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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GERALD LEE MILLER,

Plaintiff,

v.

CORRECTIONAL OFFICER J. NAVARRO,
et al.,

Defendants.

Case No. 1:17-cv-01309-DAD-SAB

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF
CERTAIN CLAIMS AND DEFENDANTS
[ECF Nos. 15, 16]

FOURTEEN (14) DAY DEADLINE

Plaintiff Gerald Lee Miller, a state prisoner, is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

On February 1, 2018, Plaintiff filed a second amended complaint. (ECF No. 15.) On March 16, 2018, the Court screened Plaintiff’s second amended complaint and found that it states a cognizable claim against Correctional Officer Navarro for deliberate indifference in violation of the Eighth Amendment and retaliation in violation of the First Amendment; and retaliation claims against Correctional Officers Florse, Marquez, and Xayoudom, but fails to state a cognizable claim against any other named defendant in this action. (ECF No. 16.) Further, the Court found that the claims that Plaintiff is seeking to bring in this action are improperly joined under the Federal Rules of Civil Procedure. Therefore, the Court granted Plaintiff fourteen (14) days to notify the Court in writing which claim he seeks to proceed upon in this action. (Id.)

On April 6, 2018, Plaintiff notified the Court that he wishes to proceed only on his claim for retaliation in violation of the First Amendment against Correctional Officers Florse,

1 Marquez, and Xayoudom. (ECF No. 17.) As a result, the Court will recommend that this action
2 only proceed on those claims, and all other claims and defendants be dismissed for the reasons
3 explained below.

4 **I.**

5 **SCREENING REQUIREMENT**

6 The Court is required to screen complaints brought by prisoners seeking relief against a
7 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
8 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
9 legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or
10 that “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
11 1915(e)(2)(B).

12 A complaint must contain “a short and plain statement of the claim showing that the
13 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
14 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
16 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate
17 that each defendant personally participated in the deprivation of Plaintiff’s rights. Jones v.
18 Williams, 297 F.3d 930, 934 (9th Cir. 2002).

19 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
20 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d
21 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be
22 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer
23 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss
24 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant
25 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s
26 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d
27 at 969.

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1 **II.**

2 **SECOND AMENDED COMPLAINT ALLEGATIONS**

3 Plaintiff is in the custody of the California Department of Corrections and Rehabilitation
4 (“CDCR”) and is currently incarcerated at Centinela State Prison. The incidents alleged in the
5 complaint occurred while Plaintiff was housed at California State Prison Corcoran (“Corcoran”).
6 Plaintiff alleges that on February 6, 2017, he was set up to be assaulted by correctional officers.
7 (Sec. Am. Compl. (“SAC”) 6,¹ ECF No. 1.)

8 On or about February 6, 2017, which was someone’s first day in the building, floor staff
9 Torress and Cagle came to Plaintiff’s cell and asked him to come out so Correctional Officer
10 Cagle’s program could be explained to all inmates in the building. (SAC 8.) Plaintiff told them
11 that he did not have time to do this because he was GED testing and did not have time to be
12 running around. (SAC 8.) Correctional Officer Cagle asked Plaintiff to do him this favor and
13 Plaintiff agreed. (SAC 8.) After the program was explained, Plaintiff left for school. (SAC 8.)
14 Plaintiff contends that Correctional Officers Cagle and Torress were mad at Plaintiff for initially
15 refusing to help Cagle. (SAC 8.)

16 After leaving the Education Department, Plaintiff was walking from education on A-Yard
17 to the general population. (Compl. 6, 9.) As Plaintiff passed through the security gate, he heard
18 several correctional officers, including Correctional Officer Navarro, laughing and telling jokes
19 with inmate Robert Taylor. (SAC 6.) Plaintiff heard these officers telling inmate Taylor that
20 Plaintiff could not even read; could not lead himself out of a wet paper bag; is working with the
21 Attorney General’s Office to train the new Attorney General; was responsible for all inmates
22 getting their cells searched and their phones taken; and if he wants to keep his phone he knows
23 what he needs to do. (SAC 6, 9.) Plaintiff did not pay attention to this because he was trying to
24 stay focused on getting his GED. (SAC 6.)

25 A minute later, inmate Taylor repeated this conversation to three other inmates who
26 assaulted Plaintiff. (SAC 6.) Correctional Officer Navarro was the first to arrive in response to

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28 ¹ All references to pagination of specific documents pertain to those as indicated on the upper right
corners via the CM/ECF electronic court docketing system.

1 the assault and took Plaintiff off the yard. (SAC 6.) Correctional Officer Navarro told Plaintiff
2 that he had picked Plaintiff up so fast and put his hat on his head so that it was as if the assault
3 had never happened. (SAC 6.) Correctional Officer Navarro also made comments implying that
4 he was showing the new Attorney General what happens in prison. (SAC 7.) Plaintiff contends
5 that Correctional Officer Navarro and the other officers should have known that telling inmates
6 that he was responsible for the cell search and their phones being confiscated would result in
7 Plaintiff being in danger. (SAC 7.) Correctional Officer Navarro did not try to stop this assault
8 before it happened or during the assault. (SAC 7.) Plaintiff received a fractured right eye and his
9 surgical jaw repair was reinjured when he was assaulted by the inmates. (SAC 7.)

