UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL ANGELO LENA, Plaintiff, v. PEOPLE OF THE STATE OF CALIFORNIA, *et. al*., Defendants.	Case No. 1:16-CV-01036-LJO-SKO SCREENING ORDER (ECF No. 1)

PRELIMINARY STATEMENT TO PARTIES AND COUNSEL

Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. Given the shortage of district judges and staff, this Court addresses only the arguments, evidence, and matters necessary to reach the decision in this order. The parties and counsel are encouraged to contact the offices of United States Senators Feinstein and Boxer to address this Court's inability to accommodate the parties and this action. The parties are required to reconsider consent to conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to parties than that of U.S. Chief District Judge Lawrence J. O'Neill, who must prioritize criminal and older civil cases.

Civil trials set before Chief Judge O'Neill trail until he becomes available and are subject to suspension mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if Chief Judge O'Neill is unavailable on the original date set for trial. Moreover, this Court's Fresno Division randomly and without advance notice reassigns civil actions to U.S. District Judges

throughout the nation to serve as visiting judges. In the absence of Magistrate Judge consent, this action is subject to reassignment to a U.S. District Judge from inside or outside the Eastern District of California.

I. Screening Requirement and Standard

Plaintiff Michael Angelo Lena ("Plaintiff") is a California state prisoner proceeding *pro se* and *in forma pauperis*[1] in this civil rights action under 42 U.S.C. § 1983. *See* ECF No. 1 ("Compl."). Plaintiff's complaint, filed on July 18, 2016, is now before the Court for screening.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). Under 28 U.S.C. § 1915A(a), the Court reviews a *pro se* complaint to determine whether the complaint is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief. A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Thus, the critical inquiry is whether a constitutional claim, however unartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

As a *pro se* litigant, Plaintiff is entitled to have his pleadings liberally construed and to have any doubt resolved in his favor. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted). Nevertheless, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that his complaint contain "a short and plain statement of the claim showing that [he] is entitled to relief." Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff's allegations are taken as true, courts "are not required to indulge unwarranted inferences." *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). Thus, to survive screening, Plaintiff's claims must be facially plausible, which requires sufficient factual detail to allow the Court reasonably to infer that each named defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (quotation marks omitted). The sheer possibility

[1] *See* ECF No. 4.

that a defendant acted unlawfully is not sufficient, and mere consistency with liability falls short of satisfying the plausibility standard. *Id.*

If the Court determines that the complaint may be cured by amendment, the Court will grant Plaintiff leave to amend and provide him with notice of the complaint's deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995). The Court will deny leave to amend if "it is absolutely clear" that amendment of a claim would be futile. *See id.*

II. Plaintiff's Allegations[2]

As an initial matter, the Court notes that Plaintiff's complaint, excluding attachments, is 54 handwritten pages, and at times, is difficult to decipher. *See* Compl. at 1-54. [3] Plaintiff also includes with his complaint an 85-page "Exhibit Book," containing 18 exhibits in support of his complaint. *Id*. at 55-146. Having reviewed the entirety of Plaintiff's filing, the Court now provides the following summary of Plaintiff's allegations:

Plaintiff is currently incarcerated at California Correctional Institution in Tehachapi, California ("CCI Tehachapi"), where the events alleged in the complaint occurred. *See id.*at 1. Plaintiff names the following Defendants: the People of the State of California; Jeffrey Beard, the former secretary of the California Department of Corrections and Rehabilitation ("CDCR"), in both his individual and official capacities; K. Holland, the former warden of the California Correctional Institution at Tehachapi, in both her individual and official capacities; Captain Yett and other unnamed correctional officers; and the Attorney General of California (collectively, "Defendants"). *See id.* at 1. Plaintiff's allegations, which claim violations of his First, Fourth, Eighth, and Fourteenth Amendment rights, center on three raids conducted by CCI Tehachapi correctional officers ("COs") on December 18, 2015; January 1, 2016; and January 3, 2016; and habitual sexual harassment by the COs. The allegations are summarized as follows:

At the relevant times, Plaintiff was housed in Level IV of the Special Needs Yard ("SNY") at CCI Tehachapi. *See id.* at 14. According to Plaintiff, many of the COs at CCI Tehachapi frequently force inmates to expose their "junk," (*i.e.*, genitalia) and any time a CO shows up at a

[2] The Court assumes Plaintiff's allegations to be true at the screening stage.

