

NO. 49001-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LORENZO GINO SANDOVAL,

Plaintiff-Appellant,

v.

CHERYL SULLIVAN, et al.,

Defendants-Appellees.

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

ROBERT W. FERGUSON
Attorney General

JERRY P. SCHAROSCH,
WSBA #39393
Assistant Attorney General
Corrections Division, OID #91025
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
Telephone: (509) 456-3123
E-Mail: Jerrys@atg.wa.gov

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION..... | 1 |
| II. | STATEMENT OF THE CASE..... | 1 |
| | A. General Factual Background..... | 1 |
| | B. Search of Sandoval’s Cell and Confiscation of Documents | 3 |
| | C. Withholding of Money Orders..... | 4 |
| | D. Sandoval’s Ancillary Pending Litigation..... | 6 |
| | E. Procedural Background..... | 7 |
| III. | STANDARD OF REVIEW..... | 7 |
| IV. | ARGUMENT | 8 |
| | A. Sandoval Received Procedural Due Process Regarding the Mail Restrictions and the Withholding of Documents and Money Orders..... | 8 |
| | 1. The Mail Restrictions..... | 9 |
| | 2. The Documents in Sandoval’s Cell..... | 11 |
| | 3. The Money Orders Sent Directly to Sandoval..... | 13 |
| | B. Sandoval Fails to Show a First Amendment Violation..... | 14 |
| | 1. Sandoval was not denied access to the courts by the Defendants..... | 14 |
| | 2. Sandoval was not subjected to any retaliation for engaging in protected activity..... | 16 |
| | C. No Calculated Harassment Regarding Search of Cell and Confiscation of Documents Occurred..... | 19 |

| | | |
|----|---|----|
| D. | Lack of Personal Participation by Defendants May, Glebe, Pacholke, and Warner..... | 20 |
| 1. | Joseph “Clint” May. | 21 |
| 2. | Pat Glebe. | 22 |
| 3. | Dan Pacholke. | 23 |
| 4. | Bernard Warner. | 23 |
| E. | Individual Defendants are Entitled to Qualified Immunity | 24 |
| 1. | First Amendment. | 27 |
| 2. | Fourteenth Amendment (Procedural Due Process). | 28 |
| 3. | Eighth Amendment Calculated Harassment..... | 30 |
| F. | Sandoval’s Objections to Evidence Submitted with Defendants’ Motion for Summary Judgment Lacks Merit..... | 30 |
| V. | CONCLUSION | 31 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------|
| <i>Ashcroft v. al-Kidd</i> , 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)..... | 25 |
| <i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)..... | 24 |
| <i>Bergquist v. County of Cochise</i> , 806 F.2d 1364 (9th Cir. 1986) | 21 |
| <i>Bill Johnson’s Rests., Inc. v. NLRB</i> , 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)..... | 14 |
| <i>Board of Regents v. Roth</i> , 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)..... | 28 |
| <i>Bounds v. Smith</i> , 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977)..... | 14 |
| <i>Brodheim v. Cry</i> , 584 F.3d 1262 (9th Cir. 2009) | 17, 18 |
| <i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)..... | 31 |
| <i>Clairmont v. Sound Mental Health</i> , 632 F.3d 1091 (9th Cir. 2011) | 26 |
| <i>Cobb v. Snohomish County</i> , 86 Wn. App. 223, 935 P.2d 1384 (1997)..... | 16 |
| <i>Cornett v. Donovan</i> , 51 F.3d 894 (9th Cir. 1995) | 15 |
| <i>Davidson v. Cannon</i> , 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986)..... | 8 |

| | |
|---|------------|
| <i>Daves v. Walker</i> , 239 F.3d 489 (2d Cir. 2001), overruled on other grounds, by <i>Phelps v. Kapnolas</i> , 308 F.3d 180 (2d Cir. 2002) | 16 |
| <i>Feis v. King Co. Sheriff's Dept.</i> , 165 Wn. App. 525, 267 P.3d 1022 (2011)..... | 25, 26, 27 |
| <i>Flores v. Pierce</i> , 617 F.2d 1386 (9th Cir. 1980) | 8 |
| <i>Frost v. Symington</i> , 197 F.3d 348 (9th Cir. 1999) | 9 |
| <i>Funtanilla v. Erwin</i> , 60 F.3d 833, 1995 WL 394295 (9th Cir. 1995) | 12 |
| <i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)..... | 24 |
| <i>Hertog, ex rel. S.A.H. v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999)..... | 8 |
| <i>Hogland v. Klein</i> , 49 Wn.2d 216, 298 P.2d 1099 (1956)..... | 16 |
| <i>Holder v. City of Vancouver</i> , 136 Wn. App. 104, 147 P.3d 641, 643 (2006)..... | 7 |
| <i>Hontz v. State</i> , 105 Wn.2d 302, 714 P.2d 1176 (1986)..... | 21, 23 |
| <i>Hope v. Pelzer</i> , 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)..... | 19 |
| <i>Hudson v. Palmer</i> , 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)..... | 9, 19 |
| <i>Hunter v. Bryant</i> , 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991)..... | 24 |