10 From 2013 to 2015, Correctional Officer Navarro and Correctional Officer Cagle were
11 Plaintiff's floor staff when he was housed in another building. (SAC 7.) During this time,
12 Plaintiff was litigating another civil action with another prison. (SAC 7.) On two occasions calls
13 were placed to correctional staff asking why Plaintiff was not released in time to participate in a
14 conference call with the court. (SAC 7.) Due to this, the A Yard second watch sergeant talked to
15 Plaintiff's floor staff to ensure that Plaintiff and other inmates would be released on time for
16 these types of matters. (SAC 7.) Plaintiff contends that Correctional Officers Navarro, Cagle, and
17 Torress took adverse action against him due to these prior civil litigations and because they
18 believed that he was working with the Attorney General's Office. (SAC 7.)

19 Correctional Officers Torress and Cagle packed Plaintiff's property for Administrative
20 Segregation. (SAC 9.) They failed to follow CDCR rules, policy, and procedure in packing his
21 property. (SAC 9.) They did not pack, sign, and date the property inventory sheet. (SAC 9.)
22 Around February 27, 2017, Plaintiff received his property and an unsigned 1083 form from
23 Correctional Officer Medina. (SAC 9.) Plaintiff found that a lot of his property was missing and
24 not listed on the unsigned property sheet. (SAC 9.)

25 Plaintiff asked Correctional Officer Medina if there was another inventory sheet because
26 a lot of his new legal books, new personal books, and other personal property were not listed on
27 the inventory sheet he received. (SAC 9.) Correctional Officer Medina told Plaintiff that he did
28 not own any new books or new personal books, and there was none in his property. (SAC 9.)

1 Plaintiff asked Correctional Officer Medina for his personal letters so he could provide receipts
2 for the missing property. (SAC 10.) Correctional Officer Medina told Plaintiff that there were no
3 personal letters in his property. (SAC 10.)

4 Plaintiff told Correctional Officer Medina that either Correctional Officers Cagle or
5 Torress did not pack his person property or she took his property and was trying to cover it up by
6 not giving him his receipts. (SAC 10.) Correctional Officer Medina told Plaintiff that he did not
7 own such property and walked off. (SAC 10.)

8 Plaintiff alleges that Correctional Officers Medina, Cagle, and Torress are part of a
9 “green-wall culture in administrative segregation” and violated due process by deliberately
10 withholding his personal property and not providing him with receipts. (SAC 10.) Plaintiff
11 alleges that Correctional Officers Medina, Cagle, and Torress took adverse action against him
12 due to his involvement in prior civil actions because they believed he was working for the
13 Attorney General. (SAC 10.) Plaintiff also contends that he has been denied a post deprivation
14 remedy because his administrative appeal was not returned at the third level of review. (SAC
15 11.) Plaintiff alleges that Correctional Officers Medina, Cagle, and Torress gave his books and
16 personal property to other inmates. (SAC 11.)

17 Plaintiff alleges that administrative segregation has a custom and practice of throwing
18 away inmate mail and he has been denied mail from his family and friends for six months in
19 retaliation for filing a prior civil suit. (SAC 11.) Around February 11, 2017, Plaintiff was moved
20 to Administrative Segregation and was denied his personal mail for six months. (SAC 11.) Prior
21 to March 15, 2017, Correctional Officers Marquez and Florse stopped by Plaintiff’s cell and told
22 him that they knew who he was and that he liked to file inmate appeals, grievances and law suits
23 and that inmates who filed appeals in administrative segregation do not get any mail. (SAC 12.)
24 On March 15, 2017, Plaintiff explained to Correctional Officer Marquez that the letters Plaintiff
25 was putting in the mail were not being mailed because Plaintiff was no longer receiving mail
26 from his children, family, or friends. (SAC 12.) Plaintiff asked Correctional Officer Marquez
27 about a February 12, 2017 and a February 27, 2017 letter that Plaintiff had given to Correctional
28 Officer Marquez to be mailed. (SAC 12.) Plaintiff had not received any response and it is not

1 like Plaintiff's family not to write and respond to his letters as they send him money every month
2 and he had not had the letters returned. (SAC 12.) Plaintiff told Correctional Officer Marquez
3 that his mail was being withheld by Marquez and Plaintiff was going to file a grievance against
4 him for withholding his mail. (SAC 12.) Correctional Officer Marquez told Plaintiff to go ahead
5 because he still was not going to get any of his mail and walked off. (SAC 12.)

6 The next day, March 16, 2017, Plaintiff gave Correctional Officer Florse his mail to be
7 sent out and informed Florse that he believed that Correctional Officer Marquez was withholding
8 his mail. (SAC 12.) Correctional Officer Florse told Plaintiff that it was not his problem and
9 walked away with Plaintiff's mail and an inmate request form about the mail. (SAC 13.)

