean clothes based on her whim.[16]

On November 15, 2011, a DOC employee issued a written response to the above grievance on behalf of defendant, who is the grievance coordinator at the SCCC, stating that plaintiff needed to "[r]ewrite – appropriately," and "[j]ust stick to the issue of what happened, when, who was involved."[17]

Two days later, plaintiff submitted a second grievance in which he asserted:

> On 11-10-11, an extremely obese Hispanic female guard (*who*) on IMU's 2nd shift (*when*) verbally corrected me from turning after I stepped back from my cell. On the way along the tier, she repeatedly asked if I heard her instruction. I said, "I'm not deaf. I heard you." On the way down the steps, she told me not to pull her (I wasn't). I rolled my eyes and said,

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[15] Dkt. 47, p.4.

[16] *Id.*

[17] *Id.*

> "Here we go again." (I have previously been subject to unprofessional conduct from this extremely obese Hispanic IMU 2nd shift guard before (I don't know her name). The guard then decided to take my yard and shower (*what happened*). Once in my cell, I remarked "son of a bitch" in exasperation. She claimed I called her a bitch and then denied me a clean shower roll. She denied me yard, my right to a shower, and a shower roll without due process or proper reason or justification. If she has a problem with my behavior, she can infract me. She's not allowed to punish me on whim by depriving me of my right to a shower.
>
> It is no wonder why guards are slapped and strangled by some prisoners. When guards like this obese female Hispanic guard abuse their position as much as they agues their caloric intake, it can make prisoners less civilized than myself to resort to violence in retaliation. She is a threat to the orderliness and security of the prison. *THIS GRIEVANCE WHAT HAPPENED WHEN IT HAPPENED, AND WHO WAS INVOLVED. FILE AND PROCESS IT!!!*[18]

In regard to a suggested remedy, plaintiff stated that "[t]he guard should be reprimanded and receive a staff misconduct report," and that "[s]he needs to learn that she can't deprive prisoners of their basic rights

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[18] *Id.* at p. 5 (emphasis in original).

without justification that is reasonable."[19] Again, a DOC employee other than defendant provided the following written response:

> Rewrite as directed. Hispanic Female is adiquit (sic). Extremely Obese is un-necessary and inapprapriate (sic).[20]

On December 7, 2011, plaintiff submitted an offender's kite, in which he wrote:

> ARE YOU GOING TO PROCESS MY PROPERLY SUBMITTED GRIEVANCE OR WHAT? I'M NOT REWRITING IT SO DO YOUR JOB AND PROCESS IT.[21]

The next day defendant responded by writing: "No, due to your decision not to rewrite as requested, your grievance has been administratively withdrawn."[22]

Shortly thereafter, plaintiff filed a civil rights complaint in this Court under 42 U.S.C. § 1983, alleging defendant violated his First Amendment right to redress grievances and to be free of retaliation.[23] Defendant moved to dismiss plaintiff's complaint on the basis of failure to exhaust administrative remedies, failure to state a claim upon which relief may be granted, and qualified

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[19] *Id.*

[20] *Id.*; Dkt. 52-2, p. 3.

[21] Dkt. 47, p. 6.

[22] *Id.*

[23] Dkt. 4, p. 5.

immunity.[24] The Court granted defendant's motion, finding plaintiff failed to allege a plausible claim for relief, in that he did not allege facts to show he engaged in protected conduct or that his First Amendment rights had been chilled.[25] The Court further found plaintiff failed to allege that his right to redress his grievances had been chilled by defendant's refusal to accept his grievance.[26]

Plaintiff appealed the Court's decision, and the Ninth Circuit reversed noting that it had "previously held that disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment."[27] The Ninth Circuit went on to note that while "[t]he prison has a legitimate penological interest in encouraging 'respect by inmates toward staff and other inmates, and rehabilitation of inmates through insistence of their use of socially acceptable ways of solving their problems,' . . . 'the link between this important purpose and the disrespect rules as applied to formal written grievances is weak.'"[28] In concluding that plaintiff had "stated a plausible claim that his rights were violated when the prison refused

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[24] Dkt. 12.

[25] Dkt. 21, pp. 3-4.

[26] *Id.* at p. 4.

[27] *Richey v. Dahne*, No. 12-36045, December 8, 2015, p. 2 (Dkt. 29) (quoting *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (citing *Bradley v. Hall*, 64 F.3d 1276, 1281-82 (9th Cir. 1995))).

[28] *Id.* (quoting *Bradley*, 64 F.3d at 1280-81).

to process and investigate his grievance because it contained 'objectionable' language describing the prison guard as 'extremely obese,'" the Ninth Circuit re-emphasized its prior holdings in *Brodheim* and *Bradley* that under *Turner v. Safley*, "a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance."[29]

In his motion for partial summary judgment, plaintiff asserts judgment should be made in his favor "on the initial claim" contained in his complaint.[30] Plaintiff did file a motion requesting leave to file a supplemental complaint containing additional claims, but that motion subsequently was denied.[31] Thus, plaintiff's First Amendment right to redress grievances and retaliation claims are the only ones currently before the Court. As such, his motion is really one for complete rather than partial summary judgment. Defendant argues summary judgment in his favor is appropriate, because plaintiff has failed to establish a valid First Amendment violation or retaliation claim, and because defendant is entitled to qualified immunity. While there are genuine issues of fact as to whether a valid First Amendment or retaliation claim exists, summary judgment in favor

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[29] *Id.* (citing 482 U.S. 78 (1987); 584 F.3d at 1272-73; 64 F.3d at 1279-81).

[30] Dkt. 46, p. 1.

[31] Dkt. 43; Dkt. 54.

of defendant is proper based on qualified immunity, and therefore the undersigned recommends the Court find for defendant on this basis.

DISCUSSION

Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[32] In deciding whether summary judgment should be granted, the Court "must view the evidence in the light most favorable to the nonmoving party," and draw all inferences "in the light most favorable" to that party.[33] When a summary judgment motion is supported as provided in Fed. R. Civ. P. 56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his or her response, by affidavits or as otherwise provided in Fed. R. Civ. P. 56, must set forth specific facts showing there is a genuine issue for trial.[34]

If the nonmoving party does not so respond, summary judgment, if appropriate, shall be rendered against that party.[35] The moving party must demonstrate the absence of a genuine issue of fact for

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[32] Federal Rule of Civil Procedure (Fed. R. Civ. P.) 56(c).

[33] *T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

[34] Fed. R. Civ. P. 56(e)(2).

[35] *Id.*

trial.[36] Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude summary judgment.[37] A "material" fact is one which is "relevant to an element of a claim or defense and whose existence might affect the outcome of the suit," and the materiality of which is "determined by the substantive law governing the claim."[38]

Mere "[d]isputes over irrelevant or unnecessary facts," therefore, "will not preclude a grant of summary judgment."[39] Rather, the nonmoving party "must produce at least some 'significant probative evidence tending to support the complaint.'"[40] "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment."[41] In other words, the purpose of summary judgment "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."[42]

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[36] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

[37] *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

[38] *T.W. Electrical Serv.*, 809 F.2d at 630.

[39] *Id.*

[40] *Id.* (quoting *Anderson*, 477 U.S. at 290).

[41] *California Architectural Building Products, Inc.*, 818 F.2d at 1468.

[42] *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

I. Plaintiff's First Amendment Claim

"Prisoners have a First Amendment right to file prison grievances."[43] Prison authorities thus are precluded "from penalizing a prisoner for exercising" that right.[44] As noted above, the Ninth Circuit has consistently held – including in the context of this case – that "disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment."[45] Prison officials, therefore, "may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance."[46]

Defendant does not disagree that prison officials "may not take or threaten adverse action against an offender for disrespectful language in a grievance," but argues that they "can require that inmates follow the grievance program rules, ask for rewritten grievances when necessary for their resolution, and deem grievances abandoned or administratively withdrawn when procedural rules such as deadlines are not followed."[47] In so arguing, defendant relies on Ninth Circuit and other court cases holding that inmates have no right to choose specific grievance procedures or how their concerns are presented to prison officials.

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[43] *Brodheim*, 584 F.3d at 1269.

[44] *Bradley*, 64 F.3d at 1279.

[45] *Richey*, No. 12-36045, at p. 2 (quoting *Brodheim*, 584 F.3d at 1271 (citing *Bradley*, 64 F.3d at 1281-82)).

[46] *Bradley*, 64 F.3d at 1282.

[47] Dkt. 52, p. 11.

Plaintiff, however, is not arguing that he has a right to choose the specific grievance *procedure* he has to follow, that he should not have to file a written grievance, or that he should be able to present his concerns outside the regular grievance process. Nor is he claiming that "he should be allowed to write whatever he wishes in a grievance."[48] Rather, plaintiff is alleging that by requiring him to rewrite his grievance defendant has impermissibly infringed on his First Amendment right to seek redress. This is substantively different from those cases that defendant relies on, wherein the plaintiffs were challenging the procedures themselves.[49] Indeed, none of those cases concerned a First Amendment claim.[50] Defendant cites *Pell v. Procunier* as well, but cites it for the uncontroversial proposition that not all First Amendment rights are consistent with the status of prisoner.[51] Further, that case involved the right of access to the press and not that of prisoners to redress grievances.[52]

The undersigned also rejects defendant's argument that requiring plaintiff to rewrite his grievance is merely an administrative act on the part of the prison, and cannot itself constitute an "adverse

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[48] *Id.*

[49] *Id.* (citing *Ramirez v. Galaza*, 334 F.3d 850 (9th Cir. 2003); *Mann v. Adams*, 855 F.3d 639 (9th Cir. 1988); *Pavey v. Conley*, 663 F.3d 899 (7th Cir. 2011)).

[50] *Id.*

[51] Dkt. 52, p. 12.

[52] *Pell*, 417 U.S. 817 (1974).

action" or punishment. In *Bradley*, the Ninth Circuit rejected the prison's argument that "the disrespect rules" at issue there "do not hinder a prisoner from *filing* a grievance or suit, but merely from using inappropriate language within the grievance itself."[53] The Ninth Circuit went on to explain:

> We are not persuaded by the [prison's] argument that punishing a prisoner for the content of his grievance does not burden his ability to file a grievance. From the prisoner's point of view, the chilling effect is the same. Whether the content of the grievance or the act of filing the grievance is deemed to be the actus reus of the offense, the prisoner risks punishment for exercising the right to complain.[54]

While a violation of the disrespect rules at issue in *Bradley* could result in a citation as opposed to a directive to rewrite the grievance, unless plaintiff agrees to rewrite his grievance to exclude the protected language at issue in this case, that grievance will not be accepted. In other words, he will be prevented from *filing* his grievance for engaging in constitutionally protected activity. This certainly *could* amount to the type of adverse action or punishment by prison officials the Ninth Circuit has found to be precluded under the First Amendment. As such, a genuine issue of fact exists here making summary judgment on this basis inappropriate.

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[53] 64 F.3d at 1279 (emphasis in original); *see also Richey*, No. 12-36045, at p. 3.

[54] *Bradley*, 64 F.3d at 1279.