[3] Pincites refer to CM/ECF pagination located at the top of each page.

cell window, "chances are, he is going to force you to show him your [genitalia]." *Id.* at 19. Plaintiff believes that COs demand that inmates expose themselves in the hopes that the inmate will refuse, because this would give the COs an excuse to attack the inmate. *Id.* at 19-20. Because Plaintiff fears retaliation by the COs, Plaintiff would "show[] them what they want." *Id.* at 20.

On December 14, 2015, Plaintiff filed a group appeal/grievance alleging that cold air was deliberately being blown into all SNY cells. *Id.* at 63-66. Prison officials ignored this grievance. *Id.* at 22.

Four days later, on December 18, 2015, prison officials retaliated against Plaintiff by conducting a "raid" on the SNY. *Id.* at 18. At the time of the raid, Plaintiff was working on an opening brief in relation to a case pending before the Ninth Circuit ("Case 15-16553"), when several COs showed up at the SNY, armed with clubs and "toxic gas." *Id.* at 18. A group of COs appeared at the door of Plaintiff's door, "smiling, leering, and shouting 'strip, strip, strip, let's see your junk!'" *Id.* The COs had positioned themselves in a manner that prevented Plaintiff from reading their name tags. *Id.* at 19. The COs seized Plaintiff's clothing, leaving him naked, but then "reluctantly" returned to him a "flimsy pair of boxer shorts." *Id.* at 20. Plaintiff and the other SNY inmates were taken outside, only clothed in boxer shorts, and handcuffed from behind, while the COs stood behind them with clubs, making threats, "creepy remarks about 'junk,'" and laughing. *Id.* at 21. It was 20 degrees outside, and Plaintiff immediately began to feel sick. *Id.* The COs put Plaintiff and the other SNY inmates into vertical coffin-like "ad-seg enclosures", described as the size of a phone booth, outside for approximately four hours while they raided the SNY cells. *Id.* Plaintiff "almost died" during this instance, and was the last one returned to his cell because he had submitted the grievance about the air conditioning. *Id.* When he returned to his cell, all of his legal files and evidence related to his ongoing cases[4] (amounting to 15 boxes) had been ransacked or stolen, including an appeal brief for Case 15-6553 he had almost finished. *Id.* at 21-22. P

On December 19, 2015, Plaintiff submitted an inmate grievance about the raid that took place on December 18. *Id.* at 28. As a result, several COs taunted and threatened Plaintiff, and then turned off the hot water in the SNY yard. *Id.* at 29. The hot water was off for several days. *Id.*

[4] At the time, Plaintiff also had a second case pending before the Ninth Circuit: Case 14-14011. Compl. at 21.

During the next few days, Plaintiff felt very ill, but did not receive any medical care until December 22, 2015. *Id.* at 22. At the Healthcare Department, despite complaining of spitting up phlegm, and having congested airways, Plaintiff was told "There's nothing wrong with you. If you don't like prison, don't commit crime." *Id.* at 22 & 30.

On December 26, 2015, Plaintiff filed an "emergency motion" to the Ninth Circuit in relation to the raid that took place on December 18, with the intention of stopping Defendants from raiding the SNY cell block again. *Id.* at 23, 77 (copy of motion). Plaintiff believed that Defendants Holland and Yett, with Beard's approval, were preparing to conduct more raids. *Id.* at 23.

On January 1, 2016, the COs conducted a second raid of the SNY cell block. *Id.* at 24. They demanded that the inmates expose themselves, and then forced the inmates into the same ad-seg enclosures, wearing only their boxer shorts, for four hours, while the COs searched the cells. *Id.* The COs destroyed the legal papers in Plaintiff's cell during this raid. *Id.*

On January 3, 2016, the COs conducted a third raid of the SNY cell block in the same manner as the previous two raids. *Id.* That same day, Plaintiff submitted a three-page request to Yett for the return of the legal documents that had been taken from his cell—specifically, the brief for Case 15-6553. *Id.* In response, Yett and Holland sent Lieutenant Garcia and CO Curliss to see Plaintiff. *Id.* Curliss forced Plaintiff to expose his genitals before taking him to see Garcia. *Id.* at 31. Garcia then made a video recording of Plaintiff's statement, and asked Plaintiff for a written statement, which Plaintiff agreed to provide. *Id.* at 32. However, nothing ever happened with regard to this grievance. According to Plaintiff, Defendants sought to thwart him from exhausting his administrative remedies under the Prison Litigation Reform Act by preventing him from even reaching the first level of review. *Id.*

