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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

TRUC N. HO,

No. 2:16-cv-1260-JAM-CMK-P

Plaintiff,

vs.

ORDER

E. MAJOR, et al.

Defendants.

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Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s complaint (Doc. 1).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that complaints contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This means that claims must be stated simply, concisely, and directly. See *McHenry v. Renne*, 84 F.3d 1172,

1 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the  
2 complaint gives the defendant fair notice of the plaintiff's claim and the grounds upon which it  
3 rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must allege  
4 with at least some degree of particularity overt acts by specific defendants which support the  
5 claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is  
6 impossible for the court to conduct the screening required by law when the allegations are vague  
7 and conclusory.

### 8 **I. PLAINTIFF'S ALLEGATIONS**

9 Plaintiff appears to be challenging a prison disciplinary proceeding wherein he  
10 was found guilty of battery on an inmate with a weapon causing serious bodily injury. Plaintiff  
11 was assessed with 360 days loss of credit and 15 months in the Secured Housing Unit (SHU). He  
12 claims his Fourteenth Amendment rights were violated in that there was not "some evidence" to  
13 support the findings that a weapon was used. However, other than setting out the proceedings  
14 and the involvement of the various defendants in those proceedings, plaintiff makes no allegation  
15 as to any specific wrongdoing or errors in the proceedings. He has requested the guilty finding  
16 be set aside and he be awarded monetary damages.

### 17 **II. DISCUSSION**

18 There are several defects in plaintiff's complaint. First, it appears that plaintiff's  
19 claims sound in habeas and are not cognizable as a § 1983 action. When a state prisoner  
20 challenges the legality of his custody and the relief he seeks is a determination that he is entitled  
21 to an earlier or immediate release, such a challenge is not cognizable under 42 U.S.C. § 1983 and  
22 the prisoner's sole federal remedy is a petition for a writ of habeas corpus. See Preiser v.  
23 Rodriguez, 411 U.S. 475, 500 (1973); see also Neal v. Shimoda, 131 F.3d 818, 824 (9th Cir.  
24 1997); Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995) (per curiam). Thus,  
25 where a § 1983 action seeking monetary damages or declaratory relief alleges constitutional  
26 violations which would necessarily imply the invalidity of the prisoner's underlying conviction

1 or sentence, or the result of a prison disciplinary hearing resulting in imposition of a sanction  
2 affecting the overall length of confinement, such a claim is not cognizable under § 1983 unless  
3 the conviction or sentence has first been invalidated on appeal, by habeas petition, or through  
4 some similar proceeding. See Heck v. Humphrey, 512 U.S. 477, 483-84 (1994) (concluding that  
5 § 1983 claim not cognizable because allegations were akin to malicious prosecution action which  
6 includes as an element a finding that the criminal proceeding was concluded in plaintiff's favor);  
7 Butterfield v. Bail, 120 F.3d 1023, 1024-25 (9th Cir. 1997) (concluding that § 1983 claim not  
8 cognizable because allegations of procedural defects were an attempt to challenge substantive  
9 result in parole hearing); cf. Neal, 131 F.3d at 824 (concluding that § 1983 claim was cognizable  
10 because challenge was to conditions for parole eligibility and not to any particular parole  
11 determination); cf. Wilkinson v. Dotson, 544 U.S. 74 (2005) (concluding that § 1983 action  
12 seeking changes in procedures for determining when an inmate is eligible for parole  
13 consideration not barred because changed procedures would hasten future parole consideration  
14 and not affect any earlier parole determination under the prior procedures).

15 In particular, where the claim involves the loss of good-time credits as a result of  
16 an adverse prison disciplinary finding, and the resulting loss directly impacts the length of the  
17 prisoner's sentence, the claim is not cognizable. See Edwards v. Balisok, 520 U.S. 641, 646  
18 (1987) (holding that § 1983 claim not cognizable because allegations of procedural defects and a  
19 biased hearing officer implied the invalidity of the underlying prison disciplinary sanction of loss  
20 of good-time credits); Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997); cf. Ramirez v.  
21 Galaza, 334 F.3d 850, 858 (9th Cir. 2003) (holding that the favorable termination rule of  
22 Heck and Edwards does not apply to challenges to prison disciplinary hearings where the  
23 administrative sanction imposed does not affect the overall length of confinement and, thus, does  
24 not go to the heart of habeas); see also Wilkerson v. Wheeler, 772 F.3d 834 (9th Cir. 2014)  
25 (discussing loss of good-time credits); Nettles v. Grounds, 830 F.3d 922, 934-35 (9th Cir. 2016)  
26 (discussing the impact of a prison disciplinary violations in determining suitability for parole).