Defendant attempts to distinguish *Bradley* on the basis that it concerned "an absolute prohibition on disrespectful language in all prison communications."[55] The Ninth Circuit did reject the prison's argument "that to permit the utterance of disrespectful language in *any* form at *any* time would result in a total breakdown of prison security and discipline."[56] But the same reasoning the Ninth Circuit used in *Bradley* to find a restriction on the content of a grievance can constitute an impermissible chilling of an inmate's First Amendment rights, applies here. First, similar to the regulation at issue in that case, the OGP prohibits use of profane language unless it is a direct quote. Second, in *Brodheim*, the Ninth Circuit found that reasoning applied equally to a prison official's warning to an inmate to be careful about what he writes in his grievance, even though no actual prison regulation appeared to be implicated.[57] Even more on point, the Ninth Circuit in *Richey* – again in the context of this case – expressly rejected defendant's attempt to distinguish *Bradley* on this basis.[58]

Equally without merit is defendant's assertion that the Ninth Circuit's concern in *Bradley* with the weakness of "the link" between the important governmental interest "in the peaceable operation of the prison" and "the respect rules as applied to formal

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[55] Dkt. 52, p. 12.

[56] *Bradley*, 64 F.3d at 1281 (emphasis in original).

[57] *Brodheim*, 584 F.3d at 1272-73.

[58] No. 12-36045, at p. 3.

written grievances,"[59] is not at issue here. "Prison regulations that infringe a prisoner's constitutional right are valid so long as they are 'reasonably related to legitimate penological interests.'"[60] In *Bradley*, the Ninth Circuit found no such reasonable relation existed, explaining that "[i]f a line between honest, unabashed airing of a grievance and 'hostile, . . . [or] abusive' language exists, it is a hazy one, leaving the aggrieved prisoner guessing whether he will be punished for what he has said in his formal prison complaint."[61]

Defendant once more attempts to distinguish *Bradley* on the basis that while the Ninth Circuit's "concern was predicated on the notion that offenders could be punished for falling on the wrong side of that line," under the OGP "offenders are encouraged to speak openly with the grievance coordinator or the responding staff member about rewrite instructions and . . . there is no punishment or disadvantage associated with" such instructions.[62] As explained above though, prohibiting an inmate from going forward with filing his grievance unless he rewrites it so as to exclude language found to be inappropriate or disrespectful, certainly *could* be deemed to be an adverse action and/or punishment. Thus, defendant has failed to show the absence of a genuine issue of

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[59] *Bradley*, 64 F.3d at 1281.

[60] *Bradley*, 64 F.3d at 1279 (quoting *Turner*, 482 U.S. at 89).

[61] *Id.* at 1281.

[62] Dkt. 51, p. 12.

material fact in regard to plaintiff's First Amendment claim here as well.

Lastly, defendant argues that under *Turner*, the OGP's written grievance guidelines are a permissible limitation on plaintiff's First Amendment rights. The Supreme Court identified four factors in *Turner* district courts are to "consider when determining the reasonableness of a prison rule."[63] Those factor are:

> 1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; 2) "whether there are alternative means of exercising the right that remain open to prison inmates"; 3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally"; and 4) the "absence of ready alternatives" or, in other words, whether the rule at issue is an "exaggerated response to prison concerns."[64]

Defendant relies on the Supreme Court's decision in *Woodford v. Ngo*, to argue that "[p]risons have a legitimate penological interest in requiring that inmate grievances contain straightforward statements of offenders' concerns and do not abuse or

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[63] *Bradley*, 64 F.3d at 1279 (citing 482 U.S. at 89-90).

[64] *Id.* at 1279-80 (quoting 482 U.S. at 89-90).

implicitly threaten staff."[65] But this is not what that case stands for. Rather, in upholding the requirement of exhaustion of administrative remedies, the Supreme Court merely pointed out that such a requirement "promotes efficiency," since "[c]laims generally can be resolved much more quickly and economically in proceedings before the agency than in litigation in federal court."[66]

As discussed above, furthermore, although a prison does have a "legitimate penological interest in encouraging 'respect by inmates toward staff . . . and rehabilitation of inmates through insistence on their use of socially acceptable ways of solving problems," as the Ninth Circuit has consistently noted, "'the link between this important purpose and the disrespect rules as applied to formal written grievances is weak.'"[67] Defendant goes on to argue that the OGP's guidelines on written grievances satisfy the other *Turner* factors. But as the Supreme Court has emphasized:

> First and foremost, "there must be a 'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." If the connection between the regulation and the asserted goal is "arbitrary or irrational,"

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[65] Dkt. 52, p. 13 (citing 548 U.S. 81, 89 (2006)).

[66] *Woodford*, 548 U.S. at 89.

[67] *Richey*, No. 12-36045, at p. 2 (quoting *Bradley*, 64 F.3d at 1280-81).

> then the regulation fails, irrespective of whether the other factors tilt in its favor.[68]

Even considering those other factors, they likely also would remain unsatisfied. As the *Bradley* court explained:

> The [prison]'s legitimate security concerns would be largely served by procedures that require grievances to be in writing and shield those prison officials who are in direct contact with the inmates from reading any insulting remarks that might be contained in those grievances. In so saying, we do not mandate any alteration to [prison]'s current procedures, but merely state that there are obvious, simple alternatives that both accommodate the prisoner's right to file a grievance and prevent any open expression of disrespect or any disrespectful communication between prisoner and guard or between prisoner and prisoner. It takes little imagination to structure a grievance system and regime of disrespect rules that would make a prisoner's statements in a complaint or grievance invisible to all those involved in the daily operations of the prison, alleviating any security concern. A prisoner's statement in a grievance need not have any more impact on prison security through the maintenance of respect than the prisoner's unexpressed thoughts.[69]

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[68] *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001) (quoting *Turner*, 482 U.S. at 89-90) (internal citations omitted).

[69] 64 F.3d at 1281 (internal citation omitted).

Defendant has put forth no plausible reason why the same procedures could not be implemented in the context of this case. Defendant does assert that such procedures are "actually not practical or workable in a the prison context where staff members being grieved have the duty, and the right, to know the grievances levied against them and provide a response as part of the resolution process."[70] But defendant points to no legal authority or specific prison regulation to support the proposition, that staff members have the duty or right to be exposed to the type of inappropriate language defendant also argues has no place in the grievance process. In other words, defendant has not shown that screening staff members from such language or other similar methods would in any way hinder the prison's ability to amicably address the grievance itself.

It is true that Supreme Court overturned the Ninth Circuit's balancing of "the importance of the prisoner's infringed right against the importance of the penological interest served by the rule" in *Bradley*, holding that "the *Turner* test, by its terms, simply does not accommodate valuations of content."[71] But in *Brodheim*, the Ninth Circuit expressly held that it had "reach[ed] the same result" when "solely applying the *Turner* factors," and in *Richey* it reiterated its prior holdings in *Brodheim* and *Bradley* that under *Turner*,

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[70] Dkt. 52, p. 18.

[71] *Shaw*, 532 U.S. at 230 and n. 2; *Brodheim*, 584 F.3d at 1272; *Bradley*, 64 F.3d at 1280.

"a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance."[72] Accordingly, for all of the above reasons, defendant has failed to establish the absence of genuine issues of material fact as to plaintiff's First Amendment claim.

II. Plaintiff's Retaliation Claim

"Retaliation against prisoners for their exercise of" their right to file prison grievances "is itself a constitutional violation."[73] There are five elements of a retaliation claim:

> (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.[74]

Under the first three elements, plaintiff must show his protected conduct was the "'substantial' or 'motivating' factor behind the defendant's conduct."[75] To do this, plaintiff "need only 'put forth evidence of

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[72] 584 F.3d at 1272-73; No. 12-36045, at p. 2.

[73] *Brodheim*, 584 F.3d at 1269.

[74] *Id.* (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

[75] *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989); *see also Brodheim*, 584 F.3d at 1271.

retaliatory motive, that, taken in the light most favorable to him, presents a genuine issue of material fact as to [the defendant's] intent.'"[76]

This case is distinguishable from *Bradley* and *Brodheim*, defendant argues, because it does not involve any actual punishment or warning of punishment, but merely "an instruction to rewrite the grievance in accordance with policy."[77] There is no dispute, however, that defendant instructed plaintiff to rewrite his grievance *because* of the inappropriate language it contained. Nor is there any dispute that plaintiff's grievance would not be processed unless he re-wrote it without that language. Defendant asserts plaintiff is not being punished thereby, but certainly he is being subject to a form of "adverse action" in that he would not be allowed to proceed with his written grievance if failed to comply.[78] At the very least, there is a genuine issue of material fact as to whether disallowing plaintiff to proceed constitutes the type of adverse action necessary to establish a retaliation claim.

Defendant also argues plaintiff's own statements indicate he is not "one who has become hesitant to speak."[79] But "an allegation that a person of ordinary firmness would have been chilled is

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[76] *Id.* (quoting *Bruce v. Ylst*, 351 F.3d 1283 1289 (9th Cir. 2003)).

[77] Dkt. 52, p. 19.

[78] *Brodheim*, 584 F.3d at 1271.

[79] Dkkt. 52, p. 20.

sufficient to state a retaliation claim."[80] Thus, "focus[ing] on whether or not the record showed [plaintiff] was actually chilled [is] incorrect."[81] "[A] plaintiff does not have to show that 'his speech was actually inhibited or suppressed,'" therefore, "but rather that the adverse action at issue 'would chill *or* silence a person of ordinary firmness from future First Amendment activities.'"[82] "To hold otherwise 'would be unjust' as it would 'allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity."[83] As "[a] reasonable person *may* have been chilled by" the re-write instruction, it cannot be said "as a matter of law" that plaintiff "has failed to meet this objective standard."[84]

Lastly, defendant argues the requirement that plaintiff re-write his grievances to exclude unnecessary and inappropriate language, reasonably advances the legitimate correctional goals of resolving disputes, maintaining order and respect, and enforcing prison rules. But as discussed above, while these may constitute legitimate correctional goals, as the Ninth Circuit consistently has pointed out, it is

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[80] *Brodheim*, 584 F.3d at 1270.

[81] *Id.* at 1271.

[82] *Id.* (quoting *Rhodes*, 408 F.3d at 568-69) (emphasis in original).

[83] *Id.* (quoting *Rhodes*, 408 F.3d at 569).

[84] *Id.*

highly questionable as to whether the requirement that plaintiff re-write his grievance *reasonably* advances them. Accordingly, defendant has failed to show the absence of genuine issues of material fact in regard to plaintiff's retaliation claim.

III. Defendant's Qualified Immunity Defense

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[85] Qualified immunity thus shields government officials from money damages, unless the plaintiff "pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[86]

In considering the first prong, the Court must determine whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[87] With respect to the second prong, an official's conduct "violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently

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[85] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[86] *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow*, 457 U.S. at 818).

[87] *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

clear' that every 'reasonable official would have understood that what he is doing violates that right.'"[88] "This inquiry," furthermore, "must be undertaken in light of the specific context of the case, not as a broad general proposition."[89] The burden is on the plaintiff to show that the right was clearly established.[90]

"If the law did not put the [official] on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."[91] As such, qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[92] On the other hand, "the very action in question" need not "have previously been held unlawful."[93] That is, "[t]he precise facts need not have been previously determined, so long as the legal principle is clearly established and a reasonable public official would realize that his conduct violated that rule of law."[94] Nevertheless,

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[88] *al-Kidd*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[89] *Saucier*, 533 U.S. at 201.

