FILED
Court of Appeals
Division II
State of Washington
1/11/2018 12:36 PM

NO. 50657-2-II

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

In re the Personal Restraint Petition of: DAVID ALLEN TROUPE, Jr., Petitioner.	DEPARTMENT OF CORRECTIONS' RESPONSE TO PETITIONER'S MOTION TO MODIFY

I. INTRODUCTION & RELIEF REQUESTED

Petitioner David Troupe mounts another constitutional challenge to RCW 4.24.430. This Court previously rejected Troupe's argument that RCW 4.24.430 was unconstitutional because it impermissibly limited the courts' inherent authority to waive fees. *See In re Personal Restraint Petition of Troupe*, 194 Wn. App. 701, 704-05, 378 P.3d 239 (2016). In his latest challenge, Troupe argues that RCW 4.24.430 is void for vagueness and violates the Equal Protection Clause. But RCW 4.24.430 does not punish an inmate based on an amorphous and ill-defined standard. Instead, when an inmate has a documented history of filing prior actions or appeals that have been dismissed as frivolous or malicious—two understandable words with a well-developed legal history—the inmate is not permitted to proceed with further lawsuits against the state for free unless the lawsuit meets narrow criteria. This statutory scheme's consequences are clear and simple; an inmate can avoid its consequences

by simply not filing frivolous or malicious lawsuits. As such, this provision is not void for vagueness.

Nor does RCW 4.24.430 violate the Equal Protection Clause because it is rationally related to a legitimate government purpose. RCW 4.24.430 deters a class of individuals, who have a well-documented history of abusing the legal system, from filing frivolous or malicious lawsuits and it conserves scarce judicial and government resources. Indeed, Troupe's own abusive litigation history demonstrates the benefit of such a provision. This Court should join the eleven federal circuit courts of appeals that have rejected equal protection challenges to a similar provision in federal law and conclude that such a provision does not violate the Equal Protection Clause. Because Troupe has three "strikes" and RCW 4.24.430 is constitutional, this Court should deny Troupe's motion to modify.

II. STATEMENT OF THE CASE

A. Troupe's Litigation History

Troupe is a frequent litigator both in federal and state court. As one federal district court noted in reviewing his litigation history, Troupe has filed twenty-one cases in federal district courts since 2013. Declaration of

Counsel, Exhibit 1, Order to Pay Filing Fee or Show Cause.[1] Although the sheer number of cases is alarming, especially in light of the fact that all of his federal cases at least were dismissed in defendants' favor, the Department focuses only on prior cases that resulted in frivolous or malicious findings.

1. *Strike[2] 1: Troupe v. Evensen*, Walla Walla Superior Court Cause No. 14-2-00038-4

In this case, Troupe sued a former employee of the Department of Corrections (Department or DOC), Amy Evensen. The trial court granted Defendant's motion to dismiss and specifically interlineated in the written order that: "This action shall be deemed 'frivolous and malicious' within the meaning and purposes of RCW 4.24.430." Counsel Declaration, Exhibit 2.

2. *Strike 2: Troupe v. Woods, et al.*, Western District of Washington, Cause No. 16-05077-RBL-DWC

In this case, Troupe sued a number of Department employees in federal court for various claims. Defendants moved for and were granted

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[1] Although not every case that Troupe has filed has been deemed a strike, a federal district court correctly noted that the "lack of a strike does not mean that [Troupe] did not act vexatiously during litigation; it means only that the Court could not find that the underlying case was itself frivolous. Indeed, in many of his cases, [Troupe] filed numerous unnecessary and irrelevant motions that were likely designed to delay the proceedings and force defendants to expend additional time and resources." Exhibit 1, at 7.

[2] The federal courts have referred to the similar provision in federal law as a "three-strikes" provision and referred to qualifying dismissals as "strikes." The Department adopts this nomenclature.

summary judgment. In granting summary judgment, the district court found that the action was frivolous and malicious. Counsel Declaration, Exhibit 3. In reaching this conclusion, the district court considered that Troupe had failed to properly exhaust his claims despite being aware of such a requirement and that he had an extensive history of abusing the judicial process, including conduct that the Court deemed abusive in that litigation. *Id.*

3. *Strike 3: Troupe v. Swain*, Western District of Washington, Cause No. 16-5380 RJB-DWC

In this case, Troupe sued a number of Defendant employees in federal court for various claims. In granting summary judgment, the district court found that the action was frivolous and malicious. Counsel Declaration, Exhibit 4. The court again considered the merits of the case, Troupe's history, and his abusive conduct in that litigation. *Id.*

4. *Strike 4: Troupe v. Washington Department of Corrections*, Thurston County Cause No. 16-2-04332-34

In this case, Troupe sued the Washington DOC in superior court. The Department moved to dismiss. Counsel Declaration, Exhibit 5. In dismissing the lawsuit, the superior court found that the matter was frivolous and deemed it a strike under RCW 4.24.430. *Id.*[3]

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[3] The Department's reliance on these four cases as strikes does not necessarily mean that these are the only qualifying strikes that Troupe has incurred. Indeed, as this Court noted in the prior case *In re Personal Restraint of Troupe*, 194 Wn. App. 701, 378

B. The Personal Restraint Petition at Issue in This Case

In his Personal Restraint Petition, Troupe challenges the application of the Department's mail policy to one piece of mail that was rejected. Petition, at 1-2. Troupe does not challenge his criminal conviction or anything that would impact the length of his sentence. After the Court received the PRP, the Clerk sua sponte notified Troupe that he was required to pay the filing fee pursuant to RCW 4.24.430 and *In re Personal Restraint of Troupe*, 194 Wn. App. 701, 378 P.3d 239 (2016). Troupe filed a motion to modify. After reviewing the motion to modify, the Court appointed counsel and allowed appointed counsel to submit an amended motion to modify. Troupe filed an amended motion to modify in which Troupe raises various constitutional challenges to RCW 4.24.430. The Department now responds and asks that the Court deny the motion to modify.

III. ARGUMENT

Although Troupe's motion to modify points out that the Clerk's order did not specifically identify the strikes upon which it relied, Amended Motion to Modify (Amended Motion), at 15, Troupe does not

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P.3d 239 (2016), Troupe has incurred strikes through prior personal restraint petitions that were deemed frivolous. However, because Troupe raises constitutional issues about counting PRPs as strikes and such strikes are not necessary to conclude Troupe is "struck out," the Department only relies upon these four non-PRP strikes to avoid the need for the court to consider Troupe's constitutional challenge.

appear to contest that he has incurred at least three strikes. Instead, Troupe raises various constitutional arguments about RCW 4.24.430. Because Troupe's petition does not make any argument that the state constitution provides greater protection than the federal constitution, the Court only needs to analyze the issue under federal law. *See State v. Sullivan*, 143 Wn.2d 162, 181 n.73, 19 P.3d 1012 (2001); *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988) (noting that when a party fails to adequately brief the factors in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the court does not need to reach the question of whether the state constitution provides broader protection).

In deciding this issue, RCW 4.24.430 is presumed constitutional. *State v. Sullivan*, 143 Wn.2d 162, 180 (2001). The party challenging a statute as unconstitutional bears the burden of overcoming this presumption by showing that the statute is unconstitutional beyond a reasonable doubt. *See State v. Mertens*, 148 Wn.2d 820, 826, 64 P.3d 633 (2003). Troupe raises two constitutional arguments, one based on the due process void-for-vagueness doctrine and one based on equal protection. Both arguments fail.

A. RCW 4.24.430 Is Not Void for Vagueness

Both the state and federal constitutions require statutory prohibitions to provide individuals "fair warning" of proscribed conduct in

order for the statute to comport with due process. *Sullivan*, 143 Wn.2d at 181. The first step in any void-for-vagueness challenge is identifying whether the challenge is an as-applied challenge or a facial challenge. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990). If a statute does not implicate First Amendment rights, it is analyzed as an as-applied challenge that considers the actual conduct at issue in the case. *Id.* at 183. Troupe does not argue that RCW 4.24.430 implicates First Amendment rights, and Troupe's challenge is considered in light of his specific conduct. As such, the question is whether RCW 4.24.430 is void for vagueness when applied to bar him from proceeding with this PRP challenging the Department's application of its mail policy to Troupe's mail because Troupe has previously filed four frivolous and/or malicious civil lawsuits.

In considering this question, there are two tests under which a statute could be unconstitutionally vague. *Sullivan*, 143 Wn.2d at 182. First, a statute is unconstitutionally vague if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what is proscribed. *Sullivan*, 143 Wn.2d at 181-82. Second, a statute is unconstitutionally vague if the statute fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Id.* at 182. RCW 4.24.430 survives both tests.

1. RCW 4.24.430 Is Sufficiently Definite That Ordinary People Can Understand What is Proscribed

A statute lacks sufficient definiteness if the terms are so vague that persons of common intelligence must necessarily guess and differ as to its application. *Sullivan*, 143 Wn.2d at 182. Courts conduct this particular inquiry by examining the language in light of prior case law and other statutes. *See Douglass*, 115 Wn.2d at 180. The fact that a statute does not define a term is not dispositive of the inquiry. *See Sullivan*, 143 Wn.2d at 184 (rejecting vagueness challenge based on the fact that statute did not define "process"). When examining undefined terms, courts can look to the ordinary and plain meaning of words. *Sullivan*, 143 Wn.2d at 184-85. Courts do not require mathematical certainty in the language of a statute for the statute to survive a vagueness challenge because there is always some degree of vagueness inherent in the use of language. *State v. Myles*, 127 Wn.2d 807, 812-13, 903 P.2d 979 (1995) (quoting *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). A statute is not unconstitutionally vague simply because it requires some statutory interpretation but instead the void-for-vagueness doctrine applies in those exceptional cases where the language is so inherently hazy or variable that ordinary people would not understand what is prohibited. *State v. Evans*, 177 Wn.2d 186, 204-06, 298 P.3d 724 (2013).

Here, RCW 4.24.430 prohibits an incarcerated individual from proceeding without payment of a filing fee in certain cases "if the person has, on three or more occasions while incarcerated or detained in any such facility, brought an action or appeal that was dismissed by a state or federal court on grounds that it was frivolous or malicious." The relevant conduct identified in the statute is bringing an action or appeal that was dismissed by a court "on grounds that it was frivolous or malicious." RCW 4.24.430. By using this language, the statute clearly identifies the conduct that will result in the denial of future fee waivers, i.e. frivolous or malicious actions or appeals. In reading the statute, a person of ordinary intelligence would understand the statute targets frivolous and malicious actions and appeals, and certainly a person of ordinary intelligence would understand that filing four frivolous and/or malicious lawsuits in superior and federal courts—as Troupe has done—would be sufficient to trigger the provisions of RCW 4.24.430.

Troupe's primary argument to the contrary is that the statute is vague because the terms frivolous and malicious are too subjective and are not defined by the statute. But the fact that there are no statutory definitions for these common English words does not automatically render the statute void. Instead, as Troupe's brief points out, these terms have readily available dictionary definitions, and there is a body of case law

that interprets these terms both under state law and under federal law. *See, e.g.*, *Orwick v. City of Seattle*, 103 Wn.2d 249, 257, 692 P.2d 793 (1984) (discussing malice in the context of malicious prosecution); *Layne v. Hyde*, 54 Wn. App. 125, 135, 773 P.3d 83 (1989) (discussing frivolous actions); *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (discussing frivolous and malicious in Prison Litigation Reform Act (PLRA) context). Indeed, even the Rules of Appellate Procedure use the term frivolous as a guide for when a party may be required to pay compensatory damages to another party. *See* RAP 18.9(a).

Under prior case law, an action is frivolous if it cannot be supported by any rational argument on the law or facts *Eller v. East Sprague Motors & R.V.'s Inc.*, 159 Wn. App. 180, 192, 244 P.3d 447 (2010), while an action is malicious if it is brought with an improper motive, i.e. malice. *See Bender v. City of Seattle*, 99 Wn.2d 582, 594, 664 P.2d 492 (1983). In other words, the term "frivolous" focuses on the merits of the case while the term "malicious" focuses on the reason that the case was brought. As such, an incarcerated person would understand based on this statutory language that he cannot repeatedly bring lawsuits that are either legally baseless or that are motivated by bad intentions without potentially incurring the consequences of RCW 4.24.430. And the statutory consequences are only incurred after an inmate has filed three

such actions. Thus, these terms provide sufficient definiteness to the prohibition that an ordinary person would understand what is targeted by the statute.

Indeed, this Court has previously rejected a vagueness challenge to RCW 4.84.185, the attorney's fee statute that provides for fees for defending against frivolous actions. *See Rhinehart v. Seattle Times*, 59 Wn. App. 332, 798 P.2d 1155 (1990). In doing so, the Court noted that the state has a clear standard for determining whether a case is frivolous. *Rhinehart*, 59 Wn. App. at 340. The court said that the "concept of frivolity is neither vague, nor unconstitutional." *Id.* Although the court rejected only a challenge to the use of the term frivolous in that case, the term malicious has a longer pedigree in the law than "frivolous"; at common law, courts construed the term in the context of the tort of malicious prosecution. *See, e.g.*, *Jones v. Jenkins*, 3 Wn. 17, 27 P. 1022 (1891) (reviewing case of malicious prosecution). Given the history of courts' interpreting these words, RCW 4.24.430 is not unconstitutionally vague simply because it uses such words. Because an ordinary person would understand the straightforward language of RCW 4.24.430, this Court should reject Troupe's argument that the statute is unconstitutionally vague.

2. RCW 4.24.430 Contains Ascertainable Standards To Guide Decisionmakers

A statute is also unconstitutionally vague if it fails to provide ascertainable standards to guide enforcement of the statute. *See State v. Sullivan*, 143 Wn.2d 162, 182, 19 P.3d 1012 (2001). A statute is not impermissibly vague simply because it requires some degree of subjective evaluation; the Due Process Clause is only concerned when a statute invites an inordinate amount of discretion. *See In re Detention of Danforth*, 173 Wn.2d 59, 73, 264 P.3d 783 (2011). Under this standard, a provision is vague if it provides no standards to guide police officers, judges, and juries. *Id.* at 74.

Similar to his argument under the first test, Troupe relies upon the fact that RCW 4.24.430 does not define "frivolous" and "malicious," and one judicial authority may define the terms differently than another. Amended Motion, at 10. The fact that there is some element of discretion, however, does not render the statute unconstitutionally vague. Indeed, if Troupe's argument were accepted, any statute that required statutory interpretation by a court would be unconstitutionally vague. It is difficult to believe that any statute would survive such an exacting test.

Instead, the statutory language in RCW 4.24.430 contains guidelines in its language about when it might be applicable. Specifically,

it is applicable when an inmate has filed three or more actions or appeals that were dismissed as frivolous and malicious. As discussed above, these terms are commonly used legal terms that courts can easily interpret. Rather than rendering the statute impermissibly vague, the use of the words "frivolous" and "malicious" in the statute create the standards by which courts apply RCW 4.24.430 to bar certain waivers of fees. Frivolity and maliciousness are not some amorphous standards but are words with well-developed meaning. Because RCW 4.24.430's contains ascertainable for courts to apply, it is not impermissibly vague under this second test.

