

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

Billy Frank Cox, )  
 ) CV-05-149-DCB P  
Plaintiff, )  
 )  
vs. )  
 ) **ORDER**  
John Ashcroft, Harrell Watts, )  
Jeff Campbell, et al., )  
Defendants. )  
 )

The Wackenhut Defendants <sup>1</sup> and the Federal Defendants<sup>2</sup> have filed Motions to Dismiss the First Amended Complaint pursuant primarily to Federal Rules of Civil Procedure, Rule 12(b)(6) for failure to state claims upon which relief may be granted.<sup>3</sup>

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Plaintiff, Billy Frank Cox (Cox), filed this action, arising out of his September 1, 1988 arrest, his subsequent criminal prosecution, and his incarceration at a privately owned federal facility in Taft,

---

<sup>1</sup>Wackenhut Defendants: O'Rourke, Murray, Craig, Ben-Shmuel, Mack, Zoley, Calabrese, Andrews, Gary, Patrick, Pederson, Henley, Wiggins, Taft Correctional Institution, Wackenhut Corrections Corporation. (Counts 1 - 9, 12.)

<sup>2</sup>Federal Defendants: Ashcroft, Watts, Campbell, Haro, Harvey, Faller, Bender and Scott. (Counts 10, 11, 12.)

<sup>3</sup>The Court did not rely on any collateral documents outside the pleadings to resolve these motions.

1 California. Cox, a pro se prisoner, brought this action pursuant to  
2 *Bivens vs. Six Unknown Agents*, 403 U.S. 388 (1971), as well as 42  
3 U.S.C. §§ 1983, 1985.

4 Plaintiff's action was originally filed in the United States  
5 District Court, District of Columbia. Thereafter, a motion to dismiss the  
6 Complaint pursuant to Federal Rule of Civil Procedure, 12(b)(2) (lack of  
7 personal jurisdiction), 12(b)(3) (improper venue) and 12(b)(4)  
8 (insufficiency of service of process) and 12(b)(6) (failure to state a  
9 claim upon which relief may be granted) was filed by the Wackenhut  
10 Defendants. The remaining Federal Defendants also filed a motion to  
11 dismiss, asserting the same and additional grounds advanced by the  
12 Wackenhut Defendants.

13 That Court, in reviewing the motion to dismiss for lack of proper  
14 venue, determined that venue in the District of Columbia was improper and  
15 found that venue would properly lie in the Central District of  
16 California. The Court ordered that Plaintiff's action be transferred to  
17 the United States District Court for the Central District of California  
18 and denied the remainder of the Defendants' Motion to Dismiss, without  
19 prejudice. Plaintiff's action was eventually properly transferred to the  
20 Eastern District of California by Order dated January 10, 2005, where the  
21 constitutional violations are alleged to have occurred and where venue  
22 is now proper.

23 On April 18, 2005, the Wackenhut Defendants filed a Motion to  
24 Dismiss (Doc. No. 35). On March 4, 2008, the First Amended Complaint  
25 (FAC) was filed by the Plaintiff. On May 15, 2008, the Court ordered the

1 dismissal of various Judicial Defendants.<sup>4</sup> On June 3, 2008, the Motion  
2 to Dismiss was filed on behalf of the Federal Defendants (Doc. No. 67).  
3 On June 6, 2008, the Wackenhut Defendants filed a second Motion to  
4 dismiss. (Doc. No. 68.) In June 2008, Plaintiff filed his Opposition  
5 briefs. On November 25, 2008, this action was transferred for all  
6 purposes to Judge David C. Bury of the United States District Court for  
7 the District of Arizona.

## 8 LEGAL STANDARD

### 9 A. Fed.R.Civ.P. 12(b)(6)

10 The Court's review of a motion to dismiss brought under  
11 Fed.R.Civ.P. 12(b)(6) is limited to the complaint. *Lee v. City of Los*  
12 *Angeles*, 250 F.3d 668, 688 (9th Cir.2001). All material factual  
13 allegations contained in the complaint "are taken as admitted" and the  
14 complaint is to be liberally "construed in the light most favorable" to  
15 the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Lee*, 250  
16 F.3d at 688. A complaint should not be dismissed under Fed.R.Civ.P.  
17 12(b)(6), furthermore, "unless it appears beyond doubt that the plaintiff  
18 can prove no set of facts in support of his claim which would entitle him  
19 to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

20 Dismissal under Fed.R.Civ.P. 12(b)(6) may be based upon "the lack  
21 of a cognizable legal theory or the absence of sufficient facts alleged  
22 under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*,  
23 901 F.2d 696, 699 (9th Cir.1990). Vague and mere "[c]onclusionary  
24 allegations, unsupported by facts" are not sufficient to state a claim  
25

---

26 <sup>4</sup>On May 15, 2008, the Court ordered the dismissal with prejudice  
27 of the Judicial Defendants: Robert E. Coyle, Claudia Wilken, William B.  
28 Shubb, Lawrence J. O'Neill, Sandra Snyder and William M. Wunderlich.  
(Counts 13, 14, 15.)