[90] *Sorrels v. McKee*, 290 F.3d 965, 969 (9th 2002).

[91] *Saucier*, 533 U.S. at 202; *see also Harlow*, 457 U.S. at 818.

[92] *Saucier*, 533 U.S. at 202 (quoting *Malloy v. Briggs*, 475 U.S. 335, 341 (1986)).

[93] *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citing *Creighton*, 483 U.S. at 640).

[94] *Delker v. Maass*, 843 F. Supp. 1390, 1397 (D. Ore. 1994).

"[t]he right the official is alleged to have violated must be made specific in regard to the kind of action complained of for the constitutional right at issue to have been clearly established."[95]

The defense of qualified immunity, furthermore, "has both an 'objective' and a 'subjective' aspect."[96] "The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'"[97] Thus, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken."[98] Under the subjective element, qualified immunity will be defeated "if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury.'"[99]

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[95] *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100-01 (9th Cir. 1995) (citing *Anderson*, 483 U.S. at 639-40).

[96] *Harlow*, 457 U.S. at 815.

[97] *Harlow*, 457 U.S. at 815 (quoting *Wood v. Strickland* 420 U.S. 308, 322 (1975)).

[98] *Creighton*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 818-19).

[99] *Harlow*, 457 U.S. at 815 (emphasis in original).

A court "may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all."[100] While "a case directly on point" is not required to grant qualified immunity, for a right to be clearly established "existing precedent must have placed the statutory or constitutional question beyond debate."[101] "This is not to say," as noted above, "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."[102] "[I]n the light of pre-existing law," though, "the unlawfulness must be apparent."[103]

Defendant argues he is entitled to qualified immunity in this case. The undersigned agrees. As discussed above, there are genuine issues of material fact as to whether defendant's conduct violated plaintiff's constitutional rights. Accordingly, the question is whether those rights were clearly established at the time of the challenged conduct. While at the time of the challenged conduct in this case the Ninth Circuit had established that inclusion of disrespectful language in a grievance "is itself protected activity," it cannot be said that instructing an inmate to rewrite a grievance because of the

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[100] *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

[101] *al-Kidd*, 563 U.S. at 741.

[102] *Creighton*, 483 U.S. at 640.

[103] *Id.*

inclusion thereof, necessarily amounted to a violation of an inmate's First Amendment right to redress grievances. Indeed, as discussed above, genuine issues of material fact exist as to whether instructing plaintiff to do so constitutes an adverse action and/or punishment, or whether it is reasonably related to a legitimate penological interest. That is at the time of the challenged conduct, it cannot be said that existing precedent placed this constitutional question "beyond debate."

CONCLUSION

Based on the foregoing discussion, the undersigned recommends that plaintiff's motion for partial summary judgment be denied, that defendant's cross motion for summary judgment be granted, and therefore that plaintiff's complaint be dismissed.

The parties shall have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto.[104] Failure to file objections will result in a waiver of those objections for purposes of appeal.[105] Accommodating this time limitation, this matter shall be set for consideration on **July 15, 2016**, as noted in the caption.

DATED this 27th day of June, 2016.

s/ Karen L. Strombom
Karen L. Strombom
United States Magistrate Judge

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[104] 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6; Fed. R. Civ. P. 72(b).

[105] *Thomas v. Arn*, 474 U.S. 140 (1985).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS W.S. RICHEY, Plaintiff-Appellant, v. D. DAHNE, Defendant Appellee.	No. 12-36045 D.C. No. 3:12-cv-05060-BHS MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted October 16, 2015
Seattle, Washington

Before: W. FLETCHER and GOULD, Circuit Judges and EZRA, **District Judge.

The facts of this case are fully set out in the jointly-filed opinion addressing Dahne's motion to

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. Circuit Rule 36-3.

** The Honorable David A. Ezra, District Judge for the U.S. Court for the District of Hawaii, sitting by designation.

revoke Richey's in forma pauperis status on appeal. We review de novo whether the district court properly granted a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, accepting all factual allegations in the complaint as true. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015) (citations omitted).

"[W]e have previously held that disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment." *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (Citing *Bradley v. Hall*, 64 F.3d 1276, 1281-82 (9th Cir. 1995)).[1] The prison has a legitimate penological interest in encouraging "respect by inmates toward staff and other inmates, and rehabilitation of inmates through insistence on their use of socially acceptable ways of solving their problems." *Bradley*, 64 F.3d at 1280. But, "the link between this important purpose and the disrespect rules as applied to formal written grievances is weak." *Id*. at 1281. As we have twice explained, applying the *Turner v. Safley*, 482 U.S. 78 (1987), factors for assessing the constitutionality of a prison regulation, a prison may not take or threaten adverse action against an inmate for using disrespectful language in a grievance. *Brodheim*, 584 F.3d at 1272-73; *Bradley*, 64 F.3d at 1279-81. Richey has stated a plausible claim that his rights were violated when the prison refused to process and investigate his grievance because it contained

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[1] As *Brodheim* noted, while we no longer "balance[ ] the importance of the prisoner's infringed right against the importance of the penological interest served by the [prison] rule," *Bradley*'s holding remains good law. *Id*. at 1272 (alteration omitted) (quoting *Bradley*, 64 F.3d at 1280-81).

"objectionable" language describing the prison guard as "extremely obese."[2]

Dahne's contrary arguments are unavailing. Dahne claims that *Bradley* is distinguishable because inmates like Richey "have the opportunity to rewrite their grievances" without offensive language. But *Bradley* rejected the prison's argument that "the disrespectful rules do not hinder a prisoner from *filing* a grievance or suit, but merely from using inappropriate language within the grievance itself." 64 F.3d at 1279. (emphasis in original). Dahne also attempts to distinguish *Bradley* by suggesting that unlike here, that case involved language "necessary to the explanation or resolution of a grievance," but not once did *Bradley* suggest that the prisoner's language was protected because it was "necessary." Moreover, *Bradley* recognized that prison rules governing an inmate's language cannot create "a hazy [line], leaving the aggrieved prisoner guessing whether he will be punished for what he has said in his formal prison complaint." 64 F.3d at 1281. A policy under which prison officials have unfettered discretion to determine what information is "necessary" to a grievance would suffer the same constitutional infirmities.

In the alternative, Dahne seeks qualified immunity because his "actions and decisions were based on his application of Department policy and his

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[2] As we are reviewing only Richey's complaint to determine whether it states a claim for relief, we do not consider whether additional statements in Richey's grievance—which were not included in the complaint—are also protected under *Bradley*.

attempt to have Richey comply with the grievance program's requirements so that Richey's complaint could be addressed." At the motion to dismiss stage, however, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness,'" *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)) (emphasis in original), and Richey's complaint says nothing about whether the prison had any language policy, what that policy was, and how consistently that policy was enforced. Dahne is therefore not entitled to qualified immunity at this time.[3]

REVERSED AND REMANDED.

[3] In this posture, we do not consider whether the law in our circuit is clearly established that "disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment." *Brodheim*, 584 F.3d at 1271 (citing *Bradley*, 64 F.3d at 1282-82).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS W.S. RICHEY, *Plaintiff-Appellant*, v. D. DAHNE, *Defendant-Appellee*.	No. 12-36045 D.C. No. 3:12-cv-05060-BHS OPINION

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted
October 16, 2015—Seattle, Washington

Filed December 8, 2015

Before: William A. Fletcher and Ronald M. Gould, Circuit Judges, and David A. Ezra,* District Judge.

Opinion by Judge Gould

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* The Honorable David A. Ezra, District Judge for the U.S. District Court for the District of Hawaii, sitting by designation.

SUMMARY**

Prisoner Civil Rights

The panel denied a motion filed by the appellee which sought to revoke appellant's in forma pauperis status on appeal under the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(g), and the panel also reversed, in an unpublished memorandum disposition filed jointly with its opinion, the district court's dismissal of appellant's lawsuit for failure to state a claim, and remanded.

The panel rejected appellee's contention that appellant did not qualify for in forma pauperis status because he had received four strikes before filing his appeal. Addressing the first strike, the panel held that a magistrate judge's March 2012 dismissal of appellant's action did not qualify as a strike for frivolousness because neither an appeals panel nor subsequent judges followed the magistrate judge's reasoning, indicating that reasonable judges differed on the merits. The panel further determined that the magistrate judge's March 2012 dismissal could not be considered a strike for failure to state a claim because the magistrate considered evidence submitted by the defendant when making her decision. The panel therefore construed the March 2012 dismissal as a grant of summary judgment to the defendant.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel agreed that appellant had acquired two strikes in another case. Addressing an issue left open by the Supreme Court's recent decision in *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015), the panel held that a prisoner is entitled to in forma pauperis status on appeal from the trial court's dismissal of a third-strike lawsuit. The panel concluded that the district court's dismissal of the complaint in this case did not constitute a "prior occasion" under the Prison Litigation Reform Act, and that therefore appellant had not accumulated a third strike before he filed this appeal.

COUNSEL

Edward A. Piper, Stoel Rives LLP, Portland, Oregon, for Plaintiff-Appellant.

Haley Beach (argued), Assistant Attorney General, Corrections Division; Robert W. Ferguson, Attorney General, Washington State Office of the Attorney General, Olympia, Washington, for Defendant-Appellee.

OPINION

GOULD, Circuit Judge:

Thomas W.S. Richey appeals from the district court's dismissal of his civil rights action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). A motions panel granted Richey's motion for in forma pauperis (IFP) status on appeal. Dahne later filed a motion to revoke Richey's IFP status under the "three strikes" provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g). Dahne's motion raises the question whether a prisoner may maintain IFP status when appealing the dismissal of

his third-strike lawsuit, an issue left open by the Supreme Court's recent decision in *Coleman v. Tollefson*, 135 S. Ct. 1759, 1764-65 (2015). Because we conclude that the PLRA does not bar a prisoner from receiving IFP status on appeal of his third-strike dismissal, we deny Dahne's motion.[1]

I

As an inmate at the Stafford Creek Corrections Center, Richey filed a grievance on November 11, 2011, alleging that a guard denied him his "right to yard, a shower, and clean underwear."[2] Richey alleged that he did not know the guard's name and that he described her "accurately" as an "extremely obese Hispanic female guard." The grievance was returned to Richey with a note to "Rewrite- appropriately. Just stick to the issue of what happened, when, who was involved." Richey submitted a revised grievance on November 17, 2011, containing similar allegations and similar references to the guard's weight, with the words "who," "when," and "what happened" inserted into the narrative. The grievance was again returned to him with an order to "Rewrite as directed. Hispanic Female is adiquit [sic]. Extremely Obese is unnecessary and inappropriate."

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[1] In a memorandum disposition filed jointly with this opinion, we also reverse the district court's dismissal of Richey's lawsuit for failure to state a claim and we remand for further proceedings.

[2] On appeal from dismissal for failure to state a claim, we "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015) (citation omitted).