1           The Ninth Circuit recently addressed the issue of a *pro se* litigant filing the  
2 incorrect action to address his claim. “[A] district court may construe a petition for habeas  
3 corpus to plead a cause of action under § 1983 after notifying and obtaining informed consent  
4 from the prisoner.” Nettles, 830 F.3d at 936. “If the complaint is amendable to conversion on its  
5 face, meaning that it names the correct defendants and seeks the correct relief, the court may  
6 recharacterize the petition so long as it warns the *pro se* litigant of the consequences of the  
7 conversion and provides an opportunity for the litigant to withdraw or amend his or her  
8 complaint.” Id. (quoting Glaus v. Anderson, 408 F.3d 382, 388 (7th Cir. 2005)). However, the  
9 Court recognized that following enactment of the PLRA, “a habeas corpus action and a prisoner  
10 civil rights suit differ in a variety of respects—such as the proper defendant, filing fees, the  
11 means of collecting them, and restrictions on future filings—that may make recharacterization  
12 impossible or, if possible, disadvantageous to the prisoner compared to a dismissal without  
13 prejudice of his petition for habeas corpus.” Id. at 935-36 (quoting Robinson v. Sherrod, 631  
14 F.3d 839, 841 (7th Cir. 2011)). Based on these differences, the court is not inclined to  
15 recharacterize plaintiff’s civil rights complaint as a habeas petition in this instance.

16           As stated above, it appears that plaintiff’s claim sound in habeas. He is  
17 challenging a prison disciplinary proceeding wherein he lost 360 days of credit and is seeking to  
18 have the guilty finding set aside and those credits restored. If plaintiff is a determinately  
19 sentenced prisoner, or he has not yet reached his minimum eligible parole date (MEPD), a  
20 finding in his favor would affect the overall length of confinement. However, if plaintiff is an  
21 indeterminately sentenced prisoner past his MEPD and is currently receiving parole consideration  
22 hearings, then a restoration of his good time credit would not necessarily affect the length of his  
23 confinement. There is simply not enough information in the complaint for the court to determine  
24 whether this case would impact the length of plaintiff’s confinement. This defect may be  
25 curable, and plaintiff will be provided an opportunity to file an amended complaint if he  
26 determines, based on the information provided herein, that his claim is appropriately raised in a

1 § 1983 action.

2           Assuming that this action is properly filed as a § 1983 action, plaintiff is informed  
3 that the Due Process Clause protects prisoners from being deprived of life, liberty, or property  
4 without due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a  
5 claim of deprivation of due process, a plaintiff must allege the existence of a liberty or property  
6 interest for which the protection is sought. See Ingraham v. Wright, 430 U.S. 651, 672 (1977);  
7 Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972). Due process protects against the deprivation  
8 of property where there is a legitimate claim of entitlement to the property. See Bd. of Regents,  
9 408 U.S. at 577. Protected property interests are created, and their dimensions are defined, by  
10 existing rules that stem from an independent source – such as state law – and which secure  
11 certain benefits and support claims of entitlement to those benefits. See id.

12           Liberty interests can arise both from the Constitution and from state law. See  
13 Hewitt v. Helms, 459 U.S. 460, 466 (1983); Meachum v. Fano, 427 U.S. 215, 224-27 (1976);  
14 Smith v. Sumner, 994 F.2d 1401, 1405 (9th Cir. 1993). In determining whether the Constitution  
15 itself protects a liberty interest, the court should consider whether the practice in question “. . . is  
16 within the normal limits or range of custody which the conviction has authorized the State to  
17 impose.” Wolff, 418 U.S. at 557-58; Smith, 994 F.2d at 1405. Applying this standard, the  
18 Supreme Court has concluded that the Constitution itself provides no liberty interest in good-  
19 time credits, see Wolff, 418 U.S. at 557; in remaining in the general population, see Sandin v.  
20 Conner, 515 U.S. 472, 485-86 (1995); in not losing privileges, see Baxter v. Palmigiano, 425  
21 U.S. 308, 323 (1976); in staying at a particular institution, see Meachum, 427 U.S. at 225-27; or  
22 in remaining in a prison in a particular state, see Olim v. Wakinekona, 461 U.S. 238, 245-47  
23 (1983).