1 under 42 U.S.C. § 1983. *Jones v. Community Development Agency*, 733 F.2d  
2 646, 649 (9th Cir.1984); *Pena v. Gardner*, 976 F.2d 469, 471 (9th  
3 Cir.1992). Thus, even though the Court is to construe the complaint  
4 liberally, such construction "may not supply essential elements of the  
5 claim that were not initially pled." *Pena*, 976 F.2d at 471.

6 Before the Court may dismiss a *pro se* complaint for failure to  
7 state a claim, it "must provide the *pro se* litigant with notice of the  
8 deficiencies of his or her complaint and an opportunity to amend the  
9 complaint prior to dismissal." *McGuckin v. Smith*, 974 F.2d 1050, 1055  
10 (9th Cir.1992); see also *Noll v. Carlson*, 809 F.2d 1446, 1449 (9th  
11 Cir.1987) (district court erred by not notifying *pro se* prisoner litigant  
12 of amended complaint's deficiencies and allowing him leave to amend).<sup>5</sup>

13  
14 As explained in greater detail below, none of the allegations in  
15 the amended complaint state a viable *Bivens* claim against any of the  
16 individually named Wackenhut Defendants or Federal Defendants. No further  
17 amendments of the Complaint will be allowed.

## 18 **B. *Bivens***

19 Plaintiff has filed what can only be interpreted as a purely *Bivens*  
20 *v. Six Unknown Fed. Narcotics Agents*, 430 U.S. 388 (1971) action because  
21 all of the Defendants are either federal prosecutors or Bureau of Prisons  
22 (BOP) personnel and facilities.<sup>6</sup> In *Bivens*, the Supreme Court held that  
23 "a victim of a Fourth Amendment violation by federal officers may bring  
24

---

25 <sup>5</sup>Plaintiff has been afforded the opportunity to amend his  
26 Complaint.

27 <sup>6</sup>Any claims pursuant to 42 U.S.C. §§1983, 1985 are legally  
28 deficient and dismissed as such, because no state actors have been named  
as defendants.

1 suit for money damages against the officers in federal court." *Malesko*  
2 *v. Correctional Services Corp.*, 534 U.S. 61, 66 (2001). Subsequently, the  
3 Supreme Court recognized the existence of an implied damages remedy for  
4 violations of the Due Process Clause of the Fifth Amendment and the Cruel  
5 and Unusual Punishment Clause of the Eighth Amendment by federal officers  
6 as well. *Id.* at 67; see also *Davis v. Passman*, 442 U.S. 228 (1979);  
7 *Carlson v. Green*, 446 U.S. 14 (1980). Since *Davis* and *Carlson*, however,  
8 the Supreme Court consistently has declined to extend *Bivens* liability  
9 to new contexts or new categories of defendants. See *Malesko*, 534 U.S.  
10 at 68. For example, in *FDIC v. Meyer*, 510 U.S. 471 (1994), the Supreme  
11 Court "unanimously declined an invitation to extend *Bivens* to permit suit  
12 against a federal agency," emphasizing that " 'the purpose of *Bivens* is  
13 to deter *the officer*,' not the agency." *Malesko*, 534 U.S. at 69 (quoting  
14 *Meyer*, 510 U.S. at 485) (emphasis in original). Employing the same  
15 reasoning it used in *Meyer*, the Supreme Court in *Malesko* further declined  
16 to extend *Bivens* liability to a private corporation which had contracted  
17 with the federal Bureau of Prisons to operate a community correctional  
18 facility that housed federal inmates. *Id.* at 63, 70-74. The Supreme Court,  
19 however, has yet to specifically address the question of whether or not  
20 individual employees of such a private entity are themselves subject to  
21 *Bivens* liability. A number of lower courts, including two circuit  
22 courts, have addressed this issue, but have come to conflicting  
23 conclusions. For example, both the Fourth and Tenth Circuits have found  
24 *Bivens* liability to be inapplicable to private individuals who are not  
25 federal officers. See *Peoples v. CCA Detention Centers*, 422 F.3d 1090  
26 (10th Cir. 2005); *Holly v. Scott* 434 F.3d 287 (4th Cir. 2006). On the  
27 other hand, at least two district courts have concluded otherwise. See

28

1 *Purkey v. CCA Detention Center*, 339 F.Supp.2d 1145 (D.Kan. 2004); *Sarro*  
2 *v. Cornell Corrections, Inc.*, 248 F.Supp.2d 52 (D.R.I. 2003).<sup>7</sup>

3 The Ninth Circuit has stated that “[a]ctions under § 1983 and  
4 those under *Bivens* are identical save for the replacement of a state  
5 actor under § 1983 by a federal actor under *Bivens*.” *Van Strum v. Lawn*,  
6 940 F.2d 406, 409 (9th Cir.1991) (applying same statute of limitations  
7 to *Bivens* actions as is applied to actions brought pursuant to section  
8 1983); see also *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir.1996)  
9 (applying rationale of *Heck v. Humphrey*, 512 U.S. 477 (1994), to *Bivens*  
10 actions); *Alexander v. Perrill*, 916 F.2d 1392, 1396 (9th Cir.1990)  
11 (applying same qualified immunity analysis to defendants in *Bivens*  
12 actions as to those in section 1983 actions); *Trotter v. Watkins*, 869  
13 F.2d 1312, 1318 (9th Cir.1989) (scope of immunity available same in both  
14 actions).