Rather than rewrite the grievance, Richey wrote a kite[3] to the grievance coordinator on November 28, 2011, asking for clarification of the word "adiquit"and explaining that his description of the guard's weight was "necessary and appropriate in helping him identify her," as he did not know her name. He asked the coordinator "not to punish [him] by rejecting [his] grievance because [the coordinator] disagreed with [his] choice of language." When Richey did not receive a response, he wrote another kite on December 7 asking "ARE YOU GOING TO PROCESS MY PROPERLY SUBMITTED GRIEVANCE OR WHAT? I'M NOT REWRITING IT SO DO YOUR JOB AND PROCESS IT." Dahne responded in writing, "No, due to your decision not to rewrite as requested your grievance has been administraitevly [sic] withdrawn."

Seeking damages, Richey sued Dahne pro se for violating his First Amendment right "to redress grievances and to be free of retaliation" and "for violating [his] freedom of speech." The district court dismissed Richey's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, ruling that Richey "provide[d] no authority for the proposition that insulting a prison guard is protected conduct" and "failed to allege that his right to redress his grievances ha[d] been chilled by the official's refusal to accept his offensive grievance." The district court also revoked Richey's IFP status at that time.

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[3] In prison terminology, a kite is a form used by prison inmates to communicate with staff.

Richey filed a timely notice of appeal and moved for IFP status on appeal. A motions panel granted the motion, stating that its "review of the record indicates that appellant is entitled to proceed in forma pauperis" under 28 U.S.C. § 1915(a). After Richey was appointed pro bono counsel and briefing was completed, Dahne moved to revoke Richey's IFP status under the "three strikes" provision of the PLRA. *See* 28 U.S.C. § 1915(g).

II

A litigant generally qualifies for IFP status if he "is unable to pay [filing] fees or give security therefor." 28 U.S.C. 1915(a)(1). Congress passed the Prison Litigation Reform Act in 1996 to "reduce the quantity and improve the quality of prisoner suits," instituting several reforms to prevent prisoners from filing meritless claims in the federal court system. *Jones v. Bock*, 549 U.S. 199, 203-04 (2007) (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). One reform was the introduction of a "three strikes" rule that bars prisoner litigants from receiving IFP status in a civil action or appeal

> if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

Dahne argues that Richey does not qualify for IFP status because Richey received four strikes before filing this appeal on December 17, 2012: dismissal of the complaint in *Richey v. Thaut*, No. C11-5680 (W.D. Wash. Mar. 26, 2012) (*Thaut I*); dismissal of another civil complaint, *Richey v. Thaut*, No. C11-5755 (W.D. Wash. May 16, 2012) (*Thaut II*); dismissal of the appeal in that case, *Richey v. Thaut*, No. 12-35632 (9th Cir. Nov. 15, 2012) (*Thaut III*); and the district court's dismissal of the complaint in this case. "[O]nce a prisoner has been placed on notice of the potential disqualification under § 1915(g) by either the district court or the defendant, the prisoner bears the ultimate burden of persuading the court that § 1915(g) does not preclude IFP status." *Andrews v. King*, 398 F.3d 1113, 1120 (9th Cir. 2005).

We review de novo the "interpretation and application" of the PLRA's three strikes provision. *Id.* at 1118. This includes de novo review of whether a district court correctly issued a strike under the PLRA in a prior case. *See id.* at 1120-21 (declining to accept district court's characterization of a prior dismissal as a strike); *Belanus v. Clark*, 796 F.3d 1021, 1032 & n.3 (9th Cir. 2015) (Fernandez, J., concurring in part and dissenting in part). Reviewing the dismissals that Dahne claims constitute "strikes" against Richey, we conclude that Richey has not received "three strikes" and is thus entitled to IFP status.

A. *Richey v. Thaut*, No. C11-5680 (W.D. Wash. Mar. 26, 2012) (*Thaut I*)

Thaut I was a civil complaint containing allegations similar to this case: Richey submitted a grievance for being denied his right to shower by an

"extremely obese female Hispanic guard," but when Thaut asked Richey to rewrite the grievance without "objectionable language," Richey sued instead. The magistrate judge determined that Richey did not exhaust his administrative remedies because he "simply failed to follow the prescribed procedure and failed to amend his grievance when he was asked to do so," recommending dismissal without prejudice and "that the dismissal count as a strike." The magistrate judge reasoned that Richey's failure to exhaust rendered his claim "frivolous" because Richey was "very familiar with the prison grievance system and the requirements for pleading a civil rights action." The district court summarily adopted the magistrate judge's recommendation.

On appeal, we affirmed the dismissal of *Thaut I*, *see Richey v. Thaut*, 509 F. App'x 659 (9th Cir. 2013), but the panel did not follow the magistrate judge's reasoning. Instead, we relied on an alternate argument, holding that "[t]he district court did not clearly err in finding that Richey was required to appeal the non-grievability determination to the grievance program manager and failed to do so."[4] *Id.* at 660. That we declined to follow the magistrate judge's reasoning raises a question about its

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[4] Thaut's brief on appeal primarily echoed the magistrate judge's conclusion that Richey needed to file an amended grievance before suing, but our conclusion was based on an alternative argument that Thaut mentioned only in passing: that Richey "had the opportunity to request review of his second grievance that was found not grievable to the Grievance Program Manager," but "chose not to avail himself of this procedure." *But see* note 5, *infra*.

correctness; notably, we did not assess a strike on appeal.

Additionally, when the magistrate judge here—incidentally the same magistrate judge as in *Thaut I*—was presented with a similar fact pattern, she did not rely on the same reasoning as she did in *Thaut I*. Instead, she recommended dismissal on exhaustion grounds for reasons similar to our decision affirming *Thaut I* on appeal: that Richey "did nothing to advance his complaint that Defendant Dahne had refused to 'process his grievance for no good reason.'" She also characterized this suit as "frivolous" and recommended it count as a strike. The district court did not adopt her recommendation, however—the district judge expressed hesitation about the correctness of the magistrate judge's ruling[5] and requested additional briefing on the exhaustion issue. Dahne then withdrew his motion to dismiss for failure to exhaust administrative remedies.

Because subsequent judges—including the magistrate judge herself in a later case—did not follow the reasoning by which the magistrate judge dismissed *Thaut I* for non-exhaustion, we conclude that reasonable judges may differ about the merits of her conclusion. The dismissal in *Thaut I* was not a strike for frivolousness. *See Neitzke v. Williams*, 490

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[5] While our decision *Richey v. Thaut*, 509 F. App'x 659 (9th Cir. 2013), concluded that "[t]he district court did not clearly err in finding that Richey was required to appeal the non-grievability determination to the grievance program manager and failed to do so," *id.* at 660, the record in this case showed that under the prison's policies, a "request for rewriting . . . can not be appealed to the Grievance Program Manager."

U.S. 319, 325 (1989) (defining frivolousness under the IFP statute as having no legal issues "arguable on their merits") (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)).

Nor can the dismissal in *Thaut I* be considered a strike for "fail[ure] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), i.e., dismissal under Fed. R. Civ. P. 12(b)(6). *See Andrews*, 398 F.3d at 1121 (equating § 1915(g) with Rule 12(b)(6)). The magistrate judge in *Thaut I* treated the motion to dismiss for failure to exhaust administrative remedies as "an unenumerated 12(b) motion," following *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). We later overruled *Wyatt* en banc, clarifying that "failure to exhaust is more appropriately handled under the framework of the existing rules," such as Rule 12(b)(6) and Rule 56 summary judgment. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc), *cert. denied sub nom. Scott v. Albino*, 135 S. Ct. 403 (2014). If the district court "consider[s] evidence submitted by the parties in reaching its decision, we construe the district court's order as a grant of summary judgment on the issue of exhaustion." *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015); *see also Albino*, 747 F.3d at 1166.

In *Thaut I*, failure to exhaust was not "clear on the face of the complaint," *Albino*, 747 F.3d at 1166, and the magistrate judge considered a declaration about the prison grievance system submitted by defendant Thaut when making her decision. *Thaut I* was therefore not dismissed for failure to state a claim, but was rather a grant of summary judgment to the defendant. Consequently, it was not a strike under the PLRA.

B. *Richey v. Thaut*, No. C11-5755 (W.D. Wash. May 16, 2012) (*Thaut II*)

In *Thaut II*, Richey filed a grievance after he was charged for envelopes that he never received. Thaut rejected the grievance because Richey "did not provide an invoice number for the order of envelopes." When Richey resubmitted the grievance with the explanation that he did not have the number because he did not have a receipt, Thaut classified his grievance as "withdrawn." But Richey then submitted a separate grievance on the same matter that was accepted and resulted in Richey being refunded, so the district court ruled that Richey failed to state a plausible claim that Thaut violated his right to file grievances. This ruling was correct, and it was Richey's first strike under the PLRA.

C. *Richey v. Thaut*, No. 12-35632 (9th Cir. Nov. 15, 2012) (*Thaut III*)

Richey then appealed the dismissal of *Thaut II* to us. A motions panel determined that the appeal was frivolous and declined to grant Richey IFP status. The panel did not dismiss the appeal, however—it instead stated that Richey could still "pursue this appeal despite the court's finding that it is frivolous" if he paid the filing fee, noting that "[o]therwise, the appeal will be dismissed by the Clerk for failure to prosecute, regardless of further filings." Richey's appeal was then dismissed four weeks later "for failure to pay the docketing/filing fees in this case."

In *O'Neal v. Price*, 531 F.3d 1146 (9th Cir. 2008), we held that "when a district court disposes of an in forma pauperis complaint 'on the grounds that [the claim] is frivolous, malicious, or fails to state a

claim upon which relief may be granted,' such a complaint is 'dismissed' for purposes of § 1915(g) even if the district court styles such dismissal as denial of the prisoner's application to file the action without prepayment of the full filing fee." *Id.* at 1153 (alteration in original). O'Neal's reasoning applies equally to the situation in *Thaut III*, as we rejected Richey's request for IFP status because the appeal was frivolous even though we did not dismiss the appeal until later when Richey did not pay the filing fee. The dismissal of the appeal in *Thaut III* was Richey's second strike.

D. The dismissal of the complaint in this case

Dahne argues that Richey received an additional strike when the district court dismissed the lawsuit at issue here for failure to state a claim. Dahne cites the Supreme Court's recent decision in *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015). In *Coleman*, a prisoner had already received two strikes when a third complaint was dismissed for failure to state a claim, and he appealed that dismissal. *Id.* at 1762. While that appeal was pending, the prisoner filed multiple other lawsuits and moved to receive IFP status while doing so. *Id.* The Supreme Court concluded that the prisoner was not entitled to IFP status in those successive suits, holding that "[a] prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal." *Id.* at 1763. The Court, however, left open the question presented here: whether a prisoner is entitled to IFP status on "appeal from the trial court's

dismissal of [a] third complaint instead of [in] an attempt to file several additional complaints. *Id.* at 1764-65.[6] We conclude that a prisoner is entitled to IFP status while appealing his third-strike dismissal.

The Supreme Court in *Coleman* based its holding on "the plain language of" § 1915(g), stating that "[l]inguistically speaking, we see nothing about the phrase 'prior occasions' that would transform a dismissal into a dismissal-plus-appellate-review." *Id.* at 1763. The United States argued as amicus curiae in *Coleman*, however, that "[t]he phrase 'prior occasions' is most sensibly read as referring to strikes imposed in prior-filed suits, not to those imposed in an earlier stage of the same suit." Brief for the United States as Amicus Curiae Supporting Respondents, *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015) (No. 13-1333), 2015 WL 272362, at *25.; *see also Coleman*, 135 S. Ct. at 1765 (noting the Solicitor General's argument that "a trial court dismissal qualifies as a strike only if it occurred in a prior, different, lawsuit" (emphasis in original)).