3. Applying the Due Process Clause's Void-for-Vagueness Doctrine to This Type of Statute Would Extend the Doctrine Beyond Its Intended Purpose

The void-for-vagueness doctrine stems from the Due Process Clause's safeguard against the government taking an individual's life, liberty, and property without due process of law. U.S. Const., Amend. XIV. Because a statute that fails to provide sufficient notice of prohibited conduct violates the "first essential of due process of law," courts have reviewed statutory prohibitions for vagueness concerns and struck down prohibitions that are impermissibly vague. *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015). These vagueness challenges usually arise as part of a challenge to a criminal prohibitions, *see, e.g.*, *State v. Evans*, 177 Wn.2d 186, 204, 298 P.3d 724 (2013) (discussing test

in terms of what is required to enforce criminal laws); *Sullivan*, 143 Wn.2d at 181-82 (defining test in terms of a "criminal offense), but courts in this state have considered such challenges in the context of disciplinary proceedings as well. *See Haley v. Medical Disciplinary Bd.*, 114 Wn.2d 720, 818 P.2d 1062 (1991). And the United States Supreme Court has said without apparent qualification that the doctrine applies in the civil context. *See Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967). However, applying the void-for-vagueness doctrine to every conceivable statute, including those that merely outline the proper procedure for bringing a lawsuit seems inconsistent with the intended purpose of the doctrine, i.e. to prevent the government from punishing someone based on an indefinite and hazy standard, and stretches the meaning of the Due Process Clause to cover situations that do not involve the deprivation of a protected property or liberty interest.

In many ways, Troupe's challenge to RCW 4.24.430 illustrates the potential oddity of applying the due process void-for-vagueness doctrine to any statute, including those that do not impose a penalty. The denial of *in forma pauperis* status by itself does not deprive Troupe of liberty, property, or life, or otherwise implicate any constitutional right. Furthermore, it would be odd to consider the imposition of the strike in a prior lawsuit to be a "punishment." A strike does not have any immediate

effect. There is no criminal or civil penalty for the imposition of the strike, and any harm to the incarcerated individual's reputational interest would be minimal, at best. Any effect occurs only when a new lawsuit is filed and only if an individual has incurred three such strikes.

Additionally, a strike is imposed only as part of a prior civil lawsuit. This means that it is imposed—as it was in Troupe's cases—after the opposing party move to dismiss the case. In practice, this means that the inmate often has the opportunity to voluntarily dismiss his claims rather than risk incurring the dismissal of the lawsuit as frivolous or malicious. The arguments about whether a case is frivolous or malicious are reviewed as part of civil litigation and are subject to the many procedural protections included in the civil rules. Based on this, it would be somewhat strange to consider such a statute and the process by which strikes are issued to infringe upon Troupe's due process rights.

Indeed, if a void-for-vagueness challenge can be raised to RCW 4.24.430, it can presumably be raised as part of a lawsuit whenever a statutory enactment could potentially affect the lawsuit either substantively or procedurally. For example, a party to a lawsuit could mount a challenge to a statute of limitations based on allegations that the statute of limitations was impermissibly vague as applied to the party's case when the statute of limitations presents a potential bar to the claims.

Stretching the void-for-vagueness doctrine to such situations expands it beyond its original concerns. Although there is some solace in the likelihood that such challenges will routinely fail, such a result would still be an unnecessary extension of the void-for-vagueness doctrine. The potential illogical consequences of finding this type of statute in violation of the Due Process Clause on vagueness grounds provides an additional reason for this Court to reject Troupe's challenge.

B. RCW 4.24.430 Does Not Violate the Equal Protection Clause

The Equal Protection Clause is implicated when a government treats similarly situated individuals differently. "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *In re Det. of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003) (quotation marks and citations omitted). When the differential treatment is based on a suspect class or implicates a fundamental right, courts apply strict scrutiny. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). If the differential treatment does not implicate a constitutional right or target a suspect class, courts apply rational basis review. *Id.* Troupe appropriately concedes that RCW 4.24.430 is reviewed under the rational basis test. This concession is consistent with the many courts to have considered the Prison Litigation Reform Act's "three strike"

provision[4] and determined that the PLRA does not target a suspect class because neither indigent individuals nor prisoners are a suspect class. *See, e.g.*, *Wilson v. Yaklich*, 148 F.3d 596 (6th Cir. 1998).

Rational basis review is highly deferential to the legislature. *Thorell*, 149 Wn.2d at 749. A law passes rational basis review if it bears a rational relationship to some legitimate government end. *Hischfelder*, 170 Wn.2d at 551. Even rational speculation that is not supported by empirical data is sufficient to sustain a statute under rational basis review. *See Thorell*, 149 Wn.2d at 749.

Here, Troupe is correct that incarcerated individuals who have filed three frivolous or malicious actions or appeals are treated differently than other similarly situated litigants, but this distinction survives rational basis review. RCW 4.24.430 was enacted in 2011 while the nation was in the midst of what has become known as the Great Recession. In considering the bill that would eventually become RCW 4.24.430, the legislature was concerned with the burden that frivolous and malicious lawsuits placed on the court system and public agencies. Appendix, at 2-4, 11-12. To address this cost issue and deter inmates from filing frivolous and malicious actions, the legislature enacted RCW 4.24.430. *Id.* In doing so, the legislature recognized that the federal government had enacted a

[4] 28 U.S.C. § 1915(g).

similar provision in the Prison Litigation Reform Act (PLRA) to address a similar concern. Appendix, at 8, 10.

The legislature heard testimony during the progress of the bill that the state had "seen a flood of inmate litigation that would otherwise have been brought in federal court" as a result of the impact of the PLRA.[5] Appendix, at 3 The testimony in support of the bill also indicated that the bill made fiscal sense because "[a]t a time when the Legislature is having to cut benefits for law abiding people in need, it is not appropriate to be putting public resources to defending against this abuse of the court system." Appendix, at 3. These concerns—deterring frivolous litigation and conserving fiscal resources—are legitimate ends for the legislature to attempt to address.

Additionally, RCW 4.24.430 is rationally related to these interests. In passing RCW 4.24.430, the legislature exercised its constitutionally delegated power to determine under what circumstances an individual can sue the state. *See Troupe*, 194 Wn. App. at 704-05. In doing so, the legislature limited an incarcerated party with a history of abusing the legal system from proceeding in future lawsuits against the state without prepayment of the filing fee, except for in specific, narrow circumstances.

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[5] The PLRA's three strike provision only affects actions filed in federal court. *See* 28 U.S.C. § 1915(g).

This limitation is directly related to the legislature's concerns of conserving resources and deterring inmates from abusing the legal system.

Federal law provides further support that RCW 4.24.430 survives rational basis review. Every federal circuit court of appeal to have entertained[6] an equal protection challenge to the PLRA's three strike provision has rejected such a challenge. *See Asemani v. U.S. Citizenship & Immigration Servs.*, 797 F.3d 1069, 1078 (D.C. Cir. 2015); *Rodriguez v. Cook*, 169 F.3d 1176, 1181 (9th Cir. 1999); *Polanco v. Hopkins*, 510 F.3d 152, 155-56 (2d Cir. 2007); *Higgins v. Carpenter*, 258 F.3d 797, 801 (8th Cir. 2001); *Adbul-Akbar v. McKelvie*, 239 F.3d 307, 318-19 (3d Cir. 2001); *Rivera v. Allin*, 144 F.3d 719, 727-28 (11th Cir. 1998), *overruled on other grounds by Jones v. Bock*, 549 U.S. 199 (2007); *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002); *White v. Colorado*, 157 F.3d 1226, 1234-35 (10th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 822 (5th Cir. 1997); *Roller v. Gunn*, 107 F.3d 227, 233-34 (4th Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281, 1286-87 (6th Cir. 1997). This Court should follow the logic of those federal courts' decisions and uphold RCW 4.24.430 against Troupe's equal protection challenge.[7] Because RCW

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[6] Out of the thirteen circuits, only the Federal Circuit and the First Circuit have not considered the issue.

[7] Troupe also raises an issue with the Clerk's failure to identify the disqualifying strikes. Amended Motion, at 15. Because the Department's motion clearly identifies the strikes in question, this argument should be rejected. To the extent that Troupe is

4.24.430 serves legitimate government interests, it does not violate Troupe's equal protection rights.

IV. CONCLUSION

The Department respectfully request that the Court deny Troupe's motion to modify and affirm the Commissioner's decision. In doing so, the Court should require Troupe to pay the filing fee within thirty days or have his PRP dismissed.

RESPECTFULLY SUBMITTED this 11th day of January, 2018.

ROBERT W. FERGUSON
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asserting that the failure to identify the strikes violates his Due Process rights, this issue is adequately addressed by the Department submitting the strikes and Troupe having an opportunity to contest them in his reply.

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the DEPARTMENT OF CORRECTIONS' RESPONSE TO PETITIONER'S MOTION TO MODIFY with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

DAVID ALLEN TROUPE, Jr., DOC #765714
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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

EXECUTED this 11th day of January, 2018, at Olympia, WA.

s/ Cherrie Melby
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APPENDIX

Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Judiciary Committee

HB 1037

Title: An act relating to restrictions on legal claims initiated by persons serving criminal sentences in correctional facilities.

Brief Description: Placing restrictions on legal claims initiated by persons serving criminal sentences in correctional facilities.

Sponsors: Representatives Ross, Johnson, Bailey, Upthegrove, Hurst, Armstrong, Walsh, Hinkle, Angel, Warnick, Schmick, Short, Klippert, Dammeier, McCune, Fagan, Nealey, Blake, Ladenburg, Kristiansen, Pearson, Tharinger and Moeller; by request of Attorney General.

Brief Summary of Bill

- Places limitations on a correctional inmate's ability to bring a court action at public expense if the inmate has had three previous actions dismissed on the grounds that the action was frivolous, malicious, or failed to state a claim upon which relief can be granted.

Hearing Date: 1/17/11

Staff: Edie Adams (786-7180).

Background:

In 1996 as one part of the federal Prison Litigation Reform Act (PLRA), Congress enacted limitations on the ability of a prisoner who has brought a number of prior court actions that were found to be frivolous or without basis to bring subsequent actions in forma pauperis. In forma pauperis, a latin phrase meaning "in the form of a pauper," is a designation allowing a person who is indigent to maintain a court action without having to pay fees for filing the action.

Under the PLRA, a prisoner who has had three or more cases dismissed as frivolous, malicious, or failing to state a claim for relief, may not proceed in forma pauperis in a civil action or appeal

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

unless the prisoner is under imminent danger of serious physical injury. This provision of the PLRA is often referred to as the "three strikes" provision. "Prisoner" is defined as a person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms of parole, probation, pretrial release, or a diversionary program.

There have been a number of constitutional challenges to the three strikes provision of the PLRA on the grounds the provision denies to a prisoner the recognized constitutional right of access to the courts. Federal appellate courts have upheld the three strikes provision, finding that although there is a recognized right of prisoners to have meaningful access to the courts, a requirement to pay a filing fee does not deny this right. The decisions have been based in part on findings that, in the civil context, the U.S. Constitution only requires waiver of filing fees in a narrow category of cases where the litigant has a fundamental interest at stake. Federal courts have determined that the PLRA three strikes provision does not preclude prisoner access to the courts, it only denies them the ability to do so at public expense, and that this limitation is rationally related to the legitimate governmental interest of deterring frivolous and malicious prisoner lawsuits.

Washington courts have also recognized a state constitutional right of access to the courts arising under Article I, section 10, which provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." An individual does not have an absolute and unlimited constitutional right of access to the court system, but rather a reasonable right of access, or a meaningful opportunity to be heard. In the context of persons who bring frivolous or abusive litigation, courts have the authority to enjoin a party from engaging in litigation upon a "specific and detailed showing of a pattern of abusive and frivolous litigation." However, when issuing an injunction, a court must limit the impact of the injunction as narrowly as needed to remedy proven abuses.

With respect to allowing indigent persons to proceed in forma pauperis, the Washington Supreme Court has held that Washington courts have inherent authority to waive the payment of court fees. This authority is part of the court's responsibility for the proper and impartial administration of justice and the duty to see that justice is done in the cases that come before the court.

Summary of Bill:

Limitations are established on the ability of a person serving a criminal sentence in a state, local, or private correctional facility (correctional inmate) to proceed in any state court proceeding at public expense.

A court must deny a request from a correctional inmate to proceed in any state court proceeding at public expense if the court finds that the correctional inmate, while incarcerated, imprisoned, or confined, has had three or more prior appeals, actions, or special proceedings dismissed by a federal or state court on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted. If the court denies the request on these grounds, the court must dismiss any action, appeal, or special proceeding commenced by the correctional inmate.

Limitations are established on the ability of a person serving a criminal sentence in a federal, state, local, or private correctional facility (correctional inmate) to proceed in certain civil actions or appeals without payment of filing fees.

A court must deny a request from a correctional inmate to proceed without the payment of filing fees in a civil action or appeal against governmental entities or their officers, employees, or volunteers, if the court finds that the correctional inmate, while incarcerated or detained, has had three or more prior civil actions or appeals dismissed by a federal or state court on the grounds that they were frivolous or malicious. One of the three dismissals must have involved an action or appeal commenced on or after the effective date of the act.

This restriction on a correctional inmate's ability to proceed without paying filing fees does not apply to actions or appeals that, if successful, would affect the duration of the person's confinement, or to actions or appeals where the court finds that the correctional inmate is in imminent danger of serious physical injury.

Substitute Bill Compared to Original Bill:

The original bill applied more broadly to all actions, appeals, and special proceedings brought by an inmate, and required dismissal of the action, appeal or special proceeding, rather than just denial of the request to waive fees. The original bill allowed dismissals based on failure to state a claim upon which relief may be granted to be counted as a type of dismissal that can lead to a denial of a request to waive filing fees. The substitute bill added the requirement that one of the three prior dismissals must have involved an action or appeal that was commenced after the effective date of the act.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is based on the federal Prison Litigation Reform Act, which was passed to curb the growing tide of inmate litigation flooding into federal courts. That federal law was effective in limiting frivolous inmate litigation by imposing procedural limitations on inmate actions, including a "three strikes" rule. As a result, states have seen a flood of inmate litigation that would otherwise have been brought in federal court. Civil rights suits by inmates have tripled over last decade and the biggest offenders are those who have struck out under federal law. Many other states have adopted their own laws to address this problem.

This bill is a common sense and fiscally responsible reform measure. At a time when the Legislature is having to cut benefits for law abiding people in need, it is not appropriate to be putting public resources to defending against this abuse of the court system. There have been

approximately 50 suits in recent years by prisoners who have struck out under federal law. There are two inmates who have brought over 40 of these actions. The cost to the state of these cases is limited to the loss of the filing fee. There is a more significant cost resulting the time that state attorneys and employees have to spend on these cases until they are dismissed, which can take many months or longer.

There is a constitutional right of meaningful access to the courts, but there needs to be a balance between competing interests to avoid abuse of the system by some inmates who engage in recreational litigation. The Department of Corrections helps ensure access to the courts by providing offenders with fully staffed law libraries, services of attorneys, and other resources to help offenders file their legitimate cases.

(Opposed) This bill is too broad and has the potential of blocking meritorious claims brought by inmates. Inmate litigation serves the important purpose of holding our corrections system accountable. The bill improperly focuses on the identity of the person bringing the claim and not on the merit of the particular claim. The bill is likely unconstitutional under our state constitution, which has different constitutional standards regarding access to the courts.

There is no need for this bill. There is already the authority and a process for the state to seek dismissal of non-meritorious claims. Courts have significant leeway to control these suits or impose sanctions for frivolous claims. The estimated fiscal savings of this bill are questionable because attorneys are not appointed to represent inmates in these cases, so the only savings is the filing fee.

The bill should not include dismissals based on failure to state a claim, which can be based on technical reasons that have nothing to do with frivolousness. The bill should not apply retroactively, and it should be limited to actions concerning prison conditions, and not apply to actions involving the offender's sentence. The bill should include an exception for claims involving psychological injuries, not just physical injuries, and also claims based on enumerated constitutional rights.

Persons Testifying: (In support) Representative Ross, prime sponsor; Tim Lang, Office of the Attorney General; Scott Blonien, Department of Corrections; and Tom Brandt.

