

1 evidence into Plaintiff’s custody, including a recording of the May 26, 2009 assault upon Plaintiff by
2 a correctional officer and the bloody shirt that Plaintiff was wearing when he was assaulted. (Doc. 18.)

3 **II. MOTION TO PRESERVE EVIDENCE**

4 Plaintiff requests a court order requiring defendants to release evidence into his custody, to
5 prevent spoliation of evidence. “Spoliation of evidence is the ‘destruction or significant alteration of
6 evidence, or the failure to preserve property for another’s use as evidence, in pending or future
7 litigation.’” Kearney v. Foldy & Lardner, LLP, 590 F.3d 638, 649 (9th Cir. 2009) (quoting Hernandez
8 v. Garcetti, 68 Cal.App.4th 675, 680, 80 Cal.Rptr.2d 443 (1998)).

9 “[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold
10 requirement imposed by Article III of the Constitution by alleging an actual case or controversy.” City
11 of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S.Ct. 1660, 1665 (1983) (citations omitted); Jones v.
12 City of Los Angeles, 444 F.3d 1118, 1126 (9th Cir. 2006). Plaintiff may presume that an actual case
13 of controversy exists at this stage of the proceedings because the Court has found cognizable claims in
14 his Amended Complaint. However, because none of the defendants have been served with the Amended
15 Complaint or appeared in this action, the Court does not have before it an actual case or controversy, nor
16 does the Court have jurisdiction over any of the defendants in this action. As a result, the Court has no
17 jurisdiction at this time to require defendants to act or refrain from acting. A federal court may not
18 attempt to determine the rights of persons not before the court. Zepeda v. United States Immigration
19 Service, 753 F.2d 719, 727 (9th Cir. 1985). Until defendants have appeared in this action, a motion
20 requiring defendants to provide Plaintiff with evidence is premature, and Plaintiff’s motion must be
21 denied.

22 Moreover, Plaintiff has not provided sufficient evidence demonstrating that defendants will
23 destroy evidence or that the videotape and shirt are in danger of being destroyed. The destruction of
24 evidence is sanctionable conduct, and “[l]itigants owe an uncompromising duty to preserve what they
25 know or reasonably should know will be relevant evidence in a pending lawsuit, or one in the offing .
26 . . .” JUDGE WILLIAM W. SCHWARZER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 11:125
27 (2004) (internal quotations and citations omitted). Given the duty to preserve evidence, the Court
28 declines to presume that defendants will destroy evidence.

1 After the Amended Complaint has been served and an Answer has been filed by one or more of
2 the defendants, the Court will issue an order commencing discovery. “Unless otherwise limited by court
3 order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged
4 matter that is relevant to any party's claim or defense — including the existence, description, nature,
5 custody, condition, and location of any documents or other tangible things and the identity and location
6 of persons who know of any discoverable matter.” Fed. R. Civ. P. 26(b)(1). When discovery has been
7 opened, Plaintiff may then seek to discover evidence, or the whereabouts of evidence, by serving
8 discovery requests upon defendants.

9 **III. CONCLUSION**

10 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff’s motion for a court order
11 requiring defendants to release evidence into Plaintiff’s custody, filed on May 26, 2011, is DENIED.

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13 IT IS SO ORDERED.

14 **Dated: May 31, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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