III. Analysis

a. Eleventh Amendment

"The Eleventh Amendment bars suit for money damages in federal courts against a state, its agencies, and state officials in their official capacities." *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) (citations omitted). Plaintiff's first named defendant—"the People of the State of California"—is therefore not a proper defendant. Moreover, because none of the factual

allegations in the complaint can plausibly be linked to "the People of the State of California," the Clerk of Court is directed to TERMINATE "People of the State of California" as a Defendant in this case. Any claims against the "People of the State of California" are DISMISSED WITHOUT LEAVE TO AMEND.

Plaintiff additionally names Jeffrey Beard, K. Holland, Captain Yett, and Kamala Harris, the Attorney General of California, as defendants, and seeks to sue Beard, Holland, and Yett in both their personal and official capacities. Compl. at 1, 10-14. However, because all four defendants are state employees, these defendants may not be sued in their official capacities. *Aholelei*, 488 F.3d at 1147. Therefore, Plaintiff's claims against these defendants may only proceed insofar as he seeks "to impose individual liability [upon defendants] for actions taken under color of state law." *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). To the extent Plaintiff's claims against these Defendants are directed at them in their official capacities, the claims are DISMISSED WITHOUT LEAVE TO AMEND.

b. § 1983 claims

Plaintiff's allegations against Defendants seek to invoke the Civil Rights Act, codified at 42 U.S.C. § 1983. The Civil Rights Act provides, in relevant part:

> Every person who, under color of [state law] … subjects, or causes to be subjected, any citizen of the United States … to the deprivation of any rights, privileges, or immunities secured by the Constitution … shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

i. Eighth Amendment – Conditions of Confinement

The Eighth Amendment protects prisoners from inhumane methods of punishment and from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir.2006). Extreme deprivations are required to make out a conditions of confinement claim, and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. *Hudson*, 503 U.S. at 9. In order to state a claim

for violation of the Eighth Amendment, the plaintiff "must make two showings. First, the plaintiff must make an 'objective' showing that the deprivation was 'sufficiently serious' to form the basis for an Eighth Amendment violation." *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2006) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). "Second, the plaintiff must make a 'subjective' showing that the prison official acted 'with a sufficiently culpable state of mind.'" *Id.* The circumstances, nature, and duration of the deprivations are critical in determining whether the conditions complained of are grave enough to form the basis of a viable Eighth Amendment claim. *Id.* "[R]outine discomfort inherent in the prison setting" does not rise to the level of a constitutional violation. *Id.*

"The denial of adequate clothing can inflict pain under the Eighth Amendment." *Walker v. Sumner*, 14 F.3d 1415, 1421 (9th Cir. 1994), overruled on other grounds by *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). Moreover, the Ninth Circuit has recognized that the failure to protect prisoners from extreme weather conditions may amount to an Eighth Amendment violation. *Johnson*, 217 F.3d at 730-31. In *Johnson*, following riots by the inmates, prison officials evacuated the building and forced all the inmates to lie outside on the ground in handcuffs and ankle restraints on two occasions: one during the summer and one during the winter. *Id.* at 730. "[P]rison officials left the prisoners outdoors while they searched the buildings and tried to identify those inmates who had participated in the riot." *Id.* The first evacuation lasted four days, during which the temperature ranged from 70 to 94 degrees. *Id.* During the second evacuation, which was approximately 17 hours, the temperature fell to 22 degrees. *Id.* During both investigations, inmates lacked access to adequate water, food, shelter, and sanitation. *Id.*

The Court finds that Plaintiff's allegation that on three instances, he was forced to be outside in subfreezing temperatures for four hours in a "vertical cage" clothed only in boxer shorts while COs conducted a raid of his cell, states a claim under the Eighth Amendment. As in *Johnson*, Plaintiff and the other inmates were forced to evacuate their cells while prison officials conducted a search of the building. Compl. at 21 ("The CO put me, and dozens of others, in 'ad-seg' enclosures, outdoors …[a]nd kept us their [sic] for about four hours, while they 'tore up, vandalized my cell'"). Plaintiff has alleged that the weather conditions outside were extreme, as the raids occurred in