(Opposed) John Sinclair, Washington Defenders Association and Washington Association of Criminal Defense Lawyers; and Shankar Narayan, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS & OVERSIGHT

Majority Report: The substitute bill by Committee on Judiciary be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Hudgins, Chair; Miloscia, Vice Chair; McCune, Ranking Minority Member; Taylor, Assistant Ranking Minority Member; Ahern, Blake, Fitzgibbon, Ladenburg, Moscoso, Pedersen, Van De Wege and Wilcox.

Staff: Alex MacBain (786-7288).

Summary of Recommendation of Committee On General Government Appropriations & Oversight Compared to Recommendation of Committee On Judiciary:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) There are a small number of inmates in the state's correctional system that are engaging in abusive frivolous lawsuits. There is a constitutional right to open unfettered access to the courts but this right needs to be balanced with competing interests to avoid abuse of the system by some inmates who engage in recreational litigation. The ability of inmates to file lawsuits is healthy for the state's correctional system. However, this legislation is not aimed at those inmates filing legitimate claims; rather, it is needed because of the small number of inmates who continuously file malicious and frivolous lawsuits. Court filing fees would not be waived until after the third time that it has been proven that someone has engaged in malicious or frivolous lawsuits. The goal of the legislation is to achieve some savings.

(In support with concerns) The purpose of this legislation is to limit the use of public funds in the form of court fee waivers that support meritless litigation brought about by inmates that repeatedly file frivolous, meritless, or malicious lawsuits. There is nothing in current state law that limits this behavior. This was originally modeled on the federal Prison Litigation Reform Act (PLRA). As a result of the PLRA, there has been a flight of these meritless cases into state courts. The original bill would have applied all PLRA federal strikes under the state law, so an inmate who currently cannot have the court fees waived in federal court would also not have fees waived in state court. The concern is around the amendment to eliminate "failure to state a claim" as the basis for a strike under the measure. This change is responsible for the dramatic reduction in the savings estimated by the fiscal note. This language effectively means that no federal strikes will apply to the state courts, and that inmates will get three more at-bats in state courts at taxpayer expense.

(Opposed) This bill will prevent some low-income offenders from being able to file lawsuits because they will be unable to get court fee waivers. The bill is unnecessary because judges already have tools for dealing with these types of litigants. There are already monetary sanctions that can be levied against filers who are abusing the process. Also, courts can issue injunctions to prevent vexatious litigants from filing frivolous lawsuits. This is a broad solution to a problem caused by just a few individuals. In addition, there are many inmates with mental illnesses in the Department of Corrections. One fear is that those inmates could file three meritless lawsuits and they would be prevented from filing a fourth legitimate

lawsuit. "Failure to state a claim" is a common reason for dismissing lawsuits filed by attorneys with the best intentions, for reasons such as filing after the statute of limitations. Unrepresented litigants will run into this type of ruling because they are unaware of how the legal process works. The exception for physical abuse under the bill does not cover psychological or sexual abuse.

Persons Testifying: (In support) Representative Ross, prime sponsor; and Scott Blonien, Department of Corrections.

(In support with concerns) Tim Lang, Office of the Attorney General.

(Opposed) Gavin Thornton, Columbia Legal Services; and Shankar Narayan, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.

HOUSE BILL REPORT
HB 1037

As Reported by House Committee On:
Judiciary
General Government Appropriations & Oversight

Title: An act relating to restrictions on legal claims initiated by persons serving criminal sentences in correctional facilities.

Brief Description: Placing restrictions on legal claims initiated by persons serving criminal sentences in correctional facilities.

Sponsors: Representatives Ross, Johnson, Bailey, Upthegrove, Hurst, Armstrong, Walsh, Hinkle, Angel, Warnick, Schmick, Short, Klippert, Dammeier, McCune, Fagan, Nealey, Blake, Ladenburg, Kristiansen, Pearson, Tharinger and Moeller; by request of Attorney General.

Brief History:
Committee Activity:
Judiciary: 1/17/11, 1/27/11 [DPS];
General Government Appropriations & Oversight: 2/10/11, 2/16/11 [DPS(JUDI)].

Brief Summary of Substitute Bill

- Places limitations on a correctional inmate's ability to bring certain court actions without paying filing fees if the inmate has had three previous actions dismissed on the grounds that the actions were frivolous or malicious.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Eddy, Frockt, Kirby, Nealey, Orwall, Rivers and Roberts.

Minority Report: Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Chandler and Klippert.

Staff: Edie Adams (786-7180).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

In 1996 as one part of the federal Prison Litigation Reform Act (PLRA), Congress enacted limitations on the ability of a prisoner who has brought a number of prior court actions that were found to be frivolous or without basis to bring subsequent actions in forma pauperis. In forma pauperis, a latin phrase meaning "in the form of a pauper," is a designation allowing a person who is indigent to maintain a court action without having to pay fees for filing the action.

Under the PLRA, a prisoner who has had three or more cases dismissed as frivolous, malicious, or failing to state a claim for relief, may not proceed in forma pauperis in a civil action or appeal unless the prisoner is under imminent danger of serious physical injury. This provision of the PLRA is often referred to as the "three strikes" provision. "Prisoner" is defined as a person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms of parole, probation, pretrial release, or a diversionary program.

There have been a number of constitutional challenges to the three strikes provision of the PLRA on the grounds the provision denies to a prisoner the recognized constitutional right of access to the courts. Federal appellate courts have upheld the three strikes provision, finding that although there is a recognized right of prisoners to have meaningful access to the courts, a requirement to pay a filing fee does not deny this right. The decisions have been based in part on findings that, in the civil context, the United States Constitution only requires a waiver of filing fees in a narrow category of cases where the litigant has a fundamental interest at stake. Federal courts have determined that the PLRA three strikes provision does not preclude prisoner access to the courts, it only denies them the ability to do so at public expense, and that this limitation is rationally related to the legitimate governmental interest of deterring frivolous and malicious prisoner lawsuits.

Washington courts have also recognized a state constitutional right of access to the courts arising under Article I, section 10, which provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." An individual does not have an absolute and unlimited constitutional right of access to the court system, but rather a reasonable right of access, or a meaningful opportunity to be heard. In the context of persons who bring frivolous or abusive litigation, courts have the authority to enjoin a party from engaging in litigation upon a "specific and detailed showing of a pattern of abusive and frivolous litigation." However, when issuing an injunction, a court must limit the impact of the injunction as narrowly as needed to remedy proven abuses.

With respect to allowing indigent persons to proceed in forma pauperis, the Washington Supreme Court has held that Washington courts have inherent authority to waive the payment of court fees. This authority is part of the court's responsibility for the proper and impartial administration of justice and the duty to see that justice is done in the cases that come before the court.

Summary of Substitute Bill:

A court may permit a correctional inmate to commence an action or special proceeding despite these requirements if the court finds the correctional inmate is in imminent danger of serious physical injury.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on January 14, 2011.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

SENATE BILL REPORT
SHB 1037

As Reported by Senate Committee On:
Human Services & Corrections, March 24, 2011

Title: An act relating to restrictions on legal claims initiated by persons serving criminal sentences in correctional facilities.

Brief Description: Placing restrictions on legal claims initiated by persons serving criminal sentences in correctional facilities.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Ross, Johnson, Bailey, Upthegrove, Hurst, Armstrong, Walsh, Hinkle, Angel, Warnick, Schmick, Short, Klippert, Dammeier, McCune, Fagan, Nealey, Blake, Ladenburg, Kristiansen, Pearson, Tharinger and Moeller; by request of Attorney General).

Brief History: Passed House: 3/03/11, 98-0.
Committee Activity: Human Services & Corrections: 3/17/11, 3/24/11 [DPA].

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: Do pass as amended.
Signed by Senators Hargrove, Chair; Regala, Vice Chair; Baxter, Carrell, Harper and McAuliffe.

Staff: Jennifer Strus (786-7316)

Background: In 1996 the federal Prison Litigation Reform Act became effective. This Act allows a court to dismiss any legal action regarding prison conditions brought by a prisoner confined in a jail, prison, or other correctional facility if the court is satisfied that 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 the relief. A prisoner cannot file an action regarding prison conditions without first exhausting administrative remedies.

A prisoner confined in a jail, prison, or other correctional facility cannot bring a lawsuit for emotional or mental injury suffered while in custody without first showing that a physical injury occurred.

Summary of Bill (Recommended Amendments): The court must deny the request of a person serving a sentence in a federal, state, local, or private correctional facility who seeks

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

to file a civil action or appeal in state court against the state, a state or local governmental agency or entity, or a local official, employee, or volunteer acting in that capacity, without paying the filing fees if the person has, on three or more occasions while incarcerated or detained in a correctional facility, brought an action or appeal that was dismissed by the state or federal court as being frivolous or malicious. One of the three dismissals must have involved an action or appeal that was filed after the effective date of this act. An action or appeal that, if successful, would affect the duration of the person's confinement is not subject to this restriction.

The court may, nevertheless, permit the person to commence the action if the court determines that the person is in imminent danger of serious physical or psychological injury.

EFFECT OF CHANGES MADE BY HUMAN SERVICES & CORRECTIONS COMMITTEE (Recommended Amendments): Adds imminent danger of serious psychological harm to the reasons a court may permit a case to move forward without the payment of filing fees even though the inmate has had three previous lawsuits dismissed for being malicious or frivolous.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill would limit the use of public funds for court access for inmates who have abused the court system in the past. Several other states have adopted the three strikes provisions of the PLRA. Currently, inmates can bring claims in state court without paying the filing fee that they are barred from bringing in federal court. I have seen prison litigation rise by 300 percent since PLRA passed. Would like to add back in that having a case dismissed for failure to state a claim upon which relief can be based would be a strike. Failure to state a claim is the lowest threshold a plaintiff must meet in civil litigation, and the court would dismiss under this provision only if the plaintiff could prove no set of facts which would entitle him or her to relief. Courts also typically give plaintiffs a chance to amend their complaints before dismissing for failure to state a claim. The federal government and the other states that have adopted the three strikes provision found that failure to state a claim was an appropriate basis upon which to base a strike.

CON: Failure to state a claim is highly technical, and a plaintiff who is not represented by counsel should not be penalized for not meeting highly technical requirements. A prisoner could have a meritorious claim that would not be allowed because it was not stated in a form that is acceptable to the court. Federal courts have determined that prison rape is not a physical injury which is why psychological injury should be added back in to match the Senate version that was voted out of this committee. This bill should match up to the PLRA and apply the three strikes provision only to lawsuits that have been filed and dismissed as frivolous or malicious and dealt with prison conditions. Without that limitation in this bill,

some meritorious lawsuits could be barred. The bill should also include some constitutional claims as an exception to the three strikes rule.

Persons Testifying: PRO: Tim Lang, Attorney General's Office.

CON: Bob Cooper, Washington Association of Criminal Defense Lawyers; Shankar Narayan, ACLU.

NO. 50657-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of: DAVID ALLEN TROUPE, Jr., Petitioner.	DECLARATION OF COUNSEL

I, TIMOTHY J. FEULNER, make the following declaration:

1. I am an Assistant Attorney General and am the Assistant Attorney General assigned to represent Respondent Department of Corrections in this matter. I have personal knowledge of the following events regarding the above referenced case.

2. A true and correct copy of the Order to Pay Filing Fee or Show Cause entered in *Troupe v. Hammond, et al.*, Eastern District Cause No. 17-05020-EFS, is attached to this declaration as Exhibit 1.

3. A true and correct copy of the Order Granting Defendant's Motion to Dismiss and Finding per RCW 4.24.430 entered in *Troupe v. Evensen*, Walla Walla Cause No. 14-2-00038-4 is attached to this declaration as Exhibit 2.

4. True and correct copies of the Order Adopting Report and Recommendation and the Report and Recommendation entered in *Troupe v. Woods, et al.*, Western District Cause No. 16-05077-RBL-DWC is attached to this declaration as Exhibit 3.

5. True and correct copies of the Order Adopting Report and Recommendation and the Report and Recommendation entered in *Troupe*

v. Swain, et al., Western District Cause No. 16-05380-RJB-DWC is attached to this declaration as Exhibit 4.

6. A true and correct copy of the Order on Motion to Dismiss and Motion to Revoke *In Forma Pauperis* Status entered in *Troupe v. Washington Department of Corrections*, Thurston County Cause No. 16-2-04332-34 is attached to this declaration as Exhibit 5.

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

SIGNED this 11th day of January, 2018, at Olympia, Washington.

Tim Feulner

TIMOTHY J. FEULNER, WSBA#45396

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the DECLARATION OF COUNSEL with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

DAVID ALLEN TROUPE, Jr., DOC #765714
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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

EXECUTED this 11th day of January, 2018, at Olympia, WA.

s/ Cherrie Melby
CHERRIE MELBY
Legal Assistant
Corrections Division
PO Box 40116
Olympia WA 98504-0116
360-586-1445
Cherriek@atg.wa.gov

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID TROUPE, Plaintiff, v. STEVEN HAMMOND, MICHAEL FURST, STEVEN JEWITT, JO PHILLIPS, JANE DOE, JOHN DOE, and WCC JOHN DOE, Defendants.	No. 4:17-CV-05020-EFS **ORDER TO PAY FILING FEE OR SHOW CAUSE**

Before the Court is Plaintiff David Troupe's Application to Proceed In Forma Pauperis, ECF No. 8. Plaintiff, a prisoner at the Stafford Creek Corrections Center in Aberdeen, Washington, brings this pro se civil rights complaint pursuant to 42 U.S.C. § 1983. In his initial complaint, Plaintiff alleges that he has not received Wellbutrin for his recurring major depression or surgery for an umbilical hernia, and he argues that this amounts to a violation of his Eighth Amendment rights. He seeks monetary damages and an injunction. For the reasons that follow, the Court finds Plaintiff's application to proceed in forma pauperis (IFP) should be denied and warns Plaintiff that if he does not either pay the filing fee or show cause why he should be granted IFP status, the Court will dismiss this action.

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EXHIBIT 1

I. PLAINTIFF'S COMPLAINT

As a preliminary matter, the Court notes that upon screening Plaintiff's complaint, the Court finds that Plaintiff fails to state a claim upon which relief may be granted.

When a pro se litigant brings a constitutional claim, the critical inquiry is whether the claim, however unartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989), *superseded by statute on other grounds as stated in Lopez*, 203 F.3d at 1130-31; *Franklin*, 745 F.2d at 1227. The facts alleged in a complaint are to be taken as true and must "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Mere legal conclusions "are not entitled to the assumption of truth." *Id.* The complaint must contain more than "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

A. Plaintiff's Allegations

In his complaint, Plaintiff claims that he suffers from recurring major depression and had been treated for this condition with Wellbutrin between 2005 and 2008. He complains that in 2008, Defendant Steven Jewitt was responsible for placing Wellbutrin on the restricted medication list and Plaintiff was taken off this medication. ECF No. 1 at 4.

Plaintiff states that he filed numerous grievances, tort claims, and complaints but was not provided Wellbutrin or surgery for an umbilical hernia. He complains in a conclusory fashion that Defendants

Michael Furst, Steven Jewitt, Steven Hammond, and John and Jane Does have denied him a medication that works for him, and that Defendants Jo Phillips, Steven Hammond and John and Jane Does have denied him surgery and pain medication for his umbilical hernia.

In addition, Plaintiff asserts that a Care Review Committee denied his requests for Wellbutrin in 2010 and 2012 without examining him. He also complains a Care Review Committee denied him hernia surgery in 2015, 2016, and 2017. Plaintiff claims he received no treatment for recurring major depression in 2016 and 2017, and that he received no treatment for his hernia in 2015, 2016, and 2017.

B. Deliberate Indifference to a Medical Need

For an inmate to state a claim under § 1983 for medical mistreatment or denial of medical care in violation of the Eighth Amendment, the prisoner must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). To demonstrate deliberate indifference, a prisoner must allege facts sufficient to indicate a culpable state of mind on the part of prison officials. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Deliberate indifference exists when an official knows of and disregards a serious medical condition and the official is "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan,* 511 U.S. 825, 837 (1994).

Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference claim. *See Sanchez v.*

Vild, 891 F.2d 240, 242 (9th Cir. 1989). A showing that a prison official has been negligent or medically negligent is insufficient to establish a constitutional deprivation under the Eighth Amendment. *See Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) ("Mere medical malpractice does not constitute cruel and unusual punishment.") (citation omitted); *see also Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (stating that even gross negligence is insufficient to establish a constitutional violation).

Here, Plaintiff's broad assertions fail to adequately state when the alleged events occurred, who was involved, or any facts from which the Court could infer that an identified Defendant has been deliberately indifferent to his serious medical needs.[1] Plaintiff does not allege that either Wellbutrin or surgery was determined to be medically necessary and that identified Defendants denied him these treatments in deliberate disregard of those determinations. Plaintiff has alleged nothing more than a difference of opinion regarding what medical treatment is appropriate. This is insufficient to state a claim upon which relief may be granted. *See Sanchez*, 891 F.2d at 242.

C. Statute of Limitations

The applicable statute of limitations for § 1983 claims under Washington law is three years. *See RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002); *Millay v. Cam*, 135 Wash. 2d 193

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[1] To the extent Plaintiff is complaining of conduct which occurred outside this judicial district, he should file such claims in the appropriate jurisdiction.

(1998) (requiring "bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff," for equitable tolling to apply). Therefore, any allegations predating February 23, 2014, are subject to dismissal as they are precluded under the applicable statute of limitations, including Plaintiff's allegation that Defendant Steven Jewitt authorized the placement of Wellbutrin on a restricted medications list in 2008.

II. APPLICATION TO PROCEED IN FORMA PAUPERIS

Plaintiff has requested permission to proceed with this action in forma pauperis. *See* ECF No. 8. Generally, this Court "*may* authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a)(1) (emphasis added). Plaintiff's declaration indicates he is unable to pay the full filing fee or give security for it. *See* ECF Nos. 8 & 9. Nonetheless, the Court finds it would be inappropriate to grant Plaintiff in forma pauperis status for this action.

A. "Strikes" under 28 U.S.C. § 1915(g)

Upon reviewing Plaintiff's litigation history, the Court finds that Plaintiff is statutorily barred from proceeding in forma pauperis. The relevant provision states as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section 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).

"The dismissals described in this provision are commonly referred to as 'strikes.'" *Harris v. Mangum*, 863 F.3d 1133, 1139 (9th Cir. 2017). The "three-strike rule" was enacted to reduce the immense costs of frivolous prisoner suits and thereby minimize such costs to the taxpayer. *See Rodriguez v. Cook*, 169 F.3d 1176, 1181 (9th Cir. 1999).

1. Plaintiff's Litigation History

Plaintiff is a frequent litigator – this is his ninth case in this district and he has twelve prior cases in the Western District of Washington. Each of Plaintiff's prior lawsuits ended in dismissal, some upon summary judgment in favor of the defendants. Still, the Court must look to the basis of each dismissal to assess how many strikes Plaintiff has incurred.

The first *Troupe v. Washington State Penitentiary et al* was filed on March 12, 2013, and administratively closed on May 17, 2016, when it was merged with *Troupe v. Katrina Suckow et al*, No. 2:13-CV-05038-EFS (E.D. Wash.). *See* No. 2:13-CV-05028-EFS (E.D. Wash.). This action did not result in a strike.

The second *Troupe v. Washington State Penitentiary et al* was also filed on March 12, 2013, and was dismissed without prejudice after Plaintiff moved for voluntary dismissal. *See* No. 2:13-CV-05029-EFS (E.D. Wash.). This action did not result in a strike.

Troupe v. End was filed on March 28, 2013, and the Court entered summary judgment for defendants on July 1, 2015, dismissing the action

with prejudice. *See* No. 2:13-CV-05036-EFS (E.D. Wash.). In this action, the Court declined to impose a strike.[2]

Troupe v. Evensen was also filed on March 28, 2013. *See* No. 2:13-CV-05037-EFS (E.D. Wash.). On August 5, 2013, the Court dismissed the action for failure to state a claim after being provided an opportunity to amend the complaint. This action resulted in Plaintiff's **FIRST STRIKE.**

Troupe v. Katrina Suckow et al was also filed on March 28, 2013. *See* No. 2:13-CV-05038-EFS (E.D. Wash.). After extensive discovery and motions practice had taken place, the Court granted Plaintiff's request for voluntary dismissal and dismissed the action with prejudice. Plaintiff appealed, but his appeal was dismissed for failure to prosecute. Neither the underlying action nor the appeal resulted in a strike.

Troupe v. Kapa et al was filed July 1, 2014, and dismissed with prejudice on December 30, 2015, after Plaintiff moved for voluntary dismissal. *See* No. 3:14-CV-05529-RBL (W.D. Wash.). This action did not result in a strike.

Troupe v. Tucker et al was filed August 18, 2014, and the district court entered judgment for defendants on May 28, 2015. *See* No. 3:14-CV-

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[2] The Court notes that a lack of a strike does not mean that Plaintiff did not act vexatiously during litigation; it means only that the Court could not find that the underlying case was itself frivolous. Indeed, in many of his cases, Plaintiff filed numerous unnecessary and irrelevant motions that were likely designed to delay the proceedings and force defendants to expend additional time and resources.

05650-BHS (W.D. Wash.). The court warned Plaintiff that he "is sailing very close to the shoals of frivolousness with his pleadings. Any further complaints filed in this Court lacking merit to the extent of the current one will be considered additional evidence of malicious abuse of process." *Id.* at ECF No. 27 at 2. The district court dismissed the action with prejudice and revoked Plaintiff's IFP status for purposes of appeal, but declined to count it as a strike.

Troupe v. Cornish et al was filed September 15, 2014, and the district court entered judgment for defendants on April 16, 2015, dismissing the action with prejudice. *See* No. 3:14-CV-05733-RBL (W.D. Wash.). Again, the court revoked IFP status for purposes of appeal, but declined to count it as a strike.

Troupe v. Sisson et al was also filed on September 15, 2014, and the district court entered judgment for defendants on April 16, 2015, dismissing the action with prejudice. *See* No. 3:14-CV-05734-RBL (W.D. Wash.). Plaintiff appealed, but his appeal was dismissed for failure to respond to an order entered by the Ninth Circuit Court of Appeals. Neither the underlying action nor the appeal resulted in a strike.

Troupe v. Swain et al was filed November 7, 2014, and dismissed on February 9, 2015. *See* No. 3:14-CV-05886-BHS (W.D. Wash.). The district court adopted a Report and Recommendation by a magistrate judge to dismiss the action with prejudice for failure to state a claim and to count the action as a strike. Plaintiff appealed, but his appeal was dismissed because the notice of appeal was not filed or delivered to prison officials within 30 days. This action resulted in Plaintiff's **SECOND STRIKE.**

Troupe v. Fernelious et al was filed December 17, 2014, and dismissed without prejudice on February 11, 2015, after Plaintiff moved for voluntary dismissal. *See* No. 3:14-CV-05986-RJB (W.D. Wash.). This action did not result in a strike.

Troupe v. Loomis was filed January 15, 2015, and dismissed without prejudice on January 27, 2016, after Plaintiff moved for voluntary dismissal. *See* No. 3:15-CV-05033-BHS (W.D. Wash.). This action did not result in a strike.

The first *Troupe v. Pease et al* was filed February 27, 2015, and dismissed without prejudice on July 20, 2015, after Plaintiff moved for voluntary dismissal. *See* No. 4:15-CV-05021-EFS (E.D. Wash.). This action did not result in a strike.

Troupe v. Blakeman et al was filed on April 24, 2015, and the district court entered judgment for defendants on September 27, 2016, dismissing the action with prejudice. *See* No. 3:15-CV-05261-RBL (W.D. Wash.). Plaintiff appealed, but his appeal was dismissed for failure to prosecute. Neither the underlying action nor the appeal resulted in a strike.

The first *Troupe v. Smith et al* was filed June 26, 2015, and dismissed without prejudice on October 19, 2015, because Plaintiff had failed to submit a proper IFP application or the filing fee. *See* No. 3:15-CV-05439-RJB (W.D. Wash.). This action did not result in a strike.

Troupe v. McKinney et al was filed on July 21, 2015, and dismissed without prejudice on October 20, 2015, after Plaintiff moved for

voluntary dismissal. *See* No. 4:15-CV-05070-EFS (E.D. Wash.). This action did not result in a strike.

The second *Troupe v. Pease et al* was filed on September 8, 2015. *See* No. 4:15-CV-05090-EFS (E.D. Wash.). The Court granted summary judgment for defendants, dismissing one claim with prejudice and the remainder without prejudice. This action did not result in a strike.

The second *Troupe v. Smith et al* was filed on September 18, 2015, and the district court entered judgment for defendants on October 14, 2016, dismissing the action with prejudice. *See* No. 3:15-CV-05261-RBL (W.D. Wash.). Plaintiff appealed, but his appeal was dismissed for failure to prosecute. Neither the underlying action nor the appeal resulted in a strike.

Troupe v. Woods et al was filed February 1, 2016, and dismissed on March 31, 2017. *See* No. 3:16-CV-05077-RBL (W.D. Wash.). The district court adopted a Report and Recommendation by a magistrate judge to dismiss the action with prejudice and to count the action as a strike for being frivolous and malicious. This action resulted in Plaintiff's **THIRD STRIKE.**

Troupe v. Swain et al was filed May 19, 2016, and dismissed on June 5, 2017. *See* No. 3:16-CV-05380-RJB (W.D. Wash.). The district court dismissed the action with prejudice and counted the action as a strike for being frivolous and malicious. This action resulted in Plaintiff's **FOURTH STRIKE.**

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2. Plaintiff Has "Struck Out"

On February 23, 2017, Plaintiff submitted his original complaint in this action along with an application to proceed in forma pauperis. *See* ECF Nos. 1 & 2. At that time, Plaintiff had accrued only two strikes: the first on August 5, 2013, in *Troupe v. Evensen*, and the second on February 9, 2015, in *Troupe v. Swain et al.* The Court, however, found Plaintiff's IFP application to be lacking, *see* ECF No. 6, and on May 23, 2017, Plaintiff filed another application to proceed in forma pauperis along with the requisite documentation. *See* ECF Nos. 8 & 9. The Court finds that this date — May 23, 2017 — is the earliest possible date that should be used when assessing Plaintiff's number of strikes. This was the first point in time that the Court had sufficient information to determine whether to allow Plaintiff to bring his action "under" 28 U.S.C. § 1915 by proceeding in forma pauperis. And by that time, Plaintiff had accrued his third strike in *Troupe v. Woods et al.*

To the Court's knowledge, there is no binding authority directly addressing the issue of when to "count" a prisoner litigator's strikes under 28 U.S.C. § 1915(g). The Court is mindful, however, that some language in Supreme Court and Ninth Circuit decisions, as well as certain holdings in other circuits, suggests that the date on which a prisoner submits his original complaint should be used.[3] Nonetheless,

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[3] *See, e.g.*, *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763 (2015) ("[W]hen [the prisoner] filed the suits at issue here, he had already experienced three such [strikes]."); *O'Neal v. Price*, 531 F.3d 1146, 1152 (9th Cir. 2008) ("[W]e conclude that a plaintiff has 'brought' an action for the

when analyzing IFP eligibility, the issue is whether a plaintiff may bring his action "under" § 1915. *See* 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action . . . *under this section*" if the prisoner has three or more strikes. (emphasis added)).

As a practical matter, a pro se prisoner cannot have brought an action under the IFP provision until the court has authorized "the commencement . . . without prepayment of fees." 28 U.S.C. § 1915(a)(1). "Subsection 1915(g) serves only to exclude serial filers from IFP-status eligibility, a determination that a court will make and, if favorable to the petitioner, then 'authorize' the 'commencement' of the IFP action under § 1915(a) if the applicant is not a three-strikes offender." *Millhouse v. Heath*, 866 F.3d 152 (3d Cir. 2017) (J. Ambro dissenting in part and concurring in judgment). Thus, the statute's structure and language suggest that when a court is deciding whether to grant IFP status, it should look to the current number of strikes incurred by the prisoner-plaintiff.

Such an interpretation is also in line with "Congress's intent to screen out frivolous complaints by precluding prisoners from submitting an endless stream of frivolous in forma pauperis complaints." *See O'Neal*

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purposes of § 1915(g) when he submits a complaint and request to proceed in forma pauperis to the court."); *Millhouse v. Heath*, No. 15-2278, 2017 WL 3319795, at *4 (3d Cir. Aug. 4, 2017) "[W]e must look to the date the notice of appeal is filed — and not the date that we grant a prisoner's motion to proceed IFP — in assessing whether a particular dismissal counts as a strike. Strikes that accrue before the filing of the notice of appeal count as strikes — while strikes that accrue after the notice of appeal is filed do not.").

v. Price, 531 F.3d 1146, 1152 (9th Cir. 2008). After all, a prisoner facing his third strike could — and indeed would be motivated to — quickly "shotgun" several complaints into the courts before his third strike becomes final, thereby avoiding the restrictions of 28 U.S.C. § 1915(g). He would have little incentive to ensure his in forma pauperis documents were in order. Moreover, upon securing IFP status in all of his cases, such a prisoner could then expect to be allowed to amend each of his various complaints. *See Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) ("[D]ismissal is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment."). Counting all strikes to date — as opposed to simply looking to the date of the first complaint — avoids § 1915(g) from becoming a "leaky filter." *Cf. Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015) ("Finally, the statute's purpose favors our interpretation. . . . To refuse to count a prior dismissal because of a pending appeal would produce a leaky filter. Appeals take time. During that time, a prisoner could file many lawsuits . . . .").

In light of the foregoing, the Court finds that Plaintiff has on three or more prior occasions, while incarcerated, brought an action in a court of the United States that was dismissed on the grounds that it is frivolous or fails to state a claim upon which relief may be granted, and that Plaintiff has not demonstrated any imminent danger of serious physical injury at the time the complaint was submitted in this action. Thus, pursuant to 28 U.S.C. § 1915(g), the Court finds Plaintiff is barred from bringing this action in forma pauperis.

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3. Opportunity to Show Cause

Once a prisoner has been placed on notice of the potential disqualification under 28 U.S.C. § 1915(g), the prisoner bears the ultimate burden of persuading the court that § 1915(g) does not preclude IFP status. *See Andrews v. King*, 398 F.3d 1113, 1120 (9th Cir. 2005). As such, if Plaintiff disagrees with the Court's assessment of his eligibility for IFP status, he may file a brief memorandum by no later than Friday, October 13, 2017, showing cause why his application to proceed in forma pauperis should not be denied under 28 U.S.C. § 1915(g) and why he should be allowed to commence this action without prepayment of the fees. In the alternative, Plaintiff may pay the $400.00 fee to commence this action. Failure to show cause or pay the filing fee by Friday, October 13, 2017, will be construed as Plaintiff's consent to the dismissal of this action.

B. Court's Discretion

Even if Plaintiff only had two strikes, however, the Court is nonetheless inclined to deny Plaintiff's IFP application. District courts have "particularly broad discretion to deny a prisoner-applicant the privilege of proceeding in forma pauperis in civil damages actions against prison official." *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990). It is worth remembering that "filing an action IFP is a privilege, not a right." *Andrews*, 398 F.3d at 1123 (J. Fernandez concurring and dissenting). The IFP provision is not designed to "give prisoners a field day in the courts, at public expense." *Weller v. Dickson*, 314 F.2d 598, 601 (9th Cir. 1963). And denial of IFP status does not prevent prisoners from accessing the courts to protect their

rights, it only requires them to pay the normal filing fee, as would any other plaintiff. *See Rodriguez*, 169 F.3d at 1180.

