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No. 66302-0-I

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION ONE

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MATTHEW G. SILVA,

Appellant,

v.

DEBORAH HOLLY,

Respondent.

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APPELLANT'S REPLY BRIEF

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 DEC 12 AM 11:00

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## I. REPLY SUMMARY

The respondent claims that collateral estoppel was correctly applied as a bar to appellant's claims of grievance censorship. BRIEF OF RESPONDENT ("BOR") at pages 6-20. Further, respondent argues that Mr. Silva failed to state a claim regarding any issue surrounding prison grievances and that Ms. Holly was entitled to qualified immunity. BOR at pages 20-25. Finally, respondent asserts that Mr. Silva's retaliation claim was properly dismissed even though no motion to dismiss was before the trial court, this on the theory that a pleading deficiency mandates a dismissal anyway.

Appellant disputes each of respondent's arguments.

## II. REPLY ARGUMENT

1. NO COLLATERAL ESTOPPEL DEFENSE WAS PLEADED OR PROVEN AT THE TRIAL COURT LEVEL. THEREFORE, THE DISMISSAL ORDER MUST BE REVERSED.

a. Respondent Failed To Plead And Prove A Prior Final Judgment On The Merits. As appellant pointed out in his APPELLANT'S AMENDED OPENING BRIEF ("AAOP"), respondent never pleaded or proved a prior final judgment. See AAOP at pages 7-9. The defense of collateral estoppel was not

pleaded as an affirmative defense in the answer. Clerk's Papers ("CP) 61. Further, no admissible evidence of the alleged prior federal judgment was presented. No complaint, answer, dismissal order or final judgment was offered to the trial court to support an affirmative defense of collateral estoppel.

The law requires a party asserting collateral estoppel as an affirmative defense to bear the burden of proof. State Farm Mutual v. Avery, 114 Wn.App 299, 304 (2002). Failure of proof is fatal to the defense. LeMond v. DOL, 143 Wn.App 797 (2008). "The record of the prior action must be before the trial court so that it may determine if the doctrine precludes relitigation of the issue in question". Beagles v. Seattle First Nat'l Bank, 25 Wn.App 925, 932 (1980).

Rather than presenting admissible evidence in the trial court to support her estoppel defense, respondent Holly relied solely on a hodge-podge of unpublished materials referenced by their "WestLaw" citations. CP 50-52. Mr. Silva objected to this procedure at the trial court level and demanded that collateral estoppel be disregarded as an affirmative defense unless Ms. Holly produced "competent evidence" to support it. CP 35-36.

Respondent did not respond to Mr. Silva's objection nor address the issue of sufficiency of proof in the trial court.

No evidence of a final judgment was presented in the trial court at all. Under federal law, a district court must enter a separate judgment after a case is disposed of, except under limited circumstances not applicable here. Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 58 requires entry of a separate document when judgment is entered. In pertinent part, Fed.R.Civ.P. 58 mandates that:

(a) **Separate Document.** Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

- (1) for judgment under Rule 50(b);
- (2) to amend or make additional findings of fact under Rule 52(b);
- (3) for attorney's fees under Rule 54;
- (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
- (5) for relief under Rule 60.

(b) **Entering Judgment.**

(1) Without the Court's Direction. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

- (A) the jury returns a general verdict;
- (B) the court awards only costs or a sum certain; or
- (C) the court denies all relief.

(2) Court's Approval Required. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

- (A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(c) **Time of Entry.** For purposes of these rules, judgment is entered at the following times:

- (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
- (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:
  - (A) it is set out in a separate document; or
  - (B) 150 days have run from the entry in the civil docket.

Respondent failed to produce or refer to any final judgment recognized by federal law in this case. On that basis alone, Ms. Holly failed to prove collateral estoppel, which requires a “final judgment on the merits”. Malland v. Department of Retirement Sys., 103 Wn.2d 484, 489 (1985).

Now for the first time on appeal, Ms. Holly argues that her reliance on WestLaw citations to orders allegedly entered in a prior federal case amount to “admissible evidence” under Evidence Rule (ER) 201(b). She offers two (2) reasons for this novel proposition: first, she says WestLaw citations amount to “(u)npublished opinions [that] can be cited to establish facts in a different case that are relevant to the current case”, citing State v. Seek, 109 Wn.App 876, 878 n.1 (2002); second, Ms. Holly claims that the WestLaw

citations she relied on are from a “publically available database”.

See BOR at pages 13-15.

In support of her position, respondent opines that Washington case law on the quality of “admissible evidence” necessary to support a collateral estoppel defense is outdated, essentially asking this Court to overrule it. According to her argument, Washington cases like Beagles and Bodeneck v. Carter’s Motor Freight System, 198 Wash. 21 are obsolete because they were decided in 1980 and 1939, respectively, “before the availability of publically accessible databases containing case law and other pleadings”. BOR at page 16. This position is specious and rests on a flawed understanding of evidence rules.