10 Plaintiff filed an inmate appeal against Correctional Officers Florse and Marquez for
11 withholding his mail. (SAC 13.) A few days later, Correctional Officer Florse came to Plaintiff's
12 cell and removed all his inmate appeals forms with his name on them. (SAC 13.) Plaintiff alleges
13 that after this Correctional Officer Florse started a retaliatory assault on Plaintiff. (SAC 13.)
14 Correctional Officer Florse would beat on Plaintiff's cell door every thirty minutes to an hour
15 with his security count stick. (SAC 13.) On shower days, Correctional Officer Florse would try
16 to provoke Plaintiff to fight with him while escorting Plaintiff to the shower by pulling on him
17 really hard. (SAC 13.)

18 Plaintiff started a mail log sheet because he was still being denied his mail. (SAC 13.) On
19 April 18, 2017, Plaintiff gave Correctional Officer Xayoudom two letters to be mailed to his
20 family and recorded them on his mail log. (SAC 13.) Plaintiff alleges that Correctional Officers
21 Florse, Marquez, and Xayoudom never mailed any of his correspondence. (SAC 13.) After
22 Plaintiff was moved from Corcoran, his family told him that all the mail they sent to him in
23 prison was returned and they never received mail from him. (SAC 13.) Plaintiff contends that
24 his family really needed his advice during this time because his daughter needed a liver
25 transplant and was in a life and death situation. (SAC 13.)

26 Around May 15, 2017, Plaintiff was being escorted from the exercise yard by
27 Correctional Officer Gonzalves who told Plaintiff that he knows who he is and that he and
28 Correctional Officer Medina went through his property and read his lawsuits and this was the

1 reason that Plaintiff was not receiving his mail. (SAC 14.) Correctional Officer Gonzalves also
2 told Plaintiff that he had talked with Plaintiff's son and mother. (SAC 15.)

3 After talking to Correctional Officer Gonzalves, Plaintiff filed a complaint with IGI/ISU.
4 (SAC 15.) On July 12, 2017, an IGI/ISU officer came and talked to Plaintiff telling him that no
5 investigation had taken place and he had no knowledge of this. (SAC 15.) Plaintiff was told that
6 he needed to file his complaint directly against Correctional Officer Gonzalves for the fake
7 investigation done by Correctional Officer Gonzalves. (SAC 15.)

8 On or around July 22, 2017, Correctional Officer Xayoudom told Plaintiff that it is an
9 underground practice to send inmate mail to the institutional security unit to be read and
10 investigated and this correspondence is not mailed, but is kept and it could be institutional
11 security who is not giving him his mail or mailing his correspondence to his family. (SAC 14.)
12 Correctional Officer Xayoudom also told Plaintiff that he knew that Plaintiff filed a lot of inmate
13 appeals and lawsuits and inmates who file appeals against staff in administrative segregation do
14 not get their mail. (SAC 14.)

15 On July 28, 2017, Plaintiff filed a citizen's complaint against Correctional Officer
16 Gonzalves for abuse of power and position and a complaint with internal affairs for the same
17 conduct. (SAC 15.) Plaintiff contends that he and his family were used as a target for retaliation
18 by Corcoran security housing unit officers who have been fired or investigated by the federal
19 courts due to inmate complaints. (SAC 15.)

20 Plaintiff alleges that when he was placed in administrative segregation on February 6,
21 2017, he was not provided with an initial classification hearing within ten days, not provided
22 with a 114 D lock-up order until May 27, 2017, in violation of the California Code of
23 Regulations. (SAC 16.) Plaintiff contends that Counselor Bugarin and Chairperson R. Godwin
24 held him in administrative segregation longer than the minimal stay for this kind of incident and
25 other persons would not have been treated in this same manner. (SAC 16.)

26 Plaintiff states that the new attorney general was being trained at the time of these actions
27 and these are the same claims that have already been litigated once before and he needs an in
28 camera review of the correspondence that the attorney general had with the prison. (SAC 17.)

1 Plaintiff states that this confidential information from Gerald Lee Miller v. McEwen, no. 11-cv-
2 2333-JLS-WVG, is the correspondence that may have led the defendants to take his property and
3 investigate his family. (SAC 17.)

4 Plaintiff brings this action against Correctional Officers Navarro, Torress, Cagle, Medina,
5 Florse, Marquez, Xayoudom, Gonzalves, Bugarin, and Goodwin seeking a declaration that his
6 rights were violated, injunctive relief, and monetary damages.

7 III.

8 DISCUSSION

9 A. Eighth Amendment

10 Plaintiff alleges that Correctional Officer Navarro subjected him to Cruel and Unusual
11 Punishment by setting him up to be assaulted and failing to stop the assault before it happened.
12 (SAC 20.) The Eighth Amendment's prohibition against cruel and unusual punishment protects
13 convicted prisoners. Bell v. Wolfish, 441 U.S. 520, 535 (1979); Graham v. Connor, 490 U.S.
14 386, 395 n.10 (1989). Although prison conditions may be restrictive and harsh, prison officials
15 have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation,
16 medical care, and personal safety, Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000)
17 (quotation marks and citations omitted), but not every injury that a prisoner sustains while in
18 prison represents a constitutional violation, Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir.
19 2006) (quotation marks omitted).