> [W]hen the action is a civil suit by a state prisoner against his jailers, whether under the Civil Rights Act or not, the district court should have, and has, a broad discretion, and can deny leave to proceed in forma pauperis even though the complaint does state a claim for relief, if the court is of the opinion that the plaintiff's chances of ultimate success are slight.

Weller, 314 F.2d at 604 (J. Duniway concurring).

As discussed above, the Court finds that Plaintiff's original complaint fails to state a claim upon which relief may be granted and would need to be amended before it would be served on any defendants. Further, considering Plaintiff's Complaint in light of his litigation history, the Court finds that not only is this action unlikely to ultimately succeed, it is probably frivolous and malicious. Plaintiff has a patterned history of abusing the litigation process in a manner seemingly designed to maximize the amount of resources that the courts and defendants must expend. *See, e.g.*, *Troupe v. Woods*, No. 16-CV-05077-RBL/DWC (W.D. Wash. 2017) (ECF No. 96 at 14-15; ECF No. 101) ("Viewing the evidence as a whole, the Court finds Plaintiff's extensive history of abusive litigation tactics combined with his conduct in this case warrants finding this action is frivolous and malicious."); *Troupe v. Pease et al*, No. 4:15-CV-05090-EFS (E.D. Wash. 2017) (ECF No. 125 at 3) (noting Plaintiff's habit of filing irrelevant motions close in time to deadlines).

The Court finds that granting Plaintiff the privilege of proceeding in forma pauperis in this action would be inappropriate. Plaintiff's

irresponsible litigation should not be encouraged or subsidized by the generosity of the in forma pauperis statute.

III. CONCLUSION

The Court finds that pursuant to 28 U.S.C. § 1915(g), Plaintiff is statutorily barred from proceeding in forma pauperis because he incurred three or more strikes before presenting the Court with a cognizable claim and the requisite financial information. The Court further finds that even if Plaintiff were not statutorily barred, it would not be appropriate to allow Plaintiff to proceed in forma pauperis because of his history of abusing the litigation process.

Accordingly, **IT IS HEREBY ORDERED:**

1. By no later than **Friday, October 13, 2017**, Plaintiff may file a memorandum showing cause why his application to proceed in forma pauperis should not be denied under 28 U.S.C. § 1915(g) and why he should be allowed to commence this action without prepayment of the fee. In the alternative, Plaintiff may pay the $400.00 fee to commence this action.

2. **FAILURE TO SHOW CAUSE OR PAY THE FILING FEE BY OCTOBER 13, 2017, WILL BE CONSTRUED AS CONSENT TO DISMISSAL OF THIS ACTION.**

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order and forward a copy to Plaintiff.

DATED this 11th day of September 2017.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge

EXHIBIT 2

FILED

MAY 12 2014

KATHY MARTIN
WALLA WALLA COUNTY CLERK

STATE OF WASHINGTON
WALLA WALLA COUNTY SUPERIOR COURT

DAVID TROUPE, Plaintiff, v. AMY EVENSEN Defendant	NO. 14-2-00038-4 ORDER GRANTING DEFENDANT'S MOTION TO DISMISS And Finding per RCW 4.24.430

On MAY 12 2014 the Court heard argument on the Defendants Motion for CR 12(b) Dismissal. ~~The Defendant was represented by Amy Clemmons, Assistant Attorney General. The Plaintiff appeared pro se. In addition to the argument of counsel,~~ The parties did not appear in person or by counsel at the direction of the Court. The matter was heard without oral argument. The Court considered the pleadings on file, which specifically included:

- Defendant Amy Evensen's Motion For CR 12(b) Dismissal and Petition for Order of Protection;
- Declaration of Amy C. Clemmons in Support of Defendant Amy Evensen's Motion For Protective Order re: Contact; and
- Any Responsive Pleadings.

Based upon the argument of counsel, the authorities cited, and pleadings on file, the Court

ATTORNEY GENERAL OF WASHINGTON
Torts Division
1116 West Riverside
Spokane, WA 99201-1194
(509) 456-3123

EXHIBIT 2

finds that Plaintiff failed to timely and properly serve this lawsuit within the statute of limitations.

The Plaintiff's complaint is hereby dismissed in its entirety with prejudice. This action is deemed "frivolous and malicious" within the meaning and purposes of RCW 4.24.430

DONE this 12th day of May, 2014.

HONORABLE JOHN W. LOHRMANN

Presented by:

ROBERT W. FERGUSON
Attorney General

AMY C. CLEMMONS, WSBA# 22997
OID No. 91106
Attorneys for Defendant

Approved as to Form and
Notice of Presentation Waived:

David Troupe, DOC #765714
Plaintiff Pro Se

PROOF OF SERVICE

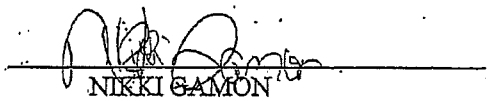
I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid to:

DAVID TROUPE, DOC #.765714
Washington Correction Center
PO Box 900
2312 W. Dayton Airport Rd
Shelton, WA 98584

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

DATED this 24 day of April, 2014, at Spokane, Washington.



NIKKI GAMON

ATTORNEY GENERAL OF WASHINGTON
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EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID TROUPE, Plaintiff, v. EDWARD WOODS, et al., Defendants.	No. 3:16-CV-05077-RBL-DWC **ORDER ADOPTING REPORT AND RECOMMENDATION**

The Court, having reviewed the Report and Recommendation of Magistrate Judge David W. Christel, objections to the Report and Recommendation, [Dkt 99], and the remaining record, does hereby find and ORDER:

(1) The Court adopts the Report and Recommendation.[Dkt # 96]

(2) Defendants' Motion for Summary Judgment (Dkt. 54) is GRANTED. Claims 1-9 are Dismissed without prejudice; Claim 10 is Dismissed with prejudice.

(3) Plaintiff's Motion to Compel [Dkt 97] is DENIED as moot.

(4) The Clerk is directed to send copies of this Order to Plaintiff, counsel for Defendants, and to the Hon. David W. Christel.

DATED this 31st day of March, 2017.

RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID TROUPE, Plaintiff, v. EDWARD WOODS, et al., Defendants.	CASE NO. 3:16-CV-05077-RBL-DWC REPORT AND RECOMMENDATION Noting Date: March 3, 2017

The District Court referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel. Presently pending before the Court is Defendants Abraha, Broumley, Burt, Comstock, Cook, Cummings, Fernelius, Glebe, Griffith, Herzog, Johnson, MacWilliam, Reinersten, Roberts, Smith, Thompson, Ward, Wirt, Woods, and Wulf's Motion for Summary Judgment ("Motion").[1] Dkt. 54; 61.

[1] Defendant Roy Reinersten had not been served in this action when the Motion was filed. *See* Dkt. 49, 50, 60. However, Defendants state the legal arguments made in the Motion demonstrate the claims against Defendant Reinersten should be dismissed for failure to exhaust. *See* Dkt. 54, n. 1. Further, Defendant Reinersten filed a Notice of Joinder, joining the Motion. Dkt. 61. Therefore, when referencing "Defendants" in this Report and Recommendation, the Court is referring to all Defendants in this action.

The Court concludes Plaintiff failed to administratively exhaust all but one of his claims. The Court also concludes Plaintiff failed to sufficiently rebut Defendants' summary judgment showing as to Plaintiff's one remaining claim. Accordingly, the Court recommends the Motion be granted. The Court further recommends this case count as a strike under 28 U.S.C. §1915(g) based on Plaintiff's conduct in this action and his history of abusing the litigation process.

BACKGROUND

Plaintiff David Troupe, an inmate housed at the Washington Corrections Center ("WCC") at all relevant times, alleges Defendants violated his constitutional rights by acting with deliberate indifference to his mental health needs. *See* Dkt. 33. Specifically, Plaintiff alleges the following ten claims: (1) Plaintiff was ignored when he declared a mental health emergency on November 25, 2015; (2) Defendant Ward looked into Plaintiff's cell, said "looks like he's still alive," and smiled on November 26, 2015; (3) Defendants ignored Plaintiff when he pushed his emergency call button on December 2, 2015; (4) Plaintiff told Defendant Thompson he needed help and was denied treatment, then Defendants Fernelious and Johnson attempted to cover up Defendant Thompson's actions on December 26, 2015; (5) Plaintiff reported to several staff members he was having thoughts of self-harm, but did not receive adequate treatment on December 29, 2015; (6) Defendant Cook asked Plaintiff if he was manipulating when Plaintiff requested to talk to mental health on January 29, 2016; (7) Defendant Cook taunted Plaintiff and denied him toilet paper on February 4, 2016; (8) Defendant Reinersten harassed Plaintiff and provoked prison officials to use force against Plaintiff on March 11, 2016; (9) Defendant Abraha refused to call Plaintiff "out for a med[ical] review" from November 2015 to March 2016; and (10) Plaintiff's Individual Behavior Management Plan ("IBMP") and Security Enhancement Plan ("SEP") violated his constitutional rights. Dkt. 33.

Defendants filed the Motion on June 21, 2016. Dkt. 54. In support of the Motion, Defendants submitted the declarations of Tim Thrasher, Dale Caldwell, and Edward Woods, portions of Plaintiff's prison records, and documents and orders from Plaintiff's previous court cases. *See* Dkt. 27-29. Plaintiff filed a Response to the Motion on December 29, 2016[2] and Plaintiff's First Amended Complaint was signed under penalty of perjury and is being considered as evidence. *See* Dkt. 33.[3] Defendants filed their Reply on January 26, 2017. Dkt. 94.[4]

STANDARD OF REVIEW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A party asserting a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). All facts and reasonable inferences drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th

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[2] Defendants request the Court strike select statements contained in Plaintiff's Response, titled "Declaration of David Troupe Re: Sum. Judgment." Dkt. 94. Defendants request the statements be stricken because they are conclusory and self-serving and have no factual details. *Id.* As Plaintiff is proceeding *pro se*, the Court declines to strike portions of Plaintiff's Response. However, the Court notes conclusory statements are not sufficient to overcome a summary judgment showing. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) (the purpose of summary judgment "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit").

[3] Because Plaintiff is *pro se*, the Court "must consider as evidence in his opposition to summary judgment all of [Plaintiff's] contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where [Plaintiff] attested under penalty of perjury that the contents of the motions or pleadings are true and correct." *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

[4] Plaintiff was granted several extensions of time to file a response to the Motion. *See* Dkt. 64, 77, 83. The Motion became ready for the Court's consideration on January 27, 2017. *See* Dkt. 83.

Cir. 2013) (*citing Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir.1997).

As the party moving for summary judgment, Defendants have the initial burden to demonstrate no genuine issue of material fact remains in this case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010). The movant "always bears the initial responsibility of informing the district court of the basis for its motion," and identifying those portions of the record, including pleadings, discovery materials, and affidavits, "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Mere disagreement or the bald assertion stating a genuine issue of material fact exists does not preclude summary judgment. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). 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." *T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Mere "[d]isputes over irrelevant or unnecessary facts," therefore, "will not preclude a grant of summary judgment." *Id.* Rather, the nonmoving party "must produce at least some 'significant probative evidence tending to support the complaint.'" *Id.* (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 290 (1986); *see also California Architectural Building Products, Inc.*, 818 F.2d at 1468 ("No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment."). 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." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). "If a party fails to properly support an assertion of fact or fails to properly address

another party's assertion of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it[.]" Fed R. Civ. P. 56(e)(3).

DISCUSSION

In the Motion, Defendants assert Plaintiff failed to: (1) exhaust administrative remedies as to Claims 1 - 9; and (2) show viable constitutional violations related to his remaining IBMP and SEP claim (Claim 10). Dkt. 54. Defendants also request the Court determine this action is a strike under 28 U.S.C. § 1915(g). *Id.*

I. Exhaustion of Administrative Remedies

Defendants allege Plaintiff failed to exhaust Claims 1 – 9 (as outlined in the Background Section). Dkt. 54, p. 19.[5] The Court agrees.

A. Legal Standard

Before a prisoner may bring a civil rights action under 42 U.S.C. § 1983, he must first exhaust all available administrative remedies. Under the Prison Litigation Reform Act of 1995 ("PLRA"),

> No action shall be 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 until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Exhaustion in cases covered by § 1997e(a) is mandatory. *Booth v. Churner*, 532 U.S. 731, 739 (2001). The mere fact a plaintiff has filed an initial grievance under a prison's grievance policy does not satisfy the PLRA exhaustion requirement; a plaintiff must exhaust *all* levels of an available grievance procedure before he can initiate litigation. *See id.* at

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[5] Defendants do not raise an exhaustion issue with Plaintiff's failure to grieve his IBMP because the IBMP cannot be grieved. *See* Dkt. 51, p. 19, n. 11.

736-41; *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is still a prerequisite to suit. *Id.* at 741. If a claim is not exhausted, it must be dismissed. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

Failure to exhaust administrative remedies is properly brought as a summary judgment motion. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014). Once the defendant proves there was an available administrative remedy and the offender failed to exhaust the available remedy, the burden shifts to the plaintiff. The plaintiff must show there was something about his particular claim which made the "existing and generally available administrative remedies effectively unavailable to him." *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (*citing Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996)).

B. Application

Defendants' evidence shows prisoners in the custody of the Washington State Department of Corrections ("DOC") may file administrative grievances pertaining to several routine matters, including conditions of confinement, conduct of staff, or retaliatory conduct. Dkt. 28, Caldwell Dec, ¶ 5; Dkt. 28-1, p.16. Prisoners may also file emergency grievances when there is a potentially serious threat to the life or health of an inmate or staff member, or involve a potential threat to the orderly operation of a facility. Dkt. 28-1, p. 14. Under DOC policy, the grievance procedure consists of four levels of review. Dkt. 28, Caldwell Dec., ¶ 8. Both routine and emergency grievances are initially filed at Level 0. *Id.* At Level 0, the facility's "grievance coordinator pursues informal resolution, returns the complaint to the offender for rewriting, returns the complaint to the offender requesting additional information, or accepts the complaint and processes it as a formal grievance." *Id.* After satisfactory review of the informal grievance at

Level 0, the grievance coordinator accepts routine and emergency grievances as formal grievances at Level I and complaints alleging staff misconduct at Level II. *Id.*

If the grievance is proceeds beyond Level 0, the grievance coordinator issues a formal response at Level I. *Id.*; Dkt. 28-1, p. 25. A prisoner may appeal the denial of either a routine or emergency grievance to the superintendent of the facility at Level II. Dkt. 28, Caldwell Dec., ¶ 8; Dkt. 28-1, p. 25. This is the final level of review for emergency grievances. Dkt. 28, Caldwell Dec., ¶ 8; Dkt. 28-1, p. 25. "Inmates may appeal all Level II responses except emergency grievances to Department headquarters . . . , where they are re-investigated" at Level III. Dkt. 28, Caldwell Dec., ¶ 8. Level III is the final level of review. *See id.*

Here, Plaintiff did not exhaust any grievances related to incidents alleged in Claims 1 – 9. *See* Dkt. 28, Caldwell Dec., ¶¶ 10, 12 (since October 2015, Plaintiff exhausted two grievances, neither of which related to Claims 1 – 9);[6] *see also* Dkt. 88. Plaintiff did file one grievance related to Claim 4 (staff ignoring claims that he was going to self-harm on December 26, 2015). Dkt. 28, Caldwell Dec., ¶ 12. However, this grievance was administratively withdrawn prior to the final grievance level. *See id.*[7]

Based on the evidence, the Court finds Defendants have carried the initial burden of showing the absence of exhaustion as to Claims 1 – 9. The undisputed evidence presented by Defendants shows there was a grievance procedure in place at the time of the incidents complained of in the First Amended Complaint. Plaintiff was aware of the grievance process and

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[6] Plaintiff exhausted two grievances during the relevant time period. The first exhausted grievance complained of the appropriate use of four-point restraints instead of six-point restraints and the second exhausted grievance dealt with legal property. *See* Dkt. 28, Caldwell Dec., ¶ 11. The exhausted grievances are unrelated to Claims 1-9 of the First Amended Complaint. *See* Dkt. 33 (First Amended Complaint).