First, State v. Seek, 109 Wn.App 876, 878 n.1 (2002) does not support the result advocated by respondent here. In Seek, the Court relied on In re Pers. Restraint of Davis, 95 Wn. App. 917, 920 n.2 (1999), aff’d, 142 Wn.2d 165 (2000), which in turn relied upon Island County v. Mackie, 36 Wn. App. 385, 391 n.3 (1984). Mackie contains one footnote indicating that the unpublished opinion of a Washington State court can be relied upon as evidence to support a collateral estoppel. There is no indication of whether a copy of that unpublished opinion was presented as evidence in the trial

court or whether the case citation was merely referenced.

Certainly, Seek, Davis and Mackie do not dispose of the issue here, which involves the admissibility of a WestLaw internet citation as proof for collateral estoppel purposes.

Second, respondent has not now and has never proven that the WestLaw internet citations are, in fact, publically available. It is appellant's experience and belief that only customers who pay for access to the WestLaw database are allowed to use it.

Conversely, everyone can look up unpublished opinions of Washington State courts because they are "official publications". See ER 902(e). They would further be available by searching the Washington Courts website. Appellant contends that the WestLaw database is not publically available and, therefore, could not amount to "admissible evidence" as used in this case.

It is possible that an article of admissible evidence could be procured from the private WestLaw database referenced in the instant case, however it would require the proponent to meet a much stricter procedural standard that respondent has here. The system would have to be described by a witness with personal knowledge, and any printout would have to be identified and authenticated. ER 901. There is no evidence before this Court that

the WestLaw internet database referenced by respondent and relied upon by the trial court maintains any standards regarding content, that it contains complete or accurate information, or how it is operated at all. Under the facts of the instant case, reference to a WestLaw internet database citation cannot be analogized to a Washington State court's unpublished opinion because there is no information about WestLaw's system in the record below. Neither the trial court nor this Court can find that WestLaw's private, commercial internet database contains only facts which are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned".

Therefore, ER 201(b) cannot apply. Trial courts cannot take judicial notice of the contents of documents from other courts' records unless they have actually viewed the file. State v. Duran-Davila, 77 Wn. App. 701 (1995). The court may take judicial notice of the record in the case presently before it or "in proceedings engrafted, ancillary, or supplementary to it." Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 53 (1952). However, the court cannot, while deciding one case, take judicial notice of records of other

independent and separate judicial proceedings even though they are between the same parties. Id at 54.

b. Respondent Failed To Plead And Prove Identity Of Issues. The issue respondent alleges to have been litigated in a prior federal action is that Mr. Silva's "grievances were not processed". BOR at page 16. Mr. Silva disputes that this is the issue previously litigated in a prior federal action between himself and any Washington State Department of Corrections (WDOC) employee.

According to appellant's records, a federal court issued an order on the following issue: "Plaintiff's Claims Regarding The Theft Of Or Failure To Process His Grievances". However, in that prior federal case, the matter was dismissed – first and foremost – based on Mr. Silva's alleged "failure to exhaust administrative remedies". Under 42 USC § 1997e and Woodford v. Ngo, 548 U.S. 81 (2006), any prisoner action brought without exhaustion of administrative remedies must be dismissed. This amounts to an alternative ground for the decision, which precludes application of collateral estoppel because any claim that "grievances were not processed" was not necessary to the dismissal order. Luisi Truck Lines, Inc. v. Washington Utilities & Transportation Comm'n, 72 Wn.2d 887, 894

(1967); see also Restatement of Judgments (Second) § 27(h), *Determinations not essential to the judgment* (“If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded”).

Next, in addressing the grievance issue, the federal court found that there was no evidence that Mr. Silva’s grievances were stolen or unprocessed but there was evidence to the contrary. On that basis, it was not necessary for the federal court to reach the legal issue of whether stealing or not processing grievances states a constitutional claim. Therefore, the legal issue respondent claims to have been adjudicated in a prior federal action – i.e., whether “grievances ... not [being] processed” states a constitutional claim – was not “actually determined and necessarily litigated” in any prior action. LeMond v. DOL, 180 P.3d 829, 833-34 (2008), citing Rufener v. Scott, 46 Wn.2d 240, 245 (1955). Moreover, because the grievance issue was decided on alternative grounds, any judgment would be inconclusive of either issue standing alone. See Restatement of Judgments (Second) § 27(i), *Alternative determinations by court of first instance*.