15 To state a claim under 42 U.S.C. § 1983, a complaint must allege:  
16 (i) the conduct complained of was committed by a person acting under  
17 color of state law and (ii) the conduct deprived a person of a right,  
18 privilege, or immunity secured by the Constitution or laws of the United  
19 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), overruled on other  
20 grounds, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the  
21 appropriate avenue to remedy an alleged wrong only if both of these  
22 elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir.

23

---

24 <sup>7</sup>The Ninth Circuit has not yet been directly presented with this  
25 issue, but has indicated that *Bivens* may be the proper vehicle for  
26 seeking recovery against individual employees of a private corporation  
27 that contracts with the federal government to operate its correctional  
28 institutions. See *Agyeman v. Corrections Corporation of America*, 390  
F.3d 1101, 1104 (2004). The Court need not decide this issue in this  
case, however, because Plaintiff has failed to state a viable cause of  
action against any of the remaining named Defendants.

1 1985); see also *Samuel v. Michaud*, 980 F.Supp. 1381, 1396 (D.Idaho 1996)  
2 (both elements must be present to hold federal defendants liable under  
3 either *Bivens* or section 1983) (quoting *Leer v. Murphy*, 844 F.2d 628, 632  
4 (9th Cir. 1988)).

5 Plaintiff also must allege facts showing how the individually named  
6 Defendants caused or personally participated in causing the  
7 constitutional harm alleged in the amended complaint. *Arnold v. IBM*, 637  
8 F.2d 1350, 1355 (9th Cir.1981): see also *Samuel*, 980 F.Supp. at 1396 ("A  
9 person deprives another of a constitutional right, within the meaning of  
10 *Bivens*, if he does an affirmative act, participates in another's  
11 affirmative acts, or omits to perform an act which he is legally required  
12 to do that causes the deprivation complained of") (citing *Leer*, 844 F.2d  
13 at 633). A defendant cannot be held liable pursuant to 42 U.S.C. § 1983,  
14 or again in this case under *Bivens*, solely on the basis of supervisory  
15 responsibility or position. *Monell v. New York City Dept. of Social*  
16 *Services*, 436 U.S. 658, 694 n. 58 (1978); see also *Padway v. Palches*,  
17 665 F.2d 965, 968 (9th Cir.1982); *Terrell*, 935 F.2d at 1018 (*respondeat*  
18 *superior* theory of liability inapplicable to *Bivens* actions).

19 **MOTIONS TO DISMISS**

20 **A. Wackenhut Defendants**

21 Generally, the Wackenhut Defendants claim that the FAC should be  
22 dismissed on the following grounds: 1) Plaintiff failed to allege  
23 sufficient facts to state a cause of action; 2) No *Bivens* action will lie  
24 against private entity defendants; 3) Warden Andrews was authorized to  
25 limit Plaintiff's access to the legal materials of another inmate; 4)  
26 Immunity; 5) Improper service of process; 6) Failure to exhaust  
27 administrative remedies; 7) Failure to state a cause of action for  
28

1 conspiracy; and, 8) No standing to plead cause of action for violation  
2 of Fair Labor Standards Act (FLSA).

3       Only the Tenth, Eleventh, and Twelfth Counts in the FAC pertain to  
4 the Wackenhut Defendants. The Tenth Count only references Defendant  
5 Andrews, the Warden at TCI when this action was commenced. Plaintiff  
6 alleges that Andrews required him to work below the minimum wage, in  
7 violation of the FLSA. Plaintiff alleges that Andrews retaliated against  
8 him. The Eleventh Count contains vague and conclusory allegations of  
9 *conspiracy* against all Wackenhut Defendants in connection with his  
10 petition for writ of habeas corpus. The Twelfth Count contains vague  
11 and conclusory allegations of *conspiracy* against all Wackenhut  
12 Defendants. A careful reading of the Twelfth Count reflects that  
13 Plaintiff's complaints also pertain primarily to his petition for writ  
14 of habeas corpus. Plaintiff alleges that following a search of his locker  
15 and cubicle on March 21, 2003, he was issued an Incident Report when  
16 prison officials discovered legal work belonging to another inmate.  
17 Plaintiff alludes to the search on March 21, 2003, and the resulting  
18 Incident Report, as "retaliation" against him for his assisting another  
19 inmate.