December and January, such that being deprived of clothing could inflict pain of a constitutional magnitude. *Id*. at 20 ("It's December 18th, 2015! There's snow on the ground outside! There's wind! A wind chill factor! It's approximately 20 degrees out!). Plaintiff has therefore satisfied the "objective" showing requirement. *See Johnson*, 217 F.3d at 732 (citing *Gordon v. Faber*, 973 F.2d 686, 687 (8th Cir. 1992), in which the Eighth Circuit "found that the Eighth Amendment had been violated where prison officials required inmates to remain outdoors in subfreezing temperatures for less than two hours, even though the inmates were provided with hip-length, lined denim coats and allowed to move freely").

Plaintiff has also satisfied the "subjective" showing requirement: "that the defendant officials had actual knowledge of the plaintiffs' basic human needs and deliberately refused to meet those needs." *Id.* (citing *Farmer v. Brennan*, 511 U.S. at 837). Plaintiff alleged that he and the other inmates were "taken outside, 'essentially naked,' except for boxer shorts and walked, marched across the yard, handcuffed from behind, while the [COs] [stood] behind them with clubs, making threats, creepy remarks about 'junk,' laughing, having 'good old farm boy fun,' in subfreezing cold." Compl. at 21. Plaintiff's allegations, which the Court must assume to be true, are sufficient for Court to infer that the COs had actual knowledge of Plaintiff's basic human need for adequate clothing in the face of 20-degree weather, and deliberately refused to meet this need. *Johnson*, 217 at 734-35. Therefore, the Court will permit Plaintiff to proceed with his Eighth Amendment conditions of confinement claim, to the extent he is able to provide further identifying information as to the COs responsible for depriving him of adequate clothing during the raids. The requirements for doing so will be addressed in further detail at the conclusion of this order.

ii. First Amendment – Retaliation

"Prisoners have a First Amendment right to file grievances against prison officials and to be free from retaliation for doing so." *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (citation omitted). Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his

First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004) (footnote and citations omitted).

Plaintiff has alleged two instances of retaliation: 1) the December 18, 2015 raid of the SNY cell block, during which Plaintiff was forced to be outside wearing only his boxer shorts for four hours in subfreezing temperatures, and which he claims was conducted because he had filed a grievance four days earlier; and 2) that on or around December 19, 2015, several COs taunted him and turned off the hot water in the SNY cell block because he filed a grievance in connection with the December 18, 2015 raid. Compl. at 21 & 29. At this stage of the proceedings, the Court must accept as true Plaintiff's allegations that these actions were taken because of Plaintiff's attempt to exercise his indisputable First Amendment right to file a grievance, and that the retaliatory actions therefore lacked a legitimate correctional goal. *See Watison v. Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012). The Court additionally finds that the raid, threats, and turning off of the hot water in the SNY block constitute "adverse actions" because these actions, allegedly taken in response to Plaintiff's filing a grievance, "would chill a person of ordinary firmness" from engaging in the exercise of his First Amendment Rights. *See Pinard v. Clatskanie School Dist.*, 467 F.3d 755, 770 (9th Cir. 2006) (an "[a]dverse action is action that would chill a person of ordinary firmness' from engaging in that activity" (citation and quotation marks omitted)). Accordingly, the Court will permit Plaintiff to proceed with his First Amendment Retaliation claim on these grounds, to the extent he is able to provide further identifying information as to the COs responsible for the raid, threats, and turning off of the hot water. The requirements for doing so will be addressed in further detail at the conclusion of this order.

iii. Fourth Amendment – Unreasonable Search

The Fourth Amendment's guarantee against unreasonable searches applies to the invasion of bodily privacy in prisons and jails. *Bull v. City and Cty. of San Francisco*, 559 F.3d 964, 974 (9th Cir. 2010). However, the Fourth Amendment rights of incarcerated persons are subject to "limitation or retraction" in order to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). Applying these principles, courts have found violations of the Fourth Amendment

where prison inmates are subjected to unreasonable strip-searches that lack legitimate penological justifications. *See Byrd v. Maricopa Cty. Sherrif's Dept.*, 629 F.3d 1135, 1147 (9th Cir. 2011).