20 Prison officials have a duty under the Eighth Amendment to protect prisoners from
21 violence at the hands of other prisoners because being violently assaulted in prison is simply not
22 part of the penalty that criminal offenders pay for their offenses against society. Farmer v.
23 Brennan, 511 U.S. 825, 833-34 (1994) (quotation marks omitted); Cortez v. Skol, 776 F.3d 1046,
24 1050 (9th Cir. 2015); Clem v. Lomeli, 566 F.3d 1177, 1181 (9th Cir. 2009); Hearns v. Terhune,
25 413 F.3d 1036, 1040 (9th Cir. 2005). However, prison officials are liable under the Eighth
26 Amendment only if they demonstrate deliberate indifference to conditions posing a substantial
27 risk of serious harm to an inmate; and it is well settled that deliberate indifference occurs when
28 an official acted or failed to act despite his knowledge of a substantial risk of serious harm.

1 Farmer, 511 U.S. at 834, 841 (quotations omitted); Clem, 566 F.3d at 1181; Hearns, 413 F.3d at
2 1040.

3 As the Court previously found, the allegation that Correctional Officer Navarro told other
4 inmates that Plaintiff was responsible for the cell search and confiscation of inmate cell phones
5 can be reasonably construed as placing Plaintiff at a substantial risk of harm from other inmates.
6 See Arredondo v. Drager, No. 14-CV-04687-HSG, 2016 WL 3755958, at *12 (N.D. Cal. July
7 14, 2016) (transferring an inmate to a housing unit known to be for snitches and informants
8 which would subject the inmate to assault from other inmates); Lyons v. Dicus, 663 F. App'x
9 498, 500 (9th Cir. 2016) (labeling inmate snitch). Further, Plaintiff alleges that Correctional
10 Officer Navarro was the first officer on the scene and failed to intervene to stop the assault. The
11 allegations in the complaint are sufficient to state a cognizable claim against Correctional Officer
12 Navarro for deliberate indifference in violation of the Eighth Amendment.

13 **B. Due Process**

14 Plaintiff alleges that he was denied his right to due process by 1) being deprived of his
15 personal property, 2) being deprived of his personal mail; 3) being placed in an ongoing
16 investigation and 3) the process by which he was placed into and held in administrative
17 segregation.² The Fourteenth Amendment's Due Process Clause protects persons against
18 deprivations of life, liberty, or property; and those who seek to invoke its procedural protection
19 must establish that one of these interests is at stake. Wilkinson v. Austin, 545 U.S. 209, 221
20 (2005) (quotation marks omitted). The Due Process Clause does not confer a liberty interest in
21 freedom from state action taken within a prisoner's imposed sentence. Sandin v. Conner, 515
22 U.S. 472, 480 (1995). However, a state may "create liberty interests which are protected by the
23 Due Process Clause." Sandin, 515 U.S. at 483-84.

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27 ² Plaintiff alleges a violation of the Fifth Amendment. "[T]he Fifth Amendment's due process clause
28 applies only to the federal government." Bingue v. Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008). Since
all Defendants in this action are state employees the Fifth Amendment is inapplicable here.

1 A prisoner has a liberty interest protected by the Due Process Clause only where the
2 restraint “imposes atypical and significant hardship on the inmate in relation to the ordinary
3 incidents of prison life.” Keenan v. Hall, 83 F.3d 1083, 1088 (9th Cir. 1996) (quoting Sandin,
4 515 U.S. at 484).

5 1. Deprivation of Property

6 Plaintiff alleges that Correctional Officers Torress, Medina, and Cagle violated his right
7 to due process by illegally confiscating his personal property. (SAC 19, 20.) The Due Process
8 Clause is not violated by the random, unauthorized deprivation of property so long as the state
9 provides an adequate post-deprivation remedy. Hudson v. Palmer, 468 U.S. 517, 533 (1984);
10 Barnett v. Centoni, 31 F.3d 813, 816-17 (9th Cir. 1994). In this instance, Plaintiff has alleged an
11 unauthorized deprivation of his personal and legal property, and Plaintiff has an adequate post-
12 deprivation remedy under California law.

13 Although Plaintiff argues that he has been deprived of an adequate remedy under state
14 law due to the failure to return his inmate appeal at the third level, even if Plaintiff’s inmate
15 appeal was not returned that does not deprive him of an adequate remedy under state law.
16 Whether Plaintiff has an adequate state remedy does not depend on administrative grievance
17 process. Claims against a government agency under California law are governed by the
18 Government Claims Act. See Cal. Gov. Code § 810, et seq.

19 Since Plaintiff has an adequate remedy under state law, he may not pursue a due process
20 claim arising out of the unlawful confiscation of his personal property.³ Barnett, 31 F.3d at 816-
21 17 (citing Cal. Gov’t Code §§ 810-895). Plaintiff fails to state a due process claim based on the
22 loss of his personal property.

23 2. Administrative Segregation

24 Plaintiff also alleges that he was placed in administrative segregation without receiving
25 the process required under the Fourteenth Amendment. The Due Process Clause does not create

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27 ³ Similarly, Plaintiff contends that the deprivation of his property violated his rights under the Fourth Amendment.
28 “[T]he fourth amendment does not protect an inmate from the seizure and destruction of his property.” Taylor v.
Knapp, 871 F.2d 803, 806 (9th Cir. 1989); accord K’napp v. Arlitz, 661 F. App’x 468, 470 (9th Cir. 2016)
(unpublished); Giba v. Cook, 232 F. Supp. 2d 1171, 1186 (D. Or. 2002).