20 **B. Federal Defendants**

21       The Federal Defendants herein submit that they are entitled to  
22 absolute immunity, or in the alternative, qualified immunity. In effect,  
23 Plaintiff is suing federal prosecutors for successfully prosecuting him.  
24 At the time this action was filed, Plaintiff was in the custody of the  
25 BOP serving a 210-month sentence for violating 21 U.S.C. § 841(A)(1)  
26 (conspiracy to manufacture and possess methamphetamine), at Taft  
27 Correctional Institution. Plaintiff was convicted by a federal jury in  
28



1 1989. Defendant Bender was the AUSA who tried his criminal case.  
2 Plaintiff alleges that he filed a habeas corpus petition in 2001 and that  
3 case was assigned to Judge Coyle and referred to Magistrate Judge Snyder  
4 who issued a report and recommendation of dismissal. Plaintiff appealed  
5 to the Ninth Circuit which dismissed the appeal for lack of jurisdiction.  
6 Plaintiff filed another habeas petition in 2002 which petition was again  
7 assigned to Judge Coyle and referred to Magistrate Judge O'Neill who  
8 recommended dismissal. Once again, Plaintiff's petition was dismissed.  
9 Judge Coyle declined to issue a certificate of appealability. Plaintiff  
10 then sought a mandamus remedy in the Ninth Circuit but this was denied  
11 in 2002. Defendants Faller, Craig, and Campbell are alleged to have been  
12 counsel for the government in the two habeas cases and are sued on the  
13 grounds that they convinced the Judicial Defendants to deny Plaintiff's  
14 petitions.

15 Finally, Plaintiff contends that in 2006, while serving the  
16 supervised release portion of his sentence, he submitted a petition for  
17 writ of habeas corpus in the Northern District of California. The  
18 petition was transferred to the new judicial district where, Plaintiff  
19 contends, Defendants United States Attorney McGregor Scott and AUSA  
20 Bender, assisted by BOP Attorney Campbell, filed a fraudulent response  
21 to Plaintiff's petition, allegedly in conspiracy with Judge Shubb. He  
22 does not explain in what manner the response was "fraudulent." Federal  
23 Defendants Scott and Bender are also alleged to have filed a motion to  
24 dismiss which Judge Shubb granted in part. As a result of these actions,  
25 Plaintiff alleges that he was deprived of his liberty, forced to incur  
26 legal fees and expenses in excess of \$35,000, lost income of at least

27

28

1 \$450,000, and suffered mental anguish, emotional distress and  
2 humiliation.

### 3 DISCUSSION

#### 4 A. Wackenhut Defendants

##### 5 1. Limitation on Access to Other Prisoner's Legal Work

6 Plaintiff alleges that, while incarcerated in Taft, his prison  
7 locker and cubicle were searched on March 21, 2003 by the Wackenhut  
8 Defendants. The search disclosed that Plaintiff had legal papers  
9 belonging to other inmates in his cell. These items were treated as  
10 contraband pursuant to 28 C.F.R. §§ 541. 11, 541.13 (Code 305).

11 Prisoners have no Fourth Amendment right to privacy in their cells.  
12 *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984). 28 Code of Federal  
13 Regulations, Section 543.11, provides in pertinent part as follows:

14 (c) Staff shall advise an inmate of rules and local  
15 procedures governing use of the inmate law library.  
16 Unauthorized possession of library materials by an inmate  
17 constitutes a prohibited act, generally warranting  
18 disciplinary action (see part 541 of this chapter).

19 (d) An inmate's legal materials include but are not limited  
20 to the inmate's pleadings and documents (such as a pre-  
21 sentence report) that have been filed in court or with  
22 another judicial or administrative body, drafts of pleadings  
23 to be submitted by the inmate to a court or with other  
24 judicial or administrative body which contain the inmate's  
25 name and/or case caption prominently displayed on the first  
26 page, documents pertaining to an inmate's administrative  
27 case, photocopies of legal reference materials, and legal  
28

1 reference materials which are not available in the  
2 institution main law library (or basic law library in a  
3 satellite camp).

4 \* \* \*

5 (2) Staff may allow an inmate to possess those legal  
6 materials which are necessary for the inmate's own legal  
7 actions. Staff may also allow an inmate to possess the legal  
8 materials of another inmate subject to the limitations of  
9 paragraph (f)(2) of this section. The Warden may limit the  
10 amount of legal materials an inmate may accumulate for  
11 security or housekeeping reasons.

12 In addition, 28 Code of Federal Regulations, Section 543.11,  
13 provides in pertinent part as follows:

14 (2) Except as provided for in paragraph (f)(4) of this  
15 section, an inmate may possess another inmate's legal  
16 materials while assisting the other inmate in the  
17 institution's main law library and in another location if the  
18 Warden so designates.

19 (i) The assisting inmate may not remove another inmate's  
20 legal materials, including copies of the legal materials,  
21 from the law library or other designated location. An  
22 assisting inmate is permitted to make handwritten notes and  
23 to remove those notes from the library or other designated  
24 location if the notes do not contain a case caption or  
25 document title or the name(s) of any inmate(s). The assisting  
26 inmate may also develop and possess handwritten drafts of  
27 pleadings, so long as the draft pleadings do not contain a  
28

1 case caption or document title or the name(s) of any  
2 inmate(s). These notes and drafts are not considered to be  
3 the assisting inmate's legal property, and when the assisting  
4 inmate has these documents outside the law library or other  
5 designated location, they are subject to the property  
6 limitations in § 553.11(a) of this chapter.

7 \* \* \*

8 (4) The Warden at any institution may impose limitations on  
9 an inmate's assistance to another inmate in the interest of  
10 institution security, good order, or discipline.