Here, Plaintiff claims that his Fourth Amendment rights have been violated by the COs' repeated demands that he expose his genitals to them. While the Court acknowledges that such behavior by the COs is undoubtedly offensive and distasteful, the Court is not persuaded that Plaintiff has alleged that the COs were involved in a "search" of Plaintiff, within the meaning of the Fourth Amendment. *See, e.g.*, *Blanco v. Cty of Kings*, 142 F. Supp. 3d. 986, 994 (E.D. Cal. 2015) (finding the defendant not liable under the Fourth Amendment because the facts in the complaint only plausibly suggested that he viewed the plaintiff in a state of undress, not that the defendant had actually searched the plaintiff). Plaintiff has not alleged that any COs were conducting a search of his person when they asked him to expose himself—rather, he claims that their actions were motivated by their desires to harass him and/or their own sexual gratification. *See, e.g.*, Compl. at 19 ("Many of the COs at Tehachapi … are 'obvious homosexuals' who enjoy forcing prisoners, as they put it, to expose 'their junk' to them…It never stops! … The being forced to show these hicks your penis, when they, not all, but most of them, clearly enjoy this!"). Thus, the Court finds that Plaintiff has failed to state a claim under the Fourth Amendment. In an abundance of caution, Plaintiff is granted leave to amend this claim.

iv. Fourteenth Amendment – Privacy

The Ninth Circuit has recognized that the Fourteenth Amendment's due process protections may also include a right to bodily privacy. *York v. Story*, 324 F.2d 450 (9th Cir. 1963); *see also Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992) (citing *York* for the notion that there is a "right to bodily privacy"). Specifically, in *York*, the Ninth Circuit noted "[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." 324 F.2d at 455. In *Grummett*, the Ninth Circuit held that the right to privacy under the Fourteenth Amendment also applies in the prison context, but that privacy interests in the prison context can be restricted "to the extent necessary to further the correctional system's legitimate goals and policies." 779 F.2d at 493-95.

Plaintiff's general allegations that COs habitually force him to expose his genitals for them for no legitimate penological purpose could potentially constitute a violation of the Fourteenth Amendment's due process bodily privacy protections. Nevertheless, as they are currently pled, these general allegations are insufficient to state a claim pursuant to Rule 8(a). With two exceptions[5], these general allegations lack specificity as to when exactly these instances occurred and the context of their occurrences. *See Iqbal*, 556 U.S. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."). Therefore, the allegations about the general harassment do not state a claim under the Fourteenth Amendment, but Plaintiff will be granted leave to amend.

v. Fourteenth Amendment – Due Process

The Fourteenth Amendment protects prisoners from being deprived of their property without due process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Prisoners have a protected interest in their personal property. *Hansen v. May*, 502 F.2d 728, 730 (9th Cir. 1974). Although an authorized, intentional deprivation of property is actionable under the Due Process Clause, *see Hudson v. Palmer*, 468 U.S. 617m 532 n. 13 (1984), neither negligent nor unauthorized deprivations of property by a governmental employee "constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available." *Hudson*, 468 U.S. at 533. Where the state provides a meaningful post-deprivation remedy (*e.g.*, as in California, a common law state tort action against a correctional employee in his personal capacity), only authorized, intentional deprivations of property by employees in their official capacities constitute actionable violations of the Due Process Clause. An authorized deprivation is one carried out pursuant to established state

[5] The first specific incident occurred on or around December 22, 2015, Plaintiff alleged that he was "forced to show his penis, anal hole' to a leering CO" before he was cuffed behind his back and taken to the healthcare unit. Compl. at 29. Plaintiff does not, however, identify the CO or allege any facts that suggest this violated his Fourteenth Amendment rights because it lacked any penological purpose. The second specific incident on January 19, 2016, after he had filed an emergency motion to the Ninth Circuit, CO Curliss forced Plaintiff to show them his penis and anal hole before he brought Plaintiff to see Lieutenant Garcia in connection with a grievance that Plaintiff had filed after the raids occurred. *Id.* at 31. However, because Plaintiff did not name CO Curliss as a defendant in this case, the Court is not yet willing to allow this particular allegation to proceed, until and unless an adequate allegation has cured the concern.

procedures, regulations, or statutes. *Piatt v. McDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985); *see also Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987).