1 a liberty interest in remaining in the general population or being free from administrative
2 segregation. Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Toussaint v. McCarthy, 801 F.2d
3 1080, 1091 (9th Cir. 1985), abrogated in part on other grounds by Sandin, 515 U.S. 472.
4 Administrative segregation is the type of confinement that should be reasonably anticipated by
5 inmates at some point in their incarceration. Toussaint, 801 F.2d at 1091 (quoting Hewitt, 459
6 U.S. at 468). However, a state may create a liberty interest which would be protected by the Due
7 Process Clause. Sandin, 515 U.S. at 483-84. A prisoner has a liberty interest protected by the
8 Due Process Clause only where the restraint “imposes atypical and significant hardship on the
9 inmate in relation to the ordinary incidents of prison life.” Keenan, 83 F.3d at 1088 (quoting
10 Sandin, 515 U.S. at 484).

11 The Ninth Circuit has concluded that prisoners have no liberty interest in remaining free
12 from administrative segregation or solitary confinement. See May v. Baldwin, 109 F.3d 557, 565
13 (9th Cir.1997). Plaintiff alleges that he was not provided the procedure required by 15 C.C.R. §§
14 3335 and 3337. (Compl. 14.) However, in Toussaint, the Ninth Circuit held that California’s
15 prison regulations which govern the removal and segregation decision, do not create a liberty
16 interest. Toussaint, 801 F.2d at 1097-98. Such regulations are procedural requirements that, even
17 if mandatory, do not raise a constitutionally cognizable liberty interest. Id. at 1098.

18 Plaintiff alleges that due to the retaliatory conduct he was subjected to he was denied his
19 mail and the right to communicate by phone for six months. (SAC at 17.) However, Plaintiff’s
20 complaint does not contain any factual allegations to demonstrate that the conditions he was
21 subjected to while he was housed in administrative segregation imposed an atypical or
22 significant hardship on him in relation to the ordinary incidents of prison life. Plaintiff’s
23 complaint fails to demonstrate that he had a liberty interest in freedom from administrative
24 segregation, and therefore, he cannot state a due process claim based on his placement in
25 administrative segregation.

26 3. Denial of Mail

27 Plaintiff alleges that Correctional Officers Florse, Marquez, and Medina denied him of
28 mail for six months while he was housed in administrative segregation in violation of the Due

1 Process Clause. An inmate has a right under the First Amendment to send and receive mail.
2 Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995). There is also a liberty interest in
3 communication by mail that is protected by the Due Process Clause. Procunier v. Martinez, 416
4 U.S. 396, 418 (1974), overruled on other grounds by Thornburgh v. Abbott, 490 U.S. 401
5 (1989)). While an inmate has a due process liberty interest in receiving notice that his mail is
6 being withheld, Prison Legal News v. Lehman, 397 F.3d 692, 701 (9th Cir. 2005); Sorrels v.
7 McKee, 290 F.3d 965, 971 (9th Cir. 2002), only where the failure to notify is pursuant to prison
8 policy would a due process claim arise, Sorrels, 290 F.3d at 972.

9 First, Plaintiff alleges that he asked Correctional Officer Marquez about letters that
10 Plaintiff gave him to mail out because he had not a response from his family. Plaintiff accused
11 Correctional Officer Marquez of withholding his mail and stated that he was going to file a
12 grievance against him. Correctional Officer Marquez responded for Plaintiff to go ahead and file
13 a grievance because he was still not going to get his mail. The following day, Plaintiff gave
14 Correctional Officer Florse some letters to be mailed. Plaintiff complained that he thought
15 Correctional Officer Marquez was withholding his mail and Correctional Officer Florse
16 responded that it was not his problem and walked away.

17 Plaintiff gave Correctional Officer Xayoudom some letters to be mailed to his family.
18 Sometime later Correctional Officer Xayoudom told Plaintiff that letters are sent to Institutional
19 Security to be read and investigated and it could be Institutional Security that was keeping his
20 mail. Plaintiff contends that this “underground policy” violates his due process rights. However,
21 prison officials may examine a prisoner’s mail without infringing upon his constitutional rights.
22 United States v. Wilson, 447 F.2d 1, 8 n.4 (9th Cir. 1971).

23 Although Plaintiff had been told by Correctional Officer Gonzalves that his family was
24 being investigated and that was why he was not getting mail, in response to an inmate complaint,
25 Institutional Security told him that they were not investigating him and his family and were not
26 withholding his mail. Plaintiff alleges that letters sent to his family were returned, but does not
27 link any named defendant to his mail being returned. Plaintiff must demonstrate that each
28 defendant personally participated in the deprivation of his rights. Jones, 297 F.3d at 934.

1 Plaintiff alleges no facts by which the Court can reasonably infer that Correctional
2 Officers Marquez, Florse, Xayoudom, or Gonzalves were denying Plaintiff of his right to send or
3 receive mail due to a prison policy. Plaintiff has failed to state a cognizable due process claim
4 based upon the denial of his mail.