11 \* \* \*

12 (j) . . . In no case shall the amount of personal legal  
13 materials be such as to pose a fire, sanitation, security, or  
14 housekeeping hazard.

15 As set forth above, C.F.R. §543.11(f)(2)(i), Plaintiff, as the  
16 "assisting inmate" may not remove another inmate's legal materials,  
17 including copies of the legal materials, from the law library or other  
18 designated location. Since Plaintiff had these documents outside the law  
19 library, they were the proper subject of property limitations set forth  
20 therein.

21 In sum, there was no constitutional injury derived from the search  
22 and confiscation of the other inmate's legal materials.

## 23 **2. Discipline for Violation of Prison Policies**

24 Plaintiff was disciplined as a result of the findings from the  
25 search and as a result, was fired from his prison job and lost telephone  
26 use privileges for thirty days. Plaintiff's possession of anything not  
27  
28

1 authorized properly falls within the moderate category of the prohibited  
2 acts and disciplinary severity scale, as follows:

3       28 Code of Federal Regulations, Section 541.13, provides for four  
4 (4) categories of prohibited acts -- Greatest, High, Moderate, and Low  
5 Moderate. Section 541.1(a) (3) provides as follows: "(3) Moderate  
6 category offenses. The Discipline Hearing Officer shall impose at least  
7 one sanction A through N, . . . " Included in Table 3, Prohibited Acts  
8 and Disciplinary Severity Scale, to Section 541.13, are the Moderate  
9 Category of offenses. Category 305 identifies the following offense:  
10 "Possession of anything not authorized for retention or receipt by the  
11 inmate, and not issued to him through regular channels."

12       In analyzing a due process claim, the Court must first decide  
13 whether Plaintiff was entitled to any process, and if so, whether he was  
14 denied any constitutionally-required procedural safeguard. Liberty  
15 interests which entitle an inmate to due process are "generally limited  
16 to freedom from restraint which, while not exceeding the sentence in such  
17 an unexpected manner as to give rise to protection by the Due Process  
18 Clause of its own force, nonetheless imposes atypical and significant  
19 hardship on the inmate in relation to the ordinary incidents of prison  
20 life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (internal citations  
21 omitted).

22       "[T]he Due Process Clause of the Fourteenth Amendment does not  
23 create a property or liberty interest in prison employment." *Walker v.*  
24 *Gomez*, 370 F.3d 969, 973 (9th Cir. 2004). Similarly, prisoners have no  
25 constitutional right to educational programs or rehabilitation. See  
26 *Baumann v. Arizona Dep't of Corrections*, 754 F.2d 841, 846 (9th Cir.  
27 1985) (no constitutional right to jobs and educational opportunities);

28

1 *Rizzo v. Dawson*, 778 F.2d 527, 530 (9th Cir. 1985) (no liberty or  
2 property interest in vocational training); *Hoptowit v. Ray*, 682 F.2d  
3 1237, 1254-55 (9th Cir. 1982) (no constitutional right to  
4 rehabilitation). Plaintiff does not have a liberty or property interest  
5 in his employment while in prison.

6 Further, prisoners do have a First Amendment right to telephone  
7 access, subject to reasonable limitations. *Keenan v. Hall*, 83 F.3d 1083,  
8 1092 (9th Cir. 1996). A 30-day suspension of telephone privileges related  
9 to a disciplinary action does not amount to a First Amendment violation.

10 Plaintiff has failed to state a due process violation or a First  
11 Amendment violation, hence there is no cognizable *Bivens* constitutional  
12 injury.

### 13 **3. Retaliation and/or Conspiracy claims**

14 Plaintiff claimed that Defendants retaliated against him or  
15 conspired to retaliate against him, because they felt that Plaintiff was  
16 in some way assisting another inmate in the other inmate's lawsuit  
17 against TCI staff members. (FAC at 17 ¶104.)

18 A viable claim of First Amendment retaliation contains five basic  
19 elements: (1) an assertion that a state actor took some adverse action  
20 against an inmate (2) because of (3) that prisoner's protected conduct  
21 and that such action (4) chilled the inmate's exercise of his First  
22 Amendment rights (or that the inmate suffered more than minimal harm) and  
23 (5) the action did not reasonably advance a legitimate correctional goal.  
24 *Rhodes v. Robinson*, 408 F.3d 559, 567-58 (9th Cir. 2005); see also *Hines*  
25 *v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) (retaliation claims require  
26 an inmate to show that (1) the prison official acted in retaliation for  
27 the exercise of a constitutionally-protected right and (2) the action

28

1 "advanced no legitimate penological interest"). To make out a prima  
2 facie case of retaliation, the plaintiff has the burden of showing that  
3 retaliation for the exercise of a protected right was the but-for factor  
4 behind the defendant's conduct. *Hartman v. Moore*, 547 U.S. 250, 258-60  
5 (2006). If a plaintiff makes that showing, the burden shifts to  
6 defendants to show that they would have engaged in the same conduct  
7 anyway. *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274,  
8 287 (1977).