Finally, the instant action asserts claims that respondent violated Mr. Silva's rights to freedom from illegal censorship, prior restraint on free speech and intentional obstruction of his prison grievances. These rights were asserted under the First Amendment. CP 40-44. Respondent claims that the issue adjudicated in the prior federal action was that "grievances were not processed". BOR at page 16. However, the first two issues (i.e., censorship and prior restraint on free speech) are not dependent on whether or not content-based restrictions occurred in relation to a grievance or some other communication. Illegal censorship and prior restraint on free speech would violate the First Amendment if perpetrated against any type of lawful communication. These are obviously not the same issues as those respondent seeks to estop.

Based on the above, respondent has failed to carry her burden of proving identity of issues. Therefore, the dismissal order (CP 4) must be reversed.

## 2. THE ISSUES RAISED IN THE COMPLAINT STATE CLAIMS FOR WHICH RELIEF CAN BE GRANTED.

Ms. Holly argues that any causes of action involving prison grievances cannot possibly state a claim because "inmates lack a separate constitutional entitlement to a specific prison grievance

procedure". BOR at page 20, citing Ramirez v. Galaza, 334 F.3d 850, 860 (9<sup>th</sup> 2003). She further clarifies her argument in asserting that "if a state elects to provide a grievance mechanism, violations of its procedure do not give rise to § 1983 claims. See BOR at 20, citing Hoover v. Watson, 886 F.Supp 410 (D.Del. 1995); Brown v. Dodson, 863 F.Supp 284, 285 (W.D.Va. 1994); Allen v. Wood, 970 F.Supp 824, 832 (E.D.Wash. 1997). However, none of these cases address the type of claims presented here, and even if they did, the cases have been superseded by the Prison Litigation Reform Act (PLRA) and contemporary case authority.

a. This Case Does Not Assert Due Process Claims, So The Authority Respondent Relies On Is Misleading And Inapplicable.

First, all of the authority relied upon by respondent falls under the Due Process Clause. In each of the cases, the court rejects inmate claims that prison staff had no official grievance procedure or failed to follow it. In Ramirez, the court explained the issue as follows:

The Due Process clause provides prisoners two separate sources of protection against unconstitutional state disciplinary actions. First, a prisoner may challenge a disciplinary action which deprives or restrains a state-created liberty interest in some "unexpected manner." Sandin v. Conner, 515 U.S. 472, 483-84 (1995). Ramirez's claimed loss of a liberty interest in the processing of his appeals does not satisfy this standard, because inmates lack a separate constitutional entitlement to a specific prison grievance procedure. Mann v. Adams, 855 F.2d 639, 640

(9<sup>th</sup> 1988). Accordingly, Ramirez's claim lacks the necessary constitutional foundation, and thus does not extend his confinement in an unexpected manner.

Ramirez, 334 F.3d at 860.

Similarly in Hoover, the issue was explained as one claiming a due process right to a specific grievance procedure:

In claim three of their complaint, plaintiffs appear to raise a due process claim based on the inadequacy of the prison grievance system. However, inmates "do not have a constitutionally protected right to a grievance procedure." Brown v. Dodson, 863 F.Supp 284, 285 (W.D. Va. 1994) (citing Flick v. Alba, 932 F.2d 728, 729 (8th 1991)); Spencer v. Moore, 638 F.Supp 315, 316 (E.D. Mo. 1986) (holding that "an inmate grievance procedure is not constitutionally required"). Furthermore, "a state grievance procedure does not confer any substantive constitutional right upon prison inmates." Brown, 863 F.Supp at 285. Thus, "if the state elects to provide a grievance mechanism, {886 F. Supp. 419} violations of its procedures do not . . . give rise to a 1983 claim." Spencer, 638 F.Supp at 316; see also Mann v. Adams, 855 F.2d 639, 640 (9th 1988).

Hoover, 866 F.Supp at 418-19

Again in Brown, the issue was described as whether due process is violated when prison staffs fail to follow official grievance procedures:

Inmates do not have a constitutionally protected right to a grievance procedure. Flick v. Alba, 932 F.2d 728, 729 (8th 1991). Because a state grievance procedure does not confer any substantive constitutional right upon prison inmates, prison officials' failure to comply with the state's grievance procedure is not actionable under § 1983. Mann v. Adams, 855 F.2d 639, 640 (9<sup>th</sup> 1988); Azeez v. De Robertis, 568 F.Supp 8, 9-11 (N.D.Ill. 1982). Moreover, because state grievance procedures are separate and

distinct from state and federal legal procedures, an institution's failure to comply with state grievance procedures does not compromise its inmates' right of access to the courts. Flick, *supra*.

Under these principles, it is clear that plaintiff's allegations do not state a claim that he has been deprived of constitutional rights. Id. Even assuming defendants have violated state grievance procedures as alleged, such actions do not state a claim actionable under 1983. Mann and West, *supra*.

Brown, 863 F.Supp at 285.