5 4. Ongoing Investigation

6 Plaintiff alleges that Defendant Gonzalves violated his rights under the Fourteenth
7 Amendment by placing Plaintiff under an ongoing investigation. The guarantees of the
8 Fourteenth Amendment only apply when a constitutionally protected liberty or property interest
9 is at stake. See Ingraham v. Wright, 430 U.S. 651, 672 (1977) (“Due process is required only
10 when a decision of the State implicates an interest within the protection of the Fourteenth
11 Amendment”); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972) (same);
12 Erickson v. U.S. ex rel. Dep’t of Health & Human Servs., 67 F.3d 858, 861 (9th Cir. 1995) (“A
13 due process claim is cognizable only if there is a recognized liberty or property interest at
14 stake.”).

15 While Plaintiff alleges that Defendant Gonzalves placed him under an ongoing
16 investigation and this caused others to withhold his mail or subject him to other treatment,
17 Plaintiff has failed to link any investigation by Defendant Gonzalves to the deprivation of a
18 liberty or property interest possessed by Plaintiff. Plaintiff’s conclusory allegation that he was
19 deprived of mail or any other protected interest due to the ongoing investigation of Defendant
20 Gonzalves is insufficient to state a plausible claim for violation of the Due Process Clause.
21 Plaintiff has failed to state a due process claim against Defendant Gonzalves.

22 **D. Retaliation**

23 Plaintiff alleges that the acts of the named defendants were in retaliation for his
24 submitting grievances and filing lawsuits. Prisoners have a First Amendment right to file
25 grievances against prison officials and to be free from retaliation for doing so.” Watison v.
26 Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing Brodheim v. Cry, 584 F.3d 1262, 1269 (9th
27 Cir. 2009)). Also protected by the First Amendment is the right to pursue civil rights litigation in
28 federal court without retaliation. Silva v. Di Vittorio, 658 F.3d 1090, 1104 (9th Cir. 2011).

1 “Within the prison context, a viable claim of First Amendment retaliation entails five basic
2 elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
3 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
4 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
5 legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

6 1. Correctional Officer Navarro

7 Plaintiff alleges that Correctional Officer Navarro set him up to be assaulted due to his
8 filing of a prior civil action and because he believed that Plaintiff was working for the attorney
9 general. Plaintiff’s allegation that Correctional Officer Navarro made statements that Plaintiff
10 filed lawsuits and was working for the Attorney General at the time that he told another inmate
11 that Plaintiff was responsible for a cell search and confiscation of inmate’s phones is sufficient to
12 state a cognizable claim for retaliation. Plaintiff has stated a cognizable retaliation claim against
13 Correctional Officer Navarro.

14 2. Correctional Officers Torress and Cagle

15 Plaintiff alleges that Correctional Officers Torress and Cagle packed his personal
16 property and failed to sign and date the property inventory sheet when he was sent to
17 administrative segregation. Plaintiff contends that this was done because he was involved in prior
18 civil litigation and that they believed that he was working for the Attorney General. However,
19 Plaintiff fails to allege facts sufficient for the Court to reasonably infer that Correctional Officers
20 Torress and Cagle had knowledge of his prior civil litigation or believed that he was working for
21 the Attorney General.

22 Plaintiff attempts to impute knowledge to these defendants based on statements made by
23 Correctional Officer Navarro. But the statements made by Correctional Officer Navarro do not
24 demonstrate knowledge or intent to Correctional Officers Torress and Cagle. To state a
25 cognizable retaliation claim, Plaintiff must establish a nexus between the retaliatory act and the
26 protected activity. Grenning v. Klemme, 34 F.Supp.3d 1144, 1153 (E.D. Wash. 2014). Plaintiff
27 attempts to link the officers by alleging that Navarro and Cagle worked together from 2013 to
28 2015 where Plaintiff was previously housed. But this too is insufficient for the Court to

1 reasonably infer that Correctional Officers Torress or Cagle destroyed Plaintiff's property
2 because of his litigation conduct. Iqbal, 556 U.S. at 678-79. Plaintiff fails to state a plausible
3 claim for retaliation against Correctional Officers Torress and Cagle.

4 3. Correctional Officer Medina

5 Plaintiff alleges that after he was placed in administrative segregation, Correctional
6 Officer Medina issued him his property and gave him the unsigned property inventory sheet. The
7 fact that he was told by Correctional Officer Medina that he did not have any other property
8 cannot reasonably be construed as adverse action. Plaintiff fails to include any factual allegations
9 that Correctional Officer Medina took adverse action against him.

10 While Plaintiff alleges that five months later, Correctional Officer Gonzalves told him
11 that he and Correctional Officer Medina went through his property and read his lawsuits, this
12 does not demonstrate that Correctional Officer Medina took any adverse action against Plaintiff
13 because of his protected conduct. Grenning, 34 F.Supp.3d at 1153. Although Plaintiff alleges that
14 his personal property was given to other inmates in retaliation for his prior civil suit such
15 conclusory allegations are insufficient for the Court to reasonably infer that any named defendant
16 took his property in retaliation for his protected conduct. Iqbal, 556 U.S. at 678-79. Plaintiff has
17 failed to state a plausible claim for retaliation against Correctional Officer Medina.