9 Plaintiff correctly states that his legal assistance to other  
10 inmates is protected by the First Amendment. Plaintiff asserts that the  
11 discipline was retaliatory for exercising that constitutional right, yet  
12 the Defendants in turn show that there were prison regulations that  
13 Plaintiff violated and this was the basis for the discipline. The prison  
14 rules reflect a legitimate penological objective in the regulation of  
15 when and where the legal assistance may occur. Such regulation does not  
16 chill the exercise of that constitutional right. Hence, Plaintiff fails  
17 to state a claim of retaliation or any concomitant constitutional injury.

18 A plaintiff must state specific facts, not mere conclusory  
19 statements, to support the existence of an alleged conspiracy. *Burns*  
20 *v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989); *Williams v. Sumner*,  
21 648 F. Supp. 510, 513 (D. Nev. 1986). Although "pro se pleadings are  
22 liberally construed, particularly where civil rights claims are  
23 involved," *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
24 Cir. 1990), a "liberal interpretation of a civil rights complaint may not  
25 supply essential elements of the claim that were not initially pled."  
26 *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.  
27 1982). Plaintiff's complaint is completely devoid of any factual

28

1 allegations that the Wackenhut Defendants had an agreement or "meeting  
2 of the minds" to conspire to violate Plaintiff's constitutional rights.  
3 *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 626 (9th Cir.  
4 1988). The Wackenhut Defendants correctly argue that Plaintiff made a  
5 variety of vague and conclusory allegations of conspiracy. However, the  
6 First Amended Complaint fails to set forth the essential facts as to the  
7 specific acts of each Wackenhut Defendant that allegedly "carried the  
8 conspiracy into effect, how those acts fit into the conspiracy, and how  
9 the injury to the plaintiff was foreseeable therefrom." *Graves v. United*  
10 *States*, 961 F. Supp. 314 (D.D.C. 1997). Other courts are in agreement as  
11 to the necessity of pleading the essential facts in a conspiracy cause  
12 of action. For example, the Ninth Circuit has explained: "To state a  
13 claim for a conspiracy to violate one's constitutional rights . . . , the  
14 plaintiff must state specific facts to support the existence of the  
15 claimed conspiracy." *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir.  
16 1989) (per curiam). Claims based on vague and conclusory allegations,  
17 which fail to specify each defendant's role in the alleged conspiracy,  
18 are subject to dismissal. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir.  
19 1992).

20 Plaintiff's conspiracy claims fail to set forth any specific facts  
21 to show that the Wackenhut Defendants were engaged in a conspiracy.  
22 Plaintiff cannot rely on conclusory statements to support his allegation  
23 of constitutional injury.

#### 24 **4. Violation of Fair Labor Standards Act**

25 In the Tenth Count of the First Amended Complaint, Plaintiff makes  
26 the allegation that Warden Andrews required him to work as an inmate "at  
27 below the minimum wage, in violation of the Fair labor Standards Act  
28



1 (FLSA).” There is nothing within the BOP’s policies, the Code of Federal  
2 Regulations, or TCI’s policies that provide for inmates to be paid  
3 pursuant to the FLSA. In point of fact, TCI policy provides for inmate  
4 pay at four (4) pay grade levels, in recognition of budgetary constraints  
5 and for the effective management of the overall performance pay program.

6 Ultimately, Plaintiff lacks standing to bring this claim, as  
7 prisoners are not employees within the meaning of the Act. *Coupar v.*  
8 *United States Dept. of Labor*, 105 F.3d 1263, 1265-66 (9th Cir. 1997).

9 **B. Federal Defendants**

10 “As a result of Defendant’s conduct, Plaintiff was detained without  
11 bail and without warrant, was unable to post bail, was arraigned, was  
12 forced to accept a court-appointed attorney, was forced to retain counsel  
13 at great expense, was forced to enter a plea, was forced to go to trial,  
14 was forced to undergo the ordeal of a trial, was found guilty under  
15 totally false charges, was sentenced to an unusually harsh term of  
16 imprisonment, was forced to file an appeal, and was made to suffer the  
17 humiliation of the denial of the appeal, was forced into imprisonment on  
18 false charges and was forced to suffer the prolongation of his  
19 unconstitutionally-executed sentence through the denial of his right to  
20 habeas corpus relief.” (FAC at 18 ¶115.) Plaintiff goes on to name all  
21 of the prosecutors and BOP attorneys involved in his trial and post-  
22 conviction habeas proceedings.<sup>8</sup>

23 1. **Heck v. Humphrey**

24 A prisoner’s claim for damages is not cognizable under 42 U.S.C.  
25 § 1983 if “a judgment in favor of the plaintiff would necessarily imply  
26 the invalidity of his conviction or sentence,” unless the prisoner

---

27 <sup>8</sup>Counts One through Nine.  
28

1 demonstrates that the conviction or sentence has previously been  
2 reversed, expunged, or otherwise invalidated. *Heck v. Humphrey*, 512 U.S.  
3 477, 486 (1994).<sup>9</sup> This bar also extends to claims for declaratory  
4 relief. *Edwards v. Balisok*, 520 U.S. 641, 647-48 (1997).

