

No. 10-15139

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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JOHN WESLEY WILLIAMS,  
*Plaintiff-Appellant,*

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS & REHABILITATION, *et al.*,  
*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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**APPELLANT'S REPLY BRIEF**

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Paul W. Hughes  
Charles A. Rothfeld  
Michael B. Kimberly  
MAYER BROWN LLP  
1999 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000 (phone)  
(202) 263-3300 (fax)

*Attorneys for Plaintiff-Appellant  
John Wesley Williams*

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## INTRODUCTION

Appellee’s brief is extraordinary—not for what it says—but for what it omits. Appellees do not spend a single word defending the lower court’s decision concerning joinder. Instead, appellees’ sole argument on this issue is that “this case is not the proper vehicle” to resolve issues relating to joinder. Ans. Br. 9. But appellees cannot merely wish the question away: it was undisputedly the sole basis for the lower court’s decision, and—as appellees now tacitly concede—it was wrongly decided. These concessions alone are sufficient to require reversal of the judgment below.

Perhaps recognizing that the district court’s decision is indefensible, appellees seek refuge in Federal Rule of Civil Procedure 41(b), suggesting that Williams’ decision to rest on his initial pleading is somehow an independent basis to justify dismissal. This assertion fails. Contrary to appellees’ fundamental factual assertion, the district court never *ordered* Williams to file an amended complaint; it simply dismissed the original complaint without prejudice, and granted him leave to file an amended complaint. Because Williams never violated any judicial order, appellees’ concocted Rule 41(b) theory falls flat. In any event, this Court has expressly rejected the sort of Rule 41(b) argument that appellees attempt to erect.

It is telling that appellees do not stop here. Instead, they spend the bulk of their brief conjuring what essentially amounts to a Rule 12(b)(6) motion to dismiss. As these issues were not decided below, there is no justification for this Court to resolve them in the first instance. Rather, it should reverse the district court's error—an error that appellees are apparently willing to concede—and remand for further proceedings.

## ARGUMENT

### I. THE DISTRICT COURT DISMISSED THIS SUIT SOLELY ON THE BASIS OF MISJOINDER.

In dismissing the complaint, the court below relied solely on the ground that Williams misjoined parties and claims. Rule 41(b) accordingly provides no basis for affirming the decision below.

**1. The June 22, 2009 Order.** In its initial and most comprehensive treatment of the complaint, the district court unmistakably dismissed the suit for misjoinder. After providing boilerplate with respect to pleading standards, the court reviewed Federal Rules of Civil Procedure 18 and 20, as well as the Seventh Circuit's decision in *George v. Smith*, 507 F.3d 605 (7th Cir. 2007). ER30-31. In its operative paragraph, the district court explained:

As described above, plaintiff's complaint includes many unrelated claims against more than a dozen defendants. Pursuant to *George v. Smith, supra*, plaintiff may not proceed with these

unrelated claims regarding different defendants in this action. Accordingly, the complaint is dismissed with leave to amend, within thirty (30) days. An amended complaint should include related claims only. Failure to file an amended complaint will result in an order dismissing these defendants from this action.

ER31. The court repeated this conclusion later:

The complaint is dismissed for the reasons discussed above, with leave to file an amended complaint within thirty days from the date of service of this order. Failure to file an amended complaint will result in a recommendation that the action be dismissed.

ER36.

Two points bear emphasis. First, the only basis the court gave for dismissing the complaint was the asserted misjoinder. Second, the court did not order Williams to file a new complaint; it merely provided him with leave to file an amended pleading to remedy the error that the lower court perceived. The decision thus served as a warning: if Williams declined to amend (which, as master of his own complaint, was his prerogative), the district court would dismiss with prejudice.

**2. The August 10, 2009 Order.** Rather than amend his complaint, Williams sought reconsideration of the order dismissing it. The court denied reconsideration, but noted that Williams “*may* still file[] an amended complaint.” ER38 (emphasis added). Again, the district court never *ordered* Williams to file an amended pleading.

Williams then appealed to this Court, which found that it lacked jurisdiction because the district court had not yet issued a final judgment. *See Order, Williams v. Cal. Dep't of Corr. & Rehab.*, No. 09-16965 (Oct. 22, 2009).