Finally, the opinion in Allen also analyzes the issue as one involving a due process claim:

Plaintiff claims defendant Warneka directed plaintiff to appeal his mail rejections to defendant Wood, rather than to "seek justification" from defendant Warneka, in violation of plaintiff's due process rights. The mail rejection notice explains an inmate's right to appeal the rejection of his mail. (Ct. Rec. 17, Ex. 102.) Plaintiff admits he was given notice of each mail rejection and had the opportunity to appeal, if he chose to do so. Accordingly, plaintiff received sufficient due process of law in conjunction with the rejection of his mail. See Procnier v. Martinez, 416 U.S. 396, 418-19 (1974), *overruled on other grounds*, Thornburgh, 490 U.S. 401.

Furthermore, inmates are not constitutionally entitled to a grievance process. Mann v. Adams, 855 F.2d 639, 640 (9<sup>th</sup> 1988). The grievance process is strictly an internal procedural mechanism for handling of prisoner complaints. It does not involve substantive rights. Therefore, plaintiff does not have a constitutional claim with respect to the processing of his grievances by defendants Warneka, Woods, or Rolfs.

970 F.Supp at 832.

The claims Mr. Silva is asserting are founded on the First Amendment right to free speech. Courts have recognized that just because a prisoner "has no right to a particular grievance procedure" does not immunize any action taken by prison officials in response to a grievance from constitutional scrutiny. The court in Bradley v. Hall, 911 F.Supp 446, 448-49 (D.Or. 1994) explained:

It is well-settled that an inmate cannot be punished for the act of filing a grievance. Sprouse v. Babcock, 870 F.2d 450, 452 (8<sup>th</sup> 1989)(filing of disciplinary charge actionable under section 1983 if done in retaliation for having filed a grievance); Wright v. Newsome, 795 F.2d 964, 968 (11<sup>th</sup> 1986) (actions taken in retaliation for filing administrative grievance violate inmate's First Amendment rights and right of access to courts). The prison administrative rules recognize this, but draw a distinction between the content of the grievance and the grievance itself: "Inmates/offenders will not be subject to reprisal for filing a grievance or for contacting or seeking review of a complaint outside the Department of Corrections; {911 F.Supp 449} however, content of the grievance may subject an inmate to the rules of prohibited conduct." OAR 291-109-015(e).

Punishing an inmate for the content of his grievance rather than for the act of filing the grievance is a distinction without a difference - both result in the chilling of free speech.

In a case involving false statements contained in an inmate grievance, the Eighth Circuit similarly rejected bifurcating the language within a grievance from the grievance itself:

Prison officials cannot properly bring a disciplinary action against a prisoner for filing a grievance that is determined by those officials to be without merit anymore than they can properly bring disciplinary action against a prisoner for filing a lawsuit that is

judicially determined to be without merit. That the Constitution does not obligate the state to establish a grievance procedure is, we believe, of no consequence here, since what is at stake is a prisoner's right of access to an existing grievance procedure without fear of being subjected to retaliatory disciplinary action. As a purely practical matter, we observe that if such disciplinary actions were allowed, the purpose of the grievance procedure - to provide an administrative forum for the airing of administrative complaints - would be defeated.

Sprouse v. Babcock, 870 F.2d 450, 452 (8<sup>th</sup> 1989). The purpose of a grievance is to allow an inmate to air his complaints to the prison administration. Any language used by an inmate to complain of guard misconduct will necessarily appear disrespectful, particularly in light of the broad discretion granted the administration in interpreting whether language is "hostile" or "abusive."

Although speech contained in an inmate grievance is not clearly protected under the First Amendment, neither has it been clearly held to be unprotected. Instead, the courts have relied upon Supreme Court holdings in cases involving employee grievances. See e.g., Curry v. Hall, 839 F.Supp 1437, 1440 (D.Or. 1993). The Supreme Court has not addressed the issue of First Amendment rights in a prisoner grievance, but in the context of employee grievances has held that "there is no sound basis for granting greater constitutional protection to statements made in a petition. . . than other First Amendment expressions." McDonald v. Smith, 472 U.S. 479, 485 (1984)(statements contained in petition to President not entitled to absolute immunity). Further, the Court has also held that speech within grievances made by public employees is entitled to protection only if the employee's speech addresses a matter of public concern. Connick v. Myers, 461 U.S. 138, 147 (1983).