5 If Plaintiff seeks the invalidation of his sentence, or any relief  
6 which would result in immediate or speedier release, his exclusive remedy  
7 is a petition for habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 488-  
8 90 (1973). Where a civil rights complainant alleges that police officers  
9 lacked probable cause to arrest him and conspired to bring unfounded  
10 criminal charges against him, the Court must apply the holding of *Heck*,  
11 which bars a § 1983 action where judgment in a plaintiff's favor would  
12 imply the invalidity of the sentence or conviction. *Smithart v. Towery*,  
13 79 F.3d 951, 952 (9th Cir. 1996). Therefore, any claims regarding lack  
14 of probable cause for arrest and a conspiracy to bring unfounded criminal  
15 charges against Plaintiff may only be reviewed by this Court if Plaintiff  
16 can demonstrate that his conviction or sentence "has been reversed on  
17 direct appeal, expunged by executive order, declared invalid by a state  
18 tribunal authorized to make such determination, or called into question  
19 by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. §  
20 2254." *Heck*, 512 U.S. at 486.

---

21  
22 <sup>9</sup>"[I]n order to recover damages for allegedly unconstitutional  
23 conviction or imprisonment, or for other harm caused by actions whose  
24 unlawfulness would render a conviction or sentence invalid, a § 1983  
25 plaintiff must prove that the conviction or sentence has been reversed  
26 on direct appeal, expunged by executive order, declared invalid by a  
27 state tribunal authorized to make such determination, or called into  
28 question by a federal court's issuance of a writ of habeas corpus, 28  
U.S.C. § 2254. A claim for damages bearing that relationship to a  
conviction or sentence that has not been so invalidated is not  
cognizable under § 1983." *Heck*, 512 U.S. at 486-7.

1           The Ninth Circuit has held that *Heck* applies to challenges to the  
2 validity of an arrest. In *Smithart*, 79 F.3d at 952, plaintiff sought  
3 damages for, *inter alia*, excessive force used during the course of an  
4 arrest that resulted in plaintiff's conviction. Plaintiff alleged that  
5 defendants, "without probable cause, authority, or justification"  
6 assaulted, arrested, handcuffed and beat plaintiff. *Smithart*, 79 F.3d  
7 at 952. Summarizing the Supreme Court's decision in *Heck* the Court  
8 stated: "if a criminal conviction arising out of the same facts stands  
9 and is fundamentally inconsistent with the unlawful behavior for which  
10 section 1983 damages are sought, the 1983 action must be dismissed." *Id.*  
11 The Court continued: "[t]here is no question that *Heck* bars  
12 [plaintiff's] claims that defendants lacked probable cause to arrest him  
13 and brought unfounded charges against him." *Id.* "If [plaintiff] wishes  
14 to challenge his arrest, prosecution or conviction, he should file a writ  
15 of habeas corpus." *Id.*

16           Accordingly, because Plaintiff's entire claim is based on the  
17 incidents surrounding his alleged unlawful arrest and conviction,  
18 Plaintiff's claim is barred by *Heck*. *Smithart*, 79 F.3d at 952.  
19 Plaintiff has challenged his conviction and sentence in every available  
20 forum, yet his conviction has not been reversed, expunged or declared  
21 invalid at any level. See *Heck*, 512 U.S. at 486-87. Because Plaintiff  
22 cannot show that his conviction has been reversed on appeal or called  
23 into question by the issuance of a writ of habeas corpus, his claims  
24 against the Prosecution Defendants must be dismissed pursuant to *Heck*,  
25 512 U.S. at 481-82. *Heck* bars a plaintiff from bringing a suit for  
26 violation of constitutional rights if a judgment in his favor would imply  
27 the invalidity of his conviction or sentence. *Id.* at 487. It is clear  
28

1 that Plaintiff's claims against the Federal Defendants are premised on  
2 his belief that he was wrongly convicted and that his habeas petitions  
3 should have been granted. As such, his claims are barred by *Heck*.

4       **2. *Imbler v. Pachtman***

5       Prosecutors are absolutely immune from liability under § 1983 (and  
6 *Bivens*) for their conduct in "initiating a prosecution and in presenting  
7 the State's case" insofar as that conduct is "intimately associated with  
8 the judicial phase of the criminal process." *Buckley v. Fitzsimmons*, 509  
9 U.S. 259, 270 (1993) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430  
10 (1976)); *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler*, 424  
11 U.S. at 430-431); *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986).

12       The Federal Defendants are absolutely immune, based on the  
13 Plaintiff's allegations. These allegations are premised on the notion  
14 that Cox was wrongly convicted and that his habeas petitions should have  
15 been granted. Cox cannot show, however, that any Court has found  
16 unconstitutional error. Indeed, Plaintiff also sued every judge involved  
17 in any aspect of his case, conviction through habeas proceeding. These  
18 Judicial Defendants have already been properly dismissed based on  
19 absolute immunity.