**3. The December 9, 2009 Order.** Back in district court, Williams specifically asked the court to enter a final judgment in the matter so as to permit an appeal. *See Dist. Ct. Dkt. No. 16 (Motion and Request for Entry of Final Judgment to Appeal the Magistrate Judge Screening of Complaint Pursuant to 28 U.S.C. § 1915A(a)).*

The district court granted this request. Again reviewing the history, the court characterized the basis for the dismissal of the claim: “that plaintiff’s complaint improperly set forth several unrelated claims against multiple defendants.” ER39. The court noted that despite being provided an opportunity, Williams “has not filed an amended complaint.” ER40. As the court found, “[i]t is clear that plaintiff seeks to rest on his original complaint.” *Ibid.* The court thus concluded that Williams’ “failure to file an amended complaint” required “that this action be dismissed.” *Ibid.* Consistent with Williams’ request, the court then dismissed with prejudice.

The basis for the district court’s dismissal with prejudice accordingly is clear: Williams decided “to rest on his original complaint,” which the

court had determined improperly joined parties and claims. Williams never disobeyed any court order to amend his complaint. Appellees’ assertion—that “the district court did not dismiss Williams’s action because of misjoinder, rather, it did so because he failed to comply with two court orders to file an amended complaint”—is simply wrong as a matter of fact.

## **II. RULE 41(b) WOULD NOT PROVIDE AN INDEPENDENT GROUND FOR AFFIRMING IN ANY EVENT.**

Even if the facts were as appellees imagine, Rule 41(b) still would offer no basis for affirming the district court. As “the converse of a default judgment,” dismissal of a claim under Rule 41(b) is proper only when a party essentially fails to prosecute it. *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010). This court has made clear that dismissal pursuant to Rule 41(b) “is so harsh a penalty it should be imposed as a sanction only in extreme circumstances.” *Id.* at 525 (quoting *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996)).

Here, Williams plainly did not fail to prosecute his claim. Quite the opposite—he has vigorously prosecuted his claims at every stage. He defended his complaint before the district court, he sought reconsideration of the court’s decision dismissing it, he took an appeal, he again sought relief in the district court, and he has pursued this action here. Rule 41(b)’s core

purpose—to ensure that plaintiffs diligently pursue their claims—is not implicated by this case.

Appellees nevertheless assert that Rule 41(b) applies here because Williams did not file an amended complaint. That is incorrect. As this Court already has explained, when a district court dismisses an action after finding it legally deficient and affords leave to file an amended complaint, Rule 41(b) does not apply when a plaintiff “elect[s] not to amend” and instead chooses to take “the case [up] on appeal in that posture.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004). In circumstances such as these, where “the plaintiff makes an affirmative *choice* not to amend, and clearly communicates that choice to the court, there has been no disobedience to a court’s order to amend” because “the plaintiff has the right to stand on the pleading.” *Id.* at 1065. A contrary conclusion “would \* \* \* unjustly deny plaintiffs \* \* \* who exercise their right to stand on a complaint their right to an appeal on the merits of the question whether the complaint is adequate as a matter of law.” *Ibid.*

In *Edwards*, the plaintiff brought both FHA and RICO claims. The court dismissed the RICO claims with leave to amend. 356 F.3d at 1061. But instead of amending, the plaintiff—just like Williams here—filed a notice electing to stand on the original pleading. The district court

construed “this curious pleading as a deliberate refusal to amend the complaint” and thus dismissed pursuant to Rule 41(b). *Ibid.* (quotation omitted).

This Court disagreed. It readily concluded that it was the plaintiff’s prerogative to rest on the initial complaint, and his filing in the lower court “was a proper means to put that choice in the record and did not merit a sanction.” *Edwards*, 356 F.3d at 1064. Rather than dismissing pursuant to Rule 41(b), “the district court should have taken the election not to amend at face value, entered a final judgment dismissing all claims with prejudice, and allowed the case to come to us on appeal in that posture.” *Ibid.*<sup>1</sup>

That same rationale controls here. Williams exercised his right to rest on his initial complaint. Rather than do nothing, he filed a document in the district court specifically requesting the entry of a final judgment in order to permit this appeal. *See* Dist. Ct. Dkt. No. 16 (Motion and Request for Entry of Final Judgment to Appeal the Magistrate Judge Screening of Complaint Pursuant to 28 U.S.C. § 1915A(a)). That is precisely how the

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<sup>1</sup> *Edwards* made clear that a Rule 41(b) dismissal for failure to file an amended complaint is appropriate only in one limited circumstance: when, in the face of a conditional dismissal and order to amend, the plaintiff does *nothing* (*i.e.*, neither files an amended complaint nor informs the court of an intent to rest on the original pleading). 356 F.3d at 1065. That assuredly does not describe this case.

district court understood Williams’s request: “It is clear that plaintiff seeks to rest on his original complaint.” ER40. This case therefore is governed squarely by *Edwards*, and—even imagining (contrary to fact) that the district court had dismissed under Rule 41(b)—that Rule provides no independent basis for affirming.