18 4. Correctional Officers Florse, Marquez, and Xayoudom

19 Plaintiff alleges that Correctional Officers Florse and Marquez retaliated against him by
20 failing to mail his letters. Further, Plaintiff alleges that after he filed a grievance against
21 Correctional Officer Florse, Officer Florse would beat on his cell every thirty minutes to an hour
22 and would try to provoke him by pulling on him. Plaintiff's allegations that he did not receive
23 any mail after Correctional Officers Florse and Marquez told him they knew who he was and that
24 inmates who filed grievances and lawsuits did not get mail in administrative segregation, and
25 that Officer Florse would harass him after an inmate grievance was filed are sufficient to state
26 cognizable retaliation claim against Correctional Officers Florse and Marquez.⁴

27 _____
28 ⁴ Although Plaintiff alleges that the correctional officers withheld his incoming mail, the complaint
alleges that all of their mail was returned to them which would indicate, not that Correctional Officers

1 Plaintiff also alleges that Plaintiff alleges that he gave Correctional Officer Xayoudom
2 some letters to be mailed to his family on April 18, 2017 and they were never received. In July
3 2017 Correctional Officer Xayoudom told Plaintiff that the mail was sent to the Institutional
4 Security Unit to be read or investigated and that might be the reason that his mail was being
5 delayed. Further, at the time, Plaintiff contends that Correctional Officer Xayoudom told
6 Plaintiff he knew that Plaintiff was filing a lot of inmate appeals and a lawsuit and that inmates
7 who filed appeals against staff do not get mail in administrative segregation. This is sufficient to
8 state a plausible claim that Correctional Officer Xayoudom interfered with Plaintiff's mail due to
9 his protected activity.

10 6. Correctional Officer Gonzalves

11 Even assuming that an investigation into possible criminal activity could be construed as
12 adverse action, the allegations in the second amended complaint are insufficient for the Court to
13 reasonably infer that Correctional Officer Gonzalves was investigating Plaintiff or his family.
14 Plaintiff alleges that Correctional Officer Gonzalves stated that he knew Plaintiff and his family
15 were being investigated by IGI/ISU and that Correctional Officer Gonzalves had spoken to
16 Plaintiff's son and mother. Plaintiff was subsequently told that IGI/ISU was not investigating
17 him and he alleges that Correctional Officer Gonzalves conducted a fake investigation. The bare
18 fact that Correctional Officer Gonzalves said that he spoke to Plaintiff's son and mother is
19 insufficient to demonstrate that he was conducting an investigation.

20 While Plaintiff eventually submitted complaints against Correctional Officer Gonzalves
21 for allegedly conducting a fake investigation, the statement that Correctional Officer Gonzalves
22 had spoken with Plaintiff's family was made prior to Plaintiff filing a complaint against
23 Correctional Officer Gonzalves. Plaintiff has failed to state a plausible claim that Correctional
24 Officer Gonzalves took adverse action against him because of his protected conduct. Plaintiff has
25 failed to state a retaliation claim against Correctional Officer Gonzalves.

26 _____
27 Florse and Marquez were holding Plaintiff's mail, but that is was rejected by the prison mailroom.
28 However, it can reasonably be inferred that the mail was rejected due to an incorrect address and that by
failing to mail the letters Plaintiff was sending to his family they did not receive notification of his change
of address due to being placed in administrative segregation.

1 7. Counselor Bugarin and Chairperson Godwin

2 Plaintiff only asserts conclusory allegations of retaliatory conduct that are insufficient to
3 state a retaliation claim against Counselor Bugarin and Chairperson Godwin. Although Plaintiff
4 alleges that the defendants deliberately failed to bring him before the classification committee in
5 a timely manner and illegally held him in administrative segregation, the complaint is devoid of
6 any allegations that Counselor Bugarin and Chairperson Godwin acted because of Plaintiff's
7 protected activity. Plaintiff has failed to state a cognizable claim against Counselor Bugarin and
8 Chairperson Godwin.

9 **E. Equitable Relief**

10 1. Declaratory Relief

11 In addition to monetary damages, Plaintiff seeks declaratory relief. “ ‘A case or
12 controversy exists justifying declaratory relief only when the challenged government activity is
13 not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence,
14 casts what may well be a substantial adverse effect on the interests of the petitioning parties.’ “
15 Feldman v. Bomar, 518 F.3d 637, 642 (9th Cir. 2008) (quoting Headwaters, Inc. v. Bureau of
16 Land Management, Medford Dist., 893 F.2d 1012, 1015 (9th Cir. 1989) (internal quotations and
17 citation omitted)). “Declaratory relief should be denied when it will neither serve a useful
18 purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and
19 afford relief from the uncertainty and controversy faced by the parties.” U.S. v. State of Wash.,
20 759 F.2d 1353, 1357 (9th Cir. 1985) (citations omitted). The conduct at issue in this action
21 occurred in 2017 while Plaintiff was housed at Corcoran, and Plaintiff's remedy is damages
22 should he prevail on his claim that his constitutional rights were violated. The Court
23 recommends that Plaintiff's request for declaratory relief be dismissed.

24 2. Injunctive Relief

25 Plaintiff also seeks an order to remove all negative correspondence from the attorney
26 general and the prison during the time he was litigating his prior lawsuit; send Plaintiff to a lower
27 level prison where he would not have enemy concerns, for defendants not to be allowed to talk
28 about this case on Facebook or the Internet; and for his mail rights to be restored.