24           In determining whether state law confers a liberty interest, the Supreme Court has  
25 adopted an approach in which the existence of a liberty interest is determined by focusing on the  
26 nature of the deprivation. See Sandin v. Connor, 515 U.S. 472, 481-84 (1995). In doing so, the

1 Court has held that state law creates a liberty interest deserving of protection only where the  
2 deprivation in question: (1) restrains the inmate's freedom in a manner not expected from the  
3 sentence; and (2) "imposes atypical and significant hardship on the inmate in relation to the  
4 ordinary incidents of prison life." Id. at 483-84. Prisoners in California have a liberty interest in  
5 the procedures used in prison disciplinary hearings where a successful claim would not  
6 necessarily shorten the prisoner's sentence. See Ramirez v. Galaza, 334 F.3d 850, 853, 859 (9th  
7 Cir. 2003) (concluding that a due process challenge to a prison disciplinary hearing which did not  
8 result in the loss of good-time credits was cognizable under § 1983); see also Wilkinson v.  
9 Dotson, 544 U.S. 74, 82 (2005) (concluding that claims which did not seek earlier or immediate  
10 release from prison were cognizable under § 1983).

11 Finally, with respect to prison disciplinary proceedings, due process requires  
12 prison officials to provide the inmate with: (1) a written statement at least 24 hours before the  
13 disciplinary hearing that includes the charges, a description of the evidence against the inmate,  
14 and an explanation for the disciplinary action taken; (2) an opportunity to present documentary  
15 evidence and call witnesses, unless calling witnesses would interfere with institutional security;  
16 and (3) legal assistance where the charges are complex or the inmate is illiterate. See Wolff, 418  
17 U.S. at 563-70. Due process is satisfied where these minimum requirements have been met, see  
18 Walker v. Sumner, 14 F.3d 1415, 1420 (9th Cir. 1994), and where there is "some evidence" in  
19 the record as a whole which supports the decision of the hearing officer, see Superintendent v.  
20 Hill, 472 U.S. 445, 455 (1985). The "some evidence" standard is not particularly stringent and is  
21 satisfied where "there is any evidence in the record that could support the conclusion reached."  
22 Id. at 455-56. However, a due process claim challenging the loss of good-time credits as a result  
23 of an adverse prison disciplinary finding is not cognizable under § 1983 and must be raised by  
24 way of habeas corpus. See Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997).

25 In addition, plaintiff names several defendants against whom he cannot state a  
26 claim. Specifically, supervisory personnel are generally not liable under § 1983 for the actions of

1 their employees. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (holding that there is no  
2 respondeat superior liability under § 1983). A supervisor is only liable for the constitutional  
3 violations of subordinates if the supervisor participated in or directed the violations. See id. The  
4 Supreme Court has rejected the notion that a supervisory defendant can be liable based on  
5 knowledge and acquiescence in a subordinate’s unconstitutional conduct because government  
6 officials, regardless of their title, can only be held liable under § 1983 for his or her own conduct  
7 and not the conduct of others. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). Supervisory  
8 personnel who implement a policy so deficient that the policy itself is a repudiation of  
9 constitutional rights and the moving force behind a constitutional violation may, however, be  
10 liable even where such personnel do not overtly participate in the offensive act. See Redman v.  
11 Cnty of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc).

12           When a defendant holds a supervisory position, the causal link between such  
13 defendant and the claimed constitutional violation must be specifically alleged. See Fayle v.  
14 Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir.  
15 1978). Vague and conclusory allegations concerning the involvement of supervisory personnel  
16 in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th  
17 Cir. 1982). “[A] plaintiff must plead that each Government-official defendant, through the  
18 official’s own individual actions, has violated the constitution.” Iqbal, 662 U.S. at 676.

19           Plaintiff names warden Swarthout as a defendant solely in his position as warden.  
20 There is no indication in the facts alleged in the complaint that defendant Swarthout was  
21 personally involved in any manner in the alleged violations. Rather, plaintiff simply alleges  
22 defenant Swarthout was responsible for the conduct of the other defendants. Similarly, plaintiff  
23 alleges defendants Leau and Wamble were reviewing supervisors of the Rules Violation Report  
24 (RVR) and the hearing proceedings. Neither were actively involved in either the RVR or the  
25 hearing. As such, plaintiff cannot state a claim against defendants Swarthout, Leau or Wamble.