Rule 41(b) is not some procedural trick that permits a court to shield its substantive rulings from review. The court below understood that its dismissal of this action was based on its view of joinder; it is that ruling that is squarely at issue here.<sup>2</sup>

### **III. THE COURT SHOULD NOT RESOLVE THIS APPEAL ON ISSUES NOT DECIDED BELOW.**

Appellees next ask this Court to consider, for the first time on appeal, what amounts to a Rule 12(b)(6) motion to dismiss. Appellees suggest that dismissal “can also be affirmed” by reference to Rule 8 (Ans. Br. 15-20), and offer eight separate grounds to support their contention that Wil-

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<sup>2</sup> Appellees’ construction of Rule 41(b) also fails because, “as this [C]ourt has oft repeated,” “an error of law *is* an abuse of discretion.” *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). *See also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”). Accordingly, if a district court commits an error of law in dismissing an action and—as a result of that error—orders a plaintiff to file an amended complaint, the district court has *ipso facto* abused its discretion.

Williams has failed to state a claim (*id.* at 20-33). There is no reason, however, for this Court to address a host of issues that were neither addressed nor decided below.

a. “It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.” *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Thus, where a “district court did not have a proper opportunity to address” arguments raised by a party, it is appropriate to remand the matter for consideration of the arguments “in the first instance.” *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009). In conformity with this rule, this Court routinely limits its consideration only to those issues actually addressed by the lower court. *See, e.g., In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008); *Miller v. Thane Int’l, Inc.*, 519 F.3d 879, 892 (9th Cir. 2008). It should do so here, as well.

This general rule has special importance in a case such as this one, where the appellees are asserting that Williams has failed to state a claim. The district court enjoys discretion in crafting solutions to challenges under Rule 8’s “short and plain statement” standard. *See Hearns v. San Bernardino Police Dep’t*, 530 F.3d 1124, 1130-31 (9th Cir. 2008). Were the district court to find Williams’ complaint deficient (it certainly has not done

so yet), for example, it might elect to give Williams leave to amend his complaint at that juncture.

This Court confronted an identical situation in *Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116 (9th Cir. 2007). There, a relator brought a False Claims Act complaint against a public school, which the district court dismissed. This Court reversed, in part, finding that certain state employees could, contrary to the ruling below, be sued under the FCA. *Id.* at 1125. On appeal, the defendants offered a separate basis for affirming the dismissal—that the complaint was deficient because it failed to state a claim. *Id.* at 1128 n.4. The Court disposed of that argument by footnote: “The district court did not address this argument and we decline to resolve it here without giving the district court the opportunity to do so in the first instance.” *Ibid.* See also *Diaz v. Gates*, 420 F.3d 897, 902-03 & n.3 (9th Cir. 2005) (per curiam) (similar). The same treatment is warranted here.

b. Even if this Court decides to address appellees’ contentions for the first time on appeal, they offer no reason for affirming the judgment of the district court.

With respect to appellees’ Rule 8 argument, it is apparent that Williams’ complaint is a far cry from the sort of pleading disallowed by that

Rule: “a dismissal for a violation under Rule 8(a)(2), is usually confined to instances in which the complaint is so verbose, confused and redundant that its true substance, if any, is well disguised.” *Hearns*, 530 F.3d at 1131 (quotation omitted). Here, while the complaint may “set out more factual detail than necessary,” it is logically organized and provides intelligible claims. *Id.* at 1132. It need do no more.

That is especially so here, given that Williams was *pro se* before the district court. It is well settled that federal courts have an “obligation where the [plaintiff] is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the [plaintiff] the benefit of any doubt” concerning the presentation of a claim. *Klinge v. Eikenberry*, 849 F.2d 409, 413 (9th Cir. 1988) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)). Thus *pro se* filings are “held to less stringent standards than formal pleadings drafted by lawyers,” and should be “construed as to do substantial justice.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quotations omitted).