| | |
|--|--------|
| <i>Hutchinson v. Grant</i> , 796 F.2d 288 (9th Cir. 1986) | 22 |
| <i>Hydrick v. Hunter</i> , 669 F.3d 937 (9th Cir. 2012) | 25 |
| <i>Ivey v. Wilson</i> , 832 F.2d 950 (6th Cir. 1987) | 19 |
| <i>Johnson v. Duffy</i> , 588 F.2d 740 (9th Cir. 1978) | 21 |
| <i>Keck v. Collins</i> , 184 Wn.2d 358, 357 P.3d 1080 (2015)..... | 7 |
| <i>Krug v. Lutz</i> , 329 F.3d 692 (9th Cir. 2003) | 10, 29 |
| <i>Lewis v. Casey</i> , 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed.2 d 606 (1996)..... | 15 |
| <i>Livingston v. Ceden</i> o, 164 Wn.2d 46, 186 P.3d 1055 (2008)..... | 10 |
| <i>Lujan v. Nat’l Wildlife Fed’n</i> , 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)..... | 22 |
| <i>Maciariello v. Sumner</i> , 973 F.2d 295 (4th Cir. 1992) | 25 |
| <i>McCollum v. California Dep’t of Corr. & Rehab.</i> , 647 F.3d 870 (9th Cir. 2011) | 18 |
| <i>McCullough v. Wyandanch Union Free Sch. Dist.</i> , 187 F.3d 272 (2nd Cir. 1999) | 26 |
| <i>McKune v. Lile</i> , 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002)..... | 19 |
| <i>Mitchell v. Forsyth</i> , 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)..... | 25 |

| | |
|---|-----------|
| <i>Nevada Dep't of Corr. v. Greene</i> , 648 F.3d 1014 (9th Cir. 2011) | 15 |
| <i>Parratt v. Taylor</i> , 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)..... | 8 |
| <i>Pearson v. Callahan</i> , 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)..... | 24, 25 |
| <i>Polk County v. Dodson</i> , 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981)..... | 20 |
| <i>Pratt v. Rowland</i> , 65 F.3d 802 (9th Cir. 1995) | 16, 17 |
| <i>Procunier v. Martinez</i> , 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974)..... | 9, 10, 29 |
| <i>Redman v. County of San Diego</i> , 942 F.2d 1435 (9th Cir. 1991) | 21 |
| <i>Rhodes v. Robinson</i> , 408 F.3d 559 (9th Cir. 2004) | 17, 28 |
| <i>Saucier v. Katz</i> , 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)..... | 25 |
| <i>Schenck v. Edwards</i> , 921 F. Supp. 679 (E.D. Wash. 1996) <i>aff'd</i> , 133 F.3d 929 (9th Cir. 1998)..... | 30 |
| <i>Seattle First–Nat'l Bank v. Shoreline Concrete Co.</i> , 91 Wn.2d 230, 588 P.2d 1308 (1978)..... | 7 |
| <i>Serrano v. Francis</i> , 345 F.3d 1071 (9th Cir. 2003) | 9 |
| <i>Sikorski v. Whorton</i> , 631 F. Supp.2d 1327 (D. Nev. 2009)..... | 10 |

| | |
|---|----------------|
| <i>Silva v. Di Vittorio</i> , 658 F.3d 1090 (9th Cir. 2011) | 14, 15 |
| <i>Soranno 's Gasco, Inc. v. Morgan</i> , 874 F.2d 1310 (9th Cir. 1989) | 17 |
| <i>Steffey v. Orman</i> , 461 F.3d 1218 (10th Cir. 2006) | 29 |
| <i>Turner v. Safley</i> , 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)..... | 10 |
| <i>Vigliotto v. Terry</i> , 873 F.2d 1201 (9th Cir. 1989) | 11, 19, 20, 28 |
| <i>Wilkins v. City of Oakland</i> , 350 F.3d 949 (9th Cir. 2003) | 27 |
| <i>Wolff v. McDonnell</i> , 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)..... | 9 |
| <i>Wood v. Yordy</i> , 753 F.3d 899 (9th Cir. 2014) | 17, 18 |
| <i>Wright v. Riveland</i> , 219 F.3d 905 (9th Cir. 2000) | 9 |

Statutes

| | |
|--|----------------------|
| 42 U.S.C. § 1983..... | 1, 8, 14, 20, 21, 24 |
| RCW 72.09.530 | 12 |
| <i>Snyder v. Nolen</i> , 380 F.3d 279 (7th Cir. 2004) | 14 |
| WAC 137-25-030..... | 2 |
| WAC 137-28-220..... | 3 |
| WAC 137-28-430..... | 29 |

WAC 137-36-040..... 27, 29

Other Authorities

10A Fed. Prac. & Proc. Civ. § 2727 (3d ed. 2015)..... 32

Rules

CR 56 8

I. INTRODUCTION

This case involves the legitimate restriction of inmate Lorenzo Sandoval's mail, the single search of his cell for contraband, and the confiscation of documents that Sandoval is not allowed to possess in his cell. Sandoval argues the actions were retaliatory, violated procedural due process, and denied him the right of access to courts. But all of these actions were reasonable, were non-retaliatory, and were supported by prison policy and valid penological interests.

Sandoval raised both constitutional claims under 42 U.S.C. § 1983 and negligence claims below. No genuine issue of material fact exists and all Defendants were entitled to judgment as a matter of law. This Court should affirm the trial court's decision granting all Defendants summary judgment.

II. STATEMENT OF THE CASE

A. General Factual Background

In August 2010, Sandoval was an inmate at Stafford Creek Corrections Center ("SCCC") in Aberdeen, Washington. CP 246. Toward the end of August, staff in the SCCC mailroom discovered Sandoval was attempting to correspond with inmate Eddie Shamp at the Monroe Correctional Complex in Monroe, Washington. CP 246-248. Offender-to-offender correspondence is not permitted unless approved in writing by

the DOC Superintendent or his/her designee. CP 248. Sandoval did not have such authorization. CP 248.

This discovery led to an investigation of Sandoval's misuse of the mail. CP 248. During August and September 2010, mailroom staff discovered and restricted several pieces of Sandoval's incoming and outgoing mail based upon DOC policy that rested on legitimate penological interests. CP 246-248. Three pieces of incoming mail contained money orders sent directly to Sandoval. CP 246-248. A total of sixteen pieces of Sandoval's mail were intercepted, and mail restriction notices were provided to Sandoval. CP 246-248.