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1 Similarly, to the extent plaintiff is challenging the inmate appeal process, he fails  
2 to state a claim. Prisoners have no stand-alone due process rights related to the administrative  
3 grievance process. See Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); see also Ramirez v.  
4 Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (holding that there is no liberty interest entitling  
5 inmates to a specific grievance process). Because there is no right to any particular grievance  
6 process, it is impossible for due process to have been violated by ignoring or failing to properly  
7 process grievances. Numerous district courts in this circuit have reached the same conclusion.  
8 See Smith v. Calderon, 1999 WL 1051947 (N.D. Cal 1999) (finding that failure to properly  
9 process grievances did not violate any constitutional right); Cage v. Cambra, 1996 WL 506863  
10 (N.D. Cal. 1996) (concluding that prison officials' failure to properly process and address  
11 grievances does not support constitutional claim); James v. U.S. Marshal's Service, 1995 WL  
12 29580 (N.D. Cal. 1995) (dismissing complaint without leave to amend because failure to process  
13 a grievance did not implicate a protected liberty interest); Murray v. Marshall, 1994 WL 245967  
14 (N.D. Cal. 1994) (concluding that prisoner's claim that grievance process failed to function  
15 properly failed to state a claim under § 1983). Prisoners do, however, retain a First Amendment  
16 right to petition the government through the prison grievance process. See Bradley v. Hall, 64  
17 F.3d 1276, 1279 (9th Cir. 1995). Therefore, interference with the grievance process may, in  
18 certain circumstances, implicate the First Amendment.

19 There is no indication in this case that plaintiff's First Amendment rights were  
20 violated. As the only allegations against defendants Arnold and Voong relate to their  
21 participation in reviewing plaintiff's inmate appeal, he cannot state a claim against either of these  
22 defendants.

### 23 III. CONCLUSION

24 Because it is possible that some of the deficiencies identified in this order may be  
25 cured by amending the complaint, plaintiff is entitled to leave to amend prior to dismissal of the  
26 entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc).

1 Plaintiff is informed that, as a general rule, an amended complaint supersedes the original  
2 complaint. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, following  
3 dismissal with leave to amend, all claims alleged in the original complaint which are not alleged  
4 in the amended complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).  
5 Therefore, if plaintiff amends the complaint, the court cannot refer to the prior pleading in order  
6 to make plaintiff's amended complaint complete. See Local Rule 220. An amended complaint  
7 must be complete in itself without reference to any prior pleading. See id.

8           If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
9 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See  
10 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how  
11 each named defendant is involved, and must set forth some affirmative link or connection  
12 between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d  
13 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

14           Because some of the defects identified in this order cannot be cured by  
15 amendment, plaintiff is not entitled to leave to amend as to such claims. Plaintiff, therefore, now  
16 has the following choices: (1) plaintiff may file an amended complaint which does not allege the  
17 claims identified herein as incurable, in which case such claims will be deemed abandoned and  
18 the court will address the remaining claims; or (2) plaintiff may file an amended complaint which  
19 continues to allege claims identified as incurable, in which case the court will issue findings and  
20 recommendations that such claims be dismissed from this action, as well as such other orders  
21 and/or findings and recommendations as may be necessary to address the remaining claims.

22           In addition, plaintiff should consider whether his claims are properly brought in a  
23 § 1983 action. Based on the above discussion, it would appear that his claims sound in habeas,  
24 in which case plaintiff may choose to voluntarily dismiss this action without prejudice to  
25 bringing his claims in a habeas petition.

26           Finally, plaintiff is warned that failure to file an amended complaint within the

1 time provided in this order may be grounds for dismissal of this action. See Ferdik, 963 F.2d at  
2 1260-61; see also Local Rule 110. Plaintiff is also warned that a complaint which fails to comply  
3 with Rule 8 may, in the court's discretion, be dismissed with prejudice pursuant to Rule 41(b).  
4 See Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. Plaintiff's complaint is dismissed with leave to amend; and
- 7 2. Plaintiff shall file an amended complaint within 30 days of the date of  
8 service of this order.

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11 DATED: May 12, 2017

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13 **CRAIG M. KELLISON**  
14 UNITED STATES MAGISTRATE JUDGE  
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