The Ninth Circuit has reaffirmed that prisoners do have a constitutional right to file prison grievances, which undermines respondent's reliance on Ramirez, Hoover, Brown and Allen. The Federal Court of Appeals held that:

Of fundamental import to prisoners are their First Amendment "right[s] to file prison grievances," Bruce v. Ylst, 351 F.3d 1283, 1288 (9<sup>th</sup> 2003), and to "pursue civil rights litigation in the courts." Schroeder v. McDonald, 55 F.3d 454, 461 (9<sup>th</sup> 1995). Without those bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices. And because purely retaliatory actions taken against a prisoner for having exercised those rights necessarily undermine those protections, such actions violate the Constitution quite apart from any underlying misconduct they are designed to shield. See, e.g., Pratt v. Rowland, 65 F.3d 802, 806 & n.4 (9<sup>th</sup> 1995) ("The prohibition against retaliatory punishment is 'clearly established law' in the Ninth Circuit, for qualified immunity purposes. That retaliatory actions by prison officials are cognizable under 1983 has also been widely accepted in other circuits.") (citing Schroeder, 55 F.3d at 461; Barnett v. Centoni, 31 F.3d 813, 815-16 (9<sup>th</sup> 1994); Frazier v. Dubois, 922 F.2d 560, 561-62 (10<sup>th</sup> 1990); Madewell v. Roberts, 909 F.2d 1203 (8<sup>th</sup> 1990); Gill v. Mooney, 824 F.2d 192, 194 (2<sup>nd</sup> 1987); Bridges v. Russell, 757 F.2d 1155 (11<sup>th</sup> 1985); Buise v. Hudkins, 584 F.2d 223 (7<sup>th</sup> 1978)).

Rhodes v. Robinson, 408 F.3d 559, 567 (9<sup>th</sup> 2005).

b. It Is Fundamental Law That The First Amendment Protects Against Content-Based Censorship. It is well-established constitutional law that the government cannot regulate speech based on its substantive content. Rosenberger v. Rector Visitors

Of The University Of Virginia, 515 U.S. 819, 828 (1995), citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972); RAV v. City of St. Paul, 505 U.S. 377, 382 (1992); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984). The danger of censorship and of the abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975). Content-based censorship is presumptively invalid. Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1020-23 (9<sup>th</sup> 2008).

Even in the prison context, regulations that infringe on First Amendment freedoms must operate "in a neutral fashion without regard to the content of the expression". Turner v. Safely, 482 U.S. 78, 90 (1987). This Court has held that Turner controls First Amendment claims by prisoners. See In re PRP of Parmelee, 115 Wn.App 273, 284 (2003). The Ninth Circuit has reached a similar conclusion in Bradley, where the court opined that:

1. The Prisoner's Rights Burdened by the Disrespect Rules  
It has long been "established beyond doubt that prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821(1977). A prisoner's right to meaningful access to the courts, along with his broader right to petition the government for a redress of his grievances under the First Amendment, precludes prison authorities

from penalizing a prisoner for exercising those rights. In some instances, prison authorities must even take affirmative steps to help prisoners exercise their rights. Id at 821-832; Casey v. Lewis, 4 F.3d 1516, 1520 (9<sup>th</sup> 1993).

The right of meaningful access to the courts extends to established prison grievance procedures. Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9<sup>th</sup> 1989). See also Hines v. Gomez, 853 F. Supp. 329, 331-332 (N.D. Cal. 1994) and cases cited therein. The "government" to which the First Amendment guarantees a right of redress of grievances includes the prison authorities, as it includes other administrative arms and units of government. Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9<sup>th</sup> 1989). Moreover, in some cases a prisoner may be required to exhaust the established prisoner grievance procedure before securing relief in federal court. See 42 U.S.C. 1997 et seq. In those cases, a prisoner's fundamental right of access to the courts hinges on his ability to access the prison grievance system.

We are not persuaded by the director's argument that punishing a prisoner for the content of his grievance does not burden his ability to file a grievance. From the prisoner's point of view, the chilling effect is the same. Whether the content of the grievance or the act of filing the grievance is deemed to be the actus reus of the offense, the prisoner risks punishment for exercising the right to complain. Without question, the application of the ODOC disrespect regulations to Bradley's written grievance impacts his constitutionally protected rights under the Fourteenth and First Amendments.

## 2. The Turner Test and Analysis

Prison regulations that infringe a prisoner's constitutional right are valid so long as they are "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89(1987); Casey v. Lewis, 4 F.3d at 1520. The Supreme Court has identified four factors to consider when determining the reasonableness of a prison rule: 1) whether there is a "valid, rational connection between the prison

regulation and the legitimate governmental interest put forward to justify it"; 2) "whether there are alternative means of exercising the right that remain open to prison inmates"; 3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally"; and 4) the "absence of ready alternatives" or, in other words, whether the rule at issue is an "exaggerated response to prison concerns." Turner v. Safley, 482 U.S. at 89-90 (internal quotations omitted).

Bradley v. Hall, 64 F.3d 1276, 1279 (9<sup>th</sup> 1995).