Based on the restricted mail, mailroom Sergeant Cheryl Sullivan issued four serious disciplinary infractions to Sandoval. WAC 137-25-030; CP 249. In the narrative portion of the infraction notice, Sullivan briefly described the pieces of mail and other evidence supporting the infractions. CP 249, 380-384. However, Sullivan erroneously ascribed an August 30, 2010 date to several pieces of mail. CP 249-250. No mail restriction notices issued to Sandoval were dated August 30, 2010. CP 249-250. Sandoval requested a hearing on these infractions, which was held on October 4, 2010. CP 249.

At the disciplinary hearing, Sandoval pled guilty to a reduced charge of a general infraction – unauthorized use of mail or telephone.

WAC 137-28-220(1)-303. The three remaining serious infractions were dismissed. CP 249.

B. Search of Sandoval's Cell and Confiscation of Documents

During the mailroom investigation described above, Sergeant Sullivan requested Sandoval's cell be searched for documents of inmate Shamp. CP 248-249. A cell search occurred on September 24, 2010. CP 397. Correctional officers Joseph Salvaggi and Kelly Bisher conducted the search, as ordered by their commanding officer. CP 397.

During the search, Officers Salvaggi and Bisher located two envelopes containing legal documents for inmate Shamp. CP 397. Under DOC policy, one inmate may possess another inmate's legal documents only in the law library when both inmates are present. CP 248. Those envelopes were confiscated and identified in a Search Report as well as on an Evidence Card when the envelopes were placed in an evidence locker. CP 397. Neither Salvaggi nor Bisher read any of Sandoval's legal mail; they simply scanned the documents for inmate Shamp's name. CP 397. At all times during the search, Officers Salvaggi and Bisher conducted themselves professionally and consistent with DOC Policy 420.320 (searches of inmate cells). CP 397. They made every effort to restore the cell area to its original condition, and did not "ransack" Sandoval's cell or leave it in "shambles." CP 397. Officer Salvaggi did drop a small stack of

Sandoval's paperwork on the floor, but he collected and neatly stacked the paperwork in a pile and left the pile on Sandoval's bunk. CP 397. The documents confiscated from Sandoval's cell were secured by DOC staff as evidence pending the infraction hearing. CP 248-249. The confiscated documents were then used in the October 4, 2010 disciplinary proceeding against Sandoval. CP 248-249.

On December 3, 2010, SCCC Grievance Coordinator Dennis Dahne called Sandoval to his office and returned to Sandoval those documents which were permissible for Sandoval to retain. CP 410-411. Dahne retained approximately 50 pages of documents pertaining to inmate Shamp, which were confiscated from Sandoval's cell. CP 410-411. On December 3, 2010, Sandoval also signed a Property Disposition form indicating he wanted these 50 pages of documents held by the property room pending his grievances and appeals. CP 410-411. Dahne therefore placed the 50 pages of inmate Shamp's documents with the SCCC property room for holding. CP 410-411. After turning these documents over to the property room, Dahne had no further involvement with Sandoval's confiscated documents. CP 411.

C. Withholding of Money Orders

Included within the sixteen mail restrictions described above were three incoming pieces of mail containing money orders. CP 246-247, 250.

Money orders are considered contraband in adult correctional institutions. WAC 137-36-040(1)(c). In September 2010, Sandoval sent the SCCC mailroom an undated kite asking the mailroom to send the money orders included in the three restricted pieces of incoming mail to non-incarcerated people. CP 250. Mailroom staff member Donna Dixon responded to Sandoval that the money orders were being held as evidence in the pending investigation/infraction hearing. CP 250.

On October 12, 2010, Sandoval sent the SCCC mailroom another kite asking the mailroom to return his restricted mail to him or to hold it “until this lawsuit is final.” CP 250. Sergeant Sullivan responded that she would hold the money orders for him. CP 250. On November 7, 2010, Sandoval sent Sergeant Sullivan a kite asking her to send out his money orders because the investigation and disciplinary hearing were completed. CP 250-251. Sullivan responded, “OK,” and asked Sandoval to provide her with a pre-stamped (or “pre-franked”) envelope, consistent with DOC Policy 450.100(XI)(A), which requires inmates to pay for their own mail costs. CP 250-251. Indigent inmates with outgoing mail may receive a credit for up to five first-class pre-stamped envelopes per week. CP 250-251. The mailroom records reflect that Sandoval never provided the mailroom staff with the requested addressed, pre-stamped envelopes.

CP 250-251. As a result, the mailroom staff have kept the money orders on file where they remain today. CP 250-251.

D. Sandoval's Ancillary Pending Litigation

In his complaint, Sandoval references an unrelated civil rights lawsuit he had pending in Thurston County Superior Court, and an associated appeal before this Court. CP 182-183. Sandoval alleges throughout his complaint that actions of Defendants Sullivan, May, Salvaggi and Glebe deprived him of access to the courts in these two unrelated proceedings. CP 182-188.

The superior court matter, Thurston County No. 09-2-02415-1, was dismissed on summary judgment by Judge Carol Murphy on January 13, 2010. CP 415, 418-419. After the case was dismissed, the superior court entered an order authorizing Sandoval to proceed with his appeal in forma pauperis ("IFP"). CP 415, 422-425. But Sandoval only designated the summary judgment order as clerk's papers and the summary judgment hearing transcript as verbatim report of proceedings in the IFP order. CP 424-425.

On May 13, 2011, the Thurston County Superior Court Clerk's Office requested Sandoval pay \$37.75 to process his additional designation of clerk's papers. CP 416, 427. Rather than seek another IFP waiver from Judge Murphy, Sandoval sent the clerk two documents in

May and July 2011 citing Defendant May and Defendant Glebe's actions (regarding the money orders) as insurmountable obstacles to him paying the \$37.75. CP 416, 428-433. Sandoval subsequently cancelled his designation of clerk's papers on or about July 31, 2011. CP 416, 434-436. On August 31, 2011, Division II Commissioner Schmidt dismissed Sandoval's appeal, No. 41671-9-II, for want of prosecution, and the mandate was issued March 6, 2012. CP 416, 437-439.