[7] Plaintiff submitted grievances in excess of the maximum allowed at one time under facility policy and thus Plaintiff was required to choose which grievances to continue. Dkt. 28, Caldwell Dec., ¶12. After Plaintiff made his election, the Claim 4 grievance was administratively withdrawn. *Id.*

participated in the grievance process while housed at WCC. Plaintiff, however, did not complete the grievance process for Claims 1 – 9.

The burden now shifts to Plaintiff, "who must show that there is something particular in his case that made the existing and generally available remedies effectively unavailable to him by 'showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'" *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (*quoting Albino*, 747 F.3d at 1172). Acts by prison officials preventing the exhaustion of administrative remedies may make administrative remedies effectively unavailable. *See Nunez v. Duncan*, 591 F.2d 1217, 1224-25 (9th Cir. 2010). "The ultimate burden of proof, however, remains with the defendants," and the evidence must be viewed in the light most favorable to the plaintiff. *Paramo*, 775 F.3d at 1191 (*citing Albino*, 747 F.3d at 1172). The Supreme Court recently held there are three circumstances in which an administrative remedy is not capable of potential relief:

> First, an administrative procedure is unavailable when it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use—i.e., some mechanism exists to provide relief, but no ordinary prisoner can navigate it. And finally, a grievance process is rendered unavailable when prison administrators thwart inmates from taking advantage of it through machination, misrepresentation, or intimidation.

Ross v. Blake, 136 S. Ct. 1850, 1853–1854 (2016).

Plaintiff alleges he complained about every issue in his First Amended Complaint, though not necessarily through the grievance process. Dkt. 87. "[T]he PLRA exhaustion requirement requires proper exhaustion." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *see also Sapp v. Kimbrell*, 623 F.3d 813, 821 (9th Cir. 2010); *Harvey v. Jordan*, 605 F.3d 681, 683-84 (9th Cir. 2010). Therefore, "a prisoner must complete the administrative review process in

accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court[.]" *Woodford*, 548 U.S. at 88. Plaintiff's conclusory statement that he complained of every claim through verbal complaints, letters, or kites is not sufficient to show proper exhaustion. *See* Dkt. 87. He was required to use the DOC grievance process to properly exhaust his claims. His attempt to exhaust through methods other than the approved grievance process fails to satisfy exhaustion or show the grievance process was unavailable. *See Panaro v. City of North Las Vegas*, 432 F.3d 949, 953 (9th Cir. 2005) (finding participation in an internal affairs investigation did not satisfy exhaustion).

Plaintiff also states he attempted to file emergency grievances, but there was no appeal. Dkt. 87. First, Plaintiff's statement is conclusory. *See id.* He fails to state which claims he was unable to exhaust because there was no appeal. *Id.* at p. 2. Second, prisoners are able to appeal emergency grievances through Level II. *See* Dkt. 28, Cadwell Dec., ¶ 8; 28-1, p. 14. Thus, Plaintiff's contention is refuted by the evidence. Third, the evidence shows Plaintiff failed to exhaust any grievance related to the incidents alleged in Claims 1 – 9. *See* Dkt. 28, Caldwell Dec., 28-1, 88.[8] Therefore, Plaintiff's alleged inability to appeal emergency grievances is not sufficient to show the grievance process was unavailable or he was incapable of effectively using it.

As Plaintiff did not fully follow the proper grievance procedures available at WCC, he has not overcome Defendants' showing that he failed to exhaust administrative remedies available to him. Therefore, the Court concludes Claims 1-9 were not properly exhausted and

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[8] Additionally, Plaintiff states a grievance was destroyed in front of him, but does not allege the grievance was related to Claims 1 – 9. *See* Dkt. 87. Plaintiff also disagrees with the DOC policy which limits him to five active grievances. *See id.* He does not allege this made exhaustion unavailable, but rather disagrees with the policy implications of being limited to five active grievances. He also does not allege he attempted to grieve Claim 4 after it was administratively withdrawn, but was unable to. Thus, the Court does not find these two additional reasons overcome Defendants' summary judgment showing.

should be dismissed without prejudice. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) *overruled on other grounds by Albino,* 747 F.3d at 1162. Accordingly, the Court recommends the Motion be granted as to Claims 1-9.

II. IBMP and SEP Claim

Defendants argue Plaintiff's sole remaining claim – his IBMP and SEP violate his constitutional rights (Claim 10) – should be dismissed because the claim is unsupported and legally meritless. Dkt. 54. First, Plaintiff alleges his rights were violated because the IBMP and SEP prohibited him from receiving medical care during mental health emergencies. *See* Dkt. 33, pp. 6-7. Second, Plaintiff asserts the IBMP violates his rights because it subjects Plaintiff to strip searches and six-point restraints. *Id.* at pp. 12-13. The Court concludes Claim 10 should be dismissed.

A. Evidence

The evidence shows Plaintiff was issued an IBMP on November 9, 2015 and it was revised on January 7, 2016. Dkt. 29, Woods Dec., ¶ 5. An IBMP is a plan "intended to address [an] offender's behaviors and manage how staff should address certain behaviors with the intent of changing the offender's behavior." *Id.* at ¶ 4. Plaintiff's "IBMP does not encourage staff to ignore [Plaintiff] or prevent [Plaintiff] from receiving mental health treatment." *Id.* Under the IBMP, if Plaintiff is verbalizing an emergency, such as self-harm, his is moved to a holding cell and given fifteen minutes to de-escalate. *See* Dkt. 29-1, p. 21; 29, Woods Dec., ¶ 5. If Plaintiff is unable to de-escalate and still voicing threats of self-harm, he is strip searched and given another fifteen minute cool-down period. Dkt. 29-1, p. 21; 29, Woods Dec., ¶ 5. Plaintiff is strip searched "to ensure he does not have contraband or anything with which he might harm himself" and "is designed to ensure [Plaintiff's] and staff's safety." Dkt. 29, Woods Dec., ¶ 6. After the second

cool-down period, Plaintiff is placed on the restraint bed and medical personnel is notified. *Id.* at ¶ 5; Dkt. 29-1, p. 21. Prior to returning Plaintiff to his cell, the mental health officer on duty is contacted. Dkt. 29-1, p. 21.

In addition to the IBMP, Plaintiff was issued an SEP while housed at WCC in late 2015 and early 2016 because of his disruptive behavior. Dkt. 29, Woods Dec., ¶ 7. An SEP is a plan for "offenders who need additional security measures or precautions to ensure the safety of staff." *Id.* Plaintiff's SEP "required staff to video and audio record all of [Plaintiff's] activities and interactions." *Id.* The SEP, however, did not apply to routine tier check conduct where the contact was "simply obtaining a yes or no; checking on [Plaintiff's] well[-]being; issuing him food trays or items from the supply cart; or retrieving items." *Id.*; *see also* Dkt. 29-1, p. 32.

B. Conditions of Confinement

First, Plaintiff essentially argues the conditions of his confinement, imposed through the IBMP and SEP, violated his constitutional rights. Dkt. 33. The Constitution does not mandate comfortable prisons, but neither does it permit inhumane prisons. *Farmer v. Brennan*, 511 U.S. 825, 832 (1970). Under the Eighth Amendment, prison officials are required to provide prisoners with basic life necessities, such as food, clothing, shelter, sanitation, medical care, and personal safety. *Id.*; *Toussaint v. McCarthy*, 801 F.3d 1080, 1107 (9th Cir. 1986). To state a claim for unconstitutional conditions of confinement, an inmate must allege a defendant's acts or omissions deprived the inmate of "the minimal civilized measure of life's necessities" and the defendant acted with deliberate indifference to an excessive risk to inmate health or safety. *Allen v. Sakai,* 48 F.3d 1082, 1087 (9th Cir. 1994) (quoting *Farmer,* 511 U.S. at 834); *see Estate of Ford v. Ramirez—Palmer,* 301 F.3d 1043, 1049–50 (9th Cir. 2002).

Here, Plaintiff alleges the IBMP and SEP violated his constitutional rights because: (1) the SEP prohibited Plaintiff from receiving emergency mental health care; and (2) the IBMP prohibited the mental health officer on duty from evaluating and treating Plaintiff when he threatened to self-harm. Dkt. 33, pp. 6-7. The evidence shows the IBMP and SEP create specific guidelines for prison officials to follow when interacting with Plaintiff. There is no evidence showing prison officials are allowed to deny Plaintiff medical treatment because of the IBMP or SEP. Rather, the IBMP has specific procedures for prison officials to follow when Plaintiff is voicing a mental health emergency. *See* Dkt. 29-1, p. 32. The SEP also has specific procedures for prison officials to follow when interacting with Plaintiff, but it does not prohibit Plaintiff from receiving medical treatment. Therefore, Plaintiff's allegation that the IBMP and SEP prohibit him from receiving mental health treatment is unsupported by the evidence.

C. Excessive Force

Plaintiff also alleges his constitutional rights were violated under his IBMP because he was subjected to strip searches and six-point restraints without a mental health evaluation. Dkt. 33, pp. 12-13. "When prison officials use excessive force against prisoners, they violate the inmates' Eighth Amendment right to be free from cruel and unusual punishment." *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002). However, "[f]orce does not amount to a constitutional violation in this respect if it is applied in a good faith effort to restore discipline and order and not 'maliciously and sadistically for the very purpose of causing harm.'" *Id.* (*quoting Whitley v. Albers,* 475 U.S. 312, 320–321 (1986)); *see also Wilkins v. Gaddy,* 559 U.S. 34, 40 (2010) (to prevail on an excessive force claim, a plaintiff must allege "not only that the assault actually occurred but also that it was carried out maliciously and sadistically rather than as part of a good-faith effort to maintain or restore discipline"). The Court must consider the following relevant

factors to determine whether the use of force was wanton and unnecessary: "the extent of injury suffered [,] ... the need for application of force, the relationship between that need and the amount of force used, the threat [to the safety of staff and inmates] 'reasonably perceived by the responsible officials,' and 'any efforts to temper the severity of a forceful response.'" *Hudson v. McMillian,* 503 U.S. 1, 7 (1992) (*quoting Whitley,* 475 U.S. at 322).

Here, Plaintiff provided only conclusory allegations asserting his rights were violated when he was subjected to strip searches and six-point restraints. Dkt. 33, pp. 12-13. He fails to allege facts showing how either the strip searches or six-point restraints violated his constitutional rights. *Id.* Plaintiff also does not allege the IBMP was created to cause him harm or allege Defendants employed strip searches or six-point restraints maliciously or sadistically for the purpose of causing harm. *Id.* Rather, the evidence shows Plaintiff was provided with a cool-down period when he threatened self-harm. *See* Dkt. 29, Woods Dec., ¶ 5. If Plaintiff was unable to de-escalate, he was strip searched and given a second cool-down period. *Id.* If Plaintiff still was threatening self-harm, he was placed on a restraint bed. *Id.* This was all done in an effort to ensure Plaintiff's safety without unnecessarily placing him on a restraint bed. *Id.* Plaintiff failed to allege facts sufficient to show his constitutional rights were violated when he was strip searched and placed in six-point restraints. *See Jeffers v. Gomez*, 267 F.3d 895, 910-11 (9th Cir. 2001) (finding a prison security measure undertaken for the protection of prison officials and inmates is constitutional when it is applied in good-faith and not used maliciously); *Thompson v. Souza*, 111 F.3d 694, 701 (9th Cir. 1997) (finding a strip search not done maliciously or sadistically for the purpose of causing harm was not a violation of clearly established law).

D. Conclusion

For the above stated reasons, the Court finds Plaintiff has failed to overcome Defendants' summary judgment showing that Plaintiff's constitutional rights were not violated through the implementation of the IBMP and SEP. Accordingly, the Court recommends the Motion be granted as to Plaintiff's IBMP and SEP claim (Claim 10).

III. Strike under PLRA

Defendants request this action be deemed frivolous and malicious and be counted as a strike under the PLRA. Dkt. 54. "[P]risoners who have repeatedly brought unsuccessful suits may entirely be barred from [*in forma pauperis*] status under the three-strikes rule." *Andrews v. Cervantes*, 493 F.3d 1047, 1051-52 (9th Cir. 2007). The "three-strikes rule," contained in §1915(g), states:

> [i]n no event shall a prisoner bring a civil action under this section 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).

The evidence shows Plaintiff has a history of abusing the litigation process. The Thurston County Superior Court has permanently enjoined Plaintiff from engaging in public records requests without court approval due to his long history of abusive behavior, which includes making threats to obtain and disseminate prison staff's personal information. *See Troupe v. Tucker*, Case No. C14-5650 BHS-JRC (Dkt. 14-14-3); Dkt. 27-1, pp. 119-34. In a separate Western District of Washington case, Plaintiff was precluded from conducting further discovery and the defendants were relieved from their obligation to respond to Plaintiff's 19th, 20th, and 21st sets of discovery due to the amount of discovery Plaintiff had served on the defendants. *See*

Troupe v. Blakeman, Case No. C15-5261 RBL-KLS (Dkt. 76; 105) (Plaintiff propounded 265 interrogatories, 223 requests for production of documents, and 4 requests for admission, all contained within 21 different sets of discovery requests).

In this case, Plaintiff failed to exhaust administrative remedies available for his claims, despite evidence showing he was aware of the grievance process and frequently used the grievance process while housed at WCC, *see* Section I, *supra*, and Plaintiff's claim regarding his IBMP and SEP is conclusory and meritless. *See* Section II, *supra*. Additionally, Plaintiff continually engaged in tactics which appeared to be for the purpose of delaying a decision on Defendants' Motion for Summary Judgment. *See* Dkt. 57, 65, 69, 70, 72, 78, 92. He also failed to follow a Court Order. On December 2, 2016, the Court allowed Plaintiff to serve limited discovery, and stated it would not grant any additional extensions of time to respond to Defendants' Motion for Summary Judgment. Dkt. 83. Contrary to the Order, Plaintiff filed discovery which was beyond the scope of the Order and sought an extension of time to respond to the Motion for Summary Judgment. *See* Dkt. 85, 92.

Viewing the evidence as a whole, the Court finds Plaintiff's extensive history of abusive litigation tactics combined with his conduct in this case warrants finding this action is frivolous and malicious. Therefore, the Court recommends this case be counted as a strike under §1915(g). *See e.g. Finley v. Gonzales*, 2009 WL 2581357, *2 (E.D. Cal. Aug. 20, 2009) (finding dismissal for failure to exhaust alone did not count as a strike under § 1915(g); to count as a strike, "the dismissal for failure to exhaust must have been done on the grounds that the action is frivolous, malicious, or fails to state a claim"); *Reed v. CCA/Crossroads Correctional Center*, 2012 WL 5830582, *2 (D. Mont. Oct. 25, 2012) (finding failure to exhaust a strike where the plaintiff's failure to exhaust was a deliberate and defiant refusal to grieve his disputes); *Young v. Spizman*,

2008 WL 678674, *2 (W.D. Wash. March 7, 2008) (courts have found a case is malicious if it is "plainly abusive of the judicial process or merely repeats pending or previously litigated claims").

CONCLUSION

For the above stated reasons, the Court recommends Defendants' Motion for Summary Judgment be granted and this case be closed. The Court also recommends this action count as a strike for purposes of 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 *de novo* review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on March 3, 2017, as noted in the caption.