In the instant case, Mr. Silva alleged that respondent Holly refused to process his grievances based on their content. AAOB at page 2. Two grievances were rejected because Ms. Holly decided they included more than one issue; the other was refused because it cited a single Revised Code of Washington (RCW). *Id.* There is no evidence at this stage of the proceedings that any of the content-based obstruction was actually done pursuant to established grievance policy. Even if Mr. Silva had no right to file a grievance (which he does not concede), respondent could not refuse him the benefit of access to the grievance process based on the content of what he submitted.

The Eleventh Circuit dealt with an argument similar to that being advocated by respondent here, rejecting it under the doctrine of unconstitutional conditions. In Adams, the court held that:

The first basis for the district court's dismissal of Adams's and Piccirillo's claims was the principle that prison inmates do not have a constitutionally protected right to remain at a particular penal institution, Fla. Stat. 945.09(3); see Meachum v. Fano, 427 U.S. 215 (1976). The district court also ruled that inmates do not have an expectation of keeping a certain job, *cf.* Gibson v. McEvers, 631 F.2d 95, 98 (7<sup>th</sup> 1980) (citing Altizer v. Paderick, 569 F.2d 812, 813 (4<sup>th</sup> 1978)); Bryan v. Werner, 516 F.2d 233 (3<sup>rd</sup> 1975).

These conclusions are correct. Prison administration requires a flexibility that cannot be burdened by the accumulation of expectations about the situations in which prisoners are placed temporarily. The due process clause does not "in and of itself protect a duly convicted prisoner against" a change of status. See Meachum v. Fano, 427 U.S. 215, 225 (1976) (transfer from one institution to another within the state prison system).

An assignment to the job of law clerk does not invest an inmate, or those he assists, with a property interest in his or her continuation as a law clerk. Despite the aspect of property in the accumulation of experience and intellectual capital by the inmate law clerk, job assignment and reassignment remain the prerogative of the prison administrators. A routine reassignment of an inmate law clerk does not enable an inmate to state a claim in federal court. This is true despite the nexus between a law clerk's primary activity and other constitutional rights retained by inmates, such as the right of free speech, and the right of access to court. See Procunier v. Martinez, 416 U.S. 396 (1974); Bounds v. Smith, 430 U.S. 817 (1977); *compare* Hoppins v. Wallace, 751 F.2d 1161 (11<sup>th</sup> 1985) (reasonableness of limitation on affirmative assistance to litigious inmate).

Adams and Piccirillo, however, have constitutional rights independent of any asserted property interest in being law clerks. Prisoners retain constitutional protections despite the necessary restrictions {784 F.2d 1080} on their rights and privileges. Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

The lack of entitlement to a particular privilege does not free prison administrators to grant or withhold the privilege for impermissible reasons. The doctrine of unconstitutional conditions prohibits terminating benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe. See Thomas v. Review Bd., 450 U.S. 707(1981); Elrod v. Burns, 427 U.S. 347(1976); Perry v. Sindermann, 408 U.S. 593 (1972).

This court has applied the unconstitutional conditions doctrine to prisoner suits. In Bridges v. Russell, 757 F.2d 1155 (11<sup>th</sup> 1985), a prisoner's allegation that he was transferred to another prison in retaliation for his exercise of first amendment rights of free speech was held to require factual resolution. In Hall v. Sutton, 755 F.2d 786 (11<sup>th</sup> 1985), an allegation of a constitutionally improper retaliatory motive for the taking of tennis shoes enabled an inmate to avoid the rule of Hudson v. Palmer, 468 U.S. 517 (1984), that an intentional deprivation of property does not violate due process if an adequate state procedure exists to redress the deprivation.

Similarly, the Seventh Circuit has applied independent constitutional scrutiny to a prison's assignment of cellmates. The court held that, although prisoners have no valid expectation of a cellmate or job of their own choosing, an inmate's charge that the prison had a policy of segregating black from white inmates in cell and job assignments stated a claim for which relief could be granted. Harris v. Greer, 750 F.2d 617 (7<sup>th</sup> 1984).

Adams v. James, 784 F.2d 1077, 1080-81 (11<sup>th</sup> 1986).

If respondent's argument were correct, the fact that unconstitutional government censorship was perpetrated against a state prisoner's grievance would preclude § 1983 relief strictly because the speech happened to be expressed in an official

grievance. However, the United States Supreme Court rejected this kind of speech-valuation approach. In Shaw v. Murphy, 532 U.S. 223 (2001), the Court held that the type and content of prisoner speech has no bearing on the analysis for First Amendment purposes; Turner controls.

This Court will note that no Turner analysis has ever been conducted in this case.

Under Turner, the burden is on the government to prove that an infringement on an inmate's constitutional rights is "reasonably related to legitimate penological interests". If prison officials fail to make the necessary showing on the first Turner factor, the court need not proceed any further with the analysis. The Walker court explained:

The first of these Turner factors constitutes a sine qua non. Because defendants failed to make the case necessary for summary judgment as to that factor, we need not consider the others; rather, we are required to reverse.