E. Procedural Background

Sandoval filed his Amended Complaint on October 11, 2013.¹ CP 175-217. All Defendants moved for summary judgment on December 11, 2015. Following a hearing on March 18, 2016, the Court entered an order dismissing all Sandoval's claims on April 15, 2016. CP 1289-1290. Sandoval timely appealed. CP 1291-1292.

III. STANDARD OF REVIEW

Review of orders granting summary judgment is de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate where there are no genuine issues of material fact and the

¹ In his Amended Opening Brief, Sandoval does not address numerous claims he raised before the trial court, namely (1) his request for injunctive and declaratory judgment relief; (2) his negligence claims against DOC, the Office of Financial Management, and Defendant Greg Pressel; (3) his claims under the Washington State Constitution, and (4) his Fifth Amendment claim. He has therefore abandoned those claims on appeal. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641, 643 (2006) (a party abandons an issue on appeal by failing to pursue it in the appellate court through briefing on the issue); *Seattle First-Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978).

moving party is entitled to judgment as a matter of law. CR 56(c); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Courts consider all facts in the light most favorable to the nonmoving party. *Id.*

A 42 U.S.C. § 1983 claim requires two elements: (1) the defendant must be a person acting under color of state law, and (2) his/her conduct must have deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). Implicit in the second element is a third element of causation. *See Flores v. Pierce*, 617 F.2d 1386, 1390–91 (9th Cir. 1980). That a plaintiff may have suffered harm, even if due to another’s negligent conduct, does not in itself, necessarily demonstrate an abridgment of constitutional protections. *Davidson v. Cannon*, 474 U.S. 344, 347, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986).

IV. ARGUMENT

A. **Sandoval Received Procedural Due Process Regarding the Mail Restrictions and the Withholding of Documents and Money Orders**

A valid due process claim under 42 U.S.C. § 1983 has three prerequisites: (1) the deprivation, (2) of a liberty or property interest, (3) by officials acting under color of state law. *Parratt*, 451 U.S. at 536–37.

To prevail on a claim of deprivation of property without due process of law, Sandoval must first establish the existence of a protected property interest. After meeting this threshold requirement, he must then demonstrate that the Defendants failed to provide the process due. *See Wolff v. McDonnell*, 418 U.S. 539, 556–57, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003). *See also Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (“[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.”); *Wright v. Riveland*, 219 F.3d 905, 918 (9th Cir. 2000) (concluding that Washington provides adequate postdeprivation remedies).

1. The Mail Restrictions.

“[W]ithhold[ing] delivery of [inmate mail] must be accompanied by minimum procedural safeguards.” *Procunier v. Martinez*, 416 U.S. 396, 417-18, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974). Specifically, an inmate “has a Fourteenth Amendment due process liberty interest in receiving notice that his incoming mail is being withheld by prison authorities.” *Frost v. Symington*, 197 F.3d 348, 353–54 (9th Cir. 1999). This liberty interest is protected from “arbitrary government invasion,”

and any decision to censor or withhold delivery of mail must be accompanied by “minimum procedural safeguards.” *Sikorski v. Whorton*, 631 F. Supp.2d 1327, 1341 (D. Nev. 2009) (quoting *Procunier*, 416 U.S. at 417–18.) The “minimum procedural safeguards” are: (1) notifying the inmate that the mail was seized; (2) allowing the inmate a reasonable opportunity to protest the decision; and (3) referring any complaints to a prison official other than the one who seized the mail. *Procunier*, 416 U.S. at 418–19; *Krug v. Lutz*, 329 F.3d 692, 698 (9th Cir. 2003).

Considerable deference must be given to prison administrators to regulate communications between prisoners and the outside world. *Livingston v. Cedeno*, 164 Wn.2d 46, 53-54, 186 P.3d 1055 (2008). A prison may adopt regulations which impinge on an inmate’s constitutional rights if those regulations are “reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Legitimate penological interests include “security, order, and rehabilitation.” *Procunier*, 416 U.S. at 413.

Here, Sandoval received minimum procedural due process regarding his restricted mail in August/September 2010. The mailroom sent Sandoval the mail restriction notices for each piece of mail. CP 246-248. The restriction notices expressly notified Sandoval of his right to appeal the restrictions. CP 246-248, 293-367. And Sandoval received a

review of the restrictions by a staff member other than the person who originally restricted the mail: Sergeant Sullivan reviewed and affirmed the restrictions implemented by mailroom staff Donna Dixon. CP 246-248, 293-367.

Additionally, the DOC policies supporting each of the restrictions on Sandoval's mail in August/September 2010 were content neutral, and were objectively applied to Sandoval's mail. Each restriction was based on DOC policy and was reasonably related to legitimate penological interests of institutional security and order. CP 246-248, 252-292. No procedural due process violation occurred regarding the restrictions of Sandoval's mail.

2. The Documents in Sandoval's Cell.

A temporary deprivation of an inmate's legal materials does not, in all cases, rise to a constitutional deprivation. *Vigliotto v. Terry*, 873 F.2d 1201, 1202 (9th Cir. 1989). Regarding the confiscation of documents during the September 24, 2010 cell search, no procedural due process violation occurred. The documents taken from Sandoval's cell included legal papers regarding inmate Champ, which Sandoval is prohibited from possessing under DOC policy. CP 248-249, 396-397. Grievance coordinator Dahne later returned some documents to Sandoval on December 3, 2010 after subsequent review. CP 410-411. The 70-day

retention of documents – both the prohibited inmate Shamp items and those later returned to Sandoval – from September 24 through December 3, 2010 did not violate Sandoval’s procedural due process rights. *Cf. Funtanilla v. Erwin*, 60 F.3d 833, *2, 1995 WL 394295 (9th Cir. 1995) (unpublished opinion) (holding dismissal of complaint was improper where prison officials withheld a trial transcript for five months, which prevented plaintiff from filing a supplemental brief in his direct criminal appeal). Additionally, the documents confiscated from Sandoval’s cell were secured by DOC staff as evidence pending the infraction hearing on October 4, 2010. The outcome of Sandoval’s infraction hearing does not render the pre-hearing securing of the documentary evidence unconstitutional.