California law provides a post-deprivation remedy for any property deprivations. *See* Cal. Gov't Code. §§ 810-895; *Barnett v. Centoni*, 32 F.3d 813, 816-17 (9th Cir. 1994). The California Government Claims Act requires that a tort claim against a public employee be presented to the California Victim Compensation and Government Claims Board no more than six months after the cause of action accrues. Cal Gov't Code §§ 905.2, 910, 911.2, 945.4, 950-950.2. Presentation of a written claim, and action on or rejection of the claim are conditions precedent to suit. *State v. Superior Court of Kings Cty (Bodde)*, 90 P.3d 116, 124 (2004); *Mangold v. Cal. Pub. Utils. Comm'n*., 67 F.3d 1470, 1477 (9th Cir. 1995). To state a tort claim against a public employee, a plaintiff must allege compliance with the Government Claims Act. *Bodde*, 90 P.3d at 121; *Mangold*, 67 F.3d at 1477.

Here, Plaintiff has alleged that COs destroyed and/or removed his personal property—specifically, his legal papers—from his cell. Because there is no indication in the Complaint that Plaintiff's property was taken because of an established state procedure, Plaintiff's allegations can only be construed as an unauthorized intentional deprivation. These types of actions only constitute a violation of due process if a meaningful post-deprivation remedy for Plaintiff's loss is unavailable. *Hudson*, 468 U.S. at 533. The Government Claims Act provides such a remedy for Plaintiff. *See Barnett*, 32 F.3d at 816-17.

For these reasons, the Court finds that Plaintiff has failed to state a cognizable claim against any of the Defendants under the Due Process Clause of the Fourteenth Amendment. Furthermore, since it is obvious that Plaintiff cannot prevail on the facts he has alleged under the Fourteenth Amendment, it would be futile to give him an opportunity to amend this allegation. *See Lopez v. Smith*, 203 F.3d 1122, 1128-30 (9th Cir. 2000). Plaintiff's Due Process claim is therefore DISMISSED WITHOUT LEAVE TO AMEND.

vi. Eighth Amendment – Denial of Medical Care

The Eighth Amendment demands, among other things, that prison officials not act in a manner "sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*

v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). An Eighth Amendment claim based on inadequate medical care has two elements: "the seriousness of the prisoner's medical need and the nature of the defendant's response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.1992). A medical need is "serious" "if the failure to treat the prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Id.* (quoting *Estelle*, 429 U.S. at 104).

Deliberate indifference to a medical need is shown when a prison official knows that an inmate has a serious medical need and disregards that need by failing to respond reasonably to it. *See Farmer*, 511 843-44. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

Plaintiff has alleged that he was denied adequate medical care following the December 18, 2015 raid, although he does not name any specific Defendant in connection with this allegation. Specifically, he alleged that he required immediate medical treatment, but was not taken to the healthcare unit until five days later. Compl. at 22, 29. While Plaintiff told the healthcare worker that he had "early stage bronchitis … a precursor to pneumonia," and complained the conditions—cold air coming into his cell and the lack of hot water, and his symptoms—spitting up, coughing up phlegm and congested airways, the healthcare worker told him "I don't hear anything. Your vitals, blood pressure are all good! Maybe you shouldn't commit crimes!" *Id.* at 30.

Even assuming that Plaintiff was suffering from a serious medical need, he has failed to allege that the healthcare worker was deliberately indifferent, as contemplated by *Farmer.* At best, Plaintiff's allegations suggest indifference or negligence, neither of which is sufficient for an Eighth Amendment claim. *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. at 105-06) ("Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support" an Eighth Amendment medical claim). Thus, the Court finds that Plaintiff's

allegations are insufficient to state a claim under the Eighth Amendment. However, the Court will grant Plaintiff leave to amend this claim.[6]

vii. Linkage Requirement and Supervisory Liability

42 U.S.C. § 1983 requires that there be an actual connection or link between the actions of Defendants and the deprivations alleged to have been suffered by Plaintiff. *See Monell v. Dept. of Social Svcs.*, 436 U.S. 658 (1978). The Ninth Circuit has held that "[a] person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978). In order to state a claim for relief under section 1983, Plaintiff must link each named Defendant with some affirmative act or omission that demonstrates a violation of Plaintiff's federal rights. Plaintiff must specify which Defendant(s) she feels are responsible for each violation of her constitutional rights and the factual basis as her Complaint must put each Defendant on notice of Plaintiff's claims against him or her. *See Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir.2004).