1 “[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the
2 threshold requirement imposed by Article III of the Constitution by alleging an actual case or
3 controversy.” City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (citations omitted); Jones
4 v. City of Los Angeles, 444 F.3d 1118, 1126 (9th Cir. 2006). “Abstract injury is not enough.”
5 Lyons, 461 U.S. at 101. “[P]laintiff must show that he has sustained or is immediately in danger
6 of sustaining some direct injury as the result of the challenged official conduct and the injury or
7 threat of injury must be both real and immediate, not conjectural or hypothetical.” Id. (internal
8 quotations and citations omitted). “The key issue is whether the plaintiff is ‘likely to suffer future
9 injury.’” Jones, 444 F.3d at 1126 (quoting Lyons, 461 U.S. at 105). Furthermore, any award of
10 equitable relief is governed by the Prison Litigation Reform Act, which provides in relevant part,
11 “Prospective relief in any civil action with respect to prison conditions shall extend no further
12 than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.
13 The court shall not grant or approve any prospective relief unless the court finds that such relief
14 is narrowly drawn, extends no further than necessary to correct the violation of the Federal right,
15 and is the least intrusive means necessary to correct the violation of the Federal right.” 18 U.S.C.
16 § 3626(a)(1)(A).

17 Plaintiff seeks relief, such as removing all negative correspondence from his file,
18 precluding the defendants from posting information on social media, or transfer to a lower level
19 prison, that would not remedy the conduct alleged in the second amended complaint and cannot
20 be granted in this action. Further, Plaintiff’s subsequent transfer out of Corcoran rendered moot
21 his prayer for injunctive relief regarding the restoration of his mail rights. See Preiser v.
22 Newkirk, 422 U.S. 395, 402-03 (1975); Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991).
23 Plaintiff’s request for injunctive relief should be dismissed as not cognizable in this action.

24 **F. Joinder**

25 Finally, the Court finds that Plaintiff is attempting to bring claims in this action that are
26 improperly joined. A basic lawsuit is a single claim against a single defendant. Federal Rule of
27 Civil Procedure 18(a) allows a plaintiff to add multiple claims to the lawsuit when they are
28 against the same defendant. Federal Rule of Civil Procedure 20(a)(2) allows a plaintiff to join

1 multiple defendants to a lawsuit where the right to relief arises out of the same “transaction,
2 occurrence, or series of transactions” and “any question of law or fact common to all defendants
3 will arise in the action.” However, unrelated claims that involve different defendants must be
4 brought in separate lawsuits. See George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). This rule is
5 not only intended to avoid confusion that arises out of bloated lawsuits, but also to ensure that
6 prisoners pay the required filing fees for their lawsuits and prevent prisoners from circumventing
7 the three strikes rule under the Prison Litigation Reform Act. 28 U.S.C. § 1915(g).

8 The claims brought in this action would result in the type of bloated lawsuit that was
9 precluded in George. Under the federal rules, Plaintiff may state a single claim against a single
10 defendant. Plaintiff may then add any additional claims to his action that are against the same
11 defendant under Rule 18. Fed. R. Civ. P. 18. Plaintiff may also add any additional claims against
12 other defendants if those claims arise from the same transaction, occurrence, or series of
13 transactions as his original claim. Fed. R. Civ. P. 20(a)(2).

14 Here, Plaintiff alleges that Correctional Officer Navarro made comments about him to
15 other inmates that resulted in him being attacked because he had filed a lawsuit and grievances.
16 However, Plaintiff’s claims regarding the handling of his property or mail even if in retaliation
17 by other correctional officers, and subsequent placement and retention in administrative
18 segregation do not arise out of the same transaction or occurrence and do not contain questions
19 of law or fact that are common to the other retaliation claims brought in this action. The fact that
20 Plaintiff alleges that prison officials retaliated against him for filing lawsuits or grievances does
21 not make the claims in this action properly joined. The Court finds that the claims are improperly
22 joined and cannot proceed in the same lawsuit.

23 **IV.**

24 **CONCLUSION**

25 For the reasons explained in this order, it is **HEREBY RECOMMENDED** that:

- 26 1. This action proceed on Plaintiff’s claim against Correctional Officers Florse,
27 Marquez, and Xayoudom for retaliation in violation of the First Amendment

28 ///

- 1 2. Plaintiff’s claim against Correctional Officer Navarro for deliberate indifference
2 in violation of the Eighth Amendment and retaliation in violation of the First
3 Amendment be dismissed, without prejudice, as improperly joined;
4 3. Plaintiff’s claim for declaratory relief be dismissed, and his claim for injunctive
5 relief dismissed as not cognizable in this action; and
6 4. All other claims and defendants be dismissed for the failure to state a claim upon
7 which relief may be granted.

8 These findings and recommendations will be submitted to the United States District
9 Judge assigned to the case, pursuant to the provision of 28 U.S.C. §636 (b)(1)(B). Within
10 fourteen (14) days after being served with these Finding and Recommendations, Plaintiff may
11 file written objections with the Court. The document should be captioned “Objections to
12 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
13 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.2d F.3d
14 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

15 IT IS SO ORDERED.

16 Dated: April 10, 2018

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19 UNITED STATES MAGISTRATE JUDGE
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