Sandoval also requested Defendant Dahne hold the confiscated inmate Shamp documents pending the resolution of grievances and appeals on December 3, 2010. CP 410-411. Sandoval cannot complain of the Defendants continuing to withhold the confiscated inmate Shamp documents when Sandoval affirmatively requested DOC staff retain them in their possession until the litigation is completed. Nor can Sandoval establish he has a protected property interest in possessing inmate Shamp’s legal documents. *Cf. RCW 72.09.530* (prohibition on possession of contraband) *with* DOC Policy 590.500(V) (rule against possessing

another inmate's legal documents in absence of the other inmate). *See* CP 248, 371-372. Because Sandoval had no protected property interest in Champ's papers, there can be no due process violation.

3. The Money Orders Sent Directly to Sandoval.

Sandoval's claims of unconstitutional deprivation of the money orders from his incoming mail are unavailing. After the October 4, 2010 disciplinary hearing was concluded, Sandoval requested the SCCC mailroom mail out the money orders from his restricted incoming mail to unincarcerated people. CP 245-251. After the mailroom responded it would mail them out when Sandoval provided a pre-stamped envelope, he never provided the addressed envelopes to the mailroom. CP 250-251. There was no obstacle to Sandoval providing the pre-stamped and addressed envelopes to the mailroom. CP 250-251. Had he cooperated with the SCCC mailroom's offer to mail them out, his unincarcerated acquaintances could easily have paid Thurston County Superior Court Clerk's Office the \$37.75 he owed in his appeal. His allegations of the Defendants invidiously withholding these money orders, while he had a simple method of mailing them out in November 2010, lack merit.

Sandoval's procedural due process claims fail as a matter of law. No genuine issue of material fact exists regarding his allegations of constitutional violations by individual Defendants. He received ample

procedural due process for his mail restrictions, the temporary deprivation of his documents does represent constitutional injury, and he did not avail himself of an easy opportunity to mail the money orders out to a third party. Summary judgment was proper.

B. Sandoval Fails to Show a First Amendment Violation

1. Sandoval was not denied access to the courts by the Defendants.

In a claim for interference with court access, the United States Supreme Court has held that the First Amendment right to petition the government includes the right to file other civil actions in court that have a reasonable basis in law or fact. *See Snyder v. Nolen*, 380 F.3d 279, 290 (7th Cir. 2004). However, the First Amendment right to petition does not protect *baseless* litigation. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). This right does not require prison officials provide affirmative assistance, but rather forbids states from “erecting barriers that impede the right of access of incarcerated persons.” *Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011).

Prisoners have a constitutional right to meaningful access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). To prevail in a § 1983 action alleging violation of this right,

Sandoval must demonstrate that he suffered an actual injury, such as having a “nonfrivolous legal claim ... frustrated or ... impeded,” as a result of the alleged misconduct. *Lewis v. Casey*, 518 U.S. 343, 351–53, 116 S. Ct. 2174, 135 L. Ed.2 d 606 (1996). Actual injury requires “actual prejudice to contemplated or existing litigation” by being shut out of court. *Nevada Dep’t of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011). This right does not extend beyond the initial pleading phase. *Cornett v. Donovan*, 51 F.3d 894 (9th Cir. 1995). A plaintiff must prove proximate causation of actual prejudice as well. *Silva*, 658 F.3d at 1103–04.

Here, the only injury Sandoval claims to have suffered is a deprivation of his right to appeal the summary judgment dismissal of an unrelated civil rights action. CP 187-188, 415-416. This does not constitute actual injury. Moreover, the actions of the Defendants were not the proximate cause of his appeal being dismissed. Instead, Sandoval ignored an opportunity to obtain the \$37.75 for the clerk’s papers in his appeal from the Thurston County Superior Court in an IFP motion. *See* CP 415, 421-425. Sandoval also did not avail himself of an opportunity to have restricted money orders sent to unincarcerated third parties. CP 250-251. He took no steps to mitigate his damages; rather, he blamed the Defendants for his “impediment” in May and July 2011 documents filed with Thurston County Superior Court Clerk’s Office. CP 416, 428-433.

The duty to mitigate damages, also known as the doctrine of avoidable consequences, is well-rooted in Washington. *See, e.g. Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956); *Cobb v. Snohomish County*, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997) (the doctrine of avoidable consequences “prevents recovery for damages the injured party could have avoided through reasonable effort[s]” under the circumstances.). The Defendants did not deny Sandoval access to the courts vis-à-vis his unrelated civil rights appeal. No constitutional violation occurred.

2. Sandoval was not subjected to any retaliation for engaging in protected activity.

“[C]ourts must approach prisoner claims of retaliation with skepticism and particular care.” *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001), *overruled on other grounds*, by *Phelps v. Kapnolas*, 308 F.3d 180, 187 (2d Cir. 2002). Although timing can be considered as circumstantial evidence of retaliatory action, timing alone cannot establish retaliation. *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995). Overall circumstances of the alleged retaliation must be considered and not simply the order of the events. *See Dawes*, 239 F.3d at 491-93.

The Ninth Circuit has summarized the elements of prisoner’s First Amendment retaliation claim as follows:

- (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 right, and (5) the action did not reasonably advance a legitimate correctional goal.

Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2004).