20       Plaintiff is precluded from using this lawsuit as vehicle from  
21 which to collaterally attack his 1989 criminal conviction. The bulk of  
22 the allegations are directed at AUSA Bender who participated in  
23 Plaintiff's criminal trial as prosecutor for the Government.  
24 Accordingly, Bender is entitled to absolute immunity. See *Ashelman*, 793  
25 F.2d at 1076 (the primary purpose of extending immunity to judges and  
26 prosecutors is to ensure independent and disinterested decisionmaking);  
27 *Butz*, 438 U.S. at 512 (absolute immunity is necessary to assure that

1 judges, advocates and witnesses can perform their respective functions  
2 without harassment or intimidation); *Imbler*, 424 U.S. at 425 ("a  
3 defendant will often transform his resentment at being prosecuted into  
4 the ascription of improper and malicious actions to the state's  
5 advocate").

6 In an attempt to circumvent Bender's clear entitlement to absolute  
7 immunity, Plaintiff alleges, in a conclusory fashion, that Bender was  
8 acting as an investigator, rather than an attorney. Such an allegation  
9 is a mere legal conclusion, rather than an allegation of fact. As such,  
10 it is legally insufficient to defeat the assertion of prosecutorial  
11 immunity. *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (the  
12 plaintiff must state specific facts to support the existence of a claimed  
13 conspiracy). Similarly, the allegations against AUSA Scott fail. BOP  
14 attorney Campbell has been sued because he assisted in the filing of  
15 briefs in an "of counsel" capacity. Campbell is absolutely immune to the  
16 same extent as the AUSAs. See *Butz*, 424 U.S. at 512 (applying absolute  
17 immunity to government agency counsel); *Fry v. Melaragno*, 939 F.2d 832,  
18 837 (9th Cir. 1991) (same). Prosecuting attorneys are absolutely immune  
19 from civil suits for damages relating to professional conduct which is  
20 "intimately associated with the judicial phase of the criminal process,"  
21 *Imbler*, 424 U.S. at 430 (1976), or which is "undertaken . . . in the  
22 course of [their] role as an advocate for the State . . ." *Buckley v.*  
23 *Fitzsimmons*, 509 U.S. 259, 273 (1993).

24 The only allegations against AUSA Faller, Craig<sup>10</sup> and BOP attorney  
25 Campbell are that they, along with AUSA Scott, convinced the Judicial  
26 Defendants to deny Cox's habeas applications. This is the quintessential

---

27 <sup>10</sup>Wackenhut Defendant.  
28

1 advocacy function of a prosecutor, and those who assist them, for which  
2 these defendants are entitled to absolute immunity. *Imbler*, 424 U.S. at  
3 430-31 (prosecutor's role in initiating a prosecution and presenting case  
4 are covered by absolute immunity). Ashcroft is sued purely in his  
5 supervisory status as the former Attorney General of the United States,  
6 which does not state a viable claim. Supervisory officials are not  
7 vicariously liable under *Bivens*. *Terrell v. Brewer*, 935 F.2d 1015, 1018  
8 (9th Cir. 1991).<sup>11</sup>

9 Accordingly, the defects in Plaintiff's allegations against the  
10 Federal Defendants cannot be resolved by more pleading. Therefore, the  
11 allegations against all Federal Defendants will be dismissed with  
12 prejudice and without leave to amend.<sup>12</sup>

### 13 CONCLUSION

14 Plaintiff's claims against the Federal Defendants are barred by  
15 *Heck*, as well as *Imbler*. None of the activities complained of with any  
16 factual specificity fell outside the official role of prosecutor. *Imbler*  
17 *v. Pachtman*, 424 U.S. at 430. Further, Plaintiff has failed to show that  
18 the Wackenhut Defendants caused any legally cognizable constitutional  
19 injury from any of the activities complained of. *Crist v. Leippe*, 138  
20 F.3d 801, 805 (9th Cir. 1998). Since amendment would be futile, the  
21 Court will dismiss Plaintiff's First Amended Complaint without leave to

---

22  
23 <sup>11</sup>This action as it is directed to BOP individuals who ruled  
24 against Plaintiff during the administrative grievance process,  
25 Defendants Haro and Watts, is fatally conclusory and vague. The claim  
against Defendant Harvey, BOP Contract Administrator, contains no  
specific allegation of any contact between the two.

26 <sup>12</sup>In addition, the Prison Litigation Reform Act forbids prisoners  
27 from filing actions for mental or emotional injury while in custody  
28 without a prior showing of physical injury. 42 U.S.C. § 1997e(e). Thus,  
Plaintiff's claim for mental anguish, emotional distress and humiliation  
must fail as a matter of law.

1 amend. See *Foman v. Davis*, 371 U.S. 178, 182, (1962); *Lopez v. Smith*, 203  
2 F.3d 1122, 1127 (9th Cir. 2000).

3 Accordingly,

4 IT IS ORDERED that the Wackenhut Defendants' Motion to Dismiss  
5 (Doc. No. 68) is GRANTED with prejudice.

6 IT IS FURTHER ORDERED that Federal Defendants' Motion to Dismiss  
7 (Doc. No. 67) is GRANTED with prejudice.

8 IT IS FURTHER ORDERED that all relief is denied against all named  
9 Defendants and this action is DISMISSED in its entirety. Final Judgment  
10 shall enter separately.

11 DATED this 19<sup>th</sup> day of February, 2009.

12

13

14

15

16

17

18

19

20

21

22

23


24

25

26

27

28

  
David C. Bury  
United States District Judge