Against this backdrop, there is little doubt that Williams alleges several cognizable claims for relief. For example, Williams states a claim that certain defendants violated his rights through deliberate indifference to his acute medical needs. As this Court has held, an inmate who has a

“heightened suicide risk” or who has “attempted suicide” has “a serious medical need.” *Conn v. City of Reno*, 591 F.3d 1081, 1095 (9th Cir. 2010), *granted, vacated, and remanded on other grounds* 2011 WL 1225709 (U.S. 2011). A custodial officer aware of such a heightened risk of suicide has a duty to respond reasonably. *Id.* at 1098.

Here, Williams asserts that he informed Defendants Ramos, Mendoza, and Lopez that he was suicidal, and he requested that they alert medical staff. ER9-10 ¶¶ 30-31. But defendants refused. *Ibid.* After not being provided medical treatment or placed on a suicide watch status, Williams attempted suicide by cutting his wrists. ER10-11 ¶¶ 32-33. If proven true, Williams contentions would establish that certain defendants were deliberately indifferent to his serious medical needs.

Additionally, Williams has asserted circumstances that support a claim for retaliation. Because the First Amendment protects a prisoner’s filing of grievances, 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.” *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005).

That is exactly what Williams alleged occurred on different occasions. Two defendants, for example, used “corporal punishment in retaliation for protected conduct.” ER15 ¶ 44. Defendant Mendoza allegedly locked Williams “inside a holding cage.” ER14 ¶ 41. Defendants Mendoza and Baughman then caused Williams to be placed in handcuff restraints and locked in a cell “for over five hours without medications, water, or bathroom break.” ER14 ¶ 42. Williams told Baughman that medical staff had directed him not to stand for more than 90 minutes as a result of a bullet that is lodged in his leg, but “Baughman completely ignored and denied Plaintiff’s distress.” ER14 ¶ 43. If Williams can prove his allegations, he will be entitled to relief.

To cite a final example, Williams surely has asserted facts that, taken as true, state a claim against Defendant Grannis. Appellees argue that Grannis’s participation in grievance adjudication alone does not support a claim. Ans. Br. 23-24. But that is not what Williams alleges: he contended that his grievances “were obstructed, ignored, and denied, as Defendant Grannis failed to perform duties legally required when reviewing Plaintiff’s inmate appeal at Director’s Level review which served to ensure that the infamous code of silence was preserved on behalf of Defendants.” ER13 ¶ 38. In short, Williams contends that Grannis conspired with other de-

endants to ensure that the internal grievance structure failed to provide Williams a legally required remedy. These contentions undoubtedly state a claim for relief, as they demonstrate (if true) that Grannis enabled the underlying unlawful treatment. *Cf. George v. Smith*, 507 F.3d 605, 609 (7th Cir. 2007) (explaining that “persons who cause or participate in the violations are responsible”).

In any event, the Court should not decide this case on issues that were not addressed below. On remand, the parties will have a full and fair opportunity to brief a motion to dismiss. Appellees offer no reason to short circuit the usual order of proceedings.

## CONCLUSION

For the foregoing reasons, the district court's order dismissing William's complaint pursuant to 28 U.S.C. § 1915A should be reversed and the matter remanded to the district court for further proceedings.

Respectfully submitted,

/s/ Paul W. Hughes

Paul W. Hughes

Charles A. Rothfeld

Michael B. Kimberly

MAYER BROWN LLP

1999 K Street, N.W.

Washington, D.C. 20006

Phone: (202) 263-3000

Fax: (202) 263-3300

Email: [phughes@mayerbrown.com](mailto:phughes@mayerbrown.com)

*Counsel for Plaintiff-Appellant*

*John Wesley Williams*

DATE: April 28, 2011

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for appellant John Wesley Williams certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,083 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Paul W. Hughes

**CERTIFICATE OF SERVICE**

I certify that on this 28th day of May 2011, I served the foregoing Appellant's Replacement Brief via the Court's ECF system upon:

Vickie P. Whitney  
Office of the California Attorney General  
1300 I Street  
P.O. Box 944255  
Sacramento, CA 94244-2550

*Counsel for Appellees*

*/s/ Paul W. Hughes*

Paul W. Hughes