Dated this 16th day of February, 2017.

David W. Christel
United States Magistrate Judge

EXHIBIT 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID TROUPE, Plaintiff, v. WILLIAM SWAIN, et al., Defendant.	CASE NO. 16-5380 RJB-DWC ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge David W. Christel. Dkt. 92. The Court has considered the Report and Recommendation, objections, if any, and the remaining record.

The facts are in the Report and Recommendation (Dkt. 92, at 1-6) and are adopted here. The Report and Recommendation recommends that all Plaintiff's claims against all remaining Defendants be summarily dismissed. Dkt. 92.

The Report and Recommendation (Dkt. 92) should be adopted. Plaintiff failed to demonstrate that there are issues of fact as to whether Defendants' placement of Plaintiff in a restraint bed for twelve hours one night after he indicated he had a razor blade and referenced

EXHIBIT 4

suicide: (1) constituted excessive force, (2) demonstrated deliberate indifference to a serious risk to Plaintiff's health or safety, or (3) was in retaliation for Plaintiff's filing of grievances. As provided in the Report and Recommendation, the Defendants are entitled to a judgment as a matter of law, and this case should be dismissed.

Further, as recommended in the Report and Recommendation, this case should be summarily dismissed because the case is malicious and frivolous. The dismissal should be counted as a strike pursuant to 28 U.S.C. § 1915(g). The Report and Recommendation (Dkt. 92) should be adopted.

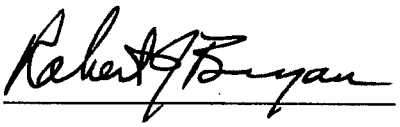
ORDER

Accordingly, it is **ORDERED** that:

- The Report and Recommendation (Dkt. 92) **IS ADOPTED**;
  - Defendants' Motion for Summary Judgment (Dkt. 74) **IS GRANTED;**
  - All claims against the remaining Defendants **ARE DISMISSED PREJUDICE;**
  - This case is **DISMISSED** as malicious and frivolous. The dismissal is a **STRIKE** pursuant to 28 U.S.C. § 1915(g).

The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge Christel, all counsel of record, and to any party appearing *pro se* at said party's last known address.

Dated this 5th day of June, 2017.



ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID TROUPE, Plaintiff, v. WILLIAM SWAIN, et al., Defendant.	CASE NO. 16-5380 RJB-DWC ORDER ADOPTING REPORT AND RECOMMENDATION

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The facts are in the Report and Recommendation (Dkt. 92, at 1-6) and are adopted here. The Report and Recommendation recommends that all Plaintiff's claims against all remaining Defendants be summarily dismissed. Dkt. 92.

The Report and Recommendation (Dkt. 92) should be adopted. Plaintiff failed to demonstrate that there are issues of fact as to whether Defendants' placement of Plaintiff in a restraint bed for twelve hours one night after he indicated he had a razor blade and referenced

suicide: (1) constituted excessive force, (2) demonstrated deliberate indifference to a serious risk to Plaintiff's health or safety, or (3) was in retaliation for Plaintiff's filing of grievances. As provided in the Report and Recommendation, the Defendants are entitled to a judgment as a matter of law, and this case should be dismissed.

Further, as recommended in the Report and Recommendation, this case should be summarily dismissed because the case is malicious and frivolous. The dismissal should be counted as a strike pursuant to 28 U.S.C. § 1915(g). The Report and Recommendation (Dkt. 92) should be adopted.

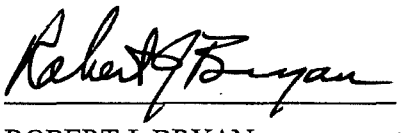
ORDER

Accordingly, it is **ORDERED** that:

- The Report and Recommendation (Dkt. 92) **IS ADOPTED**;
  - Defendants' Motion for Summary Judgment (Dkt. 74) **IS GRANTED;**
  - All claims against the remaining Defendants **ARE DISMISSED PREJUDICE**;
  - This case is **DISMISSED** as malicious and frivolous. The dismissal is a **STRIKE** pursuant to 28 U.S.C. § 1915(g).

The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge Christel, all counsel of record, and to any party appearing *pro se* at said party's last known address.

Dated this 5th day of June, 2017.



ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID TROUPE, Plaintiff, v. WILLIAM SWAIN, *et al.*, Defendants.	CASE NO. 3:16-CV-05380-RJB-DWC REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Noting Date: June 2, 2017

The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel. Presently before the Court is Defendants' Motion for Summary Judgment ("Motion"). Dkt. 74.

The Court concludes Plaintiff failed to rebut Defendants' showing that there are no genuine issues of material fact, and Defendants are entitled to judgment as a matter of law on Plaintiff's claims that Defendants: (1) used excessive force when they placed him in a restraint bed for twelve hours; (2) were deliberately indifferent to a serious risk of inmate health or safety; and (3) retaliated against him for filing grievances. Accordingly, the Court recommends the Motion (Dkt. 74) be granted and this case be closed.

BACKGROUND

Plaintiff was an inmate at Stafford Creek Corrections Center ("SCCC").[1] Defendants Eric Stielau and Barry DeHaven are corrections officers at SCCC. Plaintiff arrived at SCCC on October 8, 2014, and was held in SCCC's Intensive Management Unit ("IMU"). Dkt. 10, p. 5; Dkt. 77, pp. 1-2. Shortly after his arrival, Plaintiff alleges he engaged in self-harming behaviors over a three week period which led to varying institutional responses from corrections officers and prison administrators. Dkt. 10, p. 5. Plaintiff raised numerous claims against various corrections officers, prison administrators, and Department of Corrections personnel, based on their responses to Plaintiff's attempts at self-harm. *See, e.g.*, Dkt. 10, pp. 5-14. On December 27, 2016, the Court adopted a Report and Recommendation dismissing all but the instant claims due to Plaintiff's failure to exhaust administrative remedies. Dkt. 64, 71.

The remaining claims against Defendants Stielau and DeHaven arose on October 29, 2014. On that date, Plaintiff alleges he received a razor blade inside a yellow sticky note from corrections officer Antonio Lopez. Dkt. 10, pp. 8-9. Plaintiff filed an emergency grievance to address his receipt of the razor blade, which was denied. Dkt. 10, p. 9; Dkt. 75, p. 4. In response, Plaintiff filed a second emergency grievance, where he stated: "My thoughts of suicide and self-harm have dramatically increased. While holding that razor blade tonight, no cameras, no staff, I almost killed myself. While I am not suicidal anymore, it was hard for me not because I had a razor blade, but because SCCC staff really want me to die and that's stressful." Dkt. 75, p. 5. Plaintiff also wrote "<u>not</u> suicidal right now" on the top of his second grievance. Dkt. 75, p. 5. In response, Defendant DeHaven contacted the on-call mental health professional, Jack Luadzers,

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[1] The record reflects Plaintiff has been transferred temporarily to Washington State Penitentiary ("WSP") for the duration of unrelated proceedings in the Eastern District of Washington. Dkt. 60, Exh. A & B.

Ph.D. who then ordered Plaintiff be placed in a restraint bed until the following morning, when Plaintiff could be assessed by a mental health professional. Dkt. 75, p. 5, Dkt. 76, p. 2; Dkt. 79, p. 2. Department of Corrections' policy generally directs placement of an offender in a restraint chair before placement in the restraint bed, but Defendant DeHaven believed the on-call mental health professional had the authority to order a different restraint method based on circumstances. Dkt. 76, p. 3; Dkt. 79, p. 2, Dkt. 80, p. 7. Dr. Luadzers indicated the department's restraint policy allows for a restraint bed to be used "as needed" by mental health staff. Dkt. 79, p. 2.[2] Dr. Luadzers further indicated he authorized use of the restraint bed because, due to the late hour, he believed it "would provide better comfort than the restraint chair, the restraint bed use would be occurring during what would otherwise be [Plaintiff's] sleeping hours, and because mental health staff are not normally at the facility during those hours . . . ." Dkt. 79, p. 3

Defendant Stielau, acting on Defendant DeHaven's instructions, secured Plaintiff on the restraint bed at approximately 10:00 pm on October 29, 2014. Dkt. 76, p. 3; Dkt. 82, p. 2. The restraint bed "is a padded table, equipped with locking straps for both the ankles and the wrists. It also has 2 straps crossing the body of the restrained person, making it a 4-point restraint device." Dkt. 79, p. 2. Plaintiff cooperated with Defendant Stielau, and was placed in the restraint bed without incident or the use of force. Dkt. 82, p. 2. Throughout his restraint, Plaintiff was examined by nursing staff to ensure he had adequate circulation at his wrists and ankles, given opportunities to move and flex his limbs ("limb rotation"), and was taken to the restroom.

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[2] This understanding is consistent with the "use of restraints" policy attached to Dr. Luadzers' Declaration. Dkt. 80, pp. 3-14. This policy reflects the use of restraints may be authorized by a medical provider to prevent self injury. Dkt. 80, pp. 4, 6-7.

Dkt. 81, p. 2; Dkt. 82, pp. 3, 7-10. Plaintiff remained in the restraint bed until approximately 10:00am the following morning. Dkt. 76, p. 3; Dkt. 82, p. 10.

At the time of this incident, Plaintiff was subject to an Individual Behavior Management Plan ("IBMP"). Dkt. 77, p. 2. The IBMP indicates Plaintiff "has engaged in behaviors that have disrupted the orderly operation of the unit," including continuing to keep a wound in his leg open, threatening to stop taking his medication, requesting female staff inspect his genitals, and declaring mental health emergencies when Plaintiff is in fact experiencing behavioral issues. Dkt. 77, pp. 3-4. The IBMP identifies appropriate responses corrections officers are to take when responding to Plaintiff's claims of self harm. For example, if Plaintiff threatens self harm, corrections officers are instructed to contact Dr. Luadzers, the on-call IMU mental health professional, and place Plaintiff in a holding cell. Dkt. 77, p. 3. By contrast, if Plaintiff begins to inflict self harm, corrections officers are instructed to place him in a restraint chair, and if he continues to inflict self harm after being released from the chair, corrections officers are instructed to place him in a restraint bed. Dkt. 77, p. 4.

Plaintiff argues these alleged actions by the Defendants constitute excessive force in violation of the Eighth Amendment to the United States Constitution, and retaliation for exercising his First Amendment rights.

Defendants filed the instant motion for summary judgment on March 7, 2017. Dkt. 74. Plaintiff filed a response, along with a Motion to Stay Discovery/Add Party on March 17, 2017. Dkt. 86. The Motion to Stay Discovery/Add Party has been denied. Dkt. 91. Defendants filed a

reply to their motion for summary judgment on April 7, 2017.[3] Dkt. 89. This case is now ready for review.

STANDARD OF REVIEW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A party asserting a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). All facts and reasonable inferences drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013) (*citing Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir.1997).

As the party moving for summary judgment, Defendants have the initial burden to demonstrate no genuine issue of material fact remains in this case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010). The movant "always bears the initial responsibility of informing the district court of the basis for its motion," and identifying those portions of the record, including pleadings, discovery materials,

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[3] Because Plaintiff is *pro se*, the Court "must consider as evidence in his opposition to summary judgment all of [Plaintiff's] contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where [Plaintiff] attested under penalty of perjury that the contents of the motions or pleadings are true and correct." *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

and affidavits, "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Mere disagreement or the bald assertion stating a genuine issue of material fact exists does not preclude summary judgment. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). 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." *T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Mere "[d]isputes over irrelevant or unnecessary facts," therefore, "will not preclude a grant of summary judgment." *Id.* Rather, the nonmoving party "must produce at least some 'significant probative evidence tending to support the complaint.'" *Id.* (*quoting Anderson*, 477 U.S. at 290); *see also California Architectural Building Products, Inc.*, 818 F.2d at 1468 ("No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment."). 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." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it[.]" Fed R. Civ. P. 56(e)(3).

DISCUSSION

I. Eighth Amendment Conditions of Confinement.

The Constitution does not mandate comfortable prisons, but neither does it permit inhumane prisons. *Farmer v. Brennan*, 511 U.S. 825, 832 (1970). Under the Eighth Amendment,

prison officials are required to provide prisoners with basic life necessities, such as food, clothing, shelter, sanitation, medical care, and personal safety. *Id.*; *Toussaint v. McCarthy*, 801 F.3d 1080, 1107 (9th Cir. 1986). To state a claim for unconstitutional conditions of confinement, an inmate must allege both an objective and subjective element. Objectively, a defendant's acts or omissions must deprive the inmate of "the minimal civilized measure of life's necessities" and, subjectively, a defendant must have acted with deliberate indifference to an excessive risk to inmate health or safety. *Allen v. Sakai,* 48 F.3d 1082, 1087 (9th Cir. 1994) (quoting *Farmer,* 511 U.S. at 834); *see Estate of Ford v. Ramirez—Palmer,* 301 F.3d 1043, 1049–50 (9th Cir. 2002). In evaluating claims of unconstitutional conditions of confinement, courts must consider the "circumstances, nature, and duration of a deprivation . . . in determining whether a constitutional violation has occurred." *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000).

Here, Defendants have demonstrated there is no genuine issue of material fact as to the subjective elements of this standard.[4] Plaintiff has a well-established history of self-harming behavior, and reported suicidal ideation to corrections officers on the evening of October 29, 2014. *See* Dkt. 76, pp. 2, 6, 16, 17; Dkt. 82, p. 2. In response to Plaintiff's report of suicidal ideation, mental health staff authorized Plaintiff to be placed in a restraint bed until mental health staff could conduct an in-person evaluation. Dkt. 75, p. 5, Dkt. 76, p. 2; Dkt. 79, p. 2. Dr. Luadzers indicated he authorized Plaintiff's restraint in the restraint bed in part to allow Plaintiff an opportunity to rest at night. Dkt. 79, p. 3. Throughout his restraint, Plaintiff was examined by nursing staff to ensure he had adequate circulation at his wrists and ankles, allowed regular

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[4] Because there is no genuine issue of material fact as to the subjective element of the deliberate indifference standard, the Court need not address whether Plaintiff's restraint in a restraint bed constitutes an objective deprivation of "the minimal civilized measure of life's necessities." *Allen,* 48 F.3d at 1087.

opportunities to engage in limb rotation, and was given opportunities to use the restroom. Dkt. 81, p. 2; Dkt. 82, pp. 3, 7-10. Though Plaintiff alleges in a conclusory fashion that he experienced leg cramps while on the restraint bed, neither Registered Nurse John O. Fadele nor Defendant Stielau observed Plaintiff to be in any distress or pain, nor does Plaintiff complain of discomfort or pain in the surveillance videos. Dkt. 81, p. 3; Dkt. 82, p. 2. Dkt. 84, M2U01164_File2, M2U01169; Dkt. 86, p. 6. Plaintiff remained in the restraint bed until approximately 10:00am the following morning, when he was evaluated by mental health staff and released. Dkt. 76, p. 3; Dkt. 82, p. 10. Even assuming the use of a restraint bed impaired Plaintiff's ability to sleep or use the restroom, the use of a restraint bed under these circumstances does not rise to the level of deliberate indifference under the Eighth Amendment. *See LeMaire v. Maass*, 12 F.3d 1444, 1460 (9th Cir. 1993). If anything, the evidence demonstrates Defendants and other SCCC staff members were conscious of Plaintiff's risk of self-injury, took steps to mitigate that risk, and provided regular checks and opportunities to ensure Plaintiff's restraints did not cause him harm.