Furthermore, when a named defendant holds a supervisory position, the causal link between him and the claimed constitutional violation must be specifically alleged. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir.1979). To state a claim for relief under §1983 based on a theory of supervisory liability, Plaintiff must allege some facts that would support a claim that supervisory defendants either: personally participated in the alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or "implemented a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Under § 1983, liability may not be imposed on supervisory personnel for the actions of their employees under a theory of respondeat

[6] The Court acknowledges that Plaintiff has alleged that the healthcare worker was not wearing a nametag and that she refused to tell Plaintiff her name. Compl. at 30. However, Plaintiff has not indicated that he would like to name this healthcare worker as a Defendant. Should Plaintiff wish to proceed on this Eighth Amendment claim, he should advise this Court that he wishes to name the healthcare worker as a Defendant, and should seek to obtain her identifying information.

superior. *Iqbal*, 556 U.S. at 677. "In a § 1983 suit or a Bivens action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer." *Id*. Knowledge and acquiescence of a subordinate's misconduct is insufficient to establish liability; each government official is only liable for his or her own misconduct. *Id*.

Here, Plaintiff has failed to allege sufficient linkage any of the named Defendants—Jeffrey Beard, K. Holland, Captain Yett, and Kamala Harris—and the allegations of constitutional violations above. Although Plaintiff alleges that Holland and Yett, with Beard's approval, orchestrated the three raids, this allegation is conclusory and therefore not entitled to the presumption of truth. *Moss v. U.S. Secret Svcs.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal citations omitted) ("Such allegations are not to be discounted because they are 'unrealistic or nonsensical,' but rather because they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation."). Because all four named Defendants are in supervisory roles, Plaintiff must allege more specific facts to satisfy the linkage requirement. Therefore, the Court finds that Plaintiff has failed to state a claim for supervisory liability. However, Plaintiff is granted leave to amend this claim.

c. Access to the Courts

Prison inmates have a fundamental constitutional right of access to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996); *see also Silva v. DeVittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011) (the right of access to the courts "forbids states from erecting barriers that impede the right of access of incarcerated persons" to file civil actions that have a "reasonable basis in law or fact") (internal citations omitted). However, the right of access is merely the right to bring to court a grievance the inmate wishes to present, and is limited to direct criminal appeals, habeas petitions, and civil rights actions. *Lewis*, 518 U.S. at 354. The State is not required to enable the inmate to discover grievances or to litigate effectively once in court, *id*., and an inmate claiming interference with or denial of access to the courts must show that he suffered an actual injury—that is "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or present a claim." *Id*. at 348-49.

Although Plaintiff has alleged that Defendants interfered with his access to the courts through thwarting his inmate grievances and stealing his legal papers, the Court finds that he has failed to establish the "actual injury" requisite to proceed on this claim. To the extent that Plaintiff alleges that Defendants interfered with the cases he had pending before the Ninth Circuit (Case Nos. 15-16553 and 15-15011), the Court notes that the Ninth Circuit has already issued rulings in those cases: *Lena v. San Quentin State Prison*, --- Fed. Appx. ---, No. 15-15011, 2016 WL 4488147 (9th Cir. Aug. 26, 2016), and *Lena v. Davis*, --- Fed. Appx. ---, No. 15-16553, 2016 WL 4499832 (9th Cir. Aug. 16, 2016). Therefore, any of Defendants' alleged interference in these two cases is now moot. The Court will dismiss this claim, but grant Plaintiff leave to amend.

d. Prison Rape Elimination Act

Plaintiff seeks to invoke the protections of the Prison Rape Elimination Act, claiming that the acts described above are in violation of the Act. Compl. at 34. However, as another court in this district recently noted, "[t]he Prison Rape Elimination Act … does not create a private right of action." *Olive v. Harrington*, No. 1:15-cv-01276 BAM (PC), 2016 WL 4899177, at *4 (E.D. Cal. Sept. 14, 2016) (citing *Bell v. Cty. Of Los Angeles*, No. CV 07-8187-GW(E), 2008 WL 4375768 (C.D. Cal. Aug. 25, 2008), and *Inscoe v. Yates*, No. 1:08-cv-001588 DLB PC (E.D. Cal. Oct. 28, 2009)). "The Act in itself contains no private right of action, nor does it create a right enforceable under [§ 1983]." *Id.* Accordingly, Plaintiff's claims regarding the Prison Rape Elimination Act are DISMISSED WITHOUT LEAVE TO AMEND.