To prevail on a retaliation claim, Sandoval “bears the burden of pleading and proving the absence of legitimate correctional goals for the conduct of which he complains.” *Pratt*, 65 F.3d at 806. Sandoval must also show that his protected conduct was “the ‘substantial’ or ‘motivating’ factor behind the Defendant’s conduct.” *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (quoting *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989)). Mere speculation that Defendants acted out of retaliation is not sufficient to support a retaliation claim. *Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014).

Sandoval alleges he suffered retaliation from Defendants Sullivan, Salvaggi, and Glebe. *See* CP 194-214. But the actions of these Defendants were objectively reasonable – restricting prohibited mail pursuant to DOC policy and legitimate penological interests and requesting a cell search for prohibited items (Sullivan); searching Sandoval’s cell for prohibited items, as ordered by his commanding officer, and confiscating such items (Salvaggi); and overseeing the operations of SCCC and its staff members as prison Superintendent (Glebe). Such routine, innocuous actions would

not “chill or silence a person of ordinary firmness from future First Amendment activities.” *Brodheim*, 584 F.3d at 1271. Nor did these actions chill Sandoval’s future First Amendment activities. The Defendants’ actions were undertaken in furtherance of valid penological goals of security and order, not *because of* Sandoval’s protected activity.

Sandoval repeatedly asserted below that Defendants Cheryl Sullivan and Joseph Salvaggi retaliated against him by restricting his mail and searching his cell. But he avoids any argument and omits any facts showing that their respective actions were *not* undertaken in the furtherance of legitimate correctional goals. The undisputed facts show that prison security and order were the correctional goals behind their conduct. *See* CP 245-251, 396-398. Sandoval assumes, without supporting facts, that only vindictive maliciousness motivated their actions. However, without direct or even circumstantial evidence probative of motive, no genuine issue of material fact exists. *See McCollum v. California Dep’t of Corr. & Rehab.*, 647 F.3d 870, 882 (9th Cir. 2011) (discussing the plaintiff’s burden of production regarding motive); *Wood*, 753 F.3d at 905. Sandoval’s allegations in this regard did not overcome the Defendants’ motion for summary judgment.

C. No Calculated Harassment Regarding Search of Cell and Confiscation of Documents Occurred

The Eighth Amendment to the United States Constitution protects prisoners against cruel and unusual punishment. Inmates have an Eighth Amendment right to be free from “calculated harassment unrelated to prison needs.” *Hudson*, 468 U.S. at 530. The United States Supreme Court has reiterated that the Eighth Amendment should be reserved for serious incidents causing “unnecessary and wanton infliction of pain,” where such pain has been inflicted by prison officials’ “deliberate indifference to the inmates’ health or safety.” *Hope v. Pelzer*, 536 U.S. 730, 737, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal quotation marks omitted). Further, in *McKune v. Lile*, the Court noted that, in determining whether a constitutional claim lies, “[c]ourts must decide whether the [facts] are closer to the physical torture against which the Constitution clearly protects or the de minimis harms against which it does not.” *McKune v. Lile*, 536 U.S. 24, 41, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). “Not every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.” *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987). A single search (a “single incident”) is insufficient to constitute cruel and unusual punishment. *See Vigliotto*, 873 F.2d at 1203.

Here, no Defendant inflicted calculated harassment upon Sandoval. Although Sandoval asserts Eighth Amendment claims against nearly all individual Defendants, the gravamen of this claim involves Defendants Sullivan and Salvaggi. *See* CP 184, 196, 200. Sergeant Sullivan requested a cell search based on her reasonable suspicion Sandoval was in the possession of inmate Shamp's legal documents in violation of DOC policy. CP 245-248. Officer Salvaggi conducted the search in an objectively reasonable fashion, consistent with DOC policy and pursuant to the order of his commanding officer. CP 369-398. These two single events, even taken together, are insufficient to constitute cruel and unusual punishment. *See Vigliotto*, 873 F.2d at 1203. Nor do these actions even approach "physical torture" or the unnecessary and wanton infliction of pain. *Id.* ("No valid interest is served by withholding summary judgment on a complaint that wraps nonactionable conduct in a jacket woven of legal conclusions and hyperbole.") Dismissal of all Sandoval's Eighth Amendment claims was proper.

D. Lack of Personal Participation by Defendants May, Glebe, Pacholke, and Warner

Defendants in a § 1983 action cannot be held liable based on a theory of *respondeat superior* or vicarious liability. *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981);

Bergquist v. County of Cochise, 806 F.2d 1364, 1369 (9th Cir. 1986). Absent some personal involvement by the Defendants in the allegedly unlawful conduct of subordinates, they cannot be held liable under § 1983. *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir. 1978). “A supervisor may be liable if there exists *either* (1) his or her personal involvement in the constitutional deprivation, *or* (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.” *Redman v. County of San Diego*, 942 F.2d 1435, 1446–47 (9th Cir. 1991) (emphasis in original). “A general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983.” *Hontz v. State*, 105 Wn.2d 302, 312, 714 P.2d 1176 (1986).

1. Joseph “Clint” May.

In his complaint, Sandoval alleged May (1) responded to one of Sandoval’s grievances “that Grievance Coordinator Dahne has resolved this matter;” and (2) responded to one of Sandoval’s kites and asked Sandoval to “provide the infraction numbers” he was complaining about. CP 185-186. Sandoval alleges a deprivation of constitutional rights resulted from May’s limited actions. Sandoval cannot demonstrate a causal link between May’s innocuous actions and a deprivation of Sandoval’s constitutional rights. Absent factual specificity, broad conclusory allegations of conspiratorial purpose and involvement or

malice are properly dismissed at the pretrial stage on a motion for summary judgment. *See Hutchinson v. Grant*, 796 F.2d 288, 291 (9th Cir. 1986). Because May lacked personal involvement in Sandoval's alleged deprivation of constitutional rights, dismissal from this action was proper.