Plaintiff alleges Defendants' actions were nonetheless unconstitutional, as they were inconsistent with his IBMP. Specifically, Plaintiff argues the IBMP indicates he was not to be restrained on a restraint bed unless he was actually engaging in self-harm which could not be abated using less restrictive means. However, even if Plaintiff's allegations concerning the IBMP are true, he has failed to demonstrate how deviations from his IBMP—as distinct from the use of the restraint bed itself—constitute a violation of his federally-protected constitutional rights. *See, e.g.*, *Lovell By and Through Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 370-71 (9th Cir. 1996) (holding a violation of state law can only form the basis of a Section 1983 action where the violation of state law causes the deprivation of a right protected by the United

States Constitution). As discussed above, the evidence demonstrates Defendants were not deliberately indifferent to an excessive risk of inmate health or safety. *See Allen,* 48 F.3d at 1087. Moreover, there is no indication in the record that the IBMP is meant to supersede the Department of Corrections policies on the use of restraints, which indicate a restraint bed may be authorized by a medical provider and duty officer to prevent offender self-injury. Dkt. 80, pp. 3-14. Thus, the evidence in the record fails to establish how any alleged deviations from Plaintiff's IBMP create a genuine issue of material fact which would preclude summary judgment. Dkt. 80, pp. 4, 6.

Plaintiff has failed to show the Defendants were deliberately indifferent to an excessive risk to inmate health or safety. Accordingly, the undersigned recommends Plaintiff's Eighth Amendment claim of unconstitutional conditions of confinement against Defendants be dismissed with prejudice.

II. Eighth Amendment Excessive Force.

"When prison officials use excessive force against prisoners, they violate the inmates' Eighth Amendment right to be free from cruel and unusual punishment." *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002). However, "[f]orce does not amount to a constitutional violation in this respect if it is applied in a good faith effort to restore discipline and order and not 'maliciously and sadistically for the very purpose of causing harm.'" *Id.* (*quoting Whitley v. Albers,* 475 U.S. 312, 320–321 (1986)); *see also Wilkins v. Gaddy,* 559 U.S. 34, 40 (2010) (to prevail on an excessive force claim, a plaintiff must allege "not only that the assault actually occurred but also that it was carried out maliciously and sadistically rather than as part of a good-faith effort to maintain or restore discipline"). The Court must consider the following relevant factors to determine whether the use of force was wanton and unnecessary: "the extent of injury

suffered [,] ... the need for application of force, the relationship between that need and the amount of force used, the threat [to the safety of staff and inmates] 'reasonably perceived by the responsible officials,' and 'any efforts to temper the severity of a forceful response.'" *Hudson v. McMillian,* 503 U.S. 1, 7 (1992) (*quoting Whitley,* 475 U.S. at 322).

Viewing the evidence in the light most favorable to Plaintiff, Plaintiff has failed to establish a genuine issue of material fact as to the need to use force and the amount of force used. The evidence in the case demonstrates the Defendants used, at most, *de minimis* force during and throughout Plaintiff's restraint in the bed. *See Hudson*, 503 U.S. at 7-8 ("The Eighth Amendments' prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimis* use of physical force . . . .")(*citing Whitley*, 475 U.S. at 327). Defendant Stielau's declaration reflects Plaintiff was secured to the restraint bed without incident or without the need to use force. Dkt. 82, p.2. Both Defendant Stielau and Nurse Fadele checked Plaintiff's restraints to ensure they were not damaging his limbs or limiting his circulation. Dkt. 81, p. 2; Dkt. 82, p.2 Defendants Stielau and Mr. Fadele's description of events is corroborated by the surveillance video footage of Plaintiff's restraint on the restraint bed. The video footage clearly shows Plaintiff complied with the instructions of the corrections officers during the restraint process. Dkt. 84, M2U01164_File2. The video footage also demonstrates the corrections officers checking the restraints to ensure Plaintiff was appropriately secured to the restraint bed. *Id.* Additional video footage also demonstrates Plaintiff was periodically checked by corrections officers and nursing staff, who examined the straps at Plaintiff's wrists, ankles, and torso, and periodically removed and replaced straps to allow Plaintiff an opportunity to move and rotate his limbs and torso. *See, e.g.*, Dkt. 84, M2U01169.

Further, Defendants Stielau and DeHaven reasonably perceived a threat to Plaintiff's safety, based on Plaintiff's long history of self-harming behavior, coupled with his report of recent suicidal ideation and possession of a razor blade in his cell. *See* Dkt. 76, pp. 2, 6, 16, 17; Dkt. 82, p. 2. Plaintiff points to notes on his emergency grievances where he stated he was not feeling suicidal at the time he submitted the grievance, but does not dispute that he reported recent suicidal ideation or the possession of a razor blade to SCCC corrections staff. Moreover, despite Plaintiff's voluminous filings in this case, Plaintiff does not point to any evidence to rebut Defendants' showing that Dr. Luadzers' decision to place Plaintiff in the restraint bed pending mental health evaluation was a medically appropriate decision, or was otherwise a reasonable response to Plaintiff's admitted recent suicidal ideation. *See Jeffers v. Gomez*, 267 F.3d 895, 910-11 (9th Cir. 2001) (finding a prison security measure undertaken for the protection of prison officials and inmates is constitutional when it is applied in good-faith and not used maliciously); *Thompson v. Souza*, 111 F.3d 694, 701 (9th Cir. 1997) (finding a strip search not done maliciously or sadistically for the purpose of causing harm was not a violation of clearly established law).

Plaintiff has failed to show the Defendants used force maliciously and sadistically for the purpose of causing harm. Accordingly, the undersigned recommends Plaintiff's Eighth Amendment claim of excessive use of force against Defendants be dismissed with prejudice.

III. First Amendment Retaliation.

"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 inmate'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, 567-68 (9th Cir. 2005). Defendants argue there is no genuine issue of material fact as to the fifth element of a retaliation claim, as Plaintiff cannot demonstrate that the action did not reasonably advance a legitimate correctional goal. Dkt. 74, p. 17.

A Court must "'afford appropriate deference and flexibility' to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995) (*quoting Sandin v. Conner*, 515 U.S. 472, 482 (1995)). As discussed in Sections I and II, above, Plaintiff had informed SCCC corrections officers that he was in possession of a razor blade and had been experiencing suicidal ideation. *See* Dkt. 76, pp. 2, 6, 16, 17; Dkt. 82, p. 2. Plaintiff also had a well-known history for engaging in self-harming behavior. Dkt. 77, p. 3. In response to these facts, Dr. Luadzers ordered Plaintiff be confined on a restraint bed pending evaluation by mental health staff at the earliest opportunity. Restraining an inmate with a long history of self-harm and admitted suicidal ideation in order to prevent that inmate from engaging in self-harm before a mental health evaluation can occur is a legitimate penological reason for Defendants' actions.

Plaintiff does not argue Defendants' proffered reason for restraining him could not constitute a legitimate penological reason for his restraint. Instead, Plaintiff takes issue with case law in this Circuit requiring courts to defer to prison official's proffered reasons for allegedly retaliatory conduct, as well as case law in this Circuit requiring plaintiffs to bear the burden of proving allegedly retaliatory action does not advance legitimate penological goals. *See* Dkt. 86, pp. 7-8. Regardless of Plaintiff's feelings towards such a burden, it remains the law of the Circuit that Plaintiff must prove the absence of legitimate correctional goals for the allegedly retaliatory conduct. *See Pratt*, 65 F.3d at 806. To that end, Plaintiff offers no evidence or argument that

Defendants DeHaven or Stielau acted in retaliation for the exercise of Plaintiff's First Amendment rights, other than the fact his restraint occurred after he filed a grievance. Though "timing can properly be considered as circumstantial evidence of retaliatory intent," timing alone is not sufficient to support such an inference. *Pratt*, 65 F.3d at 808. Thus, Plaintiff has failed to demonstrate his restraint in a restraint bed was not for a legitimate penological purpose. Accordingly, the undersigned recommends Plaintiff's First Amendment claim of retaliation against Defendants be dismissed with prejudice.

IV. Qualified Immunity

Defendants also argue they are entitled to qualified immunity from suit. However, as Plaintiff has failed to raise genuine issues of material fact concerning his constitutional claims, the Court need not address the question of qualified immunity.

V. Whether This Case Should Count as a Strike

"[P]risoners who have repeatedly brought unsuccessful suits may entirely be barred from [*in forma pauperis*] status under the three-strikes rule." *Andrews v. Cervantes*, 493 F.3d 1047, 1051-52 (9th Cir. 2007). The "three-strikes rule," contained in §1915(g), states:

> [i]n no event shall a prisoner bring a civil action under this section 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).

The evidence shows Plaintiff has a history of abusing the litigation process. The Thurston County Superior Court has permanently enjoined Plaintiff from engaging in public records requests without court approval due to his long history of abusive behavior, which includes making threats to obtain and disseminate prison staff's personal information. *See Troupe v.*

Tucker, Case No. C14-5650 BHS-JRC (Dkt. 14, Exh. 14, p. 3); Dkt. 27, p. 2 ("Troupe, however, is sailing very close to the shoals of frivolousness with his pleadings. Any further complaints filed in this Court lacking merit to the extent of the current one will be considered additional evidence of malicious abuse of process."). In a separate Western District of Washington case, Plaintiff was precluded from conducting further discovery and the defendants were relieved from their obligation to respond to Plaintiff's 19th, 20th, and 21st sets of discovery due to the amount of discovery Plaintiff had served on the defendants. *See Troupe v. Blakeman*, Case No. C15-5261 RBL-KLS (Dkt. 76; 105) (Plaintiff propounded 265 interrogatories, 223 requests for production of documents, and 4 requests for admission, all contained within 21 different sets of discovery requests).

In this case, Plaintiff failed to exhaust administrative remedies available for the majority of his claims, despite evidence showing he was aware of the grievance process and frequently used the grievance process while housed at SCCC. Dkt. 64, 71. Additionally, Plaintiff has engaged in tactics which appeared to be for the purpose of delaying a decision on Defendants' Motions for Summary Judgment. *See* Dkt. 55 (Plaintiff's untimely motion for a 90-day extension of time to respond to Defendants' prior Motion for Summary Judgment), and Dkt. 86. Most recently, Plaintiff filed motions to stay the pending motion for summary judgment, amend his complaint, and conduct additional discovery, as a component of his response to Defendant's motion for summary judgment. Dkt. 86. As discussed more thoroughly in the Court's order on these motions (Dkt. 91), Plaintiff sought an order allowing him to conduct additional discovery, over a month after the discovery period closed, without demonstrating good cause or excusable neglect for his failure to timely file the motion. Further, his alleged grounds for a motion to amend his complaint and add a party at this late stage in the proceedings are contradicted by the

record. Plaintiff claims that the first he knew of Dr. Luadzers' involvement in ordering Plaintiff's restraint in a restraint bed on the night of October 29, 2014 was when Defendants mentioned his name and submitted his declaration in this motion. Dkt. 86, pp. 3, 5-6. However, this is flatly inconsistent with copies of grievances written by Plaintiff in November, 2014 through February, 2014, which Plaintiff attached to his response. *See, e.g.*, Dkt. 86, p. 15 ("I clearly wrote I was not suicidal in an emergency grievance appeal on 10-29-14, but Sgt. Stielau, Lt. Dehaven and Psych. Associate Luadzers put me into a restraint bed anyways."), Dkt. 86, p. 16 ("Jackie Luadzers, Sgt. Stielau, Lt. Whiteley, and Lt. DeHaven abused the restraint bed on me for filing an emergency grievance appeal on their co-worker."); Dkt. 86, p. 17 ("Per policy, restraint bed placement must be evaluated every 4 hrs. but Dr. Luadzers did not want to be woken up at 4:00am and with all my complaints against staff at SCCC including Dr. Luadzers . . . .") and Dkt. 86, p. 17 (Plaintiff's suggested remedy was "sanction all staff involved: Dr. Luadzers, Lt. DeHaven, Sgt. Whiteley, Sgt. Stielau, GC Dahne, and Superintendent Glebe").

Viewing the evidence as a whole, the Court finds Plaintiff's extensive history of abusive litigation tactics combined with his conduct in this case warrants finding this action is frivolous and malicious. Therefore, the Court recommends this case be counted as a strike under §1915(g). *See e.g. Finley v. Gonzales*, 2009 WL 2581357, *2 (E.D. Cal. Aug. 20, 2009) (finding dismissal for failure to exhaust alone did not count as a strike under § 1915(g); to count as a strike, "the dismissal for failure to exhaust must have been done on the grounds that the action is frivolous, malicious, or fails to state a claim"); *Reed v. CCA/Crossroads Correctional Center*, 2012 WL 5830582, *2 (D. Mont. Oct. 25, 2012) (finding failure to exhaust a strike where the plaintiff's failure to exhaust was a deliberate and defiant refusal to grieve his disputes); *Young v. Spizman*, 2008 WL 678674, *2 (W.D. Wash. March 7, 2008) (courts have found a case is malicious if it is

"plainly abusive of the judicial process or merely repeats pending or previously litigated claims").

CONCLUSION

Based on the foregoing reasons, the undersigned recommends Defendants' Motion for Summary Judgment (Dkt. 74) be granted, and this case closed. 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 *de novo* review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on June 2, 2017, as noted in the caption.

Dated this 11th day of May, 2017.

David W. Christel
United States Magistrate Judge

EXHIBIT 5

16-2-04332-34
ORDSMWP
Order of Dismissal With Prejudice
1036657

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2017 FEB 10 AM 11:45

Linda Myhre Enlow
Thurston County Clerk

☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: February 10, 2017
Time: 11:15a.m.
The Honorable James Dixon

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

DAVID TROUPE, Plaintiff, v. WASHINGTON DEPARTMENT OF CORRECTIONS, Defendant.	NO. 16-2-04332-34 ORDER ON MOTION TO DISMISS AND MOTION TO REVOKE *IN FORMA PAUPERIS* STATUS

THIS MATTER coming on for hearing on February 10, 2017, on the motion of Defendant, Washington State Department of Corrections, to dismiss for failure to state a claim under CR 12(b)(1), (2), (5), and (6), and its motion to revoke Plaintiff David Troupe's *in forma pauperis* (IFP) status, and Defendant appearing by Robert W. Ferguson, Attorney General, and Daniel J. Judge, Senior Counsel, Plaintiff David Troupe appearing telephonically, and the Court having heard argument, considered the records and files herein, including:

FOR THE MOTION TO DISMISS:

1. Defendant's motion to dismiss under CR 12(b)(1),(2),(5), and(6) and supporting memorandum;

ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300

EXHIBIT 5

2. Plaintiff's Complaint filed in this matter;

3. Plaintiff's Response, if any; and,

4. Defendant's Reply, if any;

FOR THE MOTION TO REVOKE IFP STATUS

1. Defendant's motion to revoke IFP status and supporting memorandum;

2. Certified Copies of Orders and Order Accompanying the Declaration of Aaron Williams (marked Exhibits 1 through 4);

3. Plaintiff's Response, if any; and,

4. Defendant's Reply, if any;

and THIS COURT being fully advised; now, therefore,

IT IS HEREBY ORDERED that Defendant's Motion to DISMISS is GRANTED and Plaintiff's claims are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendant's Motion to Revoke IFP Status is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Complaint in this matter is frivolous and is deemed a strike under RCW 4.24.430.

DONE IN OPEN COURT this 10 day of February, 2017.

JUDGE JAMES DIXON

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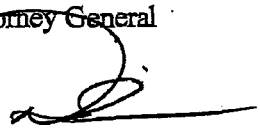
Presented by:

ROBERT W. FERGUSON
Attorney General



DANIEL J. JUDGE, WSBA No. 17392
Senior Counsel, OID #91023
Attorneys for Defendant

Approved as to Form: Notice of Presentment Waived:

DAVID TROUPE
Plaintiff, *pro se*

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CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

January 11, 2018 - 12:36 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50657-2
Appellate Court Case Title:	Personal Restraint Petition of: David Allen Jr. Troupe
Superior Court Case Number:	99-1-02498-4

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