We agree with the Solicitor General's interpretation of § 1915. The Supreme Court's holding in *Coleman* was based in part on "the way in which

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[6] Prior to *Coleman*, the law in this circuit was that "a district court's dismissal of a case does not count as a 'strike' under § 1915(g) until the litigant has exhausted or waived his opportunity to appeal," i.e., "'the date of the Supreme Court's denial or dismissal of a petition for writ of certiorari, if the prisoner filed one, or from the date when the time to file a petition for writ of certiorari expired, if he did not.'" *Silva v. Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011) (quoting *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1176 (10th Cir. 2011)). *Silva*'s holding does not survive *Coleman*.

the law ordinarily treats trial court judgments." 135 S. Ct. at 1764. While judgments are immediately preclusive as to successive suits, *see id.*, they are certainly not preclusive to the panel on appeal. Denying IFP review of a district court's third strike dismissal would prevent us from performing our "appellate function" and would "freeze out meritorious claims or ossify district court errors." *Henslee v. Keller*, 681 F.3d 538, 543 (4th Cir. 2012) (citations omitted). Furthermore, the Supreme Court's statement in *Coleman* that a prisoner could refile his fourth lawsuit IFP if his third strike were reversed on appeal, 135 S. Ct. at 1764, would be of no consolation if a prisoner could not appeal the erroneously-issued third strike IFP. And the Court's concern in *Coleman* that a dismissal-plus-appellate-review rule would "produce a leaky filter" allowing a prisoner to file many frivolous lawsuits while his third strike dismissal was pending on appeal, *id.*, is not implicated here, as the prisoner retains IFP status only for the appeal of his third strike.

The facts of this case exemplify why § 1915(g) should be construed as allowing appellate review of a third strike. As explained in the jointly-filed memorandum disposition, the district court erred in dismissing Richey's complaint. If Richey was not entitled to IFP status on appeal, he would have to pay the filing fee for us to reverse the district court's erroneous third strike, which would ironically make him eligible again for IFP status in successive suits. We do not think that Congress intended such a peculiar system.

We hold that dismissal of the complaint in the action underlying this appeal does not constitute a "prior occasion" under the PLRA, and Richey had not accumulated a third strike before he filed this appeal. Dahne's motion to revoke Richey's IFP status on appeal is denied.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS WILLIAM SINCLAIR RICHEY, Plaintiff, v. D. DAHNE, Defendant.	CASE NO. C12-5060 BHS ORDER DECLINING TO ADOPT THE REPORT AND RECCOMENDATION [sic], DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE, AND REVOKING *IN FORMA PAUPERIS* STATUS

This matter comes before the Court on the Report and Recommendation ("R&R") of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 15), Plaintiff Thomas William Sinclair Richey's ("Richey") objections to the R&R (Dkt. 16), the Court's request for additional briefing (Dkt. 18), the Government's additional response (Dkt. 19), and Richey's additional reply (Dkt. 19).

Richey is an inmate within the Washington Department of Corrections ("DOC"). On November 11, 2011, Richey filed an initial grievance that included the phrase "an extremely obese Hispanic female guard." Dkt. 16 at 8. On November 15, 2011, the acting grievance coordinator refused to accept the grievance, instructing Richey to rewrite the grievance and exclude the offending language. *Id.* Richey refused and filed another grievance, which was forwarded to the DOC grievance headquarters as an appeal. *Id.* at 16. The Grievance Program Manager

declined to reach the merits of the appeal because "request for rewriting is between the coordinator and you and can not be appealed to the Grievance Program Manager." *Id.* at 18.

On February 6, 2012, the Court accepted Richey's civil rights complaint alleging violations of his First Amendment right to redress grievances and retaliation. Dkt. 4. On June 13, 2012, Defendant filed a motion to dismiss for failure to state a claim and argued that (1) Richey failed to exhaust under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a); (2) Richey had failed to state a claim under the First Amendment; and (3) Defendant was entitled to qualified immunity. Dkt. 12. On August 30, 2012, Judge Strombom issued the R&R recommending that the Court grant the motion based on failure to exhaust, dismiss the complaint without prejudice, and count the dismissal as a strike under 28 U.S.C. § 1915(g). Dkt. 15.

On October 25, 2012, the Court requested additional briefing on the exhaustion issue. Dkt. 18. On November 9, 2012, the Government filed an additional response. Dkt. 19. On November 20, 2012, Richey filed an additional reply. Dkt. 20.

In its additional response, the Government withdraws its motion to dismiss for failure to exhaust and requests that the Court grant the motion on the ground that Richey has failed to state a claim or Defendant Dahne is entitled to qualified immunity. Dkt. 19. The Government's request, however, is based on Richey's "**failure to show** that the Defendant retaliated against him for his use of constitutionally protected speech" and that the "test for qualified

immunity is an objective test requiring the Plaintiff **to prove** that a reasonable official could not believe his actions were constitutional." Dkt. 19 at 4 (emphasis added). This is not the proper standard on a motion to dismiss.

Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed factual allegations but must provide the grounds for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974. When deciding a motion to dismiss, the Court's consideration is limited to the pleadings. Fed. R. Civ. P. 12(d).

Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights. And (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-568 (9th Cir. 2005).

In this case, Richey has failed to allege a plausible claim for relief. *Bell Atlantic Corp. v. Twobmbly*, 127 S. Ct. 1955, 1965 (2007). Specifically, Richey has failed to allege facts to show that he engaged in protected conduct or that his First Amendment rights have been chilled. Richey provides no authority for the proposition that insulting a prison guard is protected conduct. Moreover, he has failed to allege that his right to redress his grievances has been chilled by the official's refusal to accept his offensive grievance. Therefore, the Court grants the Government's motion to dismiss Richey's complaint.

In the event a court finds that dismissal is warranted, the court should grant the plaintiff leave to amend unless amendment would be futile. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The Court finds that any amendment in this case would be futile because no amendment can cure the deficiency of pleading protected conduct or the chilling of Richey's access to a grievance procedure or access to the courts.

Therefore, the Court having considered the R&R, Richey's objections, supplemental briefing, and the remaining record, does hereby find and order as follows:

(1) The Court **DECLINES** to adopt the R&R;

(2) The Court **GRANTS** Defendant's motion to dismiss for failure to state a claim;

(3) The Court **DISMISSES with prejudice** Richey's complaint; and

(4) The Court **REVOKES** Richey's *in forma pauperis* status.

Dated this 6th day of December, 2012.

s/ Ben H. Settle
BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS W.S. RICHEY, Plaintiff, v. D. DAHNE, Defendant.	No. C12-5060 BHS/KLS REPORT AND RECOMMENDATION Noted for: September 18, 2012

Presently before the Court is the motion to dismiss of Defendant D. Dahne pursuant to Fed. R. Civ. P. 12(b) for failure to exhaust administrative remedies and Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Plaintiff filed a response. ECF No. 13. Defendant filed a reply. ECF No. 14.[1] Having carefully considered the motion and balance of the record, the Court recommends that Plaintiff's claims be dismissed without prejudice for failure to exhaust administrative remedies and that the dismissal be counted as a strike under Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g).

BACKGROUND

Plaintiff Thomas Richey is an inmate in the custody of the Washington State Department of Corrections (DOC) and is currently incarcerated at Monroe Correctional Complex (MCC) in Monroe, Washington. Mr. Richey filed the current civil rights

[1] The motion to dismiss was filed and fully briefed by the parties prior to issuance of the Ninth Circuit's decision in *Woods v. Carey*, 684 F.3d 934, 934 (9th Cir. 2012).

action under 42 U.S.C. § 1983 on January 24, 2012. ECF No. 1. In his complaint, Mr. Richey alleges that Defendant Dennis Dahne violated his First Amendment right(s) to "redress grievances, . . . be free of retaliation, . . ." and "freedom of speech." ECF No. 4, at p. 5. Mr. Richey sues Dennis Dahne, Grievance Coordinator at Stafford Creek Corrections Center (SCCC) in his "personal capacity" and seeks punitive damages. *Id.* at pp. 2 and 4.

STATEMENT OF FACTS

A. Grievance Procedure

There is a grievance procedure available to inmates who are incarcerated in DOC institutions. ECF No. 12-1 (Declaration of Tamara J. Rowden). Under DOC's grievance system, an offender may file an offender complaint over a wide range of aspects of his incarceration. *Id.* Inmates may file grievances challenging: 1) DOC institution policies, rules and procedures; 2) the application of such policies, rules and procedures; 3) the lack of policies, rules or procedures that directly affect the living conditions of the offender; 4) the actions of staff and volunteers; 5) the actions of other offenders; 6) retaliation by staff for filing grievances; and 7) physical plant conditions. *Id.* at ¶ 4. An offender may not file a grievance challenging: 1) state or federal law; 2) court actions and decisions; 3) Indeterminate Sentence Review Board actions and decisions; 4) administrative segregation placement or retention; 5) classification/ unit team decisions; 6) transfers; 7) disciplinary actions. *Id.*

The grievance procedure consists of four levels of review. ECF No. 12-1 (Rowden Decl.), at ¶ 6. At

Level 0, the grievance coordinator at the prison receives a written complaint from an inmate on an issue about which the offender wishes to pursue a formal grievance. *Id.* At this complaint level, the grievance coordinator pursues informal resolution, returns the complaint to the inmate for rewriting, returns the complaint to the inmate requesting additional information, or accepts the complaint and processes it as a formal grievance. *Id.*

A complaint that has been returned for rewriting must be re-submitted within five days or on or before a date set by the Grievance Coordinator. ECF No. 12-1 (Rowden Decl.), ¶ 6. A complaint that is not re-submitted within five days or a date set by the Grievance Coordinator will be administratively withdrawn. *Id.* A complaint that the Grievance Coordinator determines is non-grievable will be returned to the inmate. *Id.*

Level I grievances are handled by the local grievance coordinator. ECF No. 12-1 (Rowden Decl.), ¶ 6. If the inmate would like a review of the Level I response, the inmate may appeal to Level II. All appeals and initial grievances received at Level II are reviewed and responded to by the facility's superintendent. Offenders may appeal all Level II responses except emergency grievances to Level III at Department Headquarters in Olympia, where they are reinvestigated. Grievance Program Administrators are the respondents at Level III. *Id.*

B. Plaintiff's Grievances

On November 11, 2011, Mr. Richey filed Initial Grievance Log No. 1122177, stating that "an extremely obese Hispanic female guard" had denied

him his "right to yard and to a shower." ECF No. 12-1 (Rowden Decl.), at ¶ 11, Attachment A (Grievance Log No. 1122177). Mr. Richey stated, in relevant part:

> . . . She has taken my right to a shower on previous occasions because I commented about her need to diet.
>
> . . . Once in my cell, . . . , I expelled the statement, "son of a bitch." She heard this and claimed I called her a bitch and then denied me a shower roll. She denied me these things without a hearing or due process. If she had a problem with my behavior she could verbally correct me or infract me. She has no authority to deprive me of the right to a shower and clean clothes without a hearing of some sort. She is abusing her position of authority. It isn't my problem that she is so obese, she holds a grudge over my previous comments about her enormous girth.
>
> It is no wonder why guards are assaulted and even killed by some prisoners. When guards like this fat Hispanic female guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violent behavior in retaliation. . . .