e. Requested Relief

Plaintiff has requested, among other things, that this Court order his transfer from CCI Tehachapi into federal custody, along with his remaining boxes, and that the three-judge panel who heard *Brown v. Plata* be empaneled again to hear his claims. These requests are beyond the jurisdiction of this Court. *See, e.g., Scally v. Ferrera*, No. 2:15-cv-2528-CMK-P, 2016 WL 5234691, at *6 (E.D. Cal. Sept. 22, 2016) ("Plaintiff is requesting this court issue an order commanding county jail employees to act, or not in such a manner. Such a request is outside this Court's power."). This Court, like every court, randomly assigns cases to judges. Further, Plaintiff is not entitled to a three-judge panel for this case.

f. Doe Defendants

Plaintiff claims that the names of the COs who harmed him were concealed or otherwise withheld from him. Compl. at 19. However, "[a]s a general rule, the use of 'John Due' to identify a defendant is not favored." *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

Plaintiff is warned that although the use of Doe Defendants is acceptable to withstand dismissal of the complaint at the screening stage, those individuals cannot be served with process in this action until they are identified by their names. The burden is on Plaintiff to discover the identity of these defendants, and amend his complaint to substitute a name for each unnamed CO.

CONCLUSION AND ORDERS

The Court finds that Plaintiff has stated cognizable claims for violations of the Eighth Amendment, for inhumane conditions of confinement, and the First Amendment, for retaliation. Plaintiff has not sufficiently pleaded any other claims.

The Court will grant Plaintiff an opportunity to cure the identified deficiencies which Plaintiff believes, in good faith, are curable. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). The Court reminds Plaintiff that if he chooses to again amend his complaint, he may not change the nature of the suit by adding new, unrelated claims. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints). Plaintiff's first amended complaint should be brief, Fed. R. Civ. P. 8(a), but it must state what each named defendant did that led to the deprivation of Plaintiff's constitutional rights, *Iqbal*, 556 U.S. at 678-79. Plaintiff is also advised that an amended complaint supersedes the original complaint. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012). Therefore, Plaintiff's third amended complaint must be "complete in itself without reference to the prior or superseded pleading." Local Rule 220.

If Plaintiff does not wish to attempt to cure the identified deficiencies discussed above through an amended complaint, and he is agreeable to proceeding only on the cognizable claims identified by the Court in this order, he may file a notice informing the Court that he is willing to proceed only on his cognizable claims. The remaining defendants and claims will then be dismissed, and Plaintiff will be required to amend his complaint only to provide the identity of the

unknown CO (i.e., "Doe") defendants. Thus, if Plaintiff sends a notice to the Court that he is willing to proceed only on his cognizable claims identified above, then the Court will issue an order permitting him forty-five (45) days to either file a motion to substitute the Doe Defendant(s), or file a status report explaining the actions he took to locate the name of Doe defendant(s). Any extension of that period will require a showing of good cause, and a failure to comply with that order shall result in a recommendation to dismiss the action.

Based on the foregoing, it is HEREBY ORDERED that:

1. The Clerk's Office shall send Plaintiff an amended complaint form;
2. Within **thirty (30) days** from the date of service of this order, Plaintiff must either
   a. File a first amended complaint curing the deficiencies identified by the Court in this order, or
   b. Notify the Court in writing that he is willing to proceed only on the two cognizable claims for (1) inhumane conditions of confinement, in violation of the Eighth Amendment, against Doe Defendant COs; and (2) retaliation, in violation of the First Amendment, against Doe Defendant COs;
3. **If Plaintiff fails to comply with this order, the Court will dismiss this action for failure to obey a court order and failure to state a claim.**
4. **Any amended complaint shall not exceed 25 pages. Plaintiff is advised that he need not attach any documents to his amended complaint.**

IT IS SO ORDERED.

Dated: **October 24, 2016** **/s/ Lawrence J. O'Neill**
UNITED STATES CHIEF DISTRICT JUDGE