...

Prison officials must "put forward" a legitimate governmental interest to justify their regulation, Turner v. Safley, 482 U.S. at 89, and must provide *evidence* that the interest proffered is the reason why the regulation was adopted or enforced. Swift v. Lewis, 901 F.2d 730, 732 (9<sup>th</sup> 1990) ("prison officials must at least produce some evidence that their policies are based on legitimate penological {917 F.2d 386} justifications"); Caldwell v. Miller, 790 F.2d 589, 598 (7<sup>th</sup> 1986) ("the governmental interest asserted in support of a restrictive policy must be sufficiently articulated to allow for

meaningful review of the regulation in question and its effect on the inmate's asserted rights"); Wilson v. Schillinger, 761 F.2d 921, 925 (3<sup>rd</sup> 1985), *cert. denied*, 475 U.S. 1096 (1986). The Constitution requires that "considerations advanced to support a restrictive policy be directly implicated by the protected activity, and sufficiently articulated to permit meaningful constitutional review." Caldwell, 790 F.2d at 599. It is only after prison officials have put forth such evidence that courts defer to the officials' judgment. Id at 600.

Walker v. Sumner, 917 F.2d 382, 382 (9<sup>th</sup> 1990).

In the instant case, respondent's failure to make the necessary showing on the Turner factors precludes finding that her actions are constitutionally permissible. Mr. Silva has a constitutional right to say whatever he wants in his grievance, within limits that are inapplicable here. See Parmelee, 115 Wn.App 273 (2003) ("true threats" not protected by First Amendment).

Respondent's position that Mr. Silva failed to state a claim is meritless.

3. THE LAW ON CONTENT-BASED PROHIBITIONS IS CLEARLY ESTABLISHED SO RESPONDENT IS NOT ENTITLED TO QUALIFIED IMMUNITY.

As is amply shown above, the law on content-based prohibitions is clearly established. Further, the law on prior restraints on free speech is also well-defined, so that any reasonable prison official would know they could not tell a prisoner what to write in their grievance. Under the circumstances of the

instant case – where respondent has made no showing on any of the Turner factors – Ms. Holly’s claim that she is entitled to qualified immunity is frivolous. The trial court did not find that she is entitled to qualified immunity and this Court should not either.

4. APPELLANT’S CLAIM THAT RESPONDENT VIOLATED HIS RIGHTS BY INFRACTING HIM FOR SERVING HER WITH THIS LAWSUIT STATES A CLAIM UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

When a grievance coordinator threatens or infracts a prisoner for accessing the courts, a valid retaliation claim is stated. See Brodheim v. Cry, 584 F.3d 1262 (9<sup>th</sup> 2009); Hines v. Gomez, 108 F.3d 265 (9th Cir. 1997). Similarly, when a prison official subjects a prisoner to punishment without notice of the proscribed conduct, the prisoner’s due process rights are violated. In re PRP of Krier, 108 Wn.App 31 (2001).

In the amended complaint, Mr. Silva alleged that Ms. Holly infringed him for serving her with this lawsuit, and that she knew there was no posted notice that doing so violated any rule. CP 44. This clearly states a claim and is not subject to dismissal at this stage of the proceedings unless the Court decides that appellant can prove no set of facts, consistent with the complaint, which would entitle him to relief. N. Coast Enters. Inc. v. Factoria P’ship,

94 Wn. App. 855, 858-59 (1999). Under that standard, it is easy to see that the complaint is not subject to dismissal on the pleadings.

### III. CONCLUSION

For the reasons set forth above, the Court should reverse the trial court and remand this case for further proceedings.

Respondent does not contest Mr. Silva's right to costs and fees on appeal, so they should be granted as well.

RESPECTFULLY submitted this <sup>7<sup>th</sup></sup> 11<sup>th</sup> day of December, 2011.

  
\_\_\_\_\_  
MATTHEW G. SILVA, appellant

**DECLARATION OF SERVICE BY MAIL**  
**Washington State Court Rules**  
**General Rule (GR) 3.1**

I, MATTHEW G. SILVA, declare that on the 7th day of December, 2011, I mailed the following documents, postage prepaid as "Legal Mail", regarding Case No. 66302-0-I:

APPELLANT'S REPLY BRIEF \_\_\_\_\_ ;  
// \_\_\_\_\_ ;  
// \_\_\_\_\_ ;  
// \_\_\_\_\_ ;  
// \_\_\_\_\_ ;

addressed to:

Clerk, Division One \_\_\_\_\_  
Court of Appeals \_\_\_\_\_  
600 University St. \_\_\_\_\_  
Seattle, WA 98101 \_\_\_\_\_

Chad Lowy, AAG \_\_\_\_\_  
Attorney General of Washington \_\_\_\_\_  
P.O. Box 40116 \_\_\_\_\_  
Olympia, WA 98504 \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The undersigned declares under penalty of perjury that the foregoing is true and correct.