2. Pat Glebe.

Sandoval alleges the following actions of Defendant Glebe violated his constitutional rights: (1) failure to investigate Sandoval's claims; (2) condoning illegal acts by SCCC officials; and (3) denying Sandoval access to the courts by not posting restricted incoming money orders to Sandoval's account. *See* CP 186-188. At the time of these actions, Glebe was the SCCC Superintendent. Sandoval treats Glebe's liability as a foregone conclusion. But Sandoval fails to establish precisely how Glebe's administrative role in supervising hundreds of SCCC employees as prison Superintendent translates into a direct deprivation of Sandoval's constitutional rights. Genuine issues of material fact are not raised by conclusory or speculative allegations. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Because Glebe lacked personal involvement in Sandoval's alleged deprivation of constitutional rights, dismissal from this action was proper.

3. Dan Pacholke.

Sandoval alleges Pacholke's liability arises from ratifying and condoning the acts of SCCC staff members as well as failing to investigate alleged wrongdoing or take corrective action. *See* CP 189. This, Sandoval alleges, violated several Amendments of the U.S. Constitution. CP 208. Pacholke was the Assistant Deputy Director of DOC at the time. Sandoval fails to sufficiently allege personal involvement by Pacholke in Sandoval's alleged constitutional injuries. Because Pacholke lacked personal involvement in Sandoval's alleged deprivation of constitutional rights, Pacholke was properly dismissed from this action.

4. Bernard Warner.

At the time of Sandoval's alleged constitutional injuries, Bernard Warner was the DOC Prisons Division Director. Sandoval alleges Warner condoned the "illegal acts" of SCCC staff members and failed to "correct" the allegedly unlawful conduct of his subordinates. CP 189-190, 209. These allegations, by definition, reflect a *respondeat superior* claim. "A general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983." *Hontz*, 105 Wn.2d at 312. No causal link exists between Warner's administrative capacity and Sandoval's alleged constitutional injuries. And a supervisor's mere knowledge of his subordinate's ill purpose does not amount to the

supervisor's violating the Constitution. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Because Warner lacked personal involvement in Sandoval's alleged deprivation of constitutional rights, dismissal from this action was justified.

E. Individual Defendants are Entitled to Qualified Immunity

The doctrine of qualified immunity shields government officials from civil liability under § 1983 if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The qualified immunity standard “gives ample room for mistaken judgments” by protecting “all but the plainly incompetent or those who knowingly violate the law.” *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). “This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued.” *Hunter*, 502 U.S. at 229 (internal quotation marks omitted). Under qualified immunity, “[o]fficials are not

liable for bad guesses in gray areas; they are liable for transgressing bright lines.” *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

Qualified immunity includes two independent prongs: (1) whether the officer’s conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident. *Pearson*, 555 U.S. at 232. These prongs may be addressed in either order. *Id.* at 236. And both are “essentially legal question[s]” for the court to decide. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). “Qualified immunity is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief.” *Hydrick v. Hunter*, 669 F.3d 937, 939-40 (9th Cir. 2012). There must be “a genuine issue as to whether the Defendant in fact committed those acts.” *Mitchell*, 472 U.S. at 526. *See also Feis v. King Co. Sheriff’s Dept.*, 165 Wn. App. 525, 267 P.3d 1022 (2011).

The second prong requires the right to have been clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). A right is clearly established only where existing precedent has placed the statutory or constitutional question raised by an alleged violation “beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). “Thus, to defeat a claim of immunity, the right at issue must

be clearly established, not only among legal practitioners, but among all properly-trained and -informed government officials as well: ‘The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the Defendant’s position should know about the constitutionality of the conduct.’” *Feis*, 165 Wn. App. at 544 (quoting *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 278 (2nd Cir. 1999)). Whether the law was clearly established is an objective standard. *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011).

Sandoval can present no evidence that any of the Defendants actually violated his constitutional rights under the first prong of the qualified immunity test. Even if the Court determines a constitutional right was violated by the Defendants, Sandoval cannot meet his burden under the second prong because none of the individual Defendants violated a clearly established constitutional right held by Sandoval in 2010.

Under the second prong, the “clearly established” law at issue in this case supported granting qualified immunity to the Defendants. *See Feis*, 165 Wn. App. at 541-545. Sandoval’s projection of nefarious intent and malice upon each Defendant does not raise a genuine issue of material fact defeating qualified immunity or summary judgment. The Defendants’ actions surrounding the restriction of Sandoval’s mail, the search of his

cell, and the temporary withholding of his documents and incoming money orders were reasonable and were not the product of plainly incompetent people or those who knowingly violated the law. Sandoval cannot present evidence showing that each individual Defendant “violated a clearly established and sufficiently particularized statutory or constitutional right” in 2010. *Feis*, 165 Wn. App. at 541. Even if the Defendants’ actions could be construed as “mistaken judgment,” “reasonable error,” “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact,” summary judgment in favor of each individual Defendant on the basis of qualified immunity remained proper. *See Id.* at 539. And even if Sandoval argues to the contrary, all the Defendants are still entitled to qualified immunity because any mistakes were reasonable. *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003).

1. First Amendment.

Regarding access to the courts, DOC has found no cases holding an inmate has a right of access to the courts encompassing a right to pay court fees with money orders mailed directly to him from un-incarcerated third parties. *See* cases cited in Section IV (B), *supra*; WAC 137-36-040(1) (money orders are contraband within adult correctional institutions). Regarding the freedom from retaliation, the Defendants

concede that *if* the Defendants restricted Sandoval's mail, searched his cell, and confiscated his property *solely* because he previously attempted to correspond with friends and the courts via the mail and previously filed grievances complaining of prison conditions, then the Defendants would have violated clearly established law protecting an inmate from retaliation for engaging in First Amendment activities. *Rhodes*, 408 F.3d at 567–68. However, the Defendants did not retaliate against Sandoval at all, so they remain entitled to qualified immunity under the first prong of the test.