Id.

On November 15, 2011, K. McTarsney responded for D. Dahne with: "[r]ewrite – appropriately. Just stick to the issue of what happened, when, who was involved." Mr. Richey was given five days to return his rewritten grievance. ECF

No. 12-1 (Rowden Decl.), at ¶ 12, Attachment A. On November 17, 2011, Mr. Richey submitted a rewritten grievance which began with "[o]n 11-10-11, an extremely obese Hispanic female guard," followed by his description of the interaction with her and his denial of yard and shower. ECF No. 12-1 (Rowden Decl.), at ¶ 13, Attachment B. He concluded with the following:

> . . . It is no wonder why guards are slapped and strangled by some prisoners.[2] When guards like this obese female Hispanic guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violence in retaliation. She is a threat to the orderliness and security of the prison."

Id. Defendant Dahne responded by instructing Mr. Richey to "[r]ewrite as directed," informing him that "[e]xtremely obese is un-necessary and inappropriate." *Id*.

On December 7, 2011, Mr. Richey sent Defendant Dahne a kite with the following: [a]re you going to process my properly submitted grievance or what? I'm not rewriting it so do your job and process it." ECF No. 12-1 (Rowden Decl.), at ¶ 14,

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[2] At the time Mr. Richey wrote this grievance, Jayme Biendl, a female corrections officer at the Monroe Correctional Complex, where the Plaintiff has been housed, was killed by strangulation on January 29, 2011; an inmate is pending trial for her murder. http://www.cbsnews.com/8301-504083_162-20030030-504083.html.

Attachment C. Defendant Dahne responded on December 8, 2011: "[n]o, due to your decision not to rewrite as requested your grievance has been administratively withdrawn." *Id.*

On December 8, 2011, Mr. Richey submitted an offender complaint form, which he marked as an "Initial Grievance", with the same Log No. 1122177 as his grievance against the female guard. In this grievance, he stated that he wanted the "the grievance coordinator [Defendant Dahne] to do his job and process my grievance ASAP." ECF No. 12-1 (Rowden Decl.), ¶ 15, Attachment D. Mr. Richey stated the following:

> . . . My grievance was sent back again I was told to remove "extremely obese" . . . . I refused. I sent the grievance coordinator a kite on 11-28-11 and told him to process my grievance ASAP. I sent a second kite when he failed to respond. The grievance coordinator is refusing to process my grievance, for no adequate reason. He is not the language police. Hell, he couldn't/can't spell adequate (he spelled it "adiquit"). . . . He ought to focus on his effing job and do that properly – and take some night classes in English 101.

Id. On December 14, 2011, Defendant Dahne responded by forwarding the grievance to "HQ as an appeal" of his request for re-write. *Id.*

The Department of Corrections Grievance Program Manual, which is available to all inmates, includes the following "[t]he request for rewriting is between the coordinator and you and cannot be

appealed to the Grievance Program Manager." ECF No. 12-1 (Rowden Decl.), at ¶ 16, Attachment E.

On December 23, 2011, the Acting Grievance Program Manager, Kerri S. McTarsney, responded to Mr. Richey by reminding him that requests for rewrites cannot be appealed and that he should "follow the directions that the grievance coordinator gave you and submit your rewritten complaint within five working days of receipt of this correspondence." ECF No. 12-1 (Rowden Decl.), at ¶ 17, Attachment E.

Mr. Richey did not submit a rewrite of his grievance against the female guard nor did he pursue his grievance against Defendant Dahne for "refusing to process" his grievance. Instead, on January 24, 2012, he filed this lawsuit against Defendant Dahne alleging that Defendant Dahne violated his First Amendment right to "redress grievances and to be free of retaliation." ECF No. 1, at p. 5.

STANDARD OF REVIEW

A court will dismiss a claim if it lacks sufficient factual material to state a claim that is plausible on its face. Fed. R. Civ. P. 12(b)(6); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007). A complaint that merely restates the elements of a cause of action and is supported only by conclusory statements cannot survive a motion to dismiss. *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965-66. When evaluating a motion to dismiss, a court is not required to accept as true factual allegations that are based on unwarranted deductions of fact or inferences that are unreasonable in light of the information provided in the complaint. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th

Cir. 2001). A court may, in its discretion, dismiss a prisoner's complaint with or without leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1124 (9th Cir. 2000).

On a motion to dismiss, material allegations of the complaint are taken as admitted and the complaint is to be liberally construed in favor of the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849 (1969), *reh'g denied*, 396 U.S. 869, 90 S. Ct. 35 (1969); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). Where a plaintiff is proceeding *pro se*, his allegations must be viewed under a less stringent standard than allegations of plaintiffs represented by counsel. *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972), *reh'g denied*, 405 U.S. 948, 92 S. Ct. 963 (1972). While the court can liberally construe a plaintiff's complaint, it cannot supply an essential fact an inmate has failed to plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). A motion to dismiss only admits, for the purposes of the motion, all well pleaded facts in the complaint, as distinguished from conclusory allegations. *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976); *see also*, *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (conclusory allegations unsupported by facts are insufficient to state a claim under 42 U.S.C. § 1983).

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(c)(1) requires:

> The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section

> 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

A motion to dismiss for failure to exhaust administrative remedies is properly brought as an unemunerated Fed. R. Civ. P. 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (citations omitted). When considering whether to dismiss a complaint for lack of exhaustion of administrative remedies, the court may look outside the pleadings to determine whether the issue has been exhausted. *Id.* at 1119-20. To survive a motion to dismiss for failure to exhaust, an inmate's claims must be both exhausted and timely. *McCollum v. California Dept. of Corrections and Rehabilitation*, 647 F.3d 870 (9th Cir. 2011). This Court determines whether an inmate's claim has been fully exhausted by referencing the prison's own grievance requirements. *Griffin v. Arpaio,* 557 F.3d 1117, 1120 (9th Cir. 2009).

DISCUSSION

The Prison Litigation Reform Act (PLRA) requires inmates to exhaust all administrative remedies before bringing a § 1983 claim. 42 U.S.C. § 1997e(a); *Griffin*, at 1119. To effectively exhaust his administrative remedies, an inmate must use all the formal steps of the prison grievance process. *Id*. Because the purpose of exhaustion is to give prison administrators a chance to resolve the issues, the

inmate must exhaust each of his claims through grievances containing enough factual specificity to notify officials of the alleged harm. *Id.* at 1120. If an inmate fails to adequately exhaust his administrative remedies on a claim, that claim must be dismissed pursuant to an unenumerated Fed. R. Civ. P. 12(b) motion. *Wyatt*, at 1119-20. When considering whether to dismiss a complaint for failure to exhaust administrative remedies, the court may look outside the pleadings to determine whether the issue has been exhausted and may decide disputed issues of fact. *Id.*

Washington state prisoners are required to use the process set forth by the OGP to exhaust their claims prior to filing suit. *See Ngo,* 548 U.S. at 90-91 (proper exhaustion requires complying "with an agency's deadlines and other critical procedural issues because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings"). This means that a prisoner must file any grievances, complaints, and appeals he has concerning his prison conditions in the time, place, and manner required by the prison's administrative rules. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir. 2009) (A prisoner must comply with a prison's procedural requirements). Exhaustion under the PLRA must be "proper." *Woodford v. Ngo*, 548 U.S. 81, 90-93, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006). In order to properly exhaust, a prisoner must comply with a prison's grievance procedures.

As is discussed in more detail below, Mr. Richey is no stranger to the prison grievance system or to federal court litigation. In fact, he previously filed a

very similar lawsuit against Mr. Dahne's predecessor involving the same female guard involved in Grievance Log 1122177. *See*, *USDC, Western District,* Cause No. C11-5680 RBL/KLS, Complaint (ECF No. 5). In that case, Mr. Richey alleged that he had been denied his "right to a shower" by an "extremely obese female Hispanic guard." *Id.* at Report and Recommendation (ECF No. 20 therein), at p. 2. In that grievance, the Plaintiff stated:

> . . . On return from the yard, I asked if there's a fat farm that raises all the obese women that Stafford Creek hires. I then asked if maybe there is a womens (sic) football team here because she was as big as a linebacker. After this statement, she denied me a shower.
>
> If a guard has a problem, they have an avenue to punish me. Take my Level or infract me. They have no authority to deprive me of a right without due process. Even prison isn't a dictatorship when it comes to the deprivation of a right. I was not a threat to security. I merely insulted her. But she has to see that I was actually trying to positively encourage her to diet. She is unhealthy. Frankly if she has such thin skin, she shouldn't work in prison around men who are largely anti-social.

Id. On August 1, 2011, Mr. Thaut told the Plaintiff that he had to re-write his grievance and leave out objectionable language and gave him until August 10 to submit the amended grievance. *Id.* Instead, the Plaintiff filed a new offender grievance on August 3, 2011 against Mr. Thaut for failing to process his

previous offender grievance, I.D. No. 1114798. *Id*. Then, on August 10, 2011, the Plaintiff additionally indicated he would not amend his complaint by filing an offender kite stating:

> Re: Grievance #1114798. You will not censor my right to free speech. I will not rewrite my grievance. You will not punish me for the language I choose to use. You are not the language police. You will do your assigned job and investigate my grievance. If not, give it to a grievance coordinator who will. I used no objectional (sic) language in my grievance. So process it pronto (also process my grievance I filed against you).

Id. at 2-3. Plaintiff's original grievance, I.D. No. 1114798, was administratively withdrawn on August 15, 2011, because the Plaintiff chose not to file an amended grievance by the August 10, 2011 deadline. *Id*. This Court upheld the Report and Recommendation and ordered Plaintiff's claims dismissed without prejudice for failure to exhaust administrative remedies. *USDC, Western District,* Cause No. C11-5680 RBL/KLS, Order Adopting Report and Recommendation (ECF No. 24 therein).

Mr. Richey is well aware that he must follow the prison's administrative rules in order to exhaust his administrative remedies prior to filing suit in this Court. With regard to the female prison guard, he was clearly aware that his remedy was to re-submit his grievance and he was given more than one opportunity to do so, but he chose not to avail himself of that remedy. Regardless of whether he did so, he has not sued the female guard in this case and

therefore, whether he exhausted his remedies as to any claims against her is irrelevant to this Court's analysis. However, after the second time he was told to rewrite his grievance, he abandoned his grievance against the female guard and began to complain that Defendant Dahne was refusing to process his grievance "for no adequate reason." ECF No. 12-1, at p. 14.

Mr. Richey's grievance against Defendant Dahne was submitted as an "Initial Grievance" but was submitted under Log No. 1122177, the same complaint number as his complaint against the female guard. The grievance was referred to the statewide grievance coordinator as an appeal of Defendant Dahne's directive that Mr. Richey re-write his complaint against the female guard. ECF No. 12-1, at 14. After that appeal was denied, Mr. Richey did nothing further to advance his grievance against Defendant Dahne. Although there are four levels of review within the prison grievance system, Mr. Richey did nothing to advance his complaint that Defendant Dahne had refused to "process his grievance for no good reason". Nor did he contend in any written grievance, as he alleges in this lawsuit, that Defendant Dahne retaliated against him. Mr. Richey argues only that when his grievance against the female guard was administratively withdrawn, he was relieved of his obligation to do anything further. His argument is without merit.

If Mr. Richey's argument is taken to its logical conclusion, prisoners can circumvent the process set forth by the OGP and the exhaustion requirement mandated by the PLRA by simply submitting

improper grievances and then refusing to rewrite them when instructed to do so.[3] When their grievances are administratively withdrawn, the prisoners can then file suit in federal court without ever having taken their grievance beyond Level 0 of the grievance process, thus rendering the entire system of appeals within the OGP moot. The undersigned does not agree that this is the result envisioned by the PLRA, when the purpose of exhaustion is to give prison administrators a chance to resolve issues before involving the courts.

Mr. Richey knows how the prison grievance system works and he knows how to properly file grievances. As of 2011, he had filed over 27 *pages* of grievances. *See* ECF No. 14-1, Exhibit 1 (McTarsney Decl.), Attachment B (Grievance Summary) (filed in Case No. C11-5755).

Because the Court finds that Mr. Richey has failed to exhaust his administrative remedies, the Court lacks discretion to resolve his claims against Defendant Dahne on the merits. *See, e.g.*, *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 535 (7th Cir. 1999) (suit filed by prisoner before administrative remedies have been exhausted must be dismissed; district court lacks discretion to resolve claim on merits, even if prisoner exhausts intra-prison

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[3] Inappropriate language is only one reason that this Court has seen cited by prison officials for requiring a prisoner to rewrite a grievance. Other reasons include improper citations to legal authority or improper signatures.

remedies before judgment). Therefore, the Court does not address the merits of Mr. Richey's claims, *i.e.*, whether Defendant Dahne violated his First Amendment rights, and it is recommended that those claims be dismissed without prejudice.

D. Granting Strike Under 28 U.S.C. § 1983

Mr. Richey filed a motion to voluntarily withdraw his civil lawsuit in this case on February 29, 2012, only three days after filing his complaint against Defendant Dahne. ECF No. 8. The undersigned recommended that his motion be granted pursuant to Fed. R. Civ. P. 41(a)(1)(i). ECF No. 9.

Mr. Richey then objected to the Report and Recommendation. ECF No. 10. Mr. Richey explained that he wanted to withdraw his complaint to avoid an adverse ruling and imposition of a third § 1915(g) strike because in two prior rulings, involving the filing of grievances, the undersigned had recommended dismissal with the imposition of strikes. As discussed above, in Case No. C11-5680 RBL/KLS, Judge Ronald B. Leighton adopted the undersigned's Report and Recommendation. In that case, Mr. Richey filed his federal lawsuit before completing his administrative remedies. In another case, C11-5755 BHS/KLS, the undersigned similarly concluded that Mr. Richey had failed to exhaust his grievances before filing his federal lawsuit and recommended that dismissal of his claims should count as a strike under § 1915(g). ECF No. 19 (therein). Judge Benjamin H. Settle declined to adopt the recommendation, finding instead that Mr. Richey's claim could be dismissed because Washington provides an adequate post

deprivation remedy. ECF No. 22 (therein). The dismissal in that case was not counted as a § 1915(g) strike.

Thereafter, it appears that Mr. Richey was no longer concerned that he was facing a third strike and he wished to withdraw his motion to voluntarily dismiss this case. The District Court allowed him to withdraw his motion to dismiss this case. ECF No. 11.

The foregoing does not, however, change the fact that Mr. Richey has once again filed a frivolous lawsuit in federal court. He has again failed to exhaust his administrative remedies even though he is well aware of his obligation to do so. This lawsuit is frivolous and its dismissal should be counted as a strike. Mr. Richey could have saved himself, the Defendants, and this Court precious time and resources had he simply withdrawn his complaint. Mr. Richey knew that his filing was frivolous. As has been previously noted Mr. Richey is no stranger to federal court. Some of his filings in the past ten years include: *Richey v. Riveland*, No. CV-92-5216-CRD, 1994 WL 249994 (9th Cir. June, 9, 1994) (denial of a transfer to another prison not unconstitutional); *Richey v. Blodgett*, No. CV-92-00158-CI, 1994 WL 697597 (9th Cir., December 12, 1994) (prison officials did not impermissibly violate due process and first amendment by confiscating two manuscripts marked "legal mail"); *Richey v. Aldana*, No. C05-5513FDB, 2007 WL 666619 (W.D. Wash., February 28, 2007) (dismissed finding that withholding publications from an inmate for behavioral modifications reasons is legitimate in light of the First Amendment); *Richey v. Lane*, No. C09-5195FDB, 2009 WL 1867607 (W.D. Wash., June 29, 2009) (action remanded to superior

court after plaintiff strikes all federal claims); *Richey v. Dixon*, W.D. Wash. No. C11-5944 RBL/JRC (closed following stipulated settlement); *Richey v. Thaut,* W.D. Wash. No., C11-5755 BHS/KLS (dismissed for failure to state a claim); *Richey v. Buile,* W.D. Wash. No. C12-0528 JLR/BAT (dismissed for failure to state a claim); *Richey v. Dixon,* W.D. Wash. No. C12-5194 RJB/KLS (Pending); and *Richey v. Sykes,* W.D. Wash. No. C12-0660 JLR/MAT (Pending).

Plaintiff has also filed 27 pages of grievances while he has been in custody. ECF No. 14-1, Exhibit 1 (McTarsney Decl.), Attachment B (Grievance Summary) (filed in Case No. C11-5755).

The foregoing indicates that Mr. Richey is very familiar with the prison grievance system and the requirements for pleading a civil rights action. Yet he continues to file lawsuits before exhausting his administrative remedies. When Mr. Richey's actions are considered in their entirety, including his attempt to evade a strike, they are frivolous. The undersigned recommends that imposing a § 1915(g) "strike" under these circumstances is merited and appropriate.

CONCLUSION

The undersigned recommends that Defendant's motion to dismiss (ECF No. 12) be **GRANTED** and that Plaintiff's claims against the Defendants be **dismissed without prejudice** for failure to exhaust and that the **dismissal be counted as a strike under 28 U.S.C. § 1915(g).**

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written

objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **September 18, 2012**, as noted in the caption.

DATED this 30th day of August, 2012.

s/Karen L. Strombom
Karen L. Strombom
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS W.S. RICHEY, Plaintiff, v. D. DAHNE, Defendant.	NO. 3:12-CV-05060-BHS-KLS DECLARATION OF DENNIS DAHNE

I, DENNIS DAHNE, make the following declaration:

1. I have knowledge of the facts herein, am over eighteen years of age, and am competent to testify to such facts.

2. I am employed with the Washington Department of Corrections (DOC) as a Corrections Specialist 3 and serve as the Grievance Coordinator at the Stafford Creek Corrections Center (SCCC) in Aberdeen, Washington. I have been employed with DOC since 1994 and have been the Grievance Coordinator at SCCC since December 2009. I also served as temporary Grievance Coordinator on several occasions prior to that date.

3. My job responsibilities as Grievance Coordinator are to process offender grievances in accordance with the Offender Grievance Program (OGP). My job duties involve: receiving offender complaints and grievances at SCCC; facilitating the informal resolution of grievances; determining

whether the issue in each grievance is grievable under policy; ensuring grievances are written in accordance with the OGP and. contain all the necessary information to conduct a complete and thorough investigation and return for rewrite if necessary; and conducting Level 1 grievance investigations and providing responses. A true and correct copy of the Offender Grievance Program Policy that was in effect in 2011 is included as Attachment A, and a true and correct copy of the Offender Grievance Program Manual that was in effect in 2011 is included as Attachment B.

4. I am familiar with the Plaintiff in this case, Thomas Richey, DOC #929444, because he was incarcerated for a time at SCCC and filed a number of grievances. On November 11, 2011, Offender Richey filed a grievance. I believe I was on annual leave at the time, so another staff member responded on-my behalf. The grievance was assigned Log ID #1122177. A true and correct copy of Grievance #1122177 is included as Attachment C. In that complaint, Offender Richey grieved the conduct of a correctional officer he described as "an extremely obese Hispanic female guard on IMU 2nd shift." Offender Richey went beyond simply describing the incident and stated: "It isn't my problem that she is so obese, she holds a grudge over my previous comments about her enormous girth. It is no wonder why guards are assaulted and even killed by some prisoners. When guards like this fat Hispanic female guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violent behavior." The staff member who received this grievance directed Offender Richey to: "Rewrite –

appropriately. Just stick to the issue of what happened, when, who was involved."

5. Two days later, Offender Richey submitted practically the exact same grievance, but added the words "(who)," "(when)," and "(what happened)" into the text. He also added: "It is no wonder why guards-are slapped and strangled by some prisoners" and "THIS GRIEVANCE DETAILS WHAT HAPPENED, WHEN IT HAPPENED, AND WHO WAS INVOLVED. FILE AND PROCESS IT!!!"

6. I directed Offender Richey to comply with the previous rewrite instruction he had gotten because the grievance contained so much irrelevant, inappropriate, and borderline threatening extra language. I told him to: "Rewrite as directed. Hispanic female is [adequate]. Extremely obese is un-necessary and inappropriate." I did not have room to include every single part of the grievance that was not in accordance with the OGP guidelines, but I believed a reasonable person could understand that making repeated references to a staff member's weight and talking about guards getting strangled have nothing to do with an actual. grievable issue and are inappropriate. This was especially true in November 2011, which was just a few months after an inmate actually did murder a DOC staff member at the Monroe Correctional Complex by strangling her to death.

7. The grievance form indicates that grievance rewrites must be resubmitted within five days of the offender receiving the rewrite directive. Offender Richey never submitted a rewritten grievance. Accordingly, the grievance was considered

administratively withdrawn. Approximately twenty days after sending the second grievance, Offender Richey sent me a kite that said: "ARE YOU GOING TO PROCESS MY PROPERLY SUBMITTED GRIEVANCE OR WHAT? I'M NOT REWRITING IT SO DO YOUR JOB AND PROCESS IT." I responded the next day and informed him that because of his decision not to rewrite the grievance as requested, the grievance was administratively withdrawn. The administrative withdrawal of a grievance is not an adverse decision; an offender can submit another grievance on the issue even if one has been administratively withdrawn.

8. The purpose of the grievance program is to encourage proper and effective communication between offenders and staff and to resolve issues at the lowest possible level. In November 2011, we processed approximately 300 new grievances per month at SCCC. In order to promote that resolution and manage the high number of issues needing resolution, it is critical that all offenders follow the rules of the OGP. It is important that we maintain consistency in the process so that offenders can trust in the OGP and rely on it for resolving their issues. Additionally, grievances are handwritten by offenders and staff members have to type them up when they are processed for any sort of formal resolution. If offenders include a lot of extra information, unrelated to the actual issue they are grieving, it becomes a greater burden on resources because it takes additional staff time to type and prepare the grievances. It also makes it more difficult to zero in on the issue that needs to be resolved. That is part of the reason why, for example, we limit grievances to only

one issue per grievance form. Additionally, requiring inmates to refrain from including unnecessary derogatory remarks in their grievance narratives facilitates resolution. If you were filling out any other form or trying to resolve any other issue, you would not call people names or go off on tangents about people's weight or other unrelated issues, and the same logic and reasonableness applies to grievance forms. The grievance form is designed to accommodate only a simple, straight-forward statement of the offender's concern.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 17th day of March, 2016, at Aberdeen, Washington.

s/Dennis Dahne
DENNIS DAHNE
Grievance Coordinator

State of Washington LOG I.D. 1122177
Department of Corrections Offender Complaint

CHECK ONE: _x_ Initial Grievance ___ Emergency Grievance
___ Appeal to Next Level

RESIDENTIAL FACILITIES: Send all completed copies of this form to the Grievance Coordinator. Explain what happened, when, where, and who was involved or which policy/grievance is being grieved. Be as brief as possible, but include the necessary facts. A formal grievance begins on the date the typed grievance forms are signed by the Coordinator. Contact staff to report an emergency situation or to initiate an emergency grievance. Please attempt to resolve all complaints through appropriate staff before initiating a grievance.

NOTE: Complaints must be filed within 20 days of the incident. Appeals must be filed within 5 days of receiving the response. Include log ID # of response being appealed.

<table>
<tr><td colspan="2">Name: Last First Middle
Richey Thomas WS</td><td colspan="2">DOC Number
929444</td></tr>
<tr><td>Program Assignment</td><td>Work Hors</td><td>Facility/Office
SCCC</td><td>Unit/Cell
FC17</td></tr>
<tr><td colspan="4">[unreadable]</td></tr>
<tr><td colspan="2">[unreadable] P.O. Box City, State</td><td>Zip Code</td><td>Telephone Number</td></tr>
<tr><td colspan="4">I WANT TO GRIEVE: On 11-10-11, an extremely obese Hispanic female guard on IMU's 2nd shift verbally corrected me from turning after stepping back from my cell. On the way along the tier, she tugged and shook my arm and asked me if I heard her. I said, "I'm not deaf. I heard you." On the way down the steps, she told me not to pull her (I wasn't). I rolled my eyes and said, "Here we go." I have previously been subject to abusive treatment from this unprofessional obese guard. She has taken my right to a shower on previous occasions because I commented about her need to diet. After I said, "Here we go," she pulled on my arm painfully and told me to go back to my cell. She denied me of my right to yard and a shower. Once in my cell, in natural exasperation, I expelled the statement, "son of a bitch." She heard this and claimed I called her a bitch and then denied me a shower roll. She denied me these things without a hearing or due process. If she had a problem with my behavior she could verbally correct me or infract me. She has no authority to deprive me of the right to a shower and clean clothes without a hearing of some sort. She is abusing her position of authority. It isn't my problem that she is so obese, she holds a grudge over my previous comments about her enormous girth. It is no wonder by guards are assaulted and even</td></tr>
</table>

killed by some prisoners. When guards like this fat Hispanic female guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violent behavior in retaliation. She is a danger to the orderliness and security of the prison.

SUGGESTED REMEDY: *The guard in this incident should be reprimanded and educated. She should receive a staff misconduct report. She needs to learn that she cannot deprive prisoners of their right to a shower or clean clothes based on her whim.*

Mandatory	*Thomas W.S. Richey* Signature	*11-11-11* Date

GRIEVANCE COORDINATOR'S RESPONSE Your complaint is being returned because: __ It is not a grievable issue. __ You requested to withdraw the complaint. __ You failed to respond to callout sheet on _____. __ The formal grievance/appeal paperwork is being prepared.	Location Code *504*	Date Received *11/15/11*
	__ The complaint was resolved informally. X Additional information and/or rewriting is needed. (See below.) Return within five (5) days or by: Due Date:_____ __ No rewrite received. Date _____	

EXPLANATION: *Rewrite – appropriately. Just stick to the issue of what happened, when, who was involved.*

[unreadable]

TYPE	CATEGORY	AREA	SPEC	REMEDY	RESOLUTION
01	02	810	722	08	05

DATE OF RESPONSE	COORDINATOR'S SIGNATURE
11/15/11	*K. McTarsney for D. Dahne*

State of Washington LOG I.D. NUMBER 1122177
Department of Corrections Offender Complaint

CHECK ONE: _x_ Initial Grievance ___ Emergency Grievance
___ Appeal to Next Level

RESIDENTIAL FACILITIES: Send all completed copies of this form to the Grievance Coordinator. Explain what happened, when, where, and who was involved or which policy/grievance is being grieved. Be as brief as possible, but include the necessary facts. A formal grievance begins on the date the typed grievance forms are signed by the Coordinator. Contact staff to report an emergency situation or to initiate an emergency grievance. Please attempt to resolve all complaints through appropriate staff before initiating a grievance.

NOTE: Complaints must be filed within 20 days of the incident. Appeals must be filed within 5 days of receiving the response. Include log ID # of response being appealed.

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FC14</td></tr>
<tr><td colspan="4">[unreadable]</td></tr>
<tr><td colspan="2">[unreadable] P.O. Box City, State</td><td>Zip Code</td><td>Telephone Number</td></tr>
<tr><td colspan="4">I WANT TO GRIEVE: On 11-10-11, an extremely obese Hispanic female guard (who) on IMU's 2nd shift (when) verbally corrected me from turning after I stepped back from my cell. On the way along the tier, she repeatedly asked if I heard her instruction. I said, "I'm not deaf. I heard you." On the way down the steps, she told me not to pull her (I wasn't). I rolled my eyes and said, "Here we go again." (I have previously been subject to unprofessional conduct from this extremely obese Hispanic IMU 2nd shift guard before (I don't know her name). The guard then decided to take my yard and shower (what happened). Once in my cell, I remarked, "son of a bitch" in exasperation. She claimed I called her a bitch and then denied me a clean shower roll. She denied me yard, my right to a shower, and a shower roll without due process nor proper reason or justification. If she has a problem with my behavior, she can infract me. She's not allowed to punish me on whim by depriving me of my right to a shower. It is no wonder why guards are slapped and strangled by some prisoners. When guards like this obese female Hispanic guard abuse their position as much as they abuse their calorie intake, it can make prisoners less civilized than myself to resort to violence in retaliation. She is a threat to the orderliness and security of the prison. THIS GRIEVANCE DETAILS</td></tr>
</table>

WHAT HAPPENED, WHEN IT HAPPENED, AND WHO WAS INVOLVED. FILE AND PROCESS IT!!!

SUGGESTED REMEDY: *The guard should be reprimanded and receive a staff misconduct report. She needs to learn that she can't deprive prisoners of their basic rights without justification.*

Mandatory	*Thomas W.S. Richey* Signature	*11-17-11* Date

GRIEVANCE COORDINATOR'S RESPONSE Your complaint is being returned because: __ It is not a grievable issue. __ You requested to withdraw the complaint. __ You failed to respond to callout sheet on _____. __ The formal grievance/appeal paperwork is being prepared.	Location Code	Date Received
	__ The complaint was resolved informally. __ Additional information and/or rewriting is needed. (See below.) Return within five (5) days or by: Due Date:_____ __ No rewrite received. Date _____	

EXPLANATION: *Rewrite as directed. Hispanic Female is adiquit. Extremely Obese is un-necessary and inappropriate.*

[unreadable]

TYPE	CATEGORY	AREA	SPEC	REMEDY	RESOLUTION

DATE OF RESPONSE	COORDINATOR'S SIGNATURE

Department of Corrections 1122177
State of Washington Offender's Kite

PAPELETA DE PETICION DEL INTERNO

OFFENDER NAME (PRINT) NOMBRE DEL INTERNO (LETRA DE MOLDE)		
TOM RICHEY		
DOC NUMBER/ NUMERO DOC	UNIT, CELL/ UNIDAD, CELDA	DATE/FECHA
929444	*FC14*	*12-7-11*
DESIRE INTERVIEW WITH OR ANSWER FROM/ DESEA ENTREVISTA CON O RESPUESTA DE		
GRIEVANCE COORDINATOR		

REASON/QUESTION
RAZON/PREGUNTA

__ Interpreter needed for ____ (language).
__ Necesito Interprete para ____ (idioma).

RE GRIEVANCE # 1122217 [sic]. *ARE YOU GOING TO PROCESS MY PROPERLY SUBMITTED GRIEVANCE OR WHAT? I'M NOT REWRITING IT SO DO YOUR JOB AND PROCESS IT.*

SIGNATURE/FIRMA DAYS OFF/DIAS LIBRES

Thomas WS Richey

RESPONSE
RESPUESTA

No, due to your decision not to rewrite as requested your grievance has been administraitouly [sic] *withdrawn.*

Log ID 1122177

RESPONDER/PERSONA QUE RESPONDE DATE/FECHA

D. Dahne *12/8/11*

State of Washington LOG I.D. NUMBER 1122177
Department of Corrections Offender Complaint

CHECK ONE: _x_ Initial Grievance ___ Emergency Grievance
___ Appeal to Next Level

RESIDENTIAL FACILITIES: Send all completed copies of this form to the Grievance Coordinator. Explain what happened, when, where, and who was involved or which policy/grievance is being grieved. Be as brief as possible, but include the necessary facts. A formal grievance begins on the date the typed grievance forms are signed by the Coordinator. Contact staff to report an emergency situation or to initiate an emergency grievance. Please attempt to resolve all complaints through appropriate staff before initiating a grievance.

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<tr><td colspan="2">[unreadable] P.O. Box City, State</td><td>Zip Code</td><td>Telephone Number</td></tr>
<tr><td colspan="4">I WANT TO GRIEVE: On 11-11-11, I filed a grievance against an extremely obese female Hispanic guard. But my grievance was returned for rewriting. I was told to explain what happened, when, and who was involved. I rewrote said grievance on 11-17-11. My grievance was sent back again and I was told to remove “extremely obese” from my grievance. I refused. I sent the grievance coordinator a kite on 11-??-11 and told him to process my grievance ASAP. I sent a second kite when he failed to respond. The grievance coordinator is refusing to process my grievance, for no adequate reason. He is not the language police. Hell, he couldn’t/can’t spell adequate (he spelled it “adiquit”). He’s in no position to correct my language. I write the English language better that he could ever hope to achieve, and he wants to try to play language police. He ought to focus more on his effing job and do that properly—and take some night classes in English 101.

SUGGESTED REMEDY: I want the grievance coordinator to do his job and process my grievance ASAP.

Mandatory Thomas W.S. Richey Signature 12-8-11 Date</td></tr>
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GRIEVANCE COORDINATOR'S RESPONSE Your complaint is being returned because: __ It is not a grievable issue. __ You requested to withdraw the complaint. __ You failed to respond to callout sheet on _____. __ The formal grievance/appeal paperwork is being prepared.	Location Code *504*	Date Received *12/14/11*
	__ The complaint was resolved informally. __ Additional information and/or rewriting is needed. (See below.) Return within five (5) days or by: Due Date:_____ __ No rewrite received. Date _____	
EXPLANATION: *Will be forwarded to HQ as appeal of Coordinators request for rewrite.*		
[unreadable]		

TYPE	CATEGORY	AREA	SPEC	REMEDY	RESOLUTION

DATE OF RESPONSE	COORDINATOR'S SIGNATURE
	D. Dahne