DATED THIS 7th day of December, 2011, at Connell, Washington.

  
\_\_\_\_\_  
MATTHEW G. SILVA

DOC # 957176 Unit CA-43  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326



## STATE-OWNED CLOTHING EXCHANGE REQUEST

**INSTRUCTIONS:**

1. Please print your name, DOC No., Unit, type of item(s), size, amount, and the reason for the exchange. (See example)
2. Sign your name, fill in the date of request, date of last exchange, and have the request reviewed by a staff member.
3. Place the form and the CLEAN item(s) to be exchanged into an exchange bag (available at the officer's station) and securely close the bag.
4. Place the bag into the exchange college cart. FOR BOOT OR WORK GEAR EXCHANGES, SEND A KITE TO THE CLOTHING ROOM; DO **NOT** USE THIS FORM.

**EXAMPLE**

TYPE OF ITEM	SIZE NEEDED	AMOUNT NEEDED	REASON
TEE SHIRT	X-LG	3 EA	ITEMS ARE WORN OUT
BATH TOWEL	---	1 EA	ITEM IS WORN OUT
JEANS	36 X 32	3 PR	ITEMS NO LONGER FIT PROPERLY
BELT	---	1 EA	ITEM IS WORN OUT
JACKET	X-LG	1 EA	ITEM DAMAGED (ZIPPER BROKEN)

**EXCHANGE REQUEST**

OFFENDER NAME		DOC NUMBER		
TYPE OF ITEM	SIZE NEEDED	AMOUNT NEEDED	REASON	

My signature verifies that I have read and understand the rules for the exchange of state-owned clothing, and I understand that I am responsible for the accuracy of the information I have provided on this form. I also understand that false information will result in the denial of this request, and may result in disciplinary action.

OFFENDER SIGNATURE \_\_\_\_\_ DATE OF REQUEST \_\_\_\_\_ DATE OF LAST EXCHANGE \_\_\_\_\_

REQUEST REVIEWED BY: \_\_\_\_\_  
STAFF MEMBER SIGNATURE

**DO NOT WRITE BELOW THIS LINE -- CLOTHING ROOM USE ONLY.**

Eligible for exchange?       Yes  No      Request Granted?       Yes  No

If no, explain: \_\_\_\_\_

I certify that the above listed items were prepared for exchange with the exceptions noted. A copy of this request has been placed on file.

STAFF SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

Distribution:    **WHITE** - Clothing Room      **CANARY** - Offender

## RULES FOR EXCHANGE OF STATE-OWNED CLOTHING

Offenders are loaned state-owned clothing, and are accountable for proper use and care of the state-owned items that they receive. Offenders who abuse state-owned clothing will be subject to disciplinary action. The following rules govern the exchange of state-owned clothing:

1. Offenders who desire to exchange state-owned clothing will follow the instructions and complete the "Exchange Request" portion on the reverse side of this form.
2. Clothing room staff will check offender files to verify that the items received for exchange match the descriptions of items issue, and will approve requests that meet the following requirements:
  - a) The request form is filled out correctly, and signed by the offender.
  - b) The request form is reviewed and signed by a staff member.
  - c) The request meets the requirements of Rule 3 shown below.
  - d) The clothing contained in the exchange bag is clean.
  - e) The clothing was originally issued to the offender requesting the exchange.
  - f) The information shown on the request form in the "size needed" section is correct.
  - g) The reasons indicated on the front meet the requirements of Rule 4 shown below.

IF ANY OF THE ABOVE REQUIREMENTS ARE NOT MET, AS DETERMINED BY CLOTHING ROOM STAFF, THE REQUEST WILL BE DENIED.

3. Exchanges will not be granted sooner than indicated in the following time lines:
  - a) Tee shirts, briefs, socks, towels, and washcloths, once per 6-month period.
  - b) Work shirts, jeans, jackets, belts, caps, gloves, thermal underwear, net bags, and boots once per 12 month period.

The only exceptions to these time lines are in cases where items do not fit because of weight gain or loss, or when items are damaged.

4. The following are the ONLY acceptable reasons for consideration of exchange requests:
  - a) Item is worn out.
  - b) Item no longer fits properly.
  - c) Item is damaged.
5. Offenders may, in accordance with these rules, exchange state-owned clothing issued to them. Offenders who attempt to exchange state clothing issued to others will be subject to disciplinary action.
6. Offenders may, in accordance with these rules, exchange state-owned clothing only.

Items that, in the opinion of Clothing Room staff, appear to have been intentionally damaged will be retained as possible evidence for disciplinary action. Items that are only stained will NOT be exchanged.