2. Fourteenth Amendment (Procedural Due Process).

Regarding the confiscation of documents Sandoval was not allowed to possess in his cell, DOC has found no cases holding an inmate has a protected property interest in possessing legal documents of another offender. *See Board of Regents v. Roth*, 408 U.S. 564, 576, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”) Nor has DOC found cases holding that an inmate is deprived of property without due process where the deprivation is temporary. *See Vigliotto*, 873 F.2d at 1202 (a temporary deprivation of an offender's legal materials does not, in all cases, rise to a

constitutional deprivation.); WAC 137-28-430 (physical evidence of infractions is held pending disciplinary hearing, appeals, or litigation).

Regarding Sandoval's mail, DOC has found no cases holding that an inmate has a right to procedural due process for prison mailroom restrictions beyond the minimum procedural safeguards of (1) notifying the inmate that the mail was seized; (2) allowing the inmate a reasonable opportunity to protest the decision; and (3) referring any complaints to a prison official other than the one who seized the mail. *Procunier*, 416 U.S. at 418–19; *Krug*, 329 F.3d at 698.

Regarding the contraband money orders withheld from Sandoval, DOC has found no case holding that an inmate has a right to possess money orders mailed directly to him from un-incarcerated third parties. *See Steffey v. Orman*, 461 F.3d 1218, 1221 (10th Cir. 2006) (“The requirement [...] of a predeprivation hearing is relevant only if an inmate first demonstrates that he has a protected property interest, and here we conclude that Mr. Steffey had no property right protected by the Fourteenth Amendment to receive a contraband money order while in prison.”); WAC 137-36-040(1) (money orders are contraband within adult correctional institutions).

3. Eighth Amendment Calculated Harassment.

As far as DOC can discern, no case holds that an inmate has a right to be free from a reasonable single search of his cell in his absence. *See Schenck v. Edwards*, 921 F. Supp. 679 (E.D. Wash. 1996) *aff'd*, 133 F.3d 929 (9th Cir. 1998) (cell search without prisoner present did not violate inmates Eighth amendment right; alternatively, officers entitled to qualified immunity).

All Defendants were entitled to qualified immunity from Sandoval's damages claims.

F. Sandoval's Objections to Evidence Submitted with Defendants' Motion for Summary Judgment Lacks Merit

Below, Sandoval filed a Motion to Strike certain exhibits submitted with the Defendants' Motion for Summary Judgment. CP 159-161. The trial court never entered an order on this motion; rather, the trial court simply granted the Defendants summary judgment. *See* CP 1289-1290. Regardless, Sandoval's objection to those exhibits fails for three reasons.

First, he cited no Washington Evidence Rule or other relevant authority which rendered the materials inadmissible. Without such citation, the Defendants could not meaningfully respond to Sandoval's objections.

Second, Sandoval submitted the same materials in his response to the Defendants' summary judgment motion. Sandoval's objection was apparently directed toward the disciplinary infraction report and related hearing documents pertaining to his mail infractions. *See* CP 159-161, 380-388. But Sandoval submitted the same documents as exhibits to his November 17, 2015 declaration in opposition to the Defendants' summary judgment motion. *See* CP 760-764. His Motion to Strike those documents from the Defendants' summary judgment materials was unjustified.

Third, Sandoval sought to strike these documents because he believed they were "patently unbelievable or untrustworthy." CP 159. However, Sandoval's mere characterization of the documents' veracity and/or credibility did not render them inadmissible.

The trial court committed no error in considering the exhibits in connection with the Defendants' summary judgment motion.

V. CONCLUSION

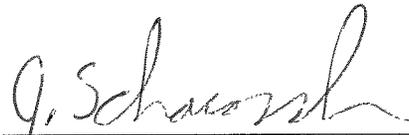
The trial court properly granted the Defendants' summary judgment motion. One of the principle purposes of summary judgment is to isolate and dispose of factually unsupported claims, and the rule should be interpreted in a way that accomplishes this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Sandoval had ample opportunity to marshal his defenses and call evidence

to the trial court attention to dispute the Defendants' position. He failed to carry this burden. Sandoval cannot overcome summary judgment merely by asserting that a genuine issue exists for trial. "To permit this type of statement to preclude summary judgment would undermine the utility of the procedure..." 10A Fed. Prac. & Proc. Civ. § 2727 (3d ed. 2015).

Based on the foregoing, the Defendants request this Court affirm the trial court's order granting the Defendants' motion for summary judgment.

RESPECTFULLY SUBMITTED this 23 day of December, 2016.

ROBERT W. FERGUSON
Attorney General



JERRY P. SCHAROSCH, WSBA #39393
Assistant Attorney General
Corrections Division, OID #91025
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
Telephone: (509) 456-3123
E-Mail: Jerrys@atg.wa.gov

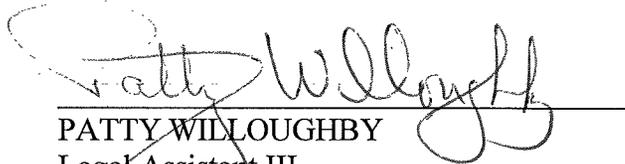
CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Response Brief of Defendants-Appellees by US Mail Postage Prepaid to the following addresses:

LORENZO SANDOVAL, DOC #283632
COYOTE RIDGE CORRECTIONS CENTER
PO BOX 769
CONNELL WA 99326-0769

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of December, 2016, at Spokane, Washington.



PATTY WILLOUGHBY
Legal Assistant III
Corrections Division, OID #91025
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
(509) 456-3123
PattyW@atg.wa.gov

WASHINGTON STATE ATTORNEY GENERAL

December 23, 2016 - 11:12 AM

Transmittal Letter

Document Uploaded: 2-490013-Response Brief.pdf

Case Name: Sandoval v. Sullivan, et al.

Court of Appeals Case Number: 49001-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Response

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patty E Willoughby - Email: pattyw